

## St. John's Law Review

---

Volume 69  
Number 1 *Volume 69, Winter-Spring 1995,*  
*Numbers 1-2*

Article 4

---

March 2012

### Sexual Harassment in the Workplace and Equal Employment Legislation

Hiroko Hayashi

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

#### Recommended Citation

Hayashi, Hiroko (1995) "Sexual Harassment in the Workplace and Equal Employment Legislation," *St. John's Law Review*: Vol. 69 : No. 1 , Article 4.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol69/iss1/4>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# SEXUAL HARASSMENT IN THE WORKPLACE AND EQUAL EMPLOYMENT LEGISLATION

HIROKO HAYASHI

## INTRODUCTION

Female participation in the modern Japanese workplace is on the rise. The total number of female Japanese workers is increasing,<sup>1</sup> and women are staying in the labor market for longer periods of time.<sup>2</sup> Two major developments have accompanied this change in traditional female employment patterns:<sup>3</sup> the passage of the Equal Employment Opportunity Law ("EEOC"),<sup>4</sup> and the recognition of sexual harassment as a form of sexual employment discrimination.

This Article examines both of these developments. Part I introduces the structure of the Japanese EEOC and evaluates its effectiveness in

---

<sup>1</sup> In 1992, 50.7% of the female population over 15 years old participated in Japanese labor markets, a 3.1% increase since 1980. See Kanpo Shinyoban ("The Official Gazette—A Special Data Edition"), Appendix to No. 1336, 1-6 (1994) [hereinafter Official Gazette]. Male participation dropped from 79.8% to 77.4% during this same period. *Id.*

<sup>2</sup> The average age of women employees in the Japanese work force increased from 26.3 years in 1960 to 35.7 in 1990. ALICE C.L. LAM, *WOMEN AND JAPANESE MANAGEMENT: DISCRIMINATION AND REFORM* 13 (1992) [hereinafter LAM, *WOMEN AND JAPANESE MANAGEMENT*].

<sup>3</sup> See Yoichiro Hamabe, *Inadvertent Support of Traditional Employment Practices: Impediments to the Internationalization of Japanese Employment Law*, 12 UCLA PAC. BASIN L.J. 306, 325-26 (1994) (pointing out that traditional female work patterns include short-term employment ending upon marriage, restrictions on hours females can work, and decreases in number of females hired during recessions).

<sup>4</sup> Danjo Koyô Kintô Hô (Equal Employment Opportunity Law), Law No. 45 of 1985. A translation of the official title, "Koyô no bunya ni okeru danjono kintô na kikâi oyobi taigû no kakuho to joshi rôdôsha no fukushi no zôshin ni kansuru hôritsu," reads as "Law to Promote the Welfare of Female Workers by Providing for Equality of Opportunity and Treatment in Employment for Women." Loraine Parkinson, Note, *Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change*, 89 COLUM. L. REV. 604, 605 & n.2 (1989) (emphasis omitted); see also Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 HARV. WOMEN'S L.J. 83, 87 n.18 (1995) (providing another translation). The two main goals of the EEOC are to remove blatant direct discriminatory business practices and to exert "moral pressure" on employers to switch to nondiscriminatory practices. Alice C.L. Lam, *Equal Employment Opportunities for Japanese Women: Changing Company Practice*, in *JAPANESE WOMEN WORKING* 197, 209 (Janet Hunter ed., 1993) [hereinafter Lam, *Equal Employment Opportunities for Japanese Women*].

reducing employment discrimination against women. Parts II and III explore the relationship between sexual discrimination and sexual harassment by discussing a current judicial decision affecting sexual harassment in the workplace.

## I. THE EQUAL EMPLOYMENT OPPORTUNITY LAW

### A. Background

Prior to enactment of the EEOL, the Labor Standards Law was the principal law in Japan protecting women in the private sector.<sup>5</sup> Although the Labor Standards Law required private employers to pay equal wages for equal work,<sup>6</sup> this law had a limited effect because it prohibited only wage discrimination by sex, but not discrimination in recruiting, hiring, job assignments, or promotions.<sup>7</sup> As a result, jobs remained separated by gender.<sup>8</sup>

### B. Provisions of the EEOL

The EEOL was enacted in 1985<sup>9</sup> in connection with Japan's ratifica-

<sup>5</sup> Rôdô Kijunhō (Labor Standards Law), Law No. 49 of 1947; *see also* FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POST WAR JAPAN 130 (1987). The Japanese Constitution prohibits discrimination in, *inter alia*, economic relations based on gender. KENPŌ [Constitution] art. XIV (Japan). Japanese courts, however, have held that Article 14 is subject to a reasonableness standard and a state action requirement. *See* UPHAM, *supra*, at 132-33.

<sup>6</sup> "The employer shall not discriminate women against men concerning wages by reason of the worker being a woman." Rôdô Kijunhō (Labor Standards Law), Law No. 49 of 1947, art. IV; *see also* Parkinson, *supra* note 4, at 616 n.32.

<sup>7</sup> *See* Michael S. Bennett, *Gender-Based Employment Discrimination in Japan and the United States*, 15 LOY. L.A. INT'L & COMP. L.J. 149, 153-54 (1992); *see also* Hiroko Hayashi, *Danjo Chingin Sabetu no Genkô Hôsei no Genkai to Mujun* [Limitations and Contradictions in the Legislation on Wage Discrimination by Sex], *Kikan Rôdôhō* [Labor Law Quarterly], No. 157, 117-18 (1990). The Shin-Shirasuna Denki case has been at trial in the Nagoya District Court since 1983. At this company, all male employees were employed full-time and all female employees were employed part-time. Full-time employees worked from 8:30 a.m. to 5:30 p.m. and part-time employees worked from 9:00 a.m. to 5:15 p.m. *Id.* Although their job descriptions were almost identical, part-time employees were paid about half the salary of full-time employees. *Id.* Ten women workers brought suit to recover the difference in wages between themselves and their male counterparts. *Id.* *But see* Parkinson, *supra* note 4, at 616 n.32 (highlighting several Japanese Court decisions which have recognized concept of equal pay for equal work).

<sup>8</sup> *See* Bennett, *supra* note 7, at 154. For example, 75% of all women in professional and technical employment are concentrated in sectors such as health service and teaching. LAM, WOMEN AND JAPANESE MANAGEMENT, *supra* note 2, at 51.

<sup>9</sup> *Danjo Koyô Kintô Hô* (Equal Employment Opportunity Law), Law No. 45 of 1985. The reason for EEOL enactment has been the subject of dispute in Japan. *See* Parkinson, *supra* note 4, at 614 n.27, 620-22 (stating that some believe law was enacted solely because of internal pressure while others believe that only international pressures accelerated enactment of EEOL).

tion of the 1979 United Nations Convention Concerning the Elimination of All Forms of Discrimination Against Women.<sup>10</sup> The EEOL prohibits employers from discriminating against female workers in providing education, training, and employee benefits. The EEOL also prohibits employers from imposing mandatory retirement at marriage, childbirth, or upon reaching a certain age.<sup>11</sup> Additionally, the EEOL requires employers to *endeavor*<sup>12</sup> to treat male and female employees equally when recruiting, hiring, or dispensing job assignments or promotions.<sup>13</sup>

The EEOL does not create a private cause of action,<sup>14</sup> but provides three mechanisms for dispute resolution:<sup>15</sup> (1) the settlement of grievances by a body composed of representatives of the employer and company employees; (2) the availability of advice, guidance, and recommendations provided by the Director of the Women's and Young Workers' Office;<sup>16</sup>

---

<sup>10</sup> G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, 107th plen. mtg., U.N. Doc. A/34/830 (1979).

<sup>11</sup> The EEOL established general standards for equal treatment with respect to these provisions and the Ministry of Labor established Ministerial ordinances which provide more concrete standards. See Parkinson, *supra* note 4, at 606-07.

<sup>12</sup> In constructing the EEOL, the Japanese use a non-coercive and voluntary approach to facilitate social change as seen by the use of the word "endeavor." See *id.* at 606 n.8, 627. A duty to endeavor was established instead of a strict prohibition against gender discrimination in recruiting, hiring and promoting, in order to balance economic and social difficulties present in Japanese society. *Id.* at 628-36. The duty to "endeavor" simply requires employers to make a good-faith effort to provide equal treatment. See Knapp, *supra* note 4, at 111, 115-17 (stating that this standard is described by critics as "the world's lowest level" of enforcement).

<sup>13</sup> See Parkinson, *supra* note 4, at 606-07 (stating that Ministry of Labor established specific standards in form of Guidelines which employers follow).

<sup>14</sup> See Danjo Koyô Kintô Hô (Equal Employment Opportunity Law) Law No. 45 of 1985. The EEOL has been criticized for not imposing sanctions on employers who fail to comply with the law. See James Ward, *Understanding "Fair Employment,"* EIU BUS. ASIA, Apr. 12, 1993, available in LEXIS, AsiaPC Library, Japan File (discussing criticism of EEOL for failing to impose sanctions on employers who fail to comply with law); *Panel Urges End to Limits on Female Hiring*, REPORT FROM JAPAN, Jan. 11, 1994, available in LEXIS, AsiaPC Library, Japan File (discussing recommendation to add provision to EEOL which would eliminate limitations on female hiring).

<sup>15</sup> Danjo Koyô Kintô Hô (Equal Opportunity Employment Law), Law No. 45 of 1985. Traditionally, Japanese society has discouraged the use of litigation to resolve disputes both because harmony is an important societal value and because there is a discrepancy between many Japanese laws and social practices. See Hamabe, *supra* note 3, at 307. Mediation is the more popular practice of dispute resolution in Japan. See Jan M. Bergeson & Kaoru Yamamoto Oba, *Japan's New Equal Employment Opportunity Law: Real Weapon or Heirloom Sword?*, 1986 B.Y.U. L. REV. 865; Parkinson, *supra* note 4, at 653-54 (highlighting that instituting lawsuits in Japan can lead to social suicide).

<sup>16</sup> Knapp, *supra* note 4, at 117-18. The Women's and Young Workers' Office has three levels of action it can take when notified of discriminatory practices. *Id.* At level one, the office encourages employers and employees to settle the dispute on their own. *Id.* at 118-19. At level two, the office conducts an investigation, the effectiveness of which depends upon the employer's

and (3) mediation by the Equal Opportunity Mediation Committee in each prefecture.<sup>17</sup>

### C. *The Two-Track System—A By-Product of EEOL*

After eight years of EEOL enforcement,<sup>18</sup> the average wage earned by women workers had not significantly increased. Despite longer terms of service<sup>19</sup> and higher educational levels,<sup>20</sup> in 1991 women earned only 57.7 percent as much as did men, a slight increase from 1980, when they earned only 56.1 percent as much as did men.<sup>21</sup> Equal opportunity employment has not significantly evolved since the enactment of EEOL, in part due to the introduction of a "two-track system" into the workplace.<sup>22</sup>

Two-track systems have been instituted by a number of Japanese employers, particularly large companies,<sup>23</sup> and are comprised of a "management track" (*Sogo Shoku*) and a "general track" (*Ippan Shoku*).<sup>24</sup>

cooperation, and gives advice to both parties. *Id.* At level three, the office determines whether further action is necessary and, with the consent of both parties, it may refer the parties to mediation which will be conducted by the Equal Opportunity Mediation Commission. *Id.* at 117.

<sup>17</sup> See Parkinson, *supra* note 4, at 607 (stating that each party must consent to mediation).

<sup>18</sup> *Id.* at 606. Danjo Koyō Kintō Hō (Equal Employment Opportunity Law), Law No. 45 of 1985, was enacted on May 17, 1985, but was not enforced until April 1, 1986. *Id.*

<sup>19</sup> *Id.* at 622. The average length of service for female workers was 6.5 years in 1984. *Id.* In 1992, the average length of service for men was 12.5 years while the average length of service for females increased to 7.4 years. Official Gazette, *supra* note 1.

<sup>20</sup> LAM, WOMEN AND JAPANESE MANAGEMENT, *supra* note 2, at 74. A comparison of female workers' educational levels is presented in the table below. The figures represent percentage of women entering employment:

	<i>Junior High School</i>	<i>High School</i>	<i>Junior College</i>	<i>University</i>
1980	5.2	60.6	22.5	11.7
1989	3.4	54.6	28.4	13.7

*Id.*

<sup>21</sup> Rōdōshō [Ministry of Labor] Chingin Kōzō Kihon Tōkei Chōsa [Basic Statistical Survey on Wage Structure] (1991).

<sup>22</sup> See Hiroko Omori, *Equality Proves Elusive for Women in Job Market; New Dual-Track White Collar System Largely Picks Up Where Old Bias Left Off*, JAPAN ECON. J., Dec. 15, 1990, at 4, available in LEXIS, World Library, Japan File (stating that dual-track system has been used to legally discriminate against women). Employers have also dodged the spirit of the EEOL by offering positions for "women only" and by restricting women's age and marital status within these positions. See Knapp, *supra* note 4, at 116-17.

<sup>23</sup> Lam, *Equal Employment Opportunities for Japanese Women*, *supra* note 4, at 212. Over 40 Japanese corporations with 5000 or more employees have instituted the two-track system. Large companies continue to foster gender-based discrimination by adopting the two-track system since there are no penalties applied for noncompliance with the EEOL. Knapp, *supra* note 4, at 123-25.

<sup>24</sup> See Knapp, *supra* note 4, at 123-25. Some businesses have established an in-between category which offers the same job requirements as management (*Sogo Shoku*) positions but limits transfers to designated geographic areas. See Omori, *supra* note 22, at 4 (describing this middle

The management track is available to employees destined for management positions and the general track is open to all other employees.<sup>25</sup> The two tracks offer very different wages, promotion opportunities, and fringe benefits.<sup>26</sup> Employees on the management track perform duties related to planning, development, and negotiations, while those on the general track perform traditional duties such as photocopying, serving tea, and clerical work.<sup>27</sup> Employees on the management track are subject to long hours and numerous job transfers,<sup>28</sup> while employees on the general track are subject to much less rigorous standards.<sup>29</sup> The two-track system facilitates a sophisticated form of discrimination against women.<sup>30</sup> According to research published by the Ministry of Labor in 1990, ninety-nine percent of Japanese working men were on the management track, while more than ninety-six percent of working women were on the general track.<sup>31</sup> The Ministry of Labor ruled, however, that the two-track system is not discriminatory and does not violate EEOL provisions because selection for entry onto either career track is based upon the employee's willingness to accept sex-neutral working conditions, such as long working hours and numerous potential job transfers.<sup>32</sup> The Ministry of Labor issued a

---

category as "watered-down version . . . of sogo-shioko positions").

<sup>25</sup> See Knapp, *supra* note 4, at 4.

<sup>26</sup> See LAM, WOMEN AND JAPANESE MANAGEMENT, *supra* note 2, at 57-58. Employees on the management track are included in the much-publicized Japanese employment system of lifetime job security, the "nenkō" wage system (whereby wages increase based on age and length of service to the company rather than on job performance), and the enterprise unionism system. *Id.* There is no limit on promotions in the management track. *Id.* In contrast, employees on the general track are not guaranteed lifetime employment (in practice, the availability of temporary women workers ensures the continued survival of the lifetime employment system since the temporary workers can be laid off in times of economic distress), are often eligible for only limited wage increases, and are excluded from the enterprise unionism system. *Id.*

<sup>27</sup> See *id.* at 123.

<sup>28</sup> See Parkinson, *supra* note 4, at 629 (explaining that employees on management track enter into "long term, all-encompassing relationship" with their employers); LAM, WOMEN AND JAPANESE MANAGEMENT, *supra* note 2, at 57-58. See generally UPHAM, *supra* note 5, at 124-65 (discussing Japanese management structure, traditionally and post EEOL).

<sup>29</sup> See Parkinson, *supra* note 4, at 623 n.67, 646-47 (stating that employees on general track are generally free to take personal day off from work and are generally not subject to transfers or overtime work). For an illuminating look at the daily lives of some of these workers, see JEANNIE LO, OFFICE LADIES FACTORY WOMEN, LIFE AND WORK AT A JAPANESE COMPANY 17-33 (1990).

<sup>30</sup> See generally Lam, *Equal Employment Opportunities for Japanese Women*, *supra* note 4, at 238-40 (discussing policy behind two-track system and its effect on women).

<sup>31</sup> Kōsubetsu Koyō Kanri ni Kansuru Kenkyūkai, Hōkokusho [Research Committee Report on Track System Employment Management] (Tokyo: Josei Shokugyō Zaidan) (1990).

<sup>32</sup> See Takashi Kashima, *Women Turn to Courts for Discrimination Relief: Job Disputes Don't Always Pit Women Against Men*, NIKKEI WKLY, May 23, 1992, at 24, available in LEXIS, World

guideline on the two-track system, stating that admission onto a specific track should not be based on sex, but should be based on each worker's ability and willingness to accept the working conditions.<sup>33</sup>

One company, Sumitomo Life Insurance Company ("Sumitomo"), introduced the two-track system to its employees on April 1, 1986, the same day that EEOL enforcement began.<sup>34</sup> This company's use of the two-track system is illustrative of the way the EEOL provisions and the two-track system operate.<sup>35</sup> At Sumitomo, men were generally assigned to the management track and women were placed on the general track.<sup>36</sup> Women were permitted to move onto the management track only after they were promoted to a position above that of supervisor on the general track *and* had passed a selective examination.<sup>37</sup> Moreover, Sumitomo discriminated against married women on the general track by refusing to promote them.<sup>38</sup> On February 29, 1992, twenty-two married, female Sumitomo employees requested mediation under Article 15 of the EEOL claiming that the company's practices were discriminatory.<sup>39</sup> On November 2, 1992,

Library, ALLWLD File.

<sup>33</sup> Kōsubetsu Koyō Kanri ni Kansuru Kenkyukai Hōkokusho [Research Committee Report on the Track System Employment Management] (Tokyo: Josei Shokugyō Zaidan) (1990).

<sup>34</sup> See Kashima, *supra* note 32, at 24.

<sup>35</sup> See *id.* (discussing Sumitomo Life Insurance Company's two-tier career track system).

<sup>36</sup> *Id.* The Sumitomo Life Insurance Company's practice occurs in most corporations. For example, the Nihon Life Insurance Company automatically places men on the management track but requires women to take a written examination, interview, and provide a recommendation before they are placed on the same track. See Knapp, *supra* note 4, at 124. Hence, only 50 of the 7200 female Nihon employees are on the management track. *Id.*

<sup>37</sup> See Knapp, *supra* note 4, at 123 (discussing that companies often require females applying for positions on management track to pass competitive examinations given only to women, and to have college degrees and fluency in foreign languages); cf. Victor Fic, *Sexual Harassment Still a Fixture in the Japanese Office*, TOKYO BUS. TODAY, Dec. 1994, at 24, available in LEXIS, AsiaPC Library, TOKBUS File (stating that 3.7% of females in workplace are on management track compared to 99% of men on same track). In a Labor Ministry poll of 22 companies which have traditionally employed a large number of women, specifically banks, brokerages, insurance, and trading corporations, 874 women were in management track positions in 1989, a small increase from the 552 women in management in 1987. See Omori, *supra* note 22, at 4.

Long working hours and the possibility of numerous job transfers are some of the reasons few women hold positions on the management track. See *id.* Only 7% of 1993 female college graduates were offered these positions. See Hidenaka Kato, *Newly Opened Corporate Career Paths Prove Rocky Roads for Ambitious Women, Despite Policy Changes, Opportunities Remain Scarce*, NIKKEI WKLY, Feb. 21, 1994, at 1, available in LEXIS, World Library, ALLWLD File.

<sup>38</sup> See Kashima, *supra* note 32, at 24. Other lawsuits have been filed by married working women alleging discrimination in wages and promotions, such as the suit filed in March 1992 by nine married women against their employer Hitachi Limited. *Id.*

<sup>39</sup> *Id.* at 24; see also Miyo Iwata, *Women Speaking Out Against Unequal Pay; Legal Challenge Proves Successful*, NIKKEI WKLY, Mar. 1, 1993, at 24, available in LEXIS, World Library, ALLWLD File (pointing out that insurance company made some positive efforts to settle

however, the Director of the Women's and Young Workers' Office decided that no mediation would be instituted by the Equal Employment Opportunity Committee because there were no men on the general track who could be compared to the married women to support the women's allegation of sexual discrimination.<sup>40</sup>

Although the Ministry of Labor does not release to the public the number of mediation applications made by women workers,<sup>41</sup> the number of requests for mediation under Article 15 of the EEOL has been estimated by the Japanese Federation of Labor Lawyers (Nihon Rodo Bengodan). Until February 3, 1995, at least 103 women employed in eleven companies requested mediation. Two of the above companies denied mediation to twenty-two women, even though the Director of Women's and Young Workers' Office approved such mediation. The Director denied mediation to a total of seventy-one women in five other companies.<sup>42</sup> For example, nineteen female employees of Nihon Seimei Insurance Co. were denied their request for mediation on March 21, 1992.<sup>43</sup> Another request for mediation, made on September 28, 1990, by sixteen female employees of Tokai Radio Broadcasting Company, was similarly refused by the Director of the Women's and Young Workers' Office in Aichi Prefecture on June

---

dispute).

<sup>40</sup> See Kashima, *supra* note 32, at 24.

<sup>41</sup> See Knapp, *supra* note 4, at 120-21. The Ministry of Labor does, however, issue an annual pamphlet which provides examples of consultations, offers interpretations of EEOL provisions, and summarizes disputes resolved in the office. *Id.* at 119-20.

<sup>42</sup> See Tetsuji Iso, 'Career Clerks' Seek Redress for Alleged Discrimination, *Middle Age Employees Petition Labor Ministry*, NIKKEI WKLY, May 30, 1994, at 13, available in LEXIS, World Library, ALLWLD File. For example, several requests for mediation under Articles 14 and 15 of the EEOL have been made. In March 1994, a 54 year-old woman and six other female employees of Sumitomo Metal Industries Co. requested and received mediation from the Osaka Women's and Young Workers' Office in the first mediation since the EEOL has been in effect. *Id.*; see also *Equal Employment Law to Be Put to First Test*, JAPAN ECON. NEWSWIRE, Sept. 12, 1994, available in LEXIS, AsiaPC Library, JEN File. The mediation resulted in the dismissal of the claims of discrimination in promotions because the women were married. See *Government Dismisses Sexual Bias Claims, Urges Job Flexibility*, JAPAN ECON. NEWSWIRE, Feb. 20, 1995, available in LEXIS, AsiaPC Library, JEN File.

Female employees of the Sumitomo Electric Industries Co. and Sumitomo Chemical Co. have made mediation requests similar to those made by female employees at the Sumitomo Metal Industries Co. See Iso, *supra*, at 13. Additionally, six female employees at the Kanematsu Corporation requested mediation from a Tokyo Metropolitan Government office to banish the two-track system. *Id.*

<sup>43</sup> A letter from Japanese Women, Counter-Report to the Japanese Government's Seasonal Periodic Report as a State Party to the Convention on the Elimination of All Forms of Discrimination Against Women 11-12 (Osaka: Kita-Ku no Kai) (1993).



10, 1991.<sup>44</sup> In March 1994, the first mediation was conducted on the Sumitomo Metal Industry Company case in Osaka, but the proposed recommendation by the Equal Opportunity Mediation Committee was rejected in March 1995 by the seven women petitioners, because it included no concrete remedies. Thus, since enforcement of the EEOL began, mediation has not served as a viable option and discrimination suits have been litigated rather than mediated.<sup>45</sup>

## II. INCREASED AWARENESS OF SEXUAL HARASSMENT AS A FORM OF SEXUAL DISCRIMINATION

In the first Japanese decision on sexual employment discrimination, the Tokyo District Court ruled in favor of the plaintiff and declared that the system of forced retirement upon marriage was illegal.<sup>46</sup> Since then, women have brought a number of successful suits regarding sexual discrimination in the workplace.<sup>47</sup> While sex discrimination in employment has continued to exist, however, the number of discrimination suits brought by women workers against their employers has been decreasing, in part because of the economic recession in Japan, but also because of the amount of time that lapses before a court renders its final decision.<sup>48</sup>

---

<sup>44</sup> See Knapp, *supra* note 4, at 121-22 (detailing attempt to achieve mediation in Tokai Radio Broadcasting Company dispute). Tokai Radio Broadcasting was the first case considered for mediation by the Women's and Young Workers' Office in Aichi Prefecture. MASAKO OWAKI, BYÔDÔ NO SEKANDO SU'SËJI [TO THE SECOND STAGE OF EQUALITY] 268-69 (1992). The office discouraged the women from considering mediation. *Id.* Refusing to capitulate, the women requested the final stage of dispute resolution under the EEOL mediation by the Equal Opportunity Mediation Committee. *Id.* The director of the Office declined their request for mediation. *Id.*

<sup>45</sup> See, e.g., Parkinson, *supra* note 4, at 615 n.33. Issues successfully litigated include forced retirement at child birth, forced retirement for women at the age of 30, and forced retirement for women at younger ages than men. *Id.*

<sup>46</sup> Sumitomo Cement Case, 467 HANJI 26 (Tokyo D. Ct. Dec. 20, 1966). See generally Knapp, *supra* note 4, at 103-04.

<sup>47</sup> See Mitsui Shipbuilding Case, 654 HANJI 29 (Osaka D. Ct. Dec. 10, 1971) (declaring forced retirement at childbirth illegal); Tôkyû Kikan Kôgyô Case, 560 HANJI 23 (Tokyo D. Ct. July 1, 1969) (holding forced retirement of women at age 30 illegal); Nagoya Broadcasting Case, 756 HANJI 56 (Nagoya High Ct. Sept. 30, 1974) (holding forced retirement of women at age 30 illegal); Nissan Motor Case, 998 HANJI 3 (Saikôsai Sup. Ct. Mar. 24, 1981) (holding forced retirement of women at age 55 and men at age 60 illegal); Izu Cactus Park Case, 770 HANJI 18 (Tokyo High Ct. Feb. 26, 1975) (holding forced retirement of women at age 47 and men at age 57 illegal); Onoda Cement Case, 523 HANJI 79 (Morioka D. Ct. Apr. 10, 1968) (declaring layoffs focusing unequally on married female employees and female employees over age 30 illegal); Koparu Case, 789 HANJI 17 (Tokyo D. Ct. Sept. 12, 1975) (declaring layoffs focusing on female employees with children illegal).

<sup>48</sup> See generally UPHAM, *supra* note 5, at 124-65 (concluding that it generally takes four or five years to complete litigation in Japanese District Court). Extreme examples include the Nihon

After ten years of enforcement of the EEOL, many women workers have realized the limitation of the remedies offered under the EEOL and mediation by the Equal Opportunity Mediation Committee, and feel that they have been betrayed by the Labor Administration. Quite recently, women workers have been approaching the court directly. This has been termed "the second boom in Japanese litigation concerning sex discrimination in employment."

In Japan, the word for sexual harassment is quite new. Formerly, the term "Seiteki Iyagarase" ("unwelcome sexual advances") was used to describe such conduct, but its actual translation refers to conduct which is more indirect than sexual harassment.<sup>49</sup> In 1982, the term "sexual harassment" appeared for the first time in *Contemporary Japanese Terms*,<sup>50</sup> an annually revised dictionary. "Sekuhara," a shortened form of the word, is now a commonly used word in the Japanese language.<sup>51</sup>

Many Japanese people perceive sexual harassment as a new social problem. Sexual harassment in the workplace, however, is not a modern development. Although sexual harassment has been present in the workplace ever since men and women began working together,<sup>52</sup> in Japan,

---

Tetsuren Case, 1215 HANJI 3 (Tokyo D. Ct. Dec. 4, 1986) (8 years and 11 months) and the Shakaihoken Shinryo Shiharai Kikin Case, 1353 HANJI 28 (Tokyo D. Ct. July 4, 1990) (10 years and 3 months).

<sup>49</sup> See Elaine Kurtenbach, *Layoffs, By Another Name, Shake Japanese Job Security*, ASSOCIATED PRESS, Feb. 24, 1993 (Business Section), available in Westlaw, ASSOCPR Database, 1993 WL 4528920 (stating that "iyagarase" connotes workplace annoyance). Japanese workers have been increasingly subject to "iyagarese" because of the recent economic downturn. *Id.* To reduce their workforce, Japanese companies create annoying work environments such as demeaning work tasks or cuts in pay. *Id.*

<sup>50</sup> Hiroko Hayashi, Written Expert Opinion on the Fukuoka Chihô Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songaibaishô Seikyû Jiken (submitted to Fukuoka District Court on Jan. 16, 1992), Rôdôhögaku Kenkyûkaihô [Labor Law Study Bulletin], No. 1880, 28 (1992).

<sup>51</sup> *We All Need an Akushon Puran*, MONTREAL GAZETTE, Feb. 16, 1992, at A2, available in Westlaw, MONTGAZ Database, 1992 WL 7157738. The Japanese have imported many English words into their vocabulary such as "bêsuboru" (baseball), "akushon puran" (action plan) and "sekushuaru harasumento" (sexual harassment). *Id.*; see also Robert Whyment, *How the Law Works-Or Does Not Work-In Other Countries: Japan*, DAILY TELEGRAPH (London), Oct. 16, 1991, at 19; *In Japan, They Call It Sekuhara*, ST. PETERSBURG TIMES, Oct. 13, 1991, at 6A.

<sup>52</sup> In the European Community, for example, sexual harassment exists in virtually every workplace, public or private. Victoria A. Carter, *Working on Dignity: EC Initiatives on Sexual Harassment in the Workplace*, 12 NW. J. INT'L L. & BUS. 431, 434 (1992). Up to 90% of young female workers in Spain report incidents of sexual harassment. *Id.* at 434 & n.14. A survey conducted in the United Kingdom indicated that 96% of women working in occupations usually held by men have suffered from sexual harassment. *Id.* at 424 & n.15. In Japan, 70% of 6500 individuals who participated in a sexual harassment survey reported that they had suffered sexual harassment at work. Elizabeth Zingg, *Complaint Highlights Sexual Harassment in Japan*, AGENCE FRANCE PRESSE, Dec. 23, 1991, available in LEXIS, World Library, AFP File. An investigation

sexual abuse and violence in the workplace have only recently begun to be recognized as forms of sexual discrimination.<sup>53</sup>

Traditionally, sexual harassment was not considered discrimination, but was viewed purely as a private matter between individuals.<sup>54</sup> In Japan, sexual harassment has been defined as "unwelcome remarks and conduct in the workplace which influence a worker's job performance and cause a hostile work environment."<sup>55</sup> Because Japanese law does not explicitly forbid sexual harassment, however,<sup>56</sup> this term does not yet have an official legal definition. Nonetheless, on April 16, 1992, for the first time ever in a Japanese court, the Fukuoka District Court held that "Seiteki Iyagarese," or "sexual unpleasantness" in the workplace is a violation of a worker's interest in maintaining the honor of her reputation.<sup>57</sup>

---

at a Japanese employee's union discovered that 500 out of the 800 women surveyed suffered sexual harassment. Elizabeth Zingg, *Japan's Female Employees Rebel Against Making Tea*, AGENCE FRANCE PRESSE, Oct. 27, 1991, available in LEXIS, World Library, AFP File.

<sup>53</sup> Bruce D. Fisher, *The Ethical Consumer: A Rejecter of Positive Law Arbitrage*, 25 SETON HALL L. REV. 230, 252 (1994) (stating that sexual harassment was first recognized in Japan in 1992 over 20 years after its recognition in United States). There are no statutory provisions in Japan which explicitly outlaw sexual harassment. See Merrill Goozner, *Japan Discovers Sex Harassment Inklings of Change in Culture that Subordinates Women*, CHI. TRIB., Jan. 31, 1993, at 21. There are, however, provisions under the EEOL (mandating equal opportunity) and the Japanese Labor Standards Act (prohibiting wage discrimination) which may theoretically form the basis of a tort-based sexual harassment claim. Tariq Mundiya, *Conditions of Work Digest: Combating Sexual Harassment at Work*, 15 COMP. LAB. L.J. 119, 124 (1993) (book review). Notwithstanding the lack of statutes prohibiting sexual harassment, a Japanese woman successfully sued her former employer for sexual harassment under a hostile work environment theory. See *infra* notes 58-106 and accompanying text. The Japanese are not only recognizing claims of sexual harassment in the workplace but are also expanding their existing tort system to encompass such claims. See Mundiya, *supra*, at 124.

<sup>54</sup> Nancy Patterson, *No More Naki-Neiri? The State of Japanese Sexual Harassment Law: Judgment of April 16, 1992, Fukuoka Chiho Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baisho Jiken (Japan)*, 34 HARV. INT'L L.J. 206 (1993). Historically, the only recourse for Japanese women facing sexual harassment in the workplace was naki-neiri (quietly crying themselves to sleep). Ted Holden, *Revenge of the 'Office Ladies,' BUS. WK.*, July 13, 1992, at 42.

<sup>55</sup> *Video to Raise Awareness of Workplace Sexual Harassment*, JAPAN ECON. NEWSWIRE, May 9, 1994 (stating that Labor Ministry of Japan issued guidelines in October of 1993 defining sexual harassment as "sexual remarks or actions against the will of a partner and creating job disadvantages for that person in retaliation against their 'negative' response, resulting in a deterioration of the work climate").

<sup>56</sup> Omori, *supra* note 22, at 4 ("After all, there are still no laws protecting Japanese women against sexual harassment.")

<sup>57</sup> Judgment of April 16, 1992, Fukuoka Chihō Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishō Seikyū Jiken (Japan). Two years later, a woman successfully sued her former boss at Kanazawa Construction Company for sexual harassment. Heather Howard, *Sexual Harassment Battle Only Starting*, DAILY YOMIURI, June 2, 1994, at 3, available in LEXIS,

### III. THE FUKUOKA SEXUAL HARASSMENT CASE<sup>58</sup>

#### A. *The Facts of the Fukuoka Case*

A female editor successfully sued her previous employer, a small publishing company, and her former supervisor for creating a hostile work environment.<sup>59</sup> The publishing company had employed a male editor in June, 1985, and the female editor in December, 1985.<sup>60</sup> The female editor received a starting salary of 90,000 yen per month while the male editor received over three times that amount; in May of 1987, a supervisor increased the female editor's salary by 20,000 yen per month and reduced the male editor's salary by an equal amount.<sup>61</sup> The male editor retaliated to the reduction in his salary by creating a hostile work environment for the female editor: he spread rumors about the female editor's sex life;<sup>62</sup> insinuated that the female editor was engaged in a sexual relationship with the supervisor;<sup>63</sup> stated that the female editor "play[ed] around and [had] many love affairs," and "often [went] out drinking after working late;"<sup>64</sup> told a customer that the female editor had "something wrong down below" when she was hospitalized for an ovarian tumor;<sup>65</sup> stated that the novel for which the female editor received a prize in the Fukuoka Citizen's Art Festival was pornographic;<sup>66</sup> and made numerous other harassing statements about the female editor to both her and her co-workers.<sup>67</sup>

The publishing company subsequently hired a new Chief Executive who supported the male editor by demanding that the female editor submit her resignation by the end of the year.<sup>68</sup> When the female editor refused, the male editor, without any authority, tried to force the female editor to

---

AsiaPC Library, Yomiur File. This decision provided Japan with its first legal definition of sexual harassment. *Id.*

<sup>58</sup> Judgment of April 16, 1992, Fukuoka Chihô Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishô Seikyû Jiken (Japan), 1426 HANJI 49.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Judgment of April 16, 1992, Fukuoka Chihô Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishô Seikyû Jiken (Japan).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Judgment of April 16, 1992, Fukuoka Chihô Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishô Seikyû Jiken (Japan).

resign on March 10, 1988.<sup>69</sup> The following day, the female editor asked the Chief Executive to order the male editor to apologize to those customers who inquired about the rumors he spread about her.<sup>70</sup> When the Chief Executive failed to comply with her request, the female editor took her cause to the company President.<sup>71</sup> Because he believed the conflict between the editors was due, in large part, to the female editor's extremely low salary, the Chief Executive raised the female editor's salary to 130,000 yen per month.<sup>72</sup> Despite this effort, the conflict between the editors eventually escalated to the point where it interfered with the company's business operations.<sup>73</sup> At this time, the female editor again complained to both the President and the Chief Executive about the male editor's harassment, both of whom viewed the case as a personal dispute between the editors.<sup>74</sup> Rather than attempt to settle the dispute, both officers instructed the female editor to discuss the matter with the male editor.<sup>75</sup>

The female editor's claim of harassment by the male editor eventually came before the publisher's Executive Board, which concluded that, if the two editors could not resolve their dispute, one of them must be dismissed.<sup>76</sup> The Chief Executive then met privately with the female editor and indicated that if the problem was not resolved, the company would request *her* resignation.<sup>77</sup> The Chief Executive further told the female editor that she was responsible for helping the male editor become a real man, and that, although she was a capable employee, as a female, she must defer to her male supervisor.<sup>78</sup> Consequently, the female editor resigned, and the Chief Executive met with the male editor to inform him of the female editor's resignation and to suspend him for three days.<sup>79</sup> The Chief Executive also subsequently reduced the male editor's bonus by 50,000 yen (approximately 500 U.S. dollars).<sup>80</sup> Although both editors

---

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Judgment of April 16, 1992, Fukuoka Chihô Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishô Seikyû Jiken (Japan).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Judgment of April 16, 1992, Fukuoka Chihô Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishô Seikyû Jiken (Japan).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

were penalized, the female editor was forced to resign while the male editor only suffered a small pay cut in his bonus and a three-day suspension.

The court held that the Chief Executive's remarks in his private meeting with the female editor supported the female editor's claim that her dismissal was unlawful.<sup>81</sup> Both editors had the same academic backgrounds and performed the same type of work, yet the male was paid 300,000 yen per month, while the female was only paid 130,000 yen per month following her second promotion.<sup>82</sup> On its face, the salary discrepancy seemed to violate Article 4 of the Labor Standards Law, which prohibits wage discrimination based on gender.<sup>83</sup> As the Fukuoka Case indicates, sex discrimination in personnel management may breed sexual harassment.<sup>84</sup>

### B. *The Judgment of Fukuoka District Court*

The Fukuoka District Court decided that the persons in charge of personnel management, namely the President and Chief Executive, negligently failed to resolve the problem between their employees due to their categorization of it as a personal dispute.<sup>85</sup> The court, therefore, concluded that the President and Chief Executive were responsible for a violation of Article 709 of the Japanese Civil Code,<sup>86</sup> which provides, in pertinent part, that "[a]ny person who intentionally or with fault infringes upon another person's rights shall compensate for the damages."<sup>87</sup>

The court further ruled that, as an employer, the publishing company was responsible for the President's and the Chief Executive's torts under Article 715 of the Civil Code,<sup>88</sup> which provides, in relevant part, that,

---

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Judgment of April 16, 1992, Fukuoka Chihō Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishō Seikyū Jiken (Japan).

<sup>84</sup> *Id.* The association of Women for Action and Research conducted a survey of 56 Japanese companies in Singapore and found that more than half of the reported incidents of sexual harassment against women in the workplace involved superiors in administrative, executive, and clerical positions. Ian Stewart, *Japanese Accused of Sexual Harassment*, S. CHINA MORNING POST, Mar. 26, 1994, at 12, available in LEXIS, News Library, SCHINA File; cf. Fic, *supra* note 37, at 24 (indicating that "sexual harassment flourishes in the corporate world in part because management relegates women to the role of prospective brides").

<sup>85</sup> Judgment of April 16, 1992, Fukuoka Chihō Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishō Seikyū Jiken (Japan).

<sup>86</sup> *Id.*

<sup>87</sup> MINPŌ (Civil Code), art. 709.

<sup>88</sup> Judgment of April 16, 1992, Fukuoka Chihō Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishō Seikyū Jiken (Japan).

"[a] person who employs another to carry out an undertaking is bound to make compensation for damage done to a third person by the employee in the course of the undertaking . . . ."<sup>89</sup>

The Fukuoka District Court held the publishing company vicariously liable under the Civil Code Article 715, not only for the torts committed by the actual harasser, but also for those committed by its President and Chief Executive.<sup>90</sup> The plaintiff claimed 3,000,000 yen in damages and 670,000 yen in attorneys' fees.<sup>91</sup> The damages were solely to compensate the plaintiff for the infringement on her personal rights and her emotional suffering, as the plaintiff made no claim for economic loss.<sup>92</sup> The court ordered the female editor's employer and supervisor to pay her 1,500,000 yen (approximately 15,000 U.S. dollars) as consolation, and 150,000 yen for attorney's fees. The decision became final on April 30, 1992.<sup>93</sup>

The Fukuoka District Court decision contains four important points. First, the court addressed whether sexual harassment violates personal rights. The court judged that the male editor, by spreading rumors about the female editor's sex life to damage her reputation and to force her to resign, infringed on her personal rights in violation of Article 709 of the Civil Code.<sup>94</sup> Personal rights include one's right to bodily integrity, liberty, honor, life, reputation, and privacy.<sup>95</sup>

Second, the Fukuoka District Court held that a worker has a right to a non-hostile work environment and found that the male editor violated Article 709 of the Civil Code by creating a hostile work environment.<sup>96</sup>

---

<sup>89</sup> MINPŌ (Civil Code), art. 715.1.

<sup>90</sup> Judgment of April 16, 1992, Fukuoka Chihō Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishō Seikyū Jiken (Japan). *See* Patterson, *supra* note 54, at 218-19 (discussing liability of employer under article 715 of Civil Code for failure to maintain non-hostile working environment).

<sup>91</sup> Judgment of April 16, 1992, Fukuoka Chihō Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishō Seikyū Jiken (Japan).

<sup>92</sup> *Id.*

<sup>93</sup> *See Defendants Accept Sexual Harassment Ruling*, JAPAN ECON. NEWSWIRE, Apr. 30, 1992, available in LEXIS, News Library, Wires File.

<sup>94</sup> Judgment of April 16, 1992, Fukuoka Chihō Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishō Seikyū Jiken (Japan).

<sup>95</sup> *See* Patterson, *supra* note 54. In recognizing the right to privacy aspect of the claims, the judge relied on an earlier decision by the Tokyo District Court which held that a company violated its employee's privacy by releasing private information about the employee to a real estate office. *Id.* at 218 n.82; *see also Defendants Accept Sexual Harassment Ruling*, *supra* note 93. Presiding Judge Takashi Kawamoto stated that the company "neglected the obligation to secure proper working conditions for the plaintiff and tried to solve the issue by having the woman accept [the] disadvantages of [leaving the firm]" due to rumors. *Id.* (citation omitted).

<sup>96</sup> Judgment of April 16, 1992, Fukuoka Chihō Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishō Seikyū Jiken (Japan); *see also* Patterson, *supra* note 54, at 218.

This decision was the first to uphold a claim to a non-hostile work environment based solely on a worker's personal right to work in an environment free of harassment.<sup>97</sup>

Third, the Fukuoka District Court addressed whether prevention of sexual harassment is the company's responsibility. Article 715 of the Civil Code provides that employers are liable for damages employees cause to a third party, including the employee's colleagues.<sup>98</sup> Employers, therefore, are responsible for sexual harassment in the workplace, even if the employers are not directly involved. The court concluded that an employer liable under Article 715 of the Civil Code must compensate an aggrieved employee for his or her suffering.<sup>99</sup> Moreover, the court held that a company is responsible for taking the necessary measures required to ensure that its employees' personal rights are not violated.<sup>100</sup>

Finally, the Fukuoka District Court addressed whether a company is liable for unlawful acts by its administrative officers. The court held that the President and the Chief Executive neglected to take the measures necessary to maintain a non-hostile work environment.<sup>101</sup> Although the Japanese Constitution, the Civil Code, and the labor laws provide for equality between men and women, the President and the Chief Executive essentially resolved a dispute between a male and a female employee by forcing the female employee to resign.<sup>102</sup> The court, therefore, held that the company failed to take the proper measures needed to improve its employee's work environment.<sup>103</sup> Although the decision never explicitly used the term "sexual harassment," it held that the male editor, by spreading rumors regarding the female editor's sex life, violated the female

---

<sup>97</sup> See Steven R. Weisman, *Landmark Sex Harassment Case in Japan*, N.Y. TIMES, Apr. 17, 1992, at 3 (stating Fukuoka District Court decision is first successful legal action against harassment in Japan); Terry McCarthy, *Sayonara Sex Harassment: Japanese Turning the Tide*, TORONTO STAR, Apr. 24, 1992, at C18 (finding Fukuoka decision unusual because defendant's harassing conduct was purely verbal); Patterson, *supra* note 54, at 216-19.

<sup>98</sup> MINPŌ (Civil Code), art. 709.

<sup>99</sup> Judgment of April 16, 1992, Fukuoka Chihō Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishō Seikyū Jiken (Japan).

<sup>100</sup> *Id.* In response to the Fukuoka Court decision, many companies are conducting seminars and publishing brochures discussing sexual harassment in an attempt to reduce its occurrence among workers. Yomiuri Shinbun, *Sexual Harassment Awareness is Rising in Japan*, DAILY YOMIURI, Feb. 9, 1994, at 13, available in LEXIS, AsiaPC Library, Yomiuri File.

<sup>101</sup> Judgment of April 16, 1992, Fukuoka Chihō Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishō Seikyū Jiken (Japan).

<sup>102</sup> *Id.*; see KENPŌ [Constitution] art. XIV (Japan); MINPŌ (Civil Code), art. 90; Rōdō Kijun Hō (Labor Standards Law), Law No. 49 of 1947; see also Patterson, *supra* note 54, at 211-15.

<sup>103</sup> Judgment of April 16, 1992, Fukuoka Chihō Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishō Seikyū Jiken (Japan).



employee's interest in maintaining the honor of her reputation.<sup>104</sup> The male editor further violated the female editor's rights by damaging her reputation as a professional and ultimately causing her resignation.<sup>105</sup> Most significantly, the court recognized a claim never before upheld in a Japanese court: an employee's right to a non-hostile work environment.<sup>106</sup>

Despite this milestone, "sexual harassment" remains officially undefined in Japan. The Ministry of Labor, however, has defined "sexual harassment" in recent guidelines as a "communication gap."<sup>107</sup> In 1991, the government organized the Council on Female Employee Management and Communications Gaps (the "Council"),<sup>108</sup> to research sexual harassment in order to prepare guidelines for businesses.<sup>109</sup> In October of 1993, the Council characterized sexual harassment as unpleasant speech or conduct, by sexual references or connotations, that creates a difficult working environment.<sup>110</sup>

### C. One-Day Telephone Survey on Sexual Harassment

Public reaction to the first successfully litigated claim of sexual harassment in Fukuoka was strong and controversial.<sup>111</sup> On October 7,

---

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*; see also Patterson, *supra* note 54, at 216-19.

<sup>106</sup> Judgment of April 16, 1992, Fukuoka Chihō Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Baishō Seikyū Jiken (Japan); see Patterson, *supra* note 54, at 218.

<sup>107</sup> See *Ministry Comes Up With Definition of Sexual Harassment*, UPI, Oct. 18, 1993, available in LEXIS, Nexis Library, UPI File.

<sup>108</sup> The Nihon Keizai Shinbun, *Lawsuit Puts Spotlight on Sexual Harassment*, JAPAN ECON. J., Aug. 18, 1990, at 10, available in LEXIS, AsiaPC Library, Japan File. Over a year after the Fukuoka Court decision was rendered, the Ministry of Labor formally defined "sexual harassment" as "sexual speech or conduct that leads to a deterioration of the work environment." *Ministry Announces Definition of Sexual Harassment*, JAPAN ECON. NEWSWIRE, Oct. 18, 1993, available in LEXIS, News Library, Wires File.

<sup>109</sup> See Shinbun, *supra* note 100. The Ministry of Labor, responding to the problem of sexual harassment, ran a major campaign against sexual harassment. *Id.* The Ministry's plan included the formulation of a research study group and the evaluation of other countries programs to eliminate sexual harassment and its goal was to set up guidelines for corporations in Japan to deal with sexual harassment in the workplace. *Id.*

<sup>110</sup> Hamabe, *supra* note 3, at 327; Pamala Kurilla, *No Sex Please, We Are Japanese*, HERALD (Glasgow), Sept. 15, 1994 (indicating Ministry of Labor has produced 100-point checklist to help companies determine if female employees are treated fairly). In 1991 the Ministry of Labor established a commission to investigate sexual harassment and its findings were published in *Sekuhara: Keihatsu katsudō de mizen ni fusegu [Preventing Sexual Harassment Through Education]*, NIKKEI, Sept. 18, 1993, at M34 (citing Hamabe, *supra* note 3, at 327).

<sup>111</sup> See generally Patterson, *supra* note 54. The Fukuoka claim was filed in the Fukuoka District Court in August of 1989. In September, the Dai-ni Tokyo Bar Association, one of three bar associations in Tokyo, announced that it would open a one-day telephone hotline to survey victims of sexual harassment. *Lawyers Plan Sexual Harassment Hotline*, JAPAN ECON.

1989, during the early stages of the litigation, the Dai-ni Tokyo Bar Association ("Association") held a one-day telephone survey on sexual harassment (the "Survey"),<sup>112</sup> and received calls indicating a surprisingly high volume of sexual harassment.<sup>113</sup> In that one day, the Association received 138 calls reporting incidents of sexual harassment; three such calls were made by male employees protesting sexual harassment by female supervisors or co-workers.<sup>114</sup>

The ages of the harassment victims ranged from the teens through the sixties, while approximately two-thirds of the victims were women in their thirties and forties.<sup>115</sup> A large number of the reports of sexual harassment actually constituted violations of the criminal law, such as rape, assault and battery, obscenity, and false imprisonment.<sup>116</sup> Many victims felt compelled to resign or were at least actively contemplating resigning.<sup>117</sup> Victims of sexual harassment who resign typically suffer economic disadvantages such as a deduction of all or part of their lump-sum retirement payments, a three-month waiting period before receiving unemployment insurance benefits, and, under the Labor Standards Law, the loss of the equivalent of thirty days of average wages as a discharge allowance.<sup>118</sup>

---

NEWSWIRE, Sept. 26, 1989, available in LEXIS, News Library, Wires File. The results of the survey were publicized in numerous forums. See, e.g., *Bosses Forced Sex on 25 Women, Hotline Told*, JAPAN ECON. NEWSWIRE, Oct. 7, 1989, available in LEXIS, News Library, Wires File. Many organizations responded by sponsoring surveys of groups such as teachers, government employees, and private workers to determine the types and prevalence of sexual harassment. See generally Steven R. Weisman, *Tokyo Journal; Sex Harassment: Glare of Light on a Man's World*, N.Y. TIMES, Nov. 13, 1989, at A4 (stating that Japan's largest federation of labor unions held seminar on sexual harassment); *Two in Three Female Workers Have No Wish for Promotion*, JAPAN ECON. NEWSWIRE, Oct. 11, 1991, available in LEXIS, News Library, Wires File (according to first survey conducted by Ministry of Labor on females in workforce, 69.9% of women do not wish to be promoted and 63.5% report having had their bodies touched).

<sup>112</sup> See *Lawyers Plan Sexual Harassment Hotline*, supra note 111. The survey was conducted to raise public awareness of sexual harassment and help attorneys establish legal guidelines against sexual harassment. *Bosses Forced Sex on 25 Women, Hotline Told*, supra note 111.

<sup>113</sup> See *Company Bosses Perpetuate Harassment, Survey Shows*, JAPAN ECON. NEWSWIRE, Dec. 2, 1989, available in LEXIS, News Library, Wires File.

<sup>114</sup> *Bosses Forced Sex on 25 Women, Hotline Told*, supra note 111.

<sup>115</sup> "Report of One-Day Telephone Consultation on Sexual Harassment by Dai-ni Tokyo Bar Association (1989)" (unpublished).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See Holden, supra note 54. The value of a lump-sum retirement payment may be equivalent to 30 to 40 months' wages, a substantial forfeiture if a woman is forced to resign. See generally Ann R. Klee, Note, *Worker Participation in Japan: The Temporary Employee and Enterprise Unionism*, 7 COMP. LAB. L.J. 365, 377 (1986).

D. *Sexual Harassment—Sex Discrimination or Not?*

One of the functions of the Tokyo Metropolitan Office of Labor Administration (the "Office of Labor Administration") is to receive labor complaints.<sup>119</sup> In the 1980s, it began to receive many complaints of "Seiteki Iyagarase." The Office of Labor Administration originally classified these complaints as incidents of "miscellaneous discrimination," but, as the number of complaints of "Seiteki Iyagarase" grew to exceed the number of claims of age discrimination, retirement-age discrimination, or violations of maternity protection, the complaints came to be classified as cases of "sexual harassment."<sup>120</sup> In fact, the Office of Labor Administration has recognized sexual harassment as a type of employment discrimination since February of 1989.<sup>121</sup> Statistics indicate that the office handles approximately 400 consultations on sexual harassment each year.<sup>122</sup>

Common-law countries treat sexual harassment as a violation of the laws that prohibit sex discrimination in employment.<sup>123</sup> The United States, for example, has a well-developed body of legislation and litigation in the area of sexual harassment. The United States Supreme Court has

---

<sup>119</sup> See Yukio Ishitizuka & Eri Oura, *War on Sexual Harassment Heats Up After Landmark Case, 1992 Judgment Prompts Government, Industry, and Community Bodies to Campaign For More Awareness*, NIKKEI WKLY., May 17, 1993, at 20, available in LEXIS, World Library, ALLWLD File. See generally T. HANAMI, *LABOUR LAW AND INDUSTRIAL RELATIONS IN JAPAN* (2d ed. 1985).

<sup>120</sup> See generally Shinbun, *supra* note 100; Akiko Fukami, *Sexual Harassment in Japan*, S.F. CHRON., June 30, 1990, at 18.

<sup>121</sup> See Fukami, *supra* note 120.

<sup>122</sup> Masaomi Kaneko, *Sōdan Madoguchi Kara Mita Seiteki Iyagarase [Sexual Harassment through the Window of Labor Consultation]*, in *SEXUAL HARASSMENT* (Nikkei Kohōbu, Tokyo ed. 1990).

<sup>123</sup> See Beverley H. Earle & Gerald A. Madek, *An International Perspective on Sexual Harassment Law*, 12 LAW & INEQ. J. 43 (1993) (discussing state of sexual harassment law in United States and Europe). In the United Kingdom, for example, the 1975 Sex Discrimination Act is construed to include sexual harassment. *Id.* at 83 (discussing *Porcelli v. Strathclyde Regional Council*, 1986 I.C.R. 564 (Scot. Sess.)). An Australian court held that the International Convention on Elimination of all Forms of Discrimination Against Women imposes a duty to take measures necessary to secure equal rights for women, including the prohibition of sexual harassment. *Id.* at 81 n.287 (discussing *Aldridge v. Booth*, 80 A.L.R. 1 (Fed. Ct. 1988)). Additionally, a New Zealand court used the existing penal law to bring criminal indecent assault charges against a shop owner accused of sexual harassment, *id.* at 81 n.287 (discussing *R. v. Dean*, 3 N.Z.L.R. 444 (Wellington Ct. App. 1991)), and in 1992, France made the abuse of authority by use of force or duress to obtain sexual favors (*quid pro quo* sexual harassment) a criminal offense. *Id.* at 80 (citing CODE PENAL [C. PEN.] art. 222-23 Titre II (Fr.), available in LEXIS, Loireg Library, Codes File).

interpreted sexual harassment under Title VII of the Civil Rights Act,<sup>124</sup> stating that quid pro quo sexual harassment<sup>125</sup> violates that statute's prohibition on sex discrimination.<sup>126</sup> The Supreme Court also ruled that hostile-environmental sexual harassment<sup>127</sup> similarly violates Title VII.<sup>128</sup> Both types of sexual harassment constitute sex discrimination because harassers, taking advantage of a victim's sex, force some employees to work under conditions different from that of other employees.<sup>129</sup> Some of the courts in the United States, therefore, conclude that sexual harassment is unlawful as a general rule and will be equally actionable whether that harassment is initiated by women against men, or

---

<sup>124</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986). In *Meritor*, Justice Rehnquist, delivering the opinion for the Court, stated that "for sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). Title VII of the Civil Rights Act of 1964, as amended, makes it an "unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988).

<sup>125</sup> Quid pro quo sexual harassment occurs when "someone with the authority to control employment opportunities, such as promotions or salary increases, tries to get a subordinate employee to grant sexual favors in order to obtain or retain that employment opportunity." BARBARA LINDEMENN & DAVID D. KADUE, *PRIMER ON SEXUAL HARASSMENT* 22 (1992). A complainant must prove all five of the following elements identified by the courts to establish liability for quid pro quo sexual harassment:

- (1) the complainant is a member of a protected group;
- (2) the complainant was subjected to unwelcome sexual advances;
- (3) the complainant suffered an adverse employment action;
- (4) (a) the sexual advance was because of the complainant's gender, and (b) the complainant's reaction to sexual advance affected a tangible aspect of her job; and
- (5) the employer is responsible.

*Id.* at 22-23.

<sup>126</sup> "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." EEOC Guidelines, 29 C.F.R. § 1604.11(a) (1980).

<sup>127</sup> See *Meritor*, 477 U.S. 57; cf. *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979) (finding plaintiff's discharge for her refusal to cooperate with her supervisor's sexual advances constituted quid pro quo sexual harassment and was thus violation of Title VII).

<sup>128</sup> See *Meritor*, 477 U.S. at 66 ("Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.").

<sup>129</sup> See, e.g., *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993). Although the EEOC guidelines seem to imply that to be violative the conduct must be sexual in nature, courts now generally recognize the applicable test to be whether the offensive conduct is due to the complainant's gender, and such conduct need not be of a sexual nature to be actionable. See *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985).

by men against women, or between members of the same sex.<sup>130</sup>

### E. No Legal Definition of Sex Discrimination

Article 14 of the Japanese Constitution prohibits sex discrimination in political, economic, or social relations.<sup>131</sup> There is no legislation, however, that prohibits sex discrimination by employers in the private sector.<sup>132</sup> While Article 4 of the Labour Standards Law only prohibits wage discrimination against women,<sup>133</sup> the EEOL offers women workers some additional protections in other areas.<sup>134</sup> It remains unclear, however, whether sexual harassment constitutes sex discrimination in Japan. Since the *Sumitomo Cement Case*,<sup>135</sup> women workers have litigated many discrimination claims against their employers.<sup>136</sup> Discriminatory practic-

<sup>130</sup> See *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205 (D.R.I. 1991) (sexual harassment claims by males actionable under Title VII), *aff'd on other grounds*, 984 F.2d 4 (1st Cir. 1993). Not all courts, however, construe Title VII to include claims of men harassed by women or between men. See, e.g., *Fleener v. Hewitt Soap Co.*, 1995 WL 386793 (S.D. Ohio Dec. 21, 1994) (discussing why Title VII does not apply to case other than male harassers and female victims). These courts want to limit Title VII to the historically oppressed and, therefore, protected class, i.e. women. *Id.*; see *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983) (holding prima facie case of sex discrimination based upon quid pro quo sexual harassment existed where manager made unsolicited homosexual overtures to plaintiff which employee rebuked); cf. *McCoy v. Johnson Controls World Servs.*, 878 F. Supp. 229 (D. Ga. 1995) (finding Title VII includes homosexual harassment provided victim is member of protected class); *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446 (5th Cir. 1994) (concluding male harassment of male employee not actionable under Title VII if harassment was sexual in nature).

<sup>131</sup> KENPŌ [Constitution] art. XIV, para. 1 (Japan). Article 14 states, in pertinent part, that "[a]ll of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin." *Id.*

<sup>132</sup> See *Patterson*, *supra* note 54, at 213 (stating that there is no private cause of action or other mechanism to force compliance of Japan's Equal Employment Opportunity Law). See generally *Hamabe*, *supra* note 3, at 324 (stating that statutory provisions fall short of ensuring equal treatment in all aspects of employment).

<sup>133</sup> Rōdō Kijinhō (Labor Standards Law), Law No. 49 of 1947, art. IV ("The employer shall not discriminate women against men concerning wages by reason of the worker being women.").

<sup>134</sup> *Danjo Koyō Kintō Hō* [Equal Employment Opportunity Law], Law No. 45 of 1985. The EEOL prohibits discrimination against female workers in the areas of retirement age, termination and voluntary resignation. *Id.* Although the EEOL requires employers to endeavor to provide equal opportunities for the recruitment, hiring, placement and promotion of female and male workers, no sanctions are imposed upon such employers who fail to provide such opportunities. See *Hamabe* *supra* note 3, at 324 nn.82-83.

<sup>135</sup> *Sumitomo Cement Case*, 467 HANJI 26 (Tokyo D. Ct. Dec. 20, 1966) (granting women right to reject forced early retirement upon marriage). In the *Sumitomo Cement Case*, the court held that forced early retirement upon marriage infringed upon Article 24 of the Constitution, which gives women the right of freedom of marriage. *Id.*

<sup>136</sup> See *Patterson*, *supra* note 54, at 213 n.49 (stating that *Sumitomo* was first case in line of decisions which granted women right to continue working after marriage).

es, such as forced retirement upon marriage,<sup>137</sup> forced retirement of young women,<sup>138</sup> gender-differentiated retirement ages,<sup>139</sup> and promotion discrimination,<sup>140</sup> have been found to violate Article Ninety of the Civil Code, which states, in pertinent part, that “[a] juristic act whose object is a matter contrary to public [policy] or good manners and customs, is void.”<sup>141</sup> Although the “public [policy]” and “good manners” standards incorporate the principle of equality set forth in Article Fourteen of the Constitution,<sup>142</sup> such standards are vague and abstract. Courts must determine whether an employment practice is reasonably discriminatory.<sup>143</sup> Even after enactment of the EEOL,<sup>144</sup> Article Ninety of the Civil Code continues to play a very important role in the litigation of sex discrimination in employment cases.<sup>145</sup>

#### F. *Quid Pro Quo Harassment or Environmental Harassment?*

Although the court in the Fukuoka case did not expressly refer to “sexual harassment,” that case has been reported as an environmental sexual harassment case.<sup>146</sup> In fact, Japanese courts now recognize two types of sexual harassment: quid pro quo harassment and environmental

<sup>137</sup> See, e.g., Onoda Cement Case, 523 HANJI 79 (Morioka D. Ct. Apr. 10, 1968) (declaring that layoffs focusing unequally on married female employees and female employees over age of 30 constitutes illegal discrimination).

<sup>138</sup> See, e.g., Tokyū Kikan Kogyō, 560 HANJI 23 (Tokyo D. Ct. July 1, 1969) (declaring that forced retirement of women at age 30 is illegal).

<sup>139</sup> See, e.g., Nissan Motor Case, 990 HANJI 3 (Sup. Ct. Mar. 24, 1981) (declaring forced retirement of women at age 55 and men at age 60 illegal); Izu Cactus Park Case, 770 HANJI 18 (High Ct. Feb. 26, 1975) (declaring mandatory retirement of women at age 47 and men at age 57 illegal).

<sup>140</sup> See *Court Issues Landmark Ruling Against Sex Discrimination*, KYODO NEWS SERVICE, July 4, 1990, available in LEXIS, Nexis Library, INTL File. In 1990, the Tokyo District Court awarded 124 million yen to a class of 18 women in a suit for gender-based denial of promotion. *Id.*

<sup>141</sup> MINPŌ (Civil Code), art. 90.

<sup>142</sup> See KENPŌ [Constitution] art. XIV, para. 1 (Japan).

<sup>143</sup> See generally Hamabe, *supra* note 3, at 327 n.96 (discussing categorization by Japan’s Ministry of Labor of “environment” of sexual harassment and comparing it to “hostile environment” harassment recognized by United States and determined using reasonable person standard).

<sup>144</sup> Danjo Koyō Kintō Hō [Equal Employment Opportunity Law], Law No. 45 of 1985.

<sup>145</sup> See generally Knapp, *supra* note 4 (discussing various advantages of using Article 90 in discrimination cases).

<sup>146</sup> See, e.g., *Japanese Women Hail Landmark Ruling on Sexual Harassment*, GUARDIAN, Apr. 17, 1992, Foreign at 11 (translating Judge Kawamoto: “It was against the law to dismiss the woman or to antagonise [sic] her with remarks about sexual relations or her personal life.”).

harassment.<sup>147</sup> *Quid pro quo* harassment occurs when a superior offers to promote an employee or raise an employee's wages in exchange for sexual favors or the toleration of sexual harassment, and threatens to disadvantage an employee who rejects such requests by methods such as dismissal and unfair transfer.<sup>148</sup> Environmental harassment exists when employers, executives, supervisors, co-workers, or customers create a hostile or unpleasant work environment by discussing sex with the victims or by engaging in conduct which diminishes the employee's work spirit.<sup>149</sup> Additionally, unnecessary touching,<sup>150</sup> the posting of nude posters,<sup>151</sup> and the use of obscene language<sup>152</sup> all may constitute environmental sexual harassment.<sup>153</sup>

---

<sup>147</sup> See Patterson, *supra* note 54, at 214. The Japanese courts and legal commentators divide sexual harassment into two categories: (1) *Daishō* ("quid pro quo") and (2) *Kankyō* ("hostile environment"). *Id.* In fact, *Daishō* harassment has been successfully litigated a few times, but the defendant's conduct must have been truly egregious for the plaintiff to be victorious. *Id.*

<sup>148</sup> See, e.g., Henson v. Dundee, 682 F.2d 897, 908 (11th Cir. 1982) (holding that "[a]n employer may not require sexual consideration from an employee as a *quid pro quo* for benefits").

<sup>149</sup> See LINDEMANN & KADUE, *supra* note 125, at 40-42. To establish a hostile environment claim, the conduct complained about must be unwelcome. *Id.* This conduct must take the form of sexual advances or "gender-based animosity," with the latter most often taking the form of "gender-baiting" or "nonsexual hazing based on sex." *Id.* In October of 1993, the Ministry of Labor published its definition of sexual harassment, "sexual speech or conduct that leads to deterioration of the work environment." *Ministry Announces Definition of Sexual Harassment*, *supra* note 108. See generally Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-66 (1986).

<sup>150</sup> See Barrett v. Omaha Nat'l Bank, 726 F.2d 424 (8th Cir. 1984).

<sup>151</sup> See Boyd v. James S. Hayes Living Health Care Agency, Inc., 671 F. Supp. 1155 (W.D. Tenn. 1987); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

<sup>152</sup> Robinson, 760 F. Supp. at 1486.

<sup>153</sup> See, e.g., Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993). The Harris Court declined to specify what types of conduct might create a hostile environment, and indicated that this could only be determined by evaluating all the circumstances. *Id.* "These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.*

Recent Japanese surveys on sexual harassment have generated confusion over the prevalence of sexual harassment and what type of behavior creates a hostile work environment. See, e.g., Robert Stern, *Japan's Women Given Tough Lesson in Sexual Harassment*, TIMES (London), Feb. 19, 1994 (quoting spokeswoman for Japan's Women's Democratic Club, as stating "Japanese men have no idea what sexual harassment is"). The All-Japan Prefectural & Municipal Worker's Union survey of 9300 women and 2000 men included incidents of physical touching, lewd jokes, comments on appearance and intentional references to age. *Survey Shows Sexual Harassment Reaches 20%*, NIKKEI WKLY, Aug. 29, 1994, Issues & People, at 22, available in LEXIS, World Library, ALLWLD File. About 30% of the men surveyed were unsure of whether they were guilty of harassment. *Id.* A survey of more than 9600 female executives showed that over 60% of senior female executives claimed to be victims of sexual harassment. Nigel Smith, *Dirty Work: Japanese Women Are Standing Up to Harassment at Work, But Still the Men's Comics are Full of Sexual Violence*, GUARDIAN, Feb. 1, 1993, at 12. The Japanese Teachers' Union reported that

Because, under agency law, agents in the United States are authorized to hire and fire personnel, claims of quid pro quo harassment by agents is common in the United States.<sup>154</sup> The most frequent case of sexual harassment in the United States involves a victim who suffers discrimination by being placed in a situation in which she must make a choice to either accept an unpleasant or hostile environment or resign, accept a discharge, or agree to an unfair transfer.<sup>155</sup> In Japan, however, because corporate executives or agents are not necessarily authorized to hire and fire personnel, this type of sexual harassment is less common and may only be initiated by empowered executives.<sup>156</sup> Instead, in Japan, it is far more common for a supervisor to take advantage of his supervisory position to sexually harass employees.<sup>157</sup> In fact, almost all of the sexual harassment

---

45% of female school teachers that responded suffered at least one type of sexual harassment. *Half of Female Teachers Suffer Sexual Harassment*, JAPAN ECON. NEWSWIRE, Aug. 5, 1994, available in LEXIS, News Library, Wires File. A 1993 survey by the Fukuoka Prefectural government found that 25% of the 1800 participants had experienced sexual harassment. *Fic*, *supra* note 37, at 24.

In an effort to educate the public about sexual harassment, the Ministry of Labor distributed a 24-minute video with examples of harassment and measures to combat it. *Video to Raise Awareness of Workplace Sexual Harassment*, *supra* note 56.

<sup>154</sup> See, e.g., *Bundy v. Johnson*, 641 F.2d 934 (D.C. Cir. 1981) (adjudicating plaintiff's claim that she was denied promotion in retaliation for her refusal of superior's sexual advances). Mere supervision of another employee is insufficient to create an agency relationship which imputes liability to the employer. See generally *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995) (applying agency theory to Title VII claims involving supervisors). In *Gary*, Gary's supervisor, Long, demanded sex in return for favors, and when she refused he demanded sex as a condition of continued employment. *Id.* at 1393. She continued to refuse and he raped her. *Id.* The court reasoned that an employer would be liable for a supervisor's quid pro quo harassment only if the supervisor had the authority to subject the victim to adverse job consequences if she refused to submit to unwelcome sexual advances. *Id.* at 1396. The employer would not be liable for environmental harassment if it could establish that a supervisor who created a hostile work environment was not acting as the employer's agent. *Id.* Gary's company had an active policy against sexual harassment, and the court found that Gary could not have reasonably believed that Long had authority to harass her. *Gary*, 59 F.3d at 1398. Therefore, the plaintiff's Title VII claims were dismissed. *Id.*

<sup>155</sup> See generally LINDEMANN & KADUE, *supra* note 125, at 30-31 (discussing common situations of hostile environment sexual harassment involving disparate treatment based on employees' gender). Quid pro quo sexual harassment may be reported and litigated more frequently because it may be easier to define forced sexual relations which have independent criminal sanctions (e.g., rape and sexual assault laws) than a hostile environment which is outside the amorphous boundaries of acceptable social interaction between men and women. See generally Earle & Madek, *supra* note 123.

<sup>156</sup> See generally Patterson, *supra* note 54, at 222 (stating that Japanese style of management tends to be consultative rather than authoritative, and disputes are more often resolved through compromise rather than confrontation).

<sup>157</sup> See Stewart, *supra* note 84. A survey of 56 Japanese companies in Singapore, conducted by the Association of Women for Action and Research, revealed that more than half of the



cases now being litigated in Japan involve this type of harassment.<sup>158</sup> Litigation over sexual harassment in the workplace has dramatically increased since the Fukuoka District Court decision.<sup>159</sup> This decision is an example of expulsive and environmental sexual harassment and illustrates how sexual harassment has been used by men in an attempt to prevent women from becoming rivals for high positions of power in the workplace.

#### CONCLUSION

The Fukuoka District Court decision demonstrates that an employer and its upper-management officers must take the necessary measures required to maintain a non-hostile work environment for its employees and prevent violations of employees' personal rights. Employers who neglect to do so may be held liable for the nonperformance of their contractual duties under Article 415 of the Civil Code.<sup>160</sup> Further, when an employee's personal rights are violated and the employee is prevented from performing his or her task, the company and the officers in charge of administration, including the president and the senior executive, are responsible for restoring a non-hostile work environment for employees. If the administrative officers neglect to fulfill this responsibility, they may be held liable for violating Article 709 of the Civil Code.<sup>161</sup>

---

reported incidents involved superiors in the workplace. REUTERS NEWSLINE, Mar. 18, 1993, available in LEXIS, News Library, Wires File. According to a regional government survey conducted in Southern Japan, in three out of four cases, the offending party was the boss. *Id.*

<sup>158</sup> See Smith, *supra* note 153, at 12 (stating that Fukuoka decision encouraged women all over Japan to sue for damages on grounds of sexual harassment). Following the decision, more serious sexual harassment claims were made around Japan, including claims of rape by a superior. *Id.*; *Woman Wins 800,000 Yen in Sexual Harassment Suit*, JAPAN ECON. NEWSWIRE, May 26, 1994, available in LEXIS, AsiaPC Library, Japan File (stating that Kanazawa District Court ordered construction company and its president to pay damages to female employee fired after rejecting president's sexual advances); Miho Yoshikawa, *Japanese Goes Public Against Sexual Harassment*, REUTER LIBRARY REPORT, May 11, 1993, available in LEXIS, News Library, Wires File (discussing first sexual harassment case where plaintiff identifies herself publicly); *Woman Demands Compensation, Apology, Over Harassment*, JAPAN ECON. NEWSWIRE, July 14, 1992, available in LEXIS, AsiaPC Library, Japan File (discussing suit filed in Yokohama District Court by woman demanding compensation and public apology over alleged sexual harassment by supervisor).

<sup>159</sup> See *supra* note 47 and accompanying text.

<sup>160</sup> MINPŌ (Civil Code), art. 415. Article 415 states that "[w]hen the debtor does not perform the obligation in accordance with the intent and purpose of the same . . . the creditor may demand compensation for accruing damage. The same applies when performance has become impossible owing to a cause attributable to the debtor." *Id.*

<sup>161</sup> MINPŌ (Civil Code), art. 709 ("A person who has intentionally or negligently violated the right of another is bound to compensate any damages resulting in consequence.").