Anti-Discrimination and Equality Laws in Brazil - Racial Discrimination in Employment

This document outlines Brazilian and regional jurisprudence on racial discrimination in employment.

We are grateful to Covington & Burling LLP for preparing this document on a pro bono basis. Their contribution is extremely relevant to disseminating information on equality and anti-discrimination laws.

This document was last updated in September 2009.

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Case Summary No. 1 - Paulo Roberto dos Reis Pereira v. Parmalat do Brasil S.A. - Indústria de Alimentos (Case No. 01011-2001-561-04-00-5)

1) Reference Details

- **Jurisdiction:** Superior Labor Court (*Tribunal Superior do Trabalho - TST*).
- **Case Name:** *Paulo Roberto dos Reis Pereira v. Parmalat do Brasil S.A. - Indústria de Alimentos* (Case No. 01011-2001-561-04-00-5).
- **Date of Decision:** The relevant decision was given by the Superior Labor Court on August 10, 2005 and published in the Court Gazette on August 26, 2005.
- **Case Status:** The case has been concluded. As of August, 2009, the award due was in the process of being calculated.
- **Links to full case:** http://ext02.tst.jus.br/pls/ap01/ap_red100novo.resumo?num_int=1457&ano_int=2004&qtd_acesso=1291561 and http://www.trt4.jus.br/portal/portal/trt4/consultas/consultaProcessual

2) Facts

Paulo Roberto dos Reis Pereira (the "Plaintiff") filed a complaint against his former employer Parmalat do Brasil S.A. - Indústria de Alimentos (the "Defendant") alleging, among other things, that he had suffered racial discrimination by one of the Defendant's representatives during the term of his employment with the Defendant. More specifically, the Plaintiff sought moral damages for suffering related to the frequent humiliation, offenses and disrespect that he had experienced over the term of his employment with the Defendant resulting from the actions of his immediate boss. The Plaintiff alleged that his immediate boss frequently called him "chipan" and "chipanzé" (in a reference to chimpanzee), "negrão" (*big black*) and other derogatory words alluding to race, which caused him great embarrassment and offended his honor and dignity. He also alleged that in a specific situation, when a new car was acquired by the Defendant, his immediate boss said, in front of several other employees, that he would have to shower before entering the vehicle.

The Defendant alleged that (i) it is usual for people in a group to call each other by "nicknames", with no connotation of discrimination; (ii) the Plaintiff always responded when called by such "nicknames", without ever showing any sign of trouble or displeasure with the expression or "nickname" used; (iii) the Plaintiff did not inform the Defendant about the discriminatory treatment; (iv) the Plaintiff recognized that, when notified about the situation, the Defendant took all measures necessary to prevent the actions described by the Plaintiff from happening again; (v) the Defendant employs other black people who, according to personal statements, never suffered discriminatory treatment; (vi) the Plaintiff recognized that his immediate boss's hierarchical superior never treated the Plaintiff in a discriminatory manner; (vii) the Plaintiff recognized that the discriminatory treatment happened only during the last two years of his employment with the Defendant; (viii) the Defendant did not act with gross negligence or wilful misconduct in connection with the discriminatory treatment suffered by the Plaintiff, (ix) the Defendant's representative acted in his individual capacity and not as an agent of the Defendant, and (x) the Plaintiff did not

suffer any discriminatory treatment in connection with entering the new car acquired by the Defendant. The Defendant also alleged that Labor Courts are not competent to decide cases involving moral damages arising out of employment relationships.

3) Law

- Article 3, subclause IV, and Article 5, and Article 114, subclause VI, of the Constitution of the Federative Republic of Brazil.
- Article 1 of Law No. 9,029/95.
- Convention 111 of the International Labour Organization.
- International Labour Organization Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the General Conference of the International Labour Organization during its 86th Session which was declared closed on June 18, 1998.

4) Legal Arguments

Our access to this case was limited to the decisions given by the appellate court (court of second instance) and the Superior Labor Court (highest court for deciding labor related matters), which decisions did not set out what legal arguments were put forward by both the Plaintiff and the Defendant, but rather gave a more factual description of the claims of each party. We did not have access to the decision issued by the court of first instance.

5) Decision

The unanimous decision given by the judges of the First Panel of the Superior Labor Court reaffirmed the decisions previously issued in the case by the court of first instance and the court of second instance, which granted the Plaintiff an award for moral damages in an amount equivalent to one month's salary per month worked.

The decision of the Superior Labor Court stated that:

- Labor courts are competent to decide any claims arising from an employment relationship, including claims related to indemnification for moral damages. This is explicitly set forth in article 114, subclause VI, of the Constitution of the Federative Republic of Brazil, which provides that labor courts are competent to hear and decide indemnification claims for moral or pecuniary damages arising from an employment relationship;
- The Brazilian legal system and international rules prohibit the employer and any other person from adopting any practice that implies prejudice or racial discrimination. In that regard, the decision mentioned Article 3, subclause IV, and Article 5 of the Constitution of the Federative Republic of Brazil, Law No. 9,029/95, Convention 111 of the International Labour Organization and the International Labour Organization Declaration on Fundamental Principles and Rights at Work and its Follow-up;

- In the context of an employment relationship, moral damages correspond to the offense or moral harassment inflicted on employees or individual employers through the violation of inherent personal rights, including offenses directed against an employee by his immediate boss regarding his or her race during the term of the employment relationship;

- The use of language that is explicitly racist or derogatory constitutes an act of slander that offends human dignity. The disrespectful and unworthy treatment received by the Plaintiff harassed and humiliated him, causing him profound suffering. This type of discriminatory treatment shall be repudiated by society and entitles the victim to be compensated for the moral damages suffered in connection therewith; and

- The employer is responsible for ensuring the existence of respect, civility and proper decorum in the workplace in connection with the fulfilment of its obligations under any employment agreement. In that sense, the employer is responsible and can be held liable in civil cases for any acts caused by its employees and/or representatives during the performance of their respective professional activities, regardless of the employer's fault. In this case, the Defendant was held liable in connection with the acts of one of its representatives as a result of its fault *in eligendo*, i.e., fault in selecting the relevant person to work as the Defendant's representative and/or employee, and fault *in vigilando*, i.e., fault in supervising the Defendant's representative and/or employee during the performance of their professional activities.

It should be noted that the reporting judge of the appellate court also ordered the notification of the case to the Public Prosecutors Office due to the fact that it allegedly also involved the crime of racism.

Case Summary No. 2 - *Public Prosecutors Office* v. *Mei Fewg Xia* (Case No. 993.05.011926-2 / 00856085.3/5-0000-000)

1) Reference Details

- **Jurisdiction:** Court of Appeals of the State of São Paulo (*Tribunal de Justiça do Estado de São Paulo - TJ/SP*).
- **Case Name:** *Public Prosecutors Office* v. *Mei Fewg Xia* (Case No. 993.05.011926-2 / 00856085.3/5-0000-000).
- **Date of Decision:** The decision was given by the Court of Appeals on February 14, 2008 and published in the Court Gazette on March 11, 2008.
- **Case Status:** The case has been concluded.
- **Links to full case:** http://esaj.tj.sp.gov.br/cjsg/getArquivo.do?cdAcordao=2476946

2) Facts

The Public Prosecutors Office (the "Prosecutor") filed a criminal complaint against Mei Fewg Xia (the "Defendant"), the owner of a commercial establishment, alleging that Alessandra Aparecida Gusmão was denied access to employment by reason of her race.

According to the Prosecutor, Ms. Gusmão was informed by her cousin that there was a job opening at the commercial establishment of the Defendant and that the Defendant had agreed to hire Ms. Gusmão subject only to a personal interview to discuss the salary. When Ms. Gusmão arrived at the commercial establishment of the Defendant, the Defendant started to scream "neguinha não, neguinha não" (*no nigger, no nigger*) saying that she would not hire Ms. Gusmão for the position.

The Defendant alleged that (i) she does not speak Portuguese and therefore does not understand the meaning of the word "neguinha" (*nigger*); (ii) she denied employment to Ms. Gusmão for reasons other than Ms. Gusmão's race; and (iii) Ms. Gusmão could not recognize the Defendant in court.

3) Law

- Article 4 of Law No. 7,716/89.

4) Legal Arguments

The Prosecutor alleged violation of Article 4 of Law No. 7,716/89, which article provides that denying or hindering employment in a private company for reasons of discrimination shall be punishable by the penalty of imprisonment from two to five years.

The Defendant alleged that she should be acquitted since the Prosecutor did not present enough evidence of Defendant's violation of Article 4 of Law No. 7,716/89.

5) Decision

The unanimous decision given by the judges of the Fifth Special Criminal Chamber of the Court of Appeals (court of second instance) reaffirmed the decision previously issued in the case by the court of first instance, which sentenced the Defendant to two years of imprisonment, which penalty was substituted by the provision of services to the community and the payment of a pecuniary penalty in the amount of two times the minimum wage to Ms. Gusmão.

The decision further stated that the evidence presented in the case was clear as to show the existence of racial discrimination and the inappropriateness of the Defendant's conduct. It was demonstrated that there was a job opening at the commercial establishment of the Defendant and that the Defendant was holding the position for Ms. Gusmão subject only to a personal interview. When the Defendant met with Ms. Gusmão, the Defendant denied employment to the victim based on Ms. Gusmão's race. Therefore, the Defendant committed the crime of racism and was correctly punished for that.

Case Summary No. 3 - *Nivalda Lopes Conceição* v. *Marlok Calçados e Confecções Ltda.* (Case No. 355.087.4/5-00)

1) Reference Details

- **Jurisdiction:** Court of Appeals of the State of São Paulo (*Tribunal de Justiça do Estado de São Paulo - TJ/SP*).
- **Case Name:** *Nivalda Lopes Conceição* v. *Marlok Calçados e Confecções Ltda.* (Case No. 355.087.4/5-00).
- **Date of Decision:** April 25, 2006.
- **Case Status:** Information provided in the Court of Appeals' website indicates that the case has been concluded.
- **Links to full case:** http://esaj.tj.sp.gov.br/cjsg/getArquivo.do?cdAcordao=2046042

2) Facts

Nivalda Lopes Conceição (the "Plaintiff") filed a complaint against her former employer Marlok Calçados e Confecções Ltda. (the "Defendant") alleging that she was discriminated against based on her race. More specifically, the Plaintiff sought moral damages for suffering related to the frequent humiliation experienced during the term of her employment with the Defendant resulting from the actions of certain employees of the Defendant.

Different witnesses of the Plaintiff confirmed the discriminatory treatment suffered by her. One of the witnesses said that the supervisor of the Plaintiff once called her "negra imunda" (*filthy nigger*). In another occasion, the sub-manager told the Plaintiff that she would be the last one to leave the workplace because she was black. The sub-manager also said "eu vou liberar você 55[1] porque preto só enche o saco" (*I'll let you go now because blacks are very annoying*). Another witness said that the manager once said to the Plaintiff that "ela é negra e que negro não é gente" (*she is black and blacks are not people*).

The Defendant alleged that there was no discrimination against the Plaintiff because several of its employees are black. The Defendant also argued that it could not be held liable for acts committed by its employees or representatives.

3) Law

- Article 3, subclause IV, of the Constitution of the Federative Republic of Brazil.

4) Legal Arguments

Our access to the case was limited to the decision given by the court of second instance, which decision did not set out what legal arguments were put forward by both the Plaintiff and the Defendant, but rather gave a more factual description of the claims of each party.

[1] The Plaintiff was identified at work by the number 55.

5) Decision

The majority decision given by the Judges of the Third Special Civil Chamber of the Court of Appeals (court of second instance) partially reaffirmed the decision previously issued in the case by the court of first instance, which ordered the Defendant to pay an award to the Plaintiff for the moral damages suffered in the amount equivalent to 250 times the minimum wage.

The evidence presented in the case was considered adequate to prove the direct offense suffered by the Plaintiff and the deliberate intent of the Defendant to offend the honor of the Plaintiff, who was discriminated against by reason of her color. The responsibility of the Defendant for acts of its employees or representatives was considered a result of its fault *in eligendo*, i.e., fault in selecting the relevant person to work as the Defendant's representative and/or employee, and fault *in vigilando*, i.e., fault in supervising the Defendant's representative and/or employee when performing their professional activities.

The decision stated that discrimination by reason of the color of people's skin is a social and political reality "that reflects a reprehensible behaviour that arises from the belief that there is a hierarchy between human groups that is able to justify acts of segregation, inferiorization and even elimination of people." The decision also stated that the Constitution of the Federative Republic of Brazil has as one of its principles to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other form of discrimination. In that sense, "[t]he Constitution took into account the strong influence of all races in the formation and development of the Brazilian culture, and any acts of prejudice or discrimination cannot be admissible."

The award for moral damages issued by the court of first instance was maintained by the Court of Appeals, but reduced to R$10,000 to make it proportional to the degree of the Defendant's fault, the social-economic status of the Plaintiff and the economic size of the Defendant.

Judge Elcio Trujillo of the Third Special Civil Chamber of the Court of Appeals diverged from the decision with respect to the responsibility of the Defendant for acts of its employees or representatives. He agrees that there was discrimination against the Plaintiff, but believes that the Defendant cannot be held liable for acts of its employees and representatives absent evidence that such discriminatory behavior was a result of their employment relationship with the Defendant. In Judge Elcio's opinion, there is no evidence that the Defendant itself motivated the discriminatory treatment of any employee, having even hired other black people. The persons who committed the discriminatory acts should be held personally liable for their acts and the case against the Defendant should be dismissed. Judge Elcio further stated that if the discriminatory acts were a result of acts of the Defendant (either direct acts or acts of its employees or representatives that resulted from instructions from the Defendant), the case should be analyzed by Labor Courts under Article 114 of the Constitution of the Federative Republic of Brazil.

Case Summary No. 4 - *Alessandro Alberto Ribeiro* v. *Vanessa Moreira Lima Finato* (Case No. 355.087.4/5-00)

1) Reference Details[2]

- **Jurisdiction:** Court of Appeals of the State of São Paulo (*Tribunal de Justiça do Estado de São Paulo - TJ/SP*).
- **Case Name:** *Alessandro Alberto Ribeiro* v. *Vanessa Moreira Lima Finato* (Case No. 355.087.4/5-00).
- **Date of Decision:** The decision was given by the Court of Appeals on December 6, 2007 and published in the Court Gazette on January 31, 2008.
- **Case Status:** The case has been concluded.
- **Links to full case:** http://esaj.tj.sp.gov.br/cjsg/getArquivo.do?cdAcordao=2412825

2) Facts

Alessandro Alberto Ribeiro (the "Plaintiff") filed a complaint with the Public Prosecutors Office alleging that he had suffered the crime of racist defamation, which was committed by Vanessa Moreira Lima Finato (the "Defendant") on May 30, 2006. According to the Plaintiff, the Defendant offended his "subjective" honor by calling him "negro sapo" (*black frog*).

The Judge of first instance decided that the case was time-barred and that the Defendant could not be punished for the crime of racist defamation because the Plaintiff had not filed the relevant criminal complaint (*queixa-crime*) within the applicable statute of limitations. The crime of racist defamation can only be prosecuted through a private criminal action initiated by the victim, who has six months from the date he/she obtains knowledge of the person(s) who committed the crime to file the criminal complaint.

The Plaintiff filed an appeal with the Court of Appeals of the State of São Paulo alleging that the crime committed by the Defendant was actually the crime of racism set forth in Law No. 7,716/89 and not the crime of racist defamation. The crime of racism has no statute of limitations and can only be prosecuted through public criminal actions initiated by the Public Prosecutors Office.

3) Law

- Article 140, Paragraph 3, of the Brazilian Penal Code.
- Law No. 7,716/89.

[2] This case does not directly relate to racial discrimination in employment, but is important to establish the difference between the crime of racist defamation and the crime of racism when verbal offenses are involved.

4) Legal Arguments

Our access to the case was limited to the decision given by the court of second instance, which decision did not set out what legal arguments were put forward by both the Plaintiff and the Defendant, but rather gave a more factual description of the claims of each party. We did not have access to the decision of the court of first instance.

5) Decision

The unanimous decision given by the Judges of the Fifth Special Criminal Chamber of the Court of Appeals (court of second instance) reaffirmed the decision previously issued in the case by the court of first instance, which determined that the Defendant could not be held liable for the crime of racist defamation because the statute of limitations had run. Considering that the Plaintiff obtained knowledge of the person who committed the crime of racist defamation on the date he suffered the offense, i.e., May 30, 2006, the Plaintiff had until November 30, 2006 to file the criminal complaint, which did not happen.

The decision also clarified the distinction between the crime of racism and the crime of racist defamation when verbal offenses are involved. According to the decision, which is followed by several courts in different Brazilian states, racist defamation is an offense to the "subjective" honor of the victim through the use of words that relate to the victim's race, color, religion, origin or ethnic group and that aim exclusively to offend the victim. The crime of racism, on the other hand, relates to acts of segregationism, i.e., that aims to deny or hinder the free exercise of rights by a person on the basis of such person's color, race, ethnic group, religion or national origin. In the case of racism, the offender shows an indistinct discrimination against people of a specific race, color, ethnic group, religion or national origin.

Case Summary No. 5 - *Simone André Diniz* v. *Federative Republic of Brazil* (Case No. 12.001)

1) Reference Details

- **Jurisdiction:** Inter-American Commission on Human Rights
- **Case Name:** *Simone André Diniz* v. *Federative Republic of Brazil* (Case No. 12.001).
- **Date of Decision:** October 21, 2006.
- **Case Status:** The case has been concluded.
- **Links to full case:** http://www.cidh.oas.org/annualrep/2006eng/BRAZIL.12001eng.htm and http://www.cidh.oas.org/annualrep/2002eng/Brazil.12001.htm.

2) Facts

On October 7 and 10, 1997, the Center for Justice and International Law ("CEJIL"), the Subcommittee on Blacks of the Human Rights Committee of the *Ordem dos Advogados do Brasil* ("OAB/SP": Brazilian bar association), and the *Instituto do Negro Padre Batista* (together with CEJIL and OAB/SP, the "Petitioners") submitted to the Inter-American Commission on Human Rights (the "Comission" or "IACHR") a petition against the Federative Republic of Brazil (the State) on behalf of Simone André Diniz.

According to the Petitioners, on March 2, 1997, Aparecida Gisele Mota da Silva placed a classified ad in the newspaper *A Folha de São Paulo*, which enjoys wide circulation in the state of São Paulo, expressing her interest in hiring a domestic employee; in the classified ad, she indicated her preference for a white person. Simone André Diniz, a student and domestic employee, called the number indicated in the ad, introducing herself as a candidate for the job. When she spoke with the person assigned to handle phone calls from applicants, she was asked the color of her skin and was informed that she did not meet the requirements for the job because she was black.

Following the events described above, Ms. Diniz reported the racial discrimination suffered and the racist ad to the Subcommittee on Blacks of the OAB/SP and the then-Special Division for Race Crimes (*Delegacia de Crimes Raciais*). On March 5, 1997, a police inquiry was opened under number 10,541/97-4 to look into the violation of Article 20 of Law 7,716/89, which defines the practice of race-based discrimination or prejudice as a crime.

The police officer in charge of the inquiry took testimony from all the persons involved and prepared a report on the criminal complaint which was sent to the Judge in the matter, who in turn forwarded the report to the Public Prosecutors Office so that the pertinent criminal action could be initiated if deemed necessary. The Public Prosecutors Office issued a statement asking that the proceeding be closed, reasoning that "it was not possible to find in the record that [Ms. da Silva] has engaged in any act that could constitute the crime of racism." On April 7, 1997, the Judge handed down a judgment to close the proceeding, for the reasons set forth by the Public Prosecutors Office.

3) Law

- Article 4, subclause VIII, and Article 5, subclause XLII, of the Constitution of the Federative Republic of Brazil.
- Article 20 of Law No. 7,716/89.
- Article 140 of the Brazilian Penal Code.
- Articles 1(1), 2, 8, 24 and 25 of the American Convention on Human Rights (the "American Convention").
- Articles 1, 2(a), 5(a)(i) and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (the "Racism Convention").

4) Legal Arguments

The Petitioners alleged that the State did not guarantee the full exercise of the right to justice and due process of law, failed to pursue domestic remedies to look into the racial discrimination suffered by Ms. Diniz, and therefore breached its obligation to ensure the exercise of the rights provided for in the American Convention. According to the Petitioners, the decision to close a police inquiry is non-appealable in Brazil, unless new facts arise that justify reopening the investigation. Such decision kept Ms. Diniz from proving before the criminal courts that Ms. da Silva engaged in racial discrimination. The Petitioners claimed violation of Articles 1(1), 8, 24, and 25 of the American Convention and, in light of Article 29 of that instrument, Articles 1, 2(a), 5(a)(I), and 6 of the Racism Convention[3].

The State alleged that the facts alleged by the Petitioners did not constitute a human rights violation. According to the State, "the police inquiry was conducted in keeping with the rules of Brazilian legislation, and archived by the competent judicial authority based on the opinion of the Public Prosecutors Office, after hearing the sworn statements of the persons involved."

5) Decision

The Commission concluded that (i) the State is responsible for the violation of the rights to equality before the law and judicial protection, and the right to a fair trial, set forth respectively in Articles 24, 25, and 8 of the American Convention, (ii) the State breached its obligation to adopt provisions of domestic law in accordance with Article 2 of the American Convention, and (iii) the State violated the obligation imposed by Article 1(1)[4] of the American Convention to respect and ensure the rights set forth in such document.[5]

[3] Although the Commission is not competent to examine violation of the rights guaranteed by the Racism Convention, it may use the provisions of such Convention as guidance for interpreting the international obligations assumed by the State Parties to the American Convention.

[4] According to the Inter-American Court of Human Rights, "States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote

According to the Commission "[n]otwithstanding the evolution of the criminal law framework for fighting racial discrimination in Brazil, the Commission is aware that impunity is still prevalent in race crimes. When it published its report on the human rights situation in Brazil, the Commission called attention to the difficult enforcement of Law 7,716/89, and to the way in which the Brazilian judiciary tended to be permissive with the practice of racial discrimination … In effect, if one analyzes racism based on what's happening in the courts, one might get the false impression that discriminatory practices are not to be found in Brazil."

The Commission further stated that (i) excluding a person from access to the labor market on grounds of race is an act of racial discrimination under Article 1 of the Racism Convention, (ii) Article 24 of the American Convention is violated, in conjunction with Article 1(1), if the State allows such conduct to remain in impunity, validating it implicitly or giving its acquiescence, (iii) in the specific case of Ms. Diniz, there was an ad that excluded her, based on her racial status, from a job, (iv) the archiving of Ms. Diniz's case was not an isolated event in the Brazilian justice system, and (v) the automatic archiving of racism complaints implies denial of justice since it keeps the judiciary from considering whether there was malicious or deceitful intent (*dolo*), which is considered a subjective element of the crime of racism and necessary for conviction.

The Commission also emphasized that "the failure of the public authorities to go forward diligently and adequately with the criminal prosecution of the perpetrators of racial discrimination and racism creates the risk of producing not only institutional racism, in which the judiciary is seen by the Afrodescendant community as a racist branch of government, but is also grave because of the impact on society, insofar as impunity encourages racist practices."

It should be noted that Commissioners José Zalaquett and Evelio Fernández Arévalos partially disagreed with the decision issued, reasoning that "in the context of the specific factual and legal circumstances in this case, the actions of the Brazilian police, the Public Ministry and the Judicial Branch taken as a whole do not constitute a response that would amount to a violation of Articles 8, 25 and 1(1) of the American Convention."

The Commission made, among others, the following recommendations to the State:

- Fully compensate the victim in both moral and material terms and grant her financial assistance for beginning or completing her higher education;

- Publicly acknowledge international responsibility for violating the human rights of Ms. Diniz and conduct a complete, impartial and effective investigation of the facts, in order to establish and sanction responsibility with respect to the events associated with the racial discrimination experienced by Ms. Diniz;

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discriminatory situations." I/A Court H.R., OC-18/03, Legal Status and Rights of Undocumented Migrants, September 17, 2003, para. 104.

[5] This is the first decision of the Inter-American Commission on Human Rights condemning a State Party to the American Convention in a case involving racial discrimination. According to the IACHR Annual Report 2008 (http://www.cidh.oas.org/annualrep/2008eng/Chap3.g.eng.htm), neither the Defendant nor the Petitioners submitted information regarding implementation of the IACHR recommendations in this case. The Commission concluded that the recommendations are pending implementation.

- Make the legislative and administrative changes needed so that the anti-racism law is effective, and adopt and implement measures to educate court and police officials to avoid taking discriminatory actions in connection with investigations, proceedings or civil or criminal cases involving claims of racial discrimination and/or racism;

- Ask state governments and Public Ministries at the state level to create offices and Public Prosecutor Offices specializing in the investigation of crimes of racism and racial discrimination; and

- Promote awareness campaigns against racial discrimination and racism.

Case Summary No. 6 - *Neusa dos Santos Nascimento* and *Gisele Ana Ferreira* v. *Federative Republic of Brazil* (Petition No. 1068-03)

1) Reference Details

- **Jurisdiction:** Inter-American Commission on Human Rights
- **Case Name:** *Neusa dos Santos Nascimento* and *Gisele Ana Ferreira* v. *Federative Republic of Brazil* (Petition No. 1068-03).
- **Date of Decision:** October 21, 2006.
- **Case Status:** As of August, 2009, this case was pending judgement.
- **Links to full case:** http://www.cidh.oas.org/annualrep/2006eng/BRAZIL1068.03eng.htm

2) Facts

On December 8, 2003, the Instituto da Mulher Negra (the "Petitioner") submitted to the Inter-American Commission on Human Rights (the "Commission" or the "IACHR") a petition against the Federative Republic of Brazil (the State) on behalf of Ms. Neusa dos Santos Nascimento and Ms. Gisele Ana Ferreira.

According to the Petitioners, on March 22, 1998, a health insurance company named Nipomed – Planos de Saúde placed an ad in the daily newspaper *A Folha de São Paulo* in which the company indicated that it was recruiting candidates for the position of sales representative. Ms. Nascimento and Ms. Ferreira, both black, went to the Nipomed offices in response to the ad. Upon arriving, they were received by Mr. Munehiro Tahara, who informed them that the positions had all been filled. Later on the same day, Ms. Isabel Lazzarini, who is white, was hired immediately for the same position and asked if she knew other persons with her same characteristics. On learning that there were still openings, Ms. Ferreira once again went to the company, where she was received by another recruiter. This time, she filled out an application form and was informed that if they were interested they would contact her, which they never did.

Following the events described above, Ms. Nascimento and Ms. Ferreira went to the police station, where they filed incident report No. 2,580/98. Subsequently, the complaint was brought before the 24th Criminal Court of São Paulo under No. 681/98 and the Public Prosecutors Office filed a criminal complaint against Mr. Tahara for racial discrimination under Article 4 of Law 7,716/89. Mr. Tahara denied the accusations, arguing that there was a misunderstanding and that as of the date of the events at issue he was merely assisting one of his colleagues. The prosecution witness, Ms. Lazzarini, confirmed the facts reported in the inquiry phase and affirmed that Ms. Nascimento and Ms. Ferreira were hindered from access to the job for being black, especially considering that all three had very similar professional qualifications and experience.

The Judge of the 24th Criminal Court decided to dismiss the criminal action reasoning that "doubts remain with respect to the actual conduct of the accused." The Judge further affirmed that there was no certainty in the evidence presented and that it was not possible to show the actual intent of the accused. An appeal was filed with the Court of Appeals of São Paulo (*Tribunal de Justiça*) on

November 21, 1999. The complete records of the case with the respective appellate petitions and counterarguments arrived in the Court of Appeals on March 22, 2000.

According to information from the Petitioner and drawn from the record, as of the submission of the complaint to the Comission, the motion on appeal had not yet been distributed to any of the Chambers of the Court of Appeals. Moreover, the company Nipomed shut down and the whereabouts of Mr. Tahara were unknown, further prejudicing the effort of Ms. Nascimento and Ms. Ferreira to seek due judicial protection from the State in relation to the alleged violations.

3) Law

- Article 4 of Law No. 7,716/89.
- Articles 1, 8, 24 and 25 of the American Convention on Human Rights (the "American Convention").
- Articles 1 and 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (the "Racism Convention").
- Articles 2 and 3 of Convention 111 of the International Labor Organization ("Convention 111").

4) Legal Arguments

The Petitioners alleged that the State failed to guarantee the exercise of fundamental individual rights provided for in different international instruments of which the State is a party. The Petitioners claimed violations of Articles 1 and 24 of the American Convention; Articles 3, 6, and 7 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights ("Protocol of San Salvador"); Articles 1 and 2 of the Racism Convention; and Articles 2 and 3 of Convention 111.

The State alleged that (i) domestic remedies have yet to be exhausted and therefore the case could not be heard before the Commission, (ii) the Commission is not competent to decide on matters arising under the Protocol of San Salvador, the Racism Convention and Convention 111, (iii) since the petition was filed, a favorable judgement had been rendered in the case on August 11, 2004, by the Fifth Special Chamber of the Court of Appeals, sentencing Mr. Tahara to two years of imprisonment to be served in a semi-open regime, and (iv) the State has been making efforts to fight racism and to promote racial equality.

5) Decision

In analyzing admissibility of the case for further consideration by the Commission, the Commission concluded that the Commission (i) is competent to examine alleged violations of Articles 1 and 24 of the American Convention, (ii) is not competent to examine alleged violations of Articles 3, 6 and 7 of the Protocol of San Salvador, and (iii) may look to the Racism Convention and Convention 111 for guidance in interpreting the international obligations assumed by the State.

The Commission also concluded that the complaint falls into one of the exceptions to the exhaustion of domestic remedies requirement because there was an unwarranted delay by the State's courts in providing the victims with the judicial protection sought. The Commission noted that "the petition was filed when the judicial action in Brazil had already seen three years go by without any movement by the judicial branch of São Paulo."

Finally, the Commission considered that *prima facie* the facts alleged by the Petitioner tend to establish a violation of Articles 1, 8, 24 and 25 of the American Convention for possible violation of the obligation to respect the rights and freedoms recognized in the American Convention, the right to a fair trial, the right to equal protection and the right to judicial protection.

As of August, 2009, the case was pending judgment on the merits.