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COMMENT

EASTERN MEN, WESTERN WOMEN: COPING WITH THE EFFECTS OF JAPANESE CULTURE IN THE UNITED STATES WORKPLACE

I. INTRODUCTION

Landing a job at Mitsubishi's Normal, Illinois, automobile manufacturing plant in 1989 delighted Margaret Coleman.¹ The twenty-seven year-old had recently graduated with a degree in economics from Illinois State University.² Previously, she spent six years as a member of the U.S. Army Reserve, where she had top-secret security clearance.³ Ms. Coleman was eager to learn more about Japanese management techniques and earn \$18 an hour.⁴

Instead, Ms. Coleman found her workplace tainted with sex discrimination.⁵ Her male co-workers continually proposi-

1. See Kirsten Downey Grimsley et al., *Fear on the Line at Mitsubishi; Women Recount Allegations of Sexual Harassment at Auto Plant*, WASH. POST, Apr. 29, 1996, at A1. Mitsubishi is part of an elite group of firms that are known for offering the best pay, best hours, and best fringe benefits in Japan. See Paul Lansing & Kathryn Ready, *Hiring Managers in Japan: An Alternative for Foreign Employers*, Japanese Management 266 (Subhash Durlabhji & Norton E. Marks eds., 1993).

2. See Grimsley et al., *supra* note 1, at A1.

3. See *id.*

4. See *id.*

5. See *id.* Sandra Rushing, who began working at the plant in 1989 when she was twenty-one, described a sexually-charged atmosphere in which events escalated to the point where she feared that she would be gang-raped by co-workers. Her troubles started when she was transferred to the chassis line, and the men began to tell in-

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tioned her and teased her for being unmarried.⁶ A Japanese manager told her that women in Japan who remain unmarried by the age of twenty-eight are considered prostitutes.⁷ One of Ms. Coleman's co-workers "repeatedly slapped her on the buttocks and told her to shut up because she was just a woman."⁸ Her co-workers would also pretend she was a dog.⁹ One man placed a steak bone on the floor in the lunchroom and said "Maggie, Maggie, come get it, girl."¹⁰

After Ms. Coleman filed a formal complaint with her union to end the harassment, her managers disciplined her.¹¹ Ms. Coleman's managers explained that she forgot the Japanese

creasingly crude jokes. They gathered around her and touched her breasts and crotch while she worked. Pictures were drawn and placed on the cars moving through the assembly line of Ms. Rushing participating in sexual activities, labeled with her name. One night, a co-worker exposed himself to her. *See id.*

Even though Ms. Rushing complained on a number of occasions to her supervisor and asked that he intervene and end it, nothing was done and the treatment grew worse. Four men gathered around her one evening when the shift ended and demanded she have sex with them. They said if she did not submit, they would force her. Ms. Rushing "was deathly afraid" as she ran to her car, crying and shaking, because "what would stop them from raping me?" She later resigned after a man that she claimed had touched her "private parts" was promoted to a position where he was her supervisor. *See id.*

6. *See id.*

7. *See Grimsley et al., supra note 1, at A1.*

8. *See id.* The sixty interviews conducted by *The Washington Post* in 1996 and the more than 100 interviews conducted by the EEOC before filing formal allegations uncovered a diverse range of alleged abuses. Men participated in pranks against the women, such as placing plastic penises in buckets of tools or putting tools on the floor so women had to bend over to retrieve them. Sexually-explicit graffiti covered the men's bathrooms, which reappeared even after periodic sandings. The graffiti included drawings of women's genitals, breasts, and acts of sexual intercourse, along with tales of sexual encounters with women co-workers. Posted lists ranked women in the plant by breast size. One woman reported receiving calls late at night and discovering afterwards that her name and phone number was written on bathroom walls at truck stops. *See id.*

Women at the plant were repeatedly called "sluts," "whores," and "bitches," not only by their peers, but by their supervisors as well. The women's work was sometimes sabotaged, causing injuries. The break rooms were strewn with pictures of men workers having sex with women outside the plant at sex parties they organized and attended. These photos were considered "trophies." Some men have openly admitted what they did, because they believed there was nothing wrong with their behavior. One man confessed to being caught up in the feeling of belonging to a gang. "It's a bad atmosphere," he said. "It's sick." *Id.*

9. *See id.*

10. *Id.*

11. *See Grimsley et al., supra note 1, at A1.*

principle of *wa*, which means to exist in harmony with others.¹² Male co-workers announced over the plant's public address system that she had accused the men of sexual harassment.¹³ Ms. Coleman later quit her job when she became ill with stress-related problems.¹⁴

In response to Ms. Coleman's claims, and those of numerous other women at the plant, the United States Equal Employment Opportunity Commission ("EEOC") filed a class action lawsuit against Mitsubishi Motors Corporation ("Mitsubishi") in April of 1996 in the U.S. District Court in Peoria, Illinois.¹⁵ The EEOC sued on behalf of 289 past and present women employees at the plant.¹⁶ Three Japanese citizens comprised the plant's senior management.¹⁷

12. *See id.*

13. *See id.*

14. *See id.* Marion Crain asserts that the ultimate goal of hostile environment harassment by male co-workers in blue collar workplaces is to induce women to either quit or remain in traditionally female occupations. *See* Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 21-22 (1995).

15. *See* Grimsley et al., *supra* note 1, at A1.

16. *See id.* In perhaps the largest sexual harassment lawsuit ever filed, the EEOC accused Mitsubishi management of allowing male employees to engage in a wide spectrum of activities that constituted sexual harassment, including fondling, propositioning, and threatening women employees. *See id.*

17. *See id.* Liability for workplace sexual harassment rests with the employer, and not the individual harassing supervisors or employees. *See, e.g.,* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). Employers are liable for sexual harassment by co-workers if they knew or should of known of the harassing behavior and they did not take prompt action reasonably calculated to end the harassment. *See, e.g.,* Jones v. Flagship Int'l., 793 F.2d 714 (5th Cir. 1986).

The attitude of Japanese managers towards sexual harassment differs from those of U.S. managers. For example, unlike most big U.S. automobile manufacturers, Mitsubishi rejected its union's recommendation to insert a provision in its contract requiring management to act within forty-eight hours after receiving a complaint of sexual harassment. *See* Grimsley et al., *supra* note 1, at A1. Union officials admit that they tried to resolve these complaints informally because they wanted to prevent the women from filing formal complaints, and to avoid disciplinary action by the company. Officially, the United Auto Workers has purported a "no tolerance policy" toward sexual harassment. Mitsubishi contends that its policies against sexual harassment are "stern" and notes that the company has documented "only 89 incidents" of harassment at the plant. The automaker insists that these incidents are isolated cases, but also claims to have fired ten men at the Normal plant for sexual harassment. *See id.*

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The *Mitsubishi* lawsuit is the most notorious example so far in a long line of sex discrimination charges and lawsuits brought by women against Japanese-owned companies.¹⁸ *Kaigaitenkinsha* or male Japanese citizens usually manage these companies.¹⁹ As Japanese citizens, the *kaigaitenkinsha* originate from a traditional, patriarchal society that has been slow to recognize workplace sex discrimination and reluctant to improve women's rights in general.²⁰ *Kaigaitenkinsha*, unfortunately, tend to treat their U.S. women employees in the same discriminatory manner that they treat women employees in Japan.²¹

This article examines the *kaigaitenkinsha's* effects on women employees in the U.S. workplace and recommends solutions to mitigate their potentially discriminatory impact.²² Part II, Section A, surveys the kinds of sex discrimination that women encountered at Japanese companies aside from those alleged at Mitsubishi.²³ Section B reviews U.S. equal employ-

18. See *infra* Part II. Japanese direct investment in the United States ballooned during the 1980s and 1990s, and exponential growth occurred in the number and size of Japanese-owned firms operating here. In 1980, Japanese direct investment in the United States totaled \$4.2 billion, but by 1994 that figure ballooned to \$103.1 billion. Approximately 723,900 U.S. workers were employed by Japanese companies at their non-bank operations in 1993. See Michael H. Gottesman, *Chickens Come Home to Roost: Have American Treaties Fenced Off Some of Our Best Jobs From Americans?*, 27 LAW & POL'Y INT'L. BUS. 601, 602 n.2 (1996).

19. This term is used by the Japanese to describe the rotating employees sent on temporary assignments to staff Japanese-owned companies in foreign countries. See Andrew B. Thorson, Note, *The 1953 United States-Japan FCN Treaty: Can Title VII Protect American Women?*, 3 B.U. PUB. INT. L.J. 315, 324 (1993). Japanese executives may obtain temporary visas to work in the United States, provided that the work is supervisory in nature, the employee is a Japanese citizen, the employee's company is at least half owned by Japanese nationals and has substantial trade or investment relations with Japan, and the employee is doing work authorized by the U.S.-Japan FCN Treaty. See *Fortino v. Quasar*, 950 F.2d 389, 392 (7th Cir. 1991). Representative Tom Lantos (D-Calif.) stated that "Japanese companies use their U.S. subsidiaries like farm teams to train their Japanese executives [and] American workers are effectively shut out from advancement opportunities and the decision-making process." Ronald A. Yates, *A Collision of Corporate Cultures: Bias Charges Grow at Japanese Firms in the U.S.*, CHI. TRIB., Jan. 12, 1992, at C1.

20. See *infra* notes 112-94 and accompanying text.

21. See Mark B. Schaffer, *The Implications of Japanese Culture on Employment Discrimination Laws in the United States*, 16 HOUS. J. INT'L L. 375, 391 (1993); See *infra* notes 37-70 and accompanying text.

22. See *infra* notes 281-93 and accompanying text.

23. See *infra* notes 37-70 and accompanying text.

ment opportunity laws to provide a framework from which to understand U.S. women's employment rights and to compare the Japanese employment laws outlined in the next section.²⁴ Section C seeks to explain why the *kaigaitenkinsha* discriminate against women by reviewing the history of women's employment in Japan and Japan's equal employment opportunity laws.²⁵

Part III of this article proposes that U.S. laws may permit Japanese companies to exclude U.S. women from their management ranks because they authorize discrimination in favor of the *kaigaitenkinsha*.²⁶ This potential outcome stems from the language of the U.S.-Japan commercial operating treaty and the decisions reached by the majority of courts interpreting the scope of the treaty.²⁷ Part III, Section A identifies the relevant treaty provision, and Section B analyzes the majority's holdings.²⁸ Section B also presents the minority view in U.S. courts that the treaty allows Japanese companies to give preference to the *kaigaitenkinsha* only upon proving that Japanese citizenship is an essential qualification for the position at issue.²⁹

Part IV proposes two solutions to mitigate the potentially discriminatory effects of Japanese culture on U.S. women employees in the future, as described in Part II and Part III. First, as part of the process of securing the licensing to establish U.S. business operations, key executives at Japanese-owned companies should receive training that enables them to demonstrate a basic understanding of U.S. equal employment opportunity laws.³⁰ This recommendation should help ensure that, at a minimum, Japanese employers possess sufficient

24. See *infra* notes 74-107 and accompanying text.

25. See *infra* notes 112-94 and accompanying text.

26. See *infra* notes 205-65 and accompanying text.

27. See *id.*

28. See *id.*

29. See *infra* notes 271-79 and accompanying text.

30. See *infra* notes 281-83 and accompanying text.

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knowledge of U.S. laws to deter them from treating U.S. women in a discriminatory manner.³¹

Second, courts should adopt the minority view set forth in Part III, and allow Japanese-owned companies to exclude women from management only upon showing that the duties of the position at issue dictate that the incumbent be a Japanese citizen.³² For example, the Japanese employer must establish that the ability to speak the Japanese language is an essential employment qualification.³³ The minority approach will help ensure that Japanese-owned companies do not use their commercial treaty rights as a guise for engaging in sex discrimination.³⁴ The foregoing recommendations are necessary and appropriate due to the apparent difficulties confronted by the *kaigaitenkinsha* in complying with the U.S. equal employment opportunity laws, which are demonstrated by the barrage of sex discrimination claims and allegations comprising the following section.³⁵

PART II. BACKGROUND

A. BEYOND *MITSUBISHI*: HISTORY OF UNITED STATES WOMEN'S SEX DISCRIMINATION CLAIMS AGAINST JAPANESE EMPLOYERS

The *Mitsubishi* case does not stand alone. Many other Japanese-owned companies have experienced difficulties in complying with U.S. anti-discrimination laws.³⁶ The *Mitsubishi* lawsuit is merely the latest and most infamous addition to a lengthy record of charges and complaints that accuse Japanese-owned companies of engaging in sex discrimination.³⁷ While it is difficult to measure precisely the number of sex discrimination complaints brought against Japanese-owned com-

31. *See id.*

32. *See infra* notes 286-93 and accompanying text.

33. *See id.*

34. *See id.*

35. *See infra* notes 37-70 and accompanying text.

36. *See id.*

37. *See infra* notes 34-70 and accompanying text.

panies, it is not uncommon for Japanese firms to have at least one employment discrimination lawsuit pending at any time.³⁸

Most lawsuits brought against Japanese-owned companies settle.³⁹ In sharp contrast to our litigious society, the Japanese consider lawsuits an embarrassment.⁴⁰ The Japanese believe that conflicts are shameful because conflicts imply disturbances in the social order.⁴¹ The Japanese seek *wa* and the act of dividing parties into winners and losers that occurs during litigation conflicts with the Japanese cultural norms of apology, forgiveness, and reconciliation.⁴²

The first U.S. Supreme Court case to focus attention on complaints of sex discrimination at a Japanese-owned company commenced in 1982.⁴³ In *Sumitomo Shoji America, Inc. v. Avagliano*, a group of secretaries sued their employer for its practice of exclusively hiring male Japanese citizens for executive, managerial, and sales positions, while the employer only hired women to fill clerical positions.⁴⁴ The plaintiffs ultimately reached a \$2.6 million settlement in a Title VII sex discrimination lawsuit.⁴⁵ Under the consent decree, the employer agreed to raise the base salaries of its non-Japanese employees, add more U.S. employees to its senior management group, and pay back wages to U.S. employees.⁴⁶ Sumitomo also created a career development program aimed at giving non-Japanese em-

38. See Deborah L. Jacobs & Laura Stanley, *Suing Japanese Employers for Discriminatory Labor Practices*, Across the Board, Oct. 1991, at 30, quoting Yoshihiro Tsurumi, Professor of International Business at Baruch College, City University of New York. Professor Michael K. Young, Director of the Center for Japanese Legal Studies at Columbia University School of Law says that "plenty of these suits are filed." Edward A. Adams, *Suits Boom Against the Japanese*, NAT'L L.J., June 22, 1987, at 40.

39. See Adams, *supra* note 38, at 40. Settlement agreements permit Japanese companies to avoid underlying legal issues because they can simply "buy their way out of lawsuits." Jacobs & Stanley, *supra* note 38, at 35.

40. See *id.*

41. See Schaffer, *supra* note 21, at 389.

42. See *id.*

43. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982).

44. See *id.* at 178.

45. See Thorson, *supra* note 19, at 333 n.128; *Sumitomo Settles Sex-Bias Lawsuit*, THE AMERICAN BANKER, Apr. 7, 1987, at 20.

46. See Thorson, *supra* note 19, at 333 n.128.

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ployees a better opportunity of obtaining management positions.⁴⁷

Several lawsuits that arose in the late 1980s and early 1990s once again placed Japanese employers under scrutiny. In 1988, Honda's American subsidiary in Marysville, Ohio, reached an out-of-court settlement for \$6 million.⁴⁸ Honda reached the agreement after the EEOC established that Honda management engaged in a pattern of discrimination against women and minorities in hiring and promotions.⁴⁹ Moreover, Carolyn York, a secretary at Canon U.S.A. Inc., sued her employer in 1990 for \$3.8 million, claiming that two supervisors sexually harassed her and denied her advancement.⁵⁰ Further, three women employed at Nikko Securities Company International agreed to a \$75,000 settlement in October 1991 for their sex discrimination lawsuit.⁵¹ Women filed similar lawsuits against companies such as Toshiba, Hoya, and NEC Electronics.⁵²

In 1992, in response to the outbreak of discrimination complaints against Japanese-owned companies, Representative Tom Lantos conducted Congressional hearings on the subject.⁵³ Representative Lantos held two hearings in Washington and one in San Francisco.⁵⁴ The subcommittee listened to testimony from disgruntled U.S. employees at DCA Advertising, Recruit USA, Ricoh Corporation, Sumitomo Corporation, Dai-ichi Kangyo Bank, Toyota Technical Center USA, NEC Amer-

47. *See id.*

48. *See id.* at 338.

49. *See id.*

50. *See* Deborah L. Jacobs, *Japanese-American Cultural Clash*, N.Y. TIMES, Sept. 9, 1990, § 3, at 25.

51. *See* Jacobs & Stanley, *supra* note 38, at 30.

52. *See* Thorson, *supra* note 19, at 338.

53. *See* *Hearing Before the Employment and Housing Subcommittee of the House Government Operations Committee*, 102d Cong. (1991) (statement of Kimberly Carraway, Sumitomo Employee) available in Federal News Service, Sept. 24, 1991.

54. *See* Yates, *supra* note 19, at C1.

ica Inc., Nikko Securities Company, and Honda Motors of America.⁵⁵

Kimberly Carraway testified before the Congressional Committee about her experiences at Sumitomo Corporation.⁵⁶ She testified that one Japanese supervisor asked for a picture of her in a swimsuit.⁵⁷ She described seeing magazines of nude women left open on conference tables, pornographic videotapes circulated throughout the office, and pornographic calendars emblazoned with Sumitomo's corporate logo.⁵⁸ When her employers learned that she was going to testify at the Congressional hearing, a Japanese manager asked her why she was complaining, since she would be, "getting married soon and then would not need money."⁵⁹

When the media ran the story, it presented a mere handful of claims: those of three white male executives complaining that their Japanese employers prevented them from transcending their companies "glass ceiling".⁶⁰ Upon disclosing the \$100,000 plus salaries each of these aggrieved executives earned at their Japanese-owned companies, the public's interest in their plight quickly faded.⁶¹ Moreover, accusations of Japan-bashing turned disinterest into distaste.⁶² As a result, Congress did not take meaningful action toward curtailing the discriminatory practices of Japanese employers.⁶³ The claims against Japanese employers thereafter continued to mount.⁶⁴

In February of 1995, Janice Harmeier sued Sanwa Securities for \$4 million for sex discrimination and sexual harass-

55. *See id.*

56. *See supra* note 53.

57. *See id.*

58. *See id.*

59. *Id.*

60. *See* Interview with Michael Baldonado, now Deputy Director, U.S. Equal Employment Opportunity Commission, San Francisco District Office, in San Francisco, Cal. (Apr. 17, 1997). Mr. Baldonado stated that he attended at least one of the hearings and followed the events thereafter. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. *See infra* notes 65-70 and *supra* notes 1-17 and accompanying text.

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ment by a former vice president and market strategist.⁶⁵ Ms. Harmeier claimed that her firing occurred because she complained about pay inequities between men and women employees in the company.⁶⁶ She alleged in her complaint that she was not only denied equal pay but that Sanwa ignored overt verbal and physical sexual harassment within the firm.⁶⁷

Ms. Harmeier alleged that her Japanese manager told her that he would never hire a woman for a sales staff position because after training her she would get pregnant and leave.⁶⁸ She claimed that she was the unwilling recipient of back rubs by another manager.⁶⁹ Ms. Harmeier further alleged that her branch office manager boasted at a research dinner that he performed his "professional duty" by taking a female customer home to have sex.⁷⁰

The preceding allegations offer valuable insights into Japanese men's attitudes toward women in the workplace.⁷¹ The examples reveal that a number of prominent Japanese employers failed to comply with U.S. laws forbidding sex discrimination because they appear to be regarding American women in a manner prescribed by the Japanese culture.⁷² To further illustrate this, the following section of this article will describe the U.S. equal employment opportunity laws regulating these entities.⁷³

B. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY LAWS

In 1964, the U.S. Congress enacted legislation which forbids employers from discriminating against their employees based

65. *See Sanwa Sued for Alleged Sex Discrimination*, Kyodo News International, Inc., Japan Weekly Monitor, Mar. 6, 1995.

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.*

70. *Supra* note 65.

71. *See infra* notes 112-94 and accompanying text.

72. *See id.*

73. *See infra* notes 74-107 and accompanying text.

on race, color, religion, sex, or national origin.⁷⁴ Title VII of the Civil Rights Act of 1964 forbids discrimination based upon these factors in regard to hiring, promotion, discharge, and any other term or condition of employment.⁷⁵

Courts recognize two fundamental types of discrimination claims under Title VII: disparate treatment and disparate impact.⁷⁶ Disparate treatment refers to claims of intentional discrimination.⁷⁷ Liability for disparate treatment may be avoided if the employer can establish that the prohibited criteria is a bona fide occupational qualification ("BFOQ") for the position at issue.⁷⁸ To prove the existence of a BFOQ, the de-

74. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended in sections of 42 U.S.C.), Section 2000e provides, in relevant part, that:

It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise 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; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1994).

75. *See id.*

76. *See e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), respectively.

77. To establish a *prima facie* case of intentional discrimination (disparate treatment) with direct evidence, plaintiff must show that discriminatory animus motivated employment action. This can be done by demonstrating that the employer harbored a bias and that there was a link between the employer's bias and the discriminatory action. *See Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858 (5th Cir. 1993).

If using circumstantial evidence, plaintiff must show that (1) she is a member of a protected class, (2) she was subjected to adverse treatment by the employer, and (3) she was treated less favorably than similarly situated persons not within her protected class. *See Perryman v. Johnson*, 698 F.2d 1138 (11th Cir. 1983). Once the complainant establishes a *prima facie* case, the employer has the burden of production to clearly set forth the reasons for its actions against the complainant. The explanation must be legally sufficient to justify a judgment for the agency. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1991). The complainant has the ultimate burden of proving by a preponderance of the evidence that a factor made unlawful under Title VII played a motivating role, or made a difference in the adverse employment action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

78. The employer's defense of a bona fide occupational qualification is codified at 42 U.S.C. section 2000e-2(e). The statute provides that:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in

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defendant employer must show that discrimination based on a forbidden criteria is reasonably necessary to the normal operation of the business.⁷⁹ For example, gender may be considered a valid BFOQ for the position of restroom attendant.⁸⁰

Disparate impact refers to the use of decision-making factors that appear neutral but actually continue to perpetuate facial segregation previously practiced by an employer.⁸¹ Gender based physical ability tests for fire fighters that for many years excluded women from qualifying for such positions constitute one sample of this practice.⁸² An employer may defend this practice by asserting the business necessity defense and establishing that the challenged practice is related to the position and is consistent with a business necessity.⁸³

The Equal Pay Act of 1963 provides that women must receive "equal pay" compared to men for "equal work."⁸⁴ The

those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Id.

79. *See id.*

80. *See* MACK A. PLAYER ET AL., EMPLOYMENT DISCRIMINATION LAW 140 (2d ed. 1995).

81. *See id.* at 244. The seminal case is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a unanimous Supreme Court decision. In *Griggs*, the defendant had openly discriminated against blacks in hiring and promotions. With the passage of Title VII, employment policies changed, and the defendant required a high school diploma and successful completion of two professionally prepared aptitude tests in order to be transferred to certain departments. The Court held that since obtaining satisfactory scores on these tests did not relate to job performance, such requirements were prohibited. Thus, tests used for employment "must measure the person for the job and not the person in the abstract." *Id.* at 436.

To establish a *prima facie* case of disparate impact, the plaintiff must establish that a particular testing procedure disproportionately excludes women. *See* 42 U.S.C.A. § 2000e-2(k)(1)(A)(i). A showing of intentional discrimination is not required. *See* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87 (1988). At that point, the burden shifts to the employer to show that the procedure is job-related and "consistent with business necessity." 42 U.S.C.A. § 2000e-2(k)(1)(A)(i). Even if the employer meets this burden, the plaintiff may still establish a Title VII violation by showing that the employer refused to adopt a readily available, non-discriminatory alternative to the challenged practice. *See* 42 U.S.C.A. § 2000e-2(k)(1)(A)(ii) & (k)(1)(C).

82. *See* *Legault v. Russo*, 842 F. Supp. 1479 (D. N.H. 1994).

83. *See supra* note 81.

84. The Equal Pay Act of 1963, 29 U.S.C. section 201 et seq., provides that men and women who perform "equal work" within a particular "establishment" of a covered employer must receive "equal pay" unless differences are related to a (1) seniority sys-

Pregnancy Discrimination Act of 1978 amended Title VII to encompass pregnancy, childbirth, or related medical conditions in the statute's definition of sex, thereby prohibiting discrimination in employment based on pregnancy.⁸⁵

United States courts recognized sexual harassment as early as 1982.⁸⁶ Two types of sexual harassment claims are cognizable under Title VII: quid pro quo and hostile work environment.⁸⁷ Quid pro quo refers to instances where the employee knows that keeping the job depends upon granting sexual favors.⁸⁸ The harassment is complete if the employer alters the job benefits or conditions for those who do not grant the requested sexual favors.⁸⁹ Quid pro quo harassment also arises if one employee's pay is increased in response to receptiveness to sexual advances more than others who do not encourage or take part in sexual activity.⁹⁰

The second form of sexual harassment, hostile environment harassment, occurs when employees work in a discriminatory hostile or abusive environment which is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."⁹¹ To

tem, (2) merit system, (3) a quantity or quality production measurement system, or (4) a differential founded upon any factor other than sex. See *id.* at § 206(d)(1).

85. The Pregnancy Discrimination Act of 1978 was passed in response to *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). A new section was added to Title VII which defines "sex" to include "pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e(k) (1994). The U.S. Supreme Court further held in *Johnson Controls* that "[u]nless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'" *United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 204 (1991), citing 42 U.S.C. § 2000e(k).

86. See *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

87. See *infra* notes 88 & 91.

88. See *Collins v. Baptist Mem. Geriatric Ctr.*, 937 F.2d 190 (5th Cir. 1991); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Priest v. Rotary*, 634 F. Supp. 571 (N.D. Cal. 1986).

89. See *supra* note 88.

90. See *Collins v. Baptist Mem. Geriatric Ctr.*, 937 F.2d 190 (5th Cir. 1991).

91. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). The Supreme Court first recognized hostile environment sexual harassment in *Meritor* and made the following observation: "Surely, a requirement that a man or woman run a gauntlet of sexual

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determine whether an environment is "hostile" or "abusive," the fact-finder considers the "totality of the circumstances."⁹² Hostile environment sexual harassment may exist even if the employee does not experience a tangible employment loss.⁹³ Employers may avoid liability for hostile work environment if the employer can show that the employee welcomed the alleged harassing behavior.⁹⁴ In instances where a co-worker is the harasser, an employer who knew or should have known of the

abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." *Id.* at 67, quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

To establish a *prima facie* case of sexual harassment based on a hostile work environment, the complainant must show that (1) she belongs to a protected group, (2) she was subject to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, (3) the harassment complained of was based on sex; that is, but for the complainant's sex, she would not have been harassed; and (4) the harassment affected a term or condition or employment by creating an intimidating, hostile or offensive work environment. See *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982).

The Ninth Circuit stated in *Ellison v. Brady* that "in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim." *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991). Therefore, the court established that evidence in hostile environment should be construed in light of "conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." See *id.* at 879 (emphasis added).

92. *Harris v. Forklift Sys.*, 510 U.S. 17 (1993). "[These] may include the frequency of 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.*

In *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333 (7th Cir. 1993), it was insufficient that plaintiff established that her supervisor asked her for dates, referred to her as a "dumb blond," placed love notes in her work area, touched her on the shoulder, and attempted to kiss her because these incidents were isolated rather than persistent. See *id.* at 337. Similarly, one pat on the buttocks, winks, a suggestion of a rubdown, and invitations to dinner were insufficient to create a hostile environment in *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986). Moreover, in *Jones v. Flagship Int'l*, 793 F.2d 714 (5th Cir. 1986), several propositions and display of statues of bare-breasted mermaids as table decorations at a Christmas party were insufficient.

However, persistent name-calling, frequent phoning, sexually oriented objects in the work area, and constant sexual comments are types of behavior that can be sufficiently severe and harassing to create a hostile environment. See *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990).

93. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

94. See *Swentek v. USAIR, Inc.*, 830 F.2d 552 (4th Cir. 1987).

conduct may escape liability by taking prompt remedial action that is reasonably calculated to end the harassment.⁹⁵

Complainants must first file charges of employment discrimination with the EEOC and/or the appropriate state or local agency responsible for enforcing state anti-discrimination laws.⁹⁶ When a complaint is filed with the EEOC, the agency investigates the claim to determine if it has merit.⁹⁷ If there is no reasonable belief that the claim has merit, the EEOC will dismiss the charge.⁹⁸ Alternatively, if the Commission finds that the charge has merit, the EEOC will attempt to resolve the dispute through conciliation and mediation.⁹⁹ If these attempts fail, the EEOC may file suit on behalf of the complainant.¹⁰⁰ Moreover, the complainant is issued a right-to-sue letter by the EEOC once the agency has had the opportunity to investigate the claim.¹⁰¹ At that point, the complainant may pursue the claim on her own.¹⁰²

The Civil Rights Act of 1991 amended Title VII to allow complainants to sue for punitive damages and the statute permits plaintiffs to obtain a jury trial.¹⁰³ Such remedies were not traditionally available under Title VII.¹⁰⁴ However, damages for sex discrimination claims are capped based on the size of the employer's workforce.¹⁰⁵ Aggrieved employees may not be awarded more than \$50,000 if their company employs 15 to 100

95. See *Jones v. Flagship Int'l.*, 793 F.2d 714 (5th Cir. 1986). The U.S. Supreme Court in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), held that the mere existence of a grievance procedure and a policy against discrimination, combined with claimant's failure to invoke the procedure, does not insulate the employer from liability. Those facts are relevant but not dispositive. See *id.* at 72.

96. 29 U.S.C. § 626(d) (1994).

97. 42 U.S.C. § 2000e-5(b) (1994).

98. See *id.*

99. 42 U.S.C. § 2000e-5(f)(1) (1994).

100. See *id.*

101. See *id.*

102. See *id.*

103. 42 U.S.C. § 1981a(a)(1) (1994); 42 U.S.C. § 1981a(c)(1) (1994).

104. See MACK A. PLAYER ET AL., *EMPLOYMENT DISCRIMINATION* 267-68, 755 n.5 (2nd ed. 1995).

105. See 42 U.S.C. § 1981a(b)(3) (1994).

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workers.¹⁰⁶ The maximum award is \$300,000 for employers with more than 500 employees.¹⁰⁷ In summary, U.S. laws mandate equal employment opportunity and provide meaningful sanctions for violations.¹⁰⁸ Japanese equal employment opportunity laws, however, stand in marked contrast to U.S. laws.¹⁰⁹

C. JAPANESE HISTORY AND LAW

This section will examine the general manner in which Japanese society, business, and the legal system perceive and treat Japanese women. Subsection one will describe the basic structure and norms of the Japanese social order and Japanese women's participation in the workforce.¹¹⁰ Subsection two will identify recent legal developments in Japan that affect women's employment status and opportunities.¹¹¹

1. The Roles of Japanese Women in Social Life and Employment

While the U.S. society's *ideal* seeks to remove all sources of differentiation other than merit, Japanese society retains the Confucian vision of society and family.¹¹² In Japan, the presence of a clearly delineated social hierarchy is natural and necessary to achieving harmony.¹¹³ Harmony is society's highest goal; thus, the Japanese do not share the U.S. model of equitable treatment and opportunity for all members of society.¹¹⁴

Differences by rank are a social reality in Japan and the required knowledge of a person's rank effects everything from

106. *See id.*

107. *See id.*

108. *See supra* notes 74-107 and accompanying text.

109. *See infra* notes 157-94 and accompanying text.

110. *See infra* notes 112-49 and accompanying text.

111. *See infra* notes 157-94 and accompanying text.

112. *See* SUBHASH DURLABHJI & NORTON E. MARKS, JAPANESE MANAGEMENT 8 (1993).

113. *See id.*

114. *See id.*

greetings to the content of conversations.¹¹⁵ Age in Japan is closely correlated with high rank, respect, and privilege.¹¹⁶ Educational achievement is another important foundation for differentiation.¹¹⁷ An acute differentiation also exists between gender roles.¹¹⁸ Women possess low status even though their traditional roles as homemakers and caretakers are considered essential.¹¹⁹

Long-standing cultural norms severely limit Japanese women's employment opportunities.¹²⁰ Traditional Japanese values dictate that a Japanese woman work until her marriage, at approximately age twenty-four.¹²¹ If a wife continues to work after marriage, her husband experienced "a severe loss of face" because the wife's employment showed that he could not support her.¹²²

Japanese women's historical exclusion from career employment reflects their society's reluctance to alter its deeply-rooted cultural norms.¹²³ During Japan's initial industrialization beginning in the late 19th century, the elders of poor rural farming families forced their young daughters to work in the textile

115. *See id.* The Japanese identify themselves primarily by the group(s) they belong to and only secondarily by personal characteristics and achievements. The group is more important than a single person, and individuals are expected to subordinate their own wishes for the greater good of the group. *See* ARTHUR M. WHITEHILL, *JAPANESE MANAGEMENT* 8 (1991).

116. DURLABHI & MARKS, *supra* note 112, at 8.

117. *See id.*

118. *See id.*

119. *See id.* Homemaking and caretaking are also considered low status duties in the United States, as evidenced by the low or nonexistent wages earned by the persons who perform these kinds of work. Historically, employment fields dominated by men afford the highest status and compensation. Yet tasks traditionally assigned to women are considered essential. Mitsuko Saito Duerr believes "[t]he government worries about the effect upon the education of children, the effect upon the work ethic, and the possible deterioration of society if women work instead of remaining at home." Mitsuko Saito Duerr, *The Return of Ohmikami, The Goddess of the Sun: Women in the Work Force in Japan* 61 (1991) (unpublished Ph.D. dissertation, Golden Gate University).

120. *See infra* notes 121-49 and accompanying text.

121. *See* Paul Lansing & Kathryn Ready, *Hiring Managers in Japan: An Alternative for Foreign Employers*, *Japanese Management* 254 (Subhash Durlabhji & Norton E. Marks eds., 1993).

122. *See id.*

123. *See infra* notes 124-49 and accompanying text.

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factories just until the women married.¹²⁴ The Japanese government delayed the mobilization of Japanese women during World War II.¹²⁵ In the aftermath of the war, broad legal reforms initiated by the Allied Powers failed to significantly improve Japanese women's employment opportunities.¹²⁶ At the close of the 1970s, employers still generally forced unmarried women employees to retire at age twenty-eight.¹²⁷ Although

124. See ALICE C.L. LAM, *WOMEN AND JAPANESE MANAGEMENT* 7 (1992). Women formed the largest share of Japan's industrial workforce during this period. After helping to support their families for a few years, the women returned to their villages to marry. See *id.* The women textile workers typically resided in company-run dormitories, with their lives controlled entirely by the factory managers. The turnover rate was high and many women ran away to escape the poor working conditions. See *id.* at 8.

125. See *id.* at 8. The Japanese government feared that the mobilization of women would result in a reduction in population. See *id.* at 9. The government treated women as auxiliary workers when they finally mobilized in the autumn of 1943 by stipulating "simple and easy work" for women as semi-skilled or unskilled workers, such as "light handwork calling for dexterity." *Id.* at 9.

In contrast, the U.S. government created the War Manpower Commission in April 1942 and commissioned it with drawing women into the civilian labor force. "By early 1944, over 2.6 million women were employed in the vital munitions, aircraft, ship-building, and related industries that supplied the Allied armies." "Rosie the Riveter" became the symbol of the working woman of this period. PETER A. SODERBERGH, *WOMEN MARINES: THE WORLD WAR II ERA*, 11 (1992). Approximately 350,000 women served in the U.S. armed forces. See *id.* at ix.

126. See LAM, *supra* note 124, at 9. The Constitution of 1946 granted Japanese women rights that were comparable to those granted to men. Article 14 of the 1946 Constitution prohibited discrimination based on race, creed, sex, social status, or family origin in political, economic, or social relations. Article 24 specified that the sexes would be equal in family life. See *id.*

In spite of these reforms, Japanese judges interpreted Article 14 to mandate a "prohibition of unjustifiable discrimination, rather than a guarantee of absolute equality." Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 HARV. WOMEN'S L.J. 97, citing KODANSHA Encyclopedia of Japan 230 (1983) (citing judgment of May 27, 1964, Saikosai (Supreme Court), 18 Minshu 676 (Japan)). They reasoned that differential treatment based on "reasonable grounds" may support the use of "reasonable and justifiable discrimination." Knapp at 97, citing Judgment of December 20, 1966, Chisai (District Court), 467 Hanji 26 (Japan). For example, the social and political conditions existing at the time of the alleged discriminatory conduct could justify otherwise illegal discrimination. See Knapp at 97, citing KODANSHA at 230.

General MacArthur's reforms also included the Labor Standards Law of 1947, a law designed to protect against possible abuses in the workplace, but which in practice imposed differential treatment upon women. Lam, *supra* note 124 at 9. The areas protected included working hours, night work, menstruation and maternity leave, holidays, and restrictions on dangerous work. See *id.* The Labor Standards Law further mandated equal pay for equal work. See *id.*

127. See Lansing & Ready, *supra* note 121, at 254.

the "marriage retirement system" is now illegal, it is still practiced at a significant number of companies.¹²⁸

In light of Japanese attitudes toward women employees, it is no surprise that the majority of Japanese women who do work hold lower-level jobs.¹²⁹ Japanese women still earn just 52 percent of the average salary earned by men.¹³⁰ As late as 1992, the classified section of a prominent national newspaper, *The Japan Times*, still categorized prospective employment listings according to gender.¹³¹ The overt segregation of Japanese women illustrates their low status because women are not even invited to compete for the same jobs as men.¹³²

Despite the employment disadvantages that Japanese women face, fewer women in recent years are following the typical pattern of withdrawing from the workforce between the

128. Yoichiro Hamabe, *Inadvertent Support of Traditional Employment Practices: Impediments to the Internationalization of Japanese Employment Law*, 12 UCLA L. REV. 306, 325-26 (1994).

129. The occupational distribution of Japanese women employees depicts the extreme gender segregation of the Japanese employment system. See LAM, *supra* note 124, at 12. In 1990, 34.4 percent of Japanese working women held clerical positions, 26.2 percent held craft, laborer and production process positions, 12.5 percent were salespersons, and 10.7 percent were service workers. Merely 13.8 percent of women occupied professional and technical positions. However, only 1 percent held positions as managers or officials. See *id.*

In 1996, U.S. women employees held 48.6 percent of all managerial and professional specialty positions, 64.2 of all technical, sales, and administrative support positions, 59.4 of all service occupation positions, 9.3 percent of precision production, craft and repair positions, 24.4 of all operators, fabricators, and laborers positions, and 19.0 percent of farming, forestry, and fishing positions. See U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 410-413 (1997).

130. See Schaffer, *supra* note 21, at 391. The total median income of women in the United States was 66 percent of men's in 1995. See U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 474 (1997). In 1963, when the Equal Pay Act was passed, U.S. women's earnings were 59.7 percent of men's. See ELIZABETH M. MEEHAN, *WOMEN'S RIGHTS AT WORK* 8 (1985).

131. See Thorson, *supra* note 19, at 318. In the United States, employers, labor organizations, and employment agencies may not "print or publish or cause to be printed or published any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination based on . . . sex." 42 U.S.C.A. § 2000e-3(b). Such a restraint on speech does not violate the First Amendment. See *Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations*, 413 U.S. 376 (1973).

132. See Thorson, *supra* note 19, at 318.

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ages of 25 to 34 to marry and rear children.¹³³ Many women are choosing to remain in the workforce during their traditional child rearing years.¹³⁴ This trend stems from women's advancements in education and the need to supplement the family income.¹³⁵ Survey evidence shows that a significant proportion of the non-working women in this age group express a desire to work.¹³⁶ The rising incidence of employment of the Japanese women points to the greater importance of the workplace in their lives.¹³⁷

The culturally-based limitations that impede women employees in Japan result from beliefs held by the majority of

133. See LAM, *supra* note 124, at 14. A graph of the labor force participation of women in contemporary Japan consistently presents a distinct bi-modal pattern [hereinafter, "M-shape"]. See *id.* at 13-14. The two peaks of the M-shape represent women aged twenty to twenty-four years and women aged forty-five to forty-nine years who are participating in the work force. See *id.* at 14. The downward curve in the middle of the "M" constitutes women aged twenty-five to thirty-four years who withdrew from the work force to marry and rear children. See *id.*

The workforce participation of U.S. women stands in marked contrast. Their pattern forms a bell-shaped curve, with the greatest participation rates among women aged twenty-five to fifty-four years old. See U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 399 (1997). Among this group, between 74.9 and 77.2 percent of women are employed. See *id.* In 1980, 51.5 percent of working age women were employed, as compared to 59.3 percent in 1996. See *id.*

134. See LAM, *supra* note 124, at 14. With the rapid expansion of the Japanese economy in the last four decades, the participation of women in paid employment grew from 5.3 million in 1955 to 18.3 million in 1990. Concurrently, the numbers of unpaid family workers dropped from 9 million in 1955 to 4.2 million in 1990. In 1990, women comprised 37.9 percent of all paid employees, and just over half (50.9 percent) of all Japanese women were employed. See *id.* at 10. Of those, married women comprised 58.4 percent. See *id.* at 13.

In the United States, 21.3 million women were employed in 1960. By 1996, that figure grew to 58.1 million. U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 406 (1997). Women comprised 46 percent of all employees in the U.S. in 1996. See *id.* at 397.

135. See LAM, *supra* note 124, at 14. In comparing gender differences in educational achievement, Japanese women overall advance to higher education at a somewhat higher rate than Japanese men. See *id.* at 13. From 1970 to 1990, Japanese women's advancement rate to higher education rose from 17.7 percent to 37.4 percent, while men's rose from 29.3 percent to 35.1 percent. See *id.* However, men attended universities in 1991 at a rate of 34 percent, while women attended universities at a rate of 16 percent. See Knapp, *supra* note 126, at 92 n.91. Men primarily enter engineering and social sciences programs, whereas women tend to pursue studies in the humanities and education. See *id.*

136. See LAM, *supra* note 124, at 14.

137. See Loraine Parkinson, *Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change*, 89 COLUM. L. REV. 604, 622 (1989).

Japanese women as well as men. In a survey conducted by the Japanese Prime Minister's Office in November of 1991, over 90 percent of the 1,768 respondents indicated that wives should be responsible for cooking and cleaning.¹³⁸ Over 80 percent said that wives should handle the shopping and finances for the household.¹³⁹ Over 70 percent said that wives should care for the children, as compared to 20 percent who believed it should be a shared responsibility.¹⁴⁰

The foregoing survey reveals that Japanese men and women still ordain that women place marriage and family obligations before all others.¹⁴¹ This belief is exemplified by the fact that among Japanese working couples, wives spend an average of three hours and thirty-one minutes each day on domestic chores, while husbands spend an average of eight minutes.¹⁴² Women's primary commitment to family conflicts with the demands of Japanese business, which requires long hours and after-work socializing with customers and co-workers.¹⁴³ Moreover, most Japanese men simply are uncomfortable with the participation of Japanese women in the business custom of socializing.¹⁴⁴

Because of Japan's culturally-imposed limitations, Japanese employers customarily do not bother to invest in vocational training for women employees.¹⁴⁵ Instead, women employees are relegated to smiling, greeting customers, preparing tea,

138. See Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 HARV. WOMEN'S L.J. 83, 93 n.75 (1995).

139. See *id.*

140. See *id.*

141. See *id.*

142. See *id.* at 93. In comparison, women in the United States spend approximately thirty-five hours per week on housework while men spend twenty-one hours. See BETH ANNE SHELTON, *WOMEN, MEN AND TIME: GENDER DIFFERENCES IN PAID WORK, HOUSEWORK AND LEISURE* 73 (1992). Both in Japan and the United States, the worker without household responsibilities is seen as the *ideal* worker. See *id.* at 153. Most often, work is structured without taking childcare or household demands into account. See *id.* at 152.

143. See Lansing & Ready, *supra* note 121, at 267.

144. See *id.*

145. See *id.*

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and supporting male workers.¹⁴⁶ Thus the major criteria used by Japanese employers in the selection of women recruits are that they be under 24 years of age, compliant, pretty, polite, and lacking in ambition.¹⁴⁷ Many employers also require that their single female employees live with their parents due to the view that such women may be undisciplined if they are without parental authority.¹⁴⁸ In view of these attitudes, it is not surprising that many Japanese women employees are labeled *shokuba no hana*, or office flowers.¹⁴⁹

It follows from an examination of Japanese society and business that Japanese women remain occupationally segregated from the most rewarding and prestigious positions.¹⁵⁰ Japanese employers customarily deny women equal employment opportunities and treatment compared to men.¹⁵¹ Prevailing sex stereotypes, uncorrelated to women's actual abilities, rationalize and sustain Japanese women's subordinate status in the workplace.¹⁵² Moreover, the next section will show that Japanese employment laws also support and maintain the belief that women are not suited to hold positions of responsibility and leadership.¹⁵³

2. Japanese Sex Discrimination Laws

The Japanese legal system perpetuates the inferior treatment of women by providing no meaningful sanctions to deter employers from engaging in sex discrimination.¹⁵⁴ The next two subsections discuss how the Japanese Working Women's Welfare Law and the Equal Employment Opportunity Law

146. *See id.* at 254.

147. *See* Knapp, *supra* note 126, at 89. Some large securities and trading firms hire women partly based on their attractiveness. This practice motivates some young female university students to undergo cosmetic surgery. *See id.*

148. *See* LAM, *supra* note 124, at 89 n.42.

149. *See* ARTHUR M. WHITEHILL, JAPANESE MANAGEMENT: TRADITION & TRANSITION 77 (1991).

150. *See supra* notes 129-32 and accompanying text.

151. *See supra* notes 127-32 and accompanying text.

152. *See id.*

153. *See infra* notes 157-94 and accompanying text.

154. *See infra* notes 165-94 and accompanying text.

both failed to improve women's employment opportunities and conditions.¹⁵⁵ The third subsection discusses the treatment of sexual harassment claims by the Japanese courts.¹⁵⁶

a. The Working Women's Welfare Law

A combination of rapid economic growth, technological advances, and a labor shortage in Japan all contributed to the passage of the Working Women's Welfare Law in 1972.¹⁵⁷ The law attempted to encourage more women to enter the workforce and, at the same time, help them balance work and family demands.¹⁵⁸ It proposed that employers provide child-care facilities and leave, and envisioned government agencies offering vocational training and guidance for working women.¹⁵⁹

However, the provisions contained in the Working Women's Welfare Law were not mandatory; they were simply recommendations.¹⁶⁰ The law assigned the task of persuading employers to adopt these standards *voluntarily* to the Women's Bureau of the Ministry of Labor.¹⁶¹ The law also did not state that the genders should receive equal employment opportunities.¹⁶² While the Working Women's Welfare Law resulted in the entrance of a significant number of women into the

155. See *infra* notes 157-85 and accompanying text.

156. See *infra* notes 186-94 and accompanying text.

157. See LAM, *supra* note 124, at 93-94. A series of discrimination cases beginning in the 1960s, not involving unequal pay, exposed a fundamental defect in the Japanese Labor Standards Law of 1947: the law failed to ensure equal job opportunities for women. See *id.* at 92. In comparison, Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sex in all aspects of the employment relationship: hire, discharge, compensation, and any other "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (1994). One Japanese labor lawyer described the lack of an equal opportunity provision as a "blind spot" in the Labor Standards Law. See LAM, *supra* note 124, at 92.

158. See LAM, *supra* note 124, at 94.

159. See *id.*

160. See *id.* at 94.

161. See *id.*

162. See *id.*

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workforce, most of them were middle-aged women who were employed as part-time workers.¹⁶³

The overall employment status of women in Japan following the passage of the Working Women's Welfare Law in 1974 remained bleak.¹⁶⁴ A 1981 Japanese government survey noted that many companies discriminated against women in recruitment, wages, job assignment, training, promotion, and retirement age.¹⁶⁵ The survey found that 83 percent of the firms had positions closed to women, 73 percent limited their recruitment of college graduates to men, and 43 percent did not give women an opportunity for promotion.¹⁶⁶ The promise of childcare facilities did not materialize.¹⁶⁷ When the Japanese government passed the next major piece of women's employment rights legislation, the Equal Opportunity Law, women would still not experience a significant improvement in their status in the workplace.¹⁶⁸

b. The Japanese Equal Opportunity Law

Japanese women remained virtually unprotected by their legal system against employment discrimination until the passage of the Equal Employment Opportunity ("EEO") law in May of 1985.¹⁶⁹ The law became effective on April 1, 1986.¹⁷⁰ International pressures on Japan to adopt international standards in the employment treatment of women played a role in the passage of the EEO law.¹⁷¹

163. See LAM, *supra* note 124, at 94.

164. See *id.*

165. See *id.* at 14.

166. See *id.* Meanwhile, most western industrialized countries passed legislation prohibiting such overt discriminatory practices against women by the mid-1970s. See *id.*

167. See *id.* at 94.

168. See *infra* notes 174-81 and accompanying text.

169. See LAM, *supra* note 124, at 19.

170. See *id.* at 89. The U.S. Congress enacted major equal employment opportunity legislation in 1964 with the passage of Title VII of the Civil Rights Act. 42 U.S.C. § 2000e et seq. (1994).

171. See LAM, *supra* note 124, at 19-20.

The Japanese EEO law is rather peculiar when compared to U.S. standards, since the law distinguishes between prohibitory and exhortatory provisions.¹⁷² Discrimination is prohibited in the areas of dismissal, retirement, fringe benefits, and vocational training.¹⁷³ In recruitment, job assignment, and promotion, the law merely “exhorts” employers to treat men and women equally.¹⁷⁴ The government designed the exhortatory provisions to exert “moral pressure” on employers to establish new standards of equality.¹⁷⁵

The EEO law’s primary focus is on the voluntary settlement of disputes between employers and employees.¹⁷⁶ The law also sets forth methods for dispute resolution.¹⁷⁷ If the parties are unable to reach a settlement, the director of the local Women’s and Young Workers’ Office has the power to provide advice or recommendations, or settle the grievance at the request of the parties.¹⁷⁸ The director has no power to conduct an investigation and even though the director may refer the case to the Equal Opportunity Mediation Commission, the parties are not bound by the Commission’s decision.¹⁷⁹ Mediation can occur only after one or both of the parties apply and both consent to the process.¹⁸⁰ If an employer refuses to mediate, the procedure cannot be conducted.¹⁸¹

Some Japanese applaud the EEO law for its emphasis on gradual change and voluntary compliance since it reflects the

172. *See id.* at 101. “Exhortatory” in this context means that the government is merely suggesting or recommending, not mandating, that employers treat the genders equally whereas prohibitory means that such conduct is forbidden by law. *See id.*

173. *See id.* at 101. Discrimination by disparate impact is not directly addressed by the EEO law. Helen A. Goff, *Glass Ceilings in the Land of the Rising Sons: The Failure of Workplace Gender Discrimination Law and Policy in Japan*, 26 *LAW & POL’Y INT’L BUS.*, 1147, 1162-63 (1995).

174. LAM, *supra* note 124, at 101.

175. *Id.* at 101. The definition and enforcement of equality for the exhortatory provisions is left to the Ministry of Labor, who has the power to develop and issue implementation instructions. *See id.* at 20.

176. *See id.* at 103.

177. *See id.*

178. *See id.*

179. *See* LAM, *supra* note 124, at 103.

180. *See id.*

181. *See id.*

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basic precepts of Japanese culture by emphasizing harmony, conformity, and non-confrontation.¹⁸² Conversely, one scholar criticized the EEO law as an "heirloom sword that is no more than an ornament or a prestige symbol used to make Japan appear respectable in Western eyes. . . ."¹⁸³ The first EEO mediation case arose in 1994.¹⁸⁴ Fully ten years after its passage, not a single woman has filed a lawsuit under the EEO law.¹⁸⁵

c. Sexual Harassment Claims

Although the EEO law is weak and does not contain provisions addressing sexual harassment, the Japanese courts recently recognized such claims.¹⁸⁶ *Sekuhara*, or sexual harassment claims, are increasing despite the institutional barriers to filing lawsuits in Japan.¹⁸⁷ Such barriers include society's aversion to lawsuits, high court costs, court delays, and lack of enforcement methods.¹⁸⁸ In 1989, the first sexual harassment lawsuit ensued.¹⁸⁹ By the end of 1995, plaintiffs filed approxi-

182. See Goff, *supra* note 173, at 1147-48.

183. Knapp, *supra* note 126, at 88.

184. See *Equal Employment Law to be Put to First Test*, Kyodo News International, Inc., Japan Weekly Monitor, Sept. 19, 1994.

185. See Leon Wolff, *Eastern Twists on Western Concepts: Equality Jurisprudence and Sexual Harassment in Japan*, 5 PAC. RIM L. & POL'Y J. 511, 517 n.45 (1996). One reason that women are reluctant to initiate claims may be the law's lack of legally enforceable rights. See Masako Kamiya, *A Decade of the Equal Employment Opportunity Act in Japan: Has It Changed Society?*, 25 LAW IN JAPAN 40, 60 (1995).

In the United States, between 1983 and 1993, the U.S. Equal Employment Opportunity Commission filed 2,812 lawsuits arising under Title VII on behalf of complainants from a total of 515,323 complaints filed with the agency. Of the 14,669 complaints received during that time under the Equal Pay Act, the EEOC sued on behalf of ninety-three complainants. See U.S. Equal Employment Opportunity Commission, *Enforcement Statistics FY 1983 to FY 1993* (1993).

186. See *infra* notes 189-90 and accompanying text. See Yoichiro Hamabe, *Inadvertent Support of Traditional Employment Practices: Impediments to the Internationalization of Japanese Employment Law*, 12 UCLA L. REV. 306, 326 (1994), noting that Japanese courts have just begun to recognize such claims. Japanese Courts generally recognize that such acts constitute a tort under the Japanese Civil Code. See *id.* at 326-27. The Courts reason that sexual harassment in employment denies the *jinkaku*, or personality, of women workers. See *id.* at 327.

187. See Wolff, *supra* note 185, at 520 n.74.

188. See *id.*

189. See *id.* at 518. U.S. courts recognized sexual harassment as early as 1982. See *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). The U.S. Supreme Court recognized that sexual harassment may

mately twenty cases of sexual harassment cases in the Japanese courts.¹⁹⁰

The Japanese courts, however, award minimal amounts to successful sexual harassment plaintiffs. In 1990, the Shizuoka District Court ruled that supervisors cannot demand sexual favors from their women employees.¹⁹¹ The court awarded 1 million yen (approximately U.S. \$10,000) for infliction of emotional distress and 100,000 yen (U.S. \$1,000) for attorneys' fees.¹⁹² Similarly, the Fukuoka District Court held an employer liable for not maintaining an environment where women could comfortably work.¹⁹³ The court awarded the plaintiff 1.5 million yen (U.S. \$15,000) for infliction of emotional distress and 150,000 yen (U.S. \$1,500) for attorneys' fees.¹⁹⁴

While the foregoing review of recent legislation and case law demonstrates the presence of a trend toward improving the employment status and opportunities of Japanese women, progress is slow compared to the United States.¹⁹⁵ The absence of meaningful penalties for violations, as illustrated by the small

create a hostile work environment in violation of Title VII in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

190. See Wolff, *supra* note 185, at 520 n.74. By contrast, approximately 6,000 sexual harassment charges were filed with the EEOC in 1990. By 1995, that number ballooned to approximately 15,000 charges. Troy Booth, *Sexual Harassment Claims Increase; Expert Warns Employers that Improper Behavior Can Hurt Productivity, Morale, and Lead to Legal Nightmares*, THE RICHMOND TIMES DISPATCH, May 1, 1996, at 12.

191. See Judgment of Dec. 20, 1990, Shizuoka Chisai [Shizuoka District Court], 580 Rodo Hanrei 17 (Japan).

192. See *id.*

193. See *id.*, citing judgment of Apr. 16, 1992, Fukuoka Chisai [Fukuoka District Court], 1426 Hanji 49 (Japan).

194. See *id.* Awards in sexual harassment cases in the United States vary. Two of the largest jury verdicts for U.S. sexual harassment cases include \$50 million by a Missouri jury and \$8 million by a federal jury in Alabama. See Gilbert M. Roman, *Remedial Action Can Save Liability in Harassment Cases*, ROCKY MOUNTAIN NEWS, Feb. 18, 1996, at F1R. In 1993, however, the average monetary benefit arising from a successful Title VII case brought by the EEOC on behalf of the complainant was \$12,536. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT STATISTICS FY 1983 to FY 1993 (1993). In total costs, settlements in 1990 were just over \$7.5 million, while that figure jumped to \$28 million in 1996. See Andrea Mitchell, *State of Sexual Harassment in the Workplace Today as Evidenced by a Current Suit Against Phillip Morris*, (NBC News Transcripts, Jan. 13, 1997).

195. See *supra* notes 129-32 and accompanying text.

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sums awarded to victims of workplace sexual harassment, suggest such reforms will continue to proceed at a gradual pace.¹⁹⁶

This section completes this article's portrayal of the difficulties faced by U.S. women employees employed by *kaigaitenkinsha* and the sources of the discrimination. The article will now shift focus and examine the implications of the U.S.-Japan commercial operating treaty and recent judicial interpretations which endorse the notion that Japanese companies may legally bar U.S. women from management positions.¹⁹⁷ This potential outcome compels judicial reinterpretation. The cultural predisposition of the Japanese and their poor record of complying with U.S. sex discrimination laws, shown in Parts I and II of this article, support the conclusion that such an outcome disproportionately harms women and thwarts the U.S. equal employment opportunity fiat.¹⁹⁸

PART III. DISCRIMINATION IN FAVOR OF
KAIGAITENKINSHA: EXCLUDING UNITED STATES
WOMEN FROM MANAGEMENT

This part of the article critiques a second regulation that, in addition to Title VII, affects equal employment opportunity guidelines at Japanese-owned businesses in the United States.¹⁹⁹ Section A identifies the commercial operating treaty that allows such entities to conduct business in the United States.²⁰⁰ This section discusses the treaty provision that grants Japanese-owned companies the right to appoint key employees of *their own choosing*.²⁰¹

Section B reviews the courts' interpretation of the scope of the treaty and the majority view which holds that Japanese-

196. See generally *supra* notes 157-94 and accompanying text (showing that legislation thus far failed to improve the status or opportunities of Japanese women employees in a significant manner).

197. See *infra* notes 205-70 and accompanying text.

198. See *supra* note 74 and *infra* note 267 and accompanying text.

199. See *infra* notes 205-11 and accompanying text.

200. See *id.*

201. See *id.*

owned companies may discriminate in favor of their own citizens in regard to management positions.²⁰² Section B also describes the minority approach, which places an additional hurdle upon suspect employers to prove that Japanese citizenship is an essential position qualification or a BFOQ for the position in question.²⁰³ The minority approach's greater burden on the employer ensures that Japanese-owned companies do not use their commercial treaty rights as a pretext for discrimination.²⁰⁴

A. THE UNITED STATES-JAPAN FRIENDSHIP, COMMERCE, AND NAVIGATION TREATY

The United States has more than two dozen Friendship, Commerce, and Navigation Treaties with foreign countries.²⁰⁵ Japanese-owned companies operate businesses in the United States by authority of the U.S.-Japan Friendship, Commerce, and Navigation Treaty, which the two nations negotiated in the aftermath of World War II.²⁰⁶ The U.S.-Japan Friendship, Commerce, and Navigation Treaty ("Treaty") contains language similar to other commercial treaties in that the Treaty contains a provision which allows the foreign employer to staff key posi-

202. See *infra* notes 212-66 and accompanying text.

203. See *infra* notes 272-79 and accompanying text.

204. See *id.*

205. See *e.g.*, Convention of Establishment, Protocol and Declaration, Nov. 25, 1959, U.S.-Fr., art. VI(1), Protocol (9), 11 U.S.T. 2398, 1960; Treaty of Friendship, Commerce and Navigation, Nov. 12, 1959, U.S.-Pak., 12 U.S.T. 110, 1961; Treaty of Friendship, Commerce and Navigation, March 27, 1956, U.S.-Neth., 8 U.S.T. 2043, 1957; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, U.S.-Nicar., 9 U.S.T. 449, 1958; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, U.S.-F.R.G., art. VIII(1), 7 U.S.T. 1839, 1956; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, U.S.-Den., 12 U.S.T. 908, 1961; Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, U.S.-Isr., 5 U.S.T. 1829, 1954; Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, U.S.-Greece, 5 U.S.T. 1829, 1954; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, U.S.-Ir., 1 U.S.T. 785, 1950; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1958, U.S.-Italy, 63 Stat. 2255, 1949; Treaty of Friendship, Commerce and Navigation, April 2, 1953, U.S.-Japan, art. VIII, para. 1, 4 U.S.T. 2063, 1953.

206. The Treaty was signed by representatives of the two nations on April 2, 1953. Treaty of Friendship, Commerce and Navigation, April 2, 1953, U.S.-Japan, 4 U.S.T. 2063, 1953.

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tions at their U.S. subsidiaries with employees *of their choice*.²⁰⁷

Japan originally opposed the *of their choice* provision during treaty negotiations.²⁰⁸ The Japanese expressed concerns that the provision would provide U.S. companies operating in Japan with nearly absolute immunity from discrimination laws.²⁰⁹ Indeed, the United States drafted the provision broadly in an attempt to secure maximum management freedom and reduce the risks of investing in overseas markets for its own citizens.²¹⁰ It was not foreseen, however, that Japan would ultimately emerge as the dominant foreign investor between the two nations and that the *of their choice* provision would be used by Japanese employers as a shield against liability for discrimination, as demonstrated in the following cases.²¹¹

B. THE SCOPE OF THE TREATY

1. Background: *Sumitomo Shoji America, Inc. v. Avagliano*

The first case to address the scope of the Treaty, noted in Part II of this article was the landmark case, *Sumitomo Shoji America, Inc. v. Avagliano*, a class action suit against the subsidiary, U.S. branch of the parent Sumitomo Corporation.²¹² In *Sumitomo*, a group of secretaries sued their employer for sys-

207. See *id.* at art. VIII, para. 1. The Treaty provides in part that "Nationals and Companies of either Party shall be permitted to engage, within the territories of the other [country], accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice*." *Id.* (emphasis added).

208. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 181, n.6 (1982), referring to State Department Airgram No. A-453, dated Jan. 7, 1952, pp.1, 3, reprinted in App. 130a, 131a, 133a (discussing Japanese objections to Article VIII(1)) (emphasis added).

209. See Daniel H. Tabak, *Friendship Treaties and Discriminatory Practices*, 28 COLUM. J.L. & SOC. PROBS. 475, 479 (1995); See Thorson, *supra* note 19, at 329.

210. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 182 n.6 (1982), explaining that Herman Walker, Jr., Adviser on Commercial Treaties at the State Department, stated that Article VIII(1) was intended "to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel." Herman Walker, Jr. *Provisions on Companies in the United States Commercial Treaties*, 50 AM. J. COMP. L. 229, 234 (1956).

211. See Thorson, *supra* note 19, at 329.

212. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982).

tematically barring women from appointment to executive, management, and sales positions by selecting only Japanese male citizens to fill these positions.²¹³

The District Court for the Southern District of New York first denied the defendant corporation's motion to dismiss.²¹⁴ The District Court then certified for interlocutory appeal to the Court of Appeals the question of whether the terms of the Treaty excluded Sumitomo from Title VII's provisions.²¹⁵ The Court of Appeals for the Second Circuit reversed in part, holding that the Treaty covered locally incorporated subsidiaries of foreign companies.²¹⁶ However, the Court opined that the Treaty language did not insulate Sumitomo's employment practices from Title VII scrutiny.²¹⁷ The U.S. Supreme Court granted certiorari in 1982.²¹⁸

The U.S. Supreme Court held that Sumitomo was a company of the United States.²¹⁹ The Court stated that because Sumitomo was a company of the United States, the employer must comply with the anti-discrimination regulations promulgated under Title VII.²²⁰ In reaching its decision, the Court relied on the plain meaning of the Treaty, which defined "companies" as "constituted under the applicable laws and regulations within the territories of either Party."²²¹ Since the Japan-based parent company incorporated the subsidiary in the state of New York, Sumitomo Corporation was a company of the United States.²²² The Court noted that the U.S. State Department and the Government of Japan both held the position that Sumitomo was not a company of Japan and therefore not per-

213. *See id.* at 176.

214. *See Sumitomo Shoji Am., Inc. v. Avagliano*, 475 F. Supp. 506, 506 (S.D. N.Y. 1979).

215. *See Sumitomo Shoji Am., Inc. v. Avagliano*, 638 F.2d 552 (2d Cir. 1981).

216. *See id.* at 554.

217. *See id.*

218. *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982).

219. *See id.* at 189.

220. *See id.*

221. *See id.* at 185-87, citing Article XII(3), U.S.-Japan, 4 U.S.T. 2063, 2070, 1953.

222. *See id.* at 182.

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mitted under Article VIII(I) of the Treaty to appoint key employees of their choice.²²³

However, the Court in *Sumitomo* left two key issues unanswered. First, the Court did not decide the questions of whether Japanese citizenship may be a bona fide occupational qualification or whether a business necessity defense could be asserted.²²⁴ Second, and most importantly, the Court expressed no view as to whether Sumitomo could assert the Treaty rights of its parent.²²⁵ The two U.S. Courts of Appeal that later addressed this issue in *Fortino v. Quasar Co.* and *Papaila v. Uniden America Corp.* both answered affirmatively.²²⁶

2. *Fortino v. Quasar Co.*: Treaty Rights Trump Title VII

The Seventh Circuit U.S. Court of Appeal in *Fortino v. Quasar Co.* held that the defendant Japanese-owned subsidiary could assert the Treaty rights of its parent and thus avoid liability for discrimination under Title VII.²²⁷ The Court summarily dismissed the plaintiffs' claims, because the Court concluded that the Japan-based parent company, Matsushita, engaged in the allegedly discriminatory treatment.²²⁸

In *Fortino*, three U.S. citizens claimed that their employer discriminated against them based upon age and national origin because their employer favored Japanese expatriates in job

223. See *id.* at 183.

224. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 190 (1982).

225. See *id.* at 189-90 n.19. The plaintiffs ultimately reached a \$2.6 million settlement with Sumitomo. Under the consent decree, the employer agreed to raise the base salaries of its non-Japanese employees, add more U.S. employees to its senior management group, and pay back wages to U.S. employees. Sumitomo further created a career development program aimed at giving non-Japanese employees a better opportunity at obtaining management positions. See Thorson, *supra* note 19, at 333 n.128; *Sumitomo Settles Sex-Bias Lawsuit*, THE AMERICAN BANKER, Apr. 7, 1987.

226. See *Papaila v. Uniden Am. Corp.*, 51 F.3d 54 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 187 (1995); *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991)..

227. See *Fortino v. Quasar Co.*, 950 F.2d 389, 393-94 (7th Cir. 1991).

228. See *id.*

protection and compensation.²²⁹ The employer, Quasar, marketed products manufactured in Japan by its parent, Matsushita, and was under the day-to-day control of Matsushita.²³⁰ After Quasar suffered losses of \$20 million in 1985, the employer dismissed the plaintiff executives, while the employer did not discharge any of the ten Japanese expatriate executives.²³¹ The Japanese executives not only retained their jobs; they received salary increases as well.²³²

The District Court for the Northern District of Illinois awarded the three plaintiffs \$2.5 million in damages plus \$400,000 in attorneys' fees and costs.²³³ The defendant appealed from the judgment of the District Court and the Seventh Circuit reversed, remanding the age claim with directions and dismissing the claim of national origin.²³⁴

The Seventh Circuit reasoned that Title VII does not forbid discrimination based on citizenship.²³⁵ In countries such as Japan, where the population is highly homogeneous, the Court noted that citizenship and national origin are closely correlated.²³⁶ The Court further explained that this correlation

229. *See id.* at 391-92. The claims were founded upon alleged violations of the Age Discrimination in Employment Act, 29 U.S.C. § 626(b) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., respectively. *See id.* at 391.

As the *Fortino* Court explained, "the parties call them 'expatriates,' though in common parlance the word is not applied to a person on merely temporary assignment to another country." *Fortino*, 950 F.2d at 392.

230. *See Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991).

231. *See id.*

232. *See id.*

233. *See id.* at 389, 391.

234. *See id.* at 399.

235. *See Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991), citing *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). The U.S. Supreme Court ruled in *Espinoza* that an employer may refuse to hire an individual based on citizenship, so long as it does not have the *effect or purpose* of discriminating on the basis of national origin. *See Espinoza*, 414 U.S. at 92 (emphasis added). Dictum in *Espinoza* indicated that a challenge may succeed where citizenship requirements are "one part of a wider scheme of unlawful national origin discrimination" or "a pretext to disguise what is in fact national origin discrimination." *Id.* The court therefore has effectively left the door open in such cases; however, plaintiffs may have to cope with an impossible task in bringing forth evidence sufficient to establish such a scheme or pretext when their employer speaks and writes all documents in Japanese. *See Thorson*, *supra* note 19, at 326.

236. *See Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991).

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could not be used to infer national origin discrimination from a treaty-sanctioned preference for Japanese citizens who also happen to be of Japanese national origin.²³⁷ National origin and citizenship are separate.²³⁸ The Court pointed to the fact that Quasar also discharged two of its three Japanese-American employees.²³⁹ The Court thus decided that since Quasar did not extend favoritism to its Japanese-American employees, it cannot be said that the company participated in national origin discrimination.²⁴⁰

Although the Court stated that Quasar failed to raise the issue of the Treaty's provisions to the District Judge, the Seventh Circuit permitted the Treaty to be considered.²⁴¹ The Court advised that the Treaty would be considered "for the sake of international comity, amity, and commerce . . . [because] we are asked to consider the bearing of a major treaty with a major power and principal ally of the United States."²⁴²

The Seventh Circuit further justified its decision by stating that the parent company, Matsushita, dictated Quasar's discriminatory conduct.²⁴³ To forbid Quasar to assert its Treaty rights would be analogous to preventing its parent from asserting its rights.²⁴⁴ Moreover, the Treaty rights are reciprocal and without the Treaty exemption, Americans employed overseas at foreign subsidiaries would lose their positions to foreign nationals.²⁴⁵ The Seventh Circuit's decision set the standard emulated later by its sister circuit in *Papaila v. Uniden America Corp.*²⁴⁶

237. *See id.* at 392-93.

238. *See id.* at 393.

239. *See id.* at 392.

240. *See id.* at 393.

241. *See Fortino v. Quasar Co.*, 950 F.2d 389, 391 (7th Cir. 1991), citing *Singleton v. Wulff*, 428 U.S. 106 (1976).

242. *Id.*

243. *See id.* at 393.

244. *See id.*

245. *See id.* at 393-94.

246. *See Papaila v. Uniden Am. Corp.*, 51 F.3d 54 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 187 (1995).

3. *Papaila v. Uniden America Corp.*

The Fifth Circuit followed the lead of the Seventh Circuit in *Papaila v. Uniden America Corp.*²⁴⁷ The Court held that a Japanese-owned subsidiary may avoid liability under Title VII if its Japan-based parent company, operating under the Treaty, is found responsible for the allegedly discriminatory treatment.²⁴⁸ The plaintiff in *Papaila* appealed from the United States District Court for the Northern District of Texas' grant of summary judgment.²⁴⁹ The Fifth Circuit affirmed and the U.S. Supreme Court denied certiorari in 1995.²⁵⁰

In *Papaila*, the male Caucasian, U.S. citizen plaintiff claimed that his employer subjected him to race and national origin discrimination by favoring Japanese expatriates in compensation, benefits, and job protection.²⁵¹ The plaintiff contended that only Japanese expatriates received high salaries, housing and tuition allowances, and the ability to transfer rather than be discharged.²⁵²

The Fifth Circuit concluded that Uniden America Corp. ("UAC"), by itself, had no rights under Article VIII(1) of the Treaty because it is not a "company of Japan."²⁵³ According to the Court, however, UAC could assert the rights of its parent because the parent made all of the allegedly discriminatory decisions.²⁵⁴ To preclude such a right of the subsidiary would be the same as if it precluded the parent, in clear violation of the FCN Treaty.²⁵⁵

The Fifth Circuit distinguished *Sumitomo*, stating that in *Sumitomo* the parent did not dictate the discriminatory con-

247. *See id.* at 55.

248. *See id.* at 56.

249. *See id.* at 54.

250. *See Papaila*, 51 F.3d at 56, *cert. denied* 1165 S.Ct. 187 (1995).

251. *See Papaila v. Uniden Am. Corp.*, 51 F.3d 54, 55 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 187 (1995).

252. *See id.*

253. *Id.*

254. *See id.*

255. *See id.* at 56, citing *Fortino*, 950 F.2d at 393.

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duct of the subsidiary.²⁵⁶ Like the Seventh Circuit in *Fortino*, the Fifth Circuit recognized citizenship and national origin as distinct categories and stated that Title VII was, arguably, not implicated since the Court believed that the discrimination was based solely on citizenship.²⁵⁷ The Court observed that UAC did not show favoritism to six employees of Japanese race and national origin who were not Japanese citizens.²⁵⁸ Thus, in favoring Japanese citizens at the command of its Japan-based parent, UAC was exempt from charges of disparate treatment based on race and national origin discrimination.²⁵⁹ It follows from the ruling of a third court, discussed in the next section, that claims of disparate impact could be similarly dismissed.²⁶⁰

4. *MacNamara v. Korean Air Lines*: The Treaty Bars Disparate Impact Claims

The Third Circuit further limited the *types* of claims plaintiffs can bring against a foreign-owned subsidiary that is operating under its parent's Friendship, Commerce, and Navigation Treaty ("FCN Treaty"). In *MacNamara v. Korean Air Lines*, the Court concluded that claims of disparate impact could not succeed if a company is operating under an FCN Treaty.²⁶¹ The Third Circuit reasoned that whenever a company discriminated in favor of citizens from its own country, a statistical disparity based on race or national origin would naturally result.²⁶² The Court explained that it would be unfair to impose liability in a situation where the foreign-owned company merely exercised a commercial treaty right.²⁶³

The *of their choice* provision in the U.S.-Japan FCN Treaty is similarly worded to the relevant provision of the U.S.-Korean

256. See *Papaila v. Uniden Am. Corp.*, 51 F.3d 54, 56 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 187 (1995).

257. See *id.* at 56 n.2.

258. See *id.*

259. See *id.* at 56.

260. See *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989).

261. See *id.* at 1148.

262. See *id.*

263. See *id.*

FCN Treaty.²⁶⁴ Moreover, dicta in *Fortino* set forth the Seventh Circuit's opinion that the United States-Japan FCN Treaty exempted Japanese parent companies from liability for disparate impact claims.²⁶⁵ The decisions in *Fortino*, *Papaila*, and *MacNamara* accordingly support the proposition that Japanese parent companies may discriminate against U.S. citizens by excluding them from the management ranks of their U.S. subsidiaries.²⁶⁶ Such an outcome disproportionately affects women, who are less likely than men to be appointed to management positions at these companies.²⁶⁷

The courts have not yet heard a sex discrimination case where a Japanese-owned company asserted the Treaty rights of its parent.²⁶⁸ Clearly, Japanese-owned entities cannot escape liability for sexual harassment by asserting their Treaty rights, since the Treaty only allows Japanese parent companies to select management employees of their choosing.²⁶⁹ However, claims of sex discrimination in selection, promotion, or discharge could be dismissed if future decisions follow the analyses and conclusions reached by the *Fortino*, *Papaila*, and *MacNamara* courts.²⁷⁰ The following subsection offers an alterna-

264. See Thorson, *supra* note 19, at 315.

265. See *Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991).

266. See *supra* notes 206-07 and accompanying text.

267. See Thorson, *supra* note 19, at 25. In 1990, 31 percent of senior management positions at Japanese-owned companies were occupied by Americans. Women held less of these positions than men. Women were employed at a rate of 32.3 percent at other foreign-owned companies, while the national average was 28.6 percent. However, Japanese-owned companies employed women at a rate of 15.9 percent in these positions. See *id.*

268. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982) (the U.S. Supreme Court declined to decide whether Sumitomo could assert the treaty rights of its parent in sex discrimination case) See *id.* at 190 n.19.

269. See *supra* notes 225 and 227-63 and accompanying text.

270. See generally *Papaila v. Uniden America Corp.*, 51 F.3d 54, 55 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 187 (1995) (holding that claims of race and national origin discrimination cannot succeed because the U.S.-Japan FCN Treaty permits Japan-based parent companies to discriminate in favor of their own citizens in employment at their U.S.-based subsidiaries); *Fortino v. Quasar Co.*, 950 F.2d 389, 393-94 (7th Cir. 1991) and; *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989) (stating that, in practice, claims of disparate impact cannot succeed where there is an operative FCN Treaty).

Furthermore, the courts historically treated claims of race and national origin (or alienage) with greater suspicion than claims of sex discrimination. In constitutional law, race and national origin discrimination claims are subject to the highest standard

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tive approach to adjudicating these claims, which is more equitable than that promulgated by the majority.²⁷¹

5. The Minority View: *Goyette v. DCA Advertising*

In *Goyette v. DCA Advertising Inc.*, the District Court of the Southern District of New York sharply departed from the analyses applied by the Fifth and Seventh Circuits. The District Court did not dismiss the plaintiffs' claim based on the employer's assertions that the discrimination was founded on citizenship and ordered by the parent.²⁷² The *Goyette* Court held that the foreign employer must establish, for the specific position at issue, that discrimination in favor of its own citizens was essential to the normal operation of its business, or a bona fide occupational qualification.²⁷³

Goyette involved five plaintiffs discharged by their Japanese-owned employer during a reduction in force, an action that DCA described as necessary to increase profitability.²⁷⁴ The plaintiffs claimed that national origin discrimination in violation of Title VII motivated the employer's decision to discharge them.²⁷⁵ The *Goyette* Court transformed the defendant's motion to dismiss into a motion for summary judgment and the Court granted the defendant's motion for summary judgment solely on the plaintiffs' disparate impact claim.²⁷⁶

of review, or strict scrutiny. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Washington v. Davis*, 426 U.S. 229 (1976); *Loving v. Virginia*, 388 U.S. 1 (1967); *Hernandez v. Texas*, 347 U.S. 475 (1954). A law that classifies based upon these immutable characteristics will be upheld only if such a regulation is deemed necessary to promote a compelling government interest. In comparison, gender is a semi-suspect classification, and the means chosen by the legislature in this instance must be substantially related to an important government objective. See *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976). In light of the foregoing, sex discrimination claims under Title VII most likely will not be treated in a manner more suspect than claims of race and national origin discrimination.

271. See *Goyette v. DCA Adver. Inc.*, 830 F. Supp. 737 (S.D. N.Y. 1993).

272. See *id.* at 749.

273. See *id.* at 749.

274. See *Goyette v. DCA Adver. Inc.*, 830 F. Supp. 737, 740 (S.D. N.Y. 1993).

275. See *id.* at 739-40.

276. See *id.* at 740.

The District Court for the Southern District of New York held that a Japanese corporation conducting business in the United States can only hire with respect to national origin if the company can show that national origin is a bona fide occupational qualification or BFOQ.²⁷⁷ To accommodate the foreign employer's treaty rights, the *Goyette* Court ruled that the following factors must be considered in regard to the position at issue: "(1) Japanese linguistic and cultural skills; (2) knowledge of Japanese products, markets, customs, and business practices; (3) familiarity with . . . the parent enterprise in Japan; and (4) acceptability to those with whom the company . . . does business."²⁷⁸ The Court concluded that in this instance the Defendant presented no such evidence and therefore ruled that the Treaty did not entitle DCA Advertising to implement a policy that discriminated against employees based on national origin.²⁷⁹

PART IV. RECOMMENDATIONS

A. UNITED STATES LAWS SHOULD REQUIRE MANDATORY EDUCATION

The claims asserted in *Mitsubishi* and its predecessors support the view that steps must be taken to deter culturally-predisposed Japanese managers from tolerating or engaging in sex discrimination.²⁸⁰ The first step toward ensuring that Japanese companies comply with existing U.S. anti-discrimination laws is to educate and assimilate the Japanese executives sent overseas to operate their employers' subsidiaries.²⁸¹

277. See *id.* at 749.

278. *Id.* The *Goyette* Court explained that the Second Circuit in *Avigliano v. Sumotomo Shoji Am., Inc.*, 638 F.2d 552, 559 (2nd Cir. 1981), first set forth this four part test. See *id.*

279. See *Goyette v. DCA Adver. Inc.*, 830 F. Supp. 737, 749 (S.D. N.Y. 1993).

280. See *supra* notes 1-20 and notes 36-70 and accompanying text.

281. Education must also be extended to reach the Japanese business leaders who oversee the decisions of the *kaigaitenkinsha*. Following the announcement of the lawsuit against Mitsubishi, the Chairman of the EEOC traveled to Japan to meet with business leaders and discuss the problems that Japanese employers experience in

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U.S. laws should mandate that high-level Japanese managers undergo employment discrimination instruction and testing prior to being permitted to file articles of incorporation or otherwise operate businesses in the United States that employ more than 15 employees.²⁸² Such teaching methods must be carefully tailored to accomplish the profound cultural adjustments that are needed for Japanese managers to begin to regard and treat U.S. women as equals rather than subordinates.²⁸³

conforming to U.S. laws. See *Text of Remarks by Equal Employment Opportunity Commission Chairman Gilbert Casellas to Japanese Business Group*, Daily Labor Report, Oct. 23, 1996. This kind of outreach helps confirm and emphasize the expectation that Japanese companies will respect and obey U.S. laws.

282. Title VII covers employers with fifteen or more employees. 42 U.S.C. § 2000e(b) (1994).

283. Japanese companies already use a variety of measures to prevent lawsuits, including handbooks and videotapes, and the attendance of seminars on U.S. employment law. See Jacobs, *supra* note 50, § 3, at 25.

"Moralsuasion" is another method that may be effective in reaching the Japanese. In May of 1996, Mitsubishi Motors Corp. was reprimanded by a bipartisan group of U.S. Congresswomen for its handling of women's complaints at this facility. See *U.S. Lawmakers Slam Mitsubishi Over Sexual Harassment*, Kyodo News Int'l, Inc., JAPAN WEEKLY MONITOR, May 6, 1996. Colorado Democrat Patricia Schroeder wrote to the Japanese Ambassador to the United States, Kunihiko Saito, and urged him to "encourage Mitsubishi to act like a responsible corporate citizen." *Id.*

Women's groups from the U.S. and Japan protested against Mitsubishi at its annual shareholders' meeting in July of 1996. See *Women's Groups Protest Outside MMC Shareholders Meeting*, Kyodo News Int'l, Inc., Japan Transportation Scan, July 1, 1996. Representatives of the U.S. National Organization of Women (NOW) joined members of Japanese women's groups and called for Mitsubishi to respond to allegations of sexual harassment against women at the U.S. plant. See *id.* The annual shareholders' meeting lasted just 23 minutes. See *id.*

Jesse Jackson announced a national boycott of Mitsubishi Motors, in July of 1996, to protest its policies of sex discrimination and race exclusion at U.S. plants. See *Jackson to Visit Japan for Talks with Business Leaders*, Kyodo News International, Inc., Japan Poly & Pol., July 15, 1996. The eight-month long boycott was called off in February of 1997 after the automaker committed to boosting its share of women and minority-owned dealerships by providing company-assisted funding, if needed. See *Jesse Jackson Ends Mitsubishi Boycott*, JET, Feb. 3, 1997, at 25.

In response to being denounced in the press and boycotted, Mitsubishi reformed its internal practices toward addressing and resolving claims of sexual harassment. See *Mitsubishi Panel Unveils Antisexual Harassment Program*, Kyodo News Int'l, Inc., Japan Transportation Scan, Feb. 27, 1997. Lynn Martin, the former Secretary of Labor, headed the task force issuing the report. See *id.* Mitsubishi hired Ms. Martin subsequent to the filing of the class action lawsuit by the EEOC. See *id.* Informed sources surmised that the report was the first step in reaching an out-of-court settlement. See *id.*

B. UNITED STATES COURTS SHOULD ADOPT THE *GOYETTE* APPROACH TO ADJUDICATING SEX DISCRIMINATION CLAIMS IN HIRING, PROMOTION, AND DISCHARGE

As noted in Part II of this article, thus far the Third, Fifth, and Seventh Circuits upheld the *of their choice* provisions of the FCN Treaties, ruling that foreign parent companies may appoint their own nation's citizens to management positions at U.S. subsidiaries.²⁸⁴ Since discrimination in favor of foreign citizens is permitted and most U.S. women are not citizens of Japan, the United States-Japan FCN Treaty could effectively exclude women from ever acquiring management positions at these companies.²⁸⁵

The FCN Treaties' ability to legally bar women from management compels the notion that some standard of review or limitations should be placed on the Japanese and other foreign employers who conduct business in the United States.²⁸⁶ Otherwise, we could spoil some of the hard-won gains achieved by U.S. women in the workplace, such as the ability to challenge and transcend glass ceilings.²⁸⁷ One step toward this goal is to adopt the Southern District of New York's approach in *Goyette* to adjudicate sex discrimination claims as they arise in future lawsuits.²⁸⁸

The District Court of the Southern District of New York's four-prong test in *Goyette*, requiring a bona fide occupational qualification, places a greater but not insurmountable burden on the foreign employer to establish that discriminating in favor of its own citizens is necessary for a particular position.²⁸⁹ The *Goyette* requirement of a bona fide occupational qualifica-

284. See *supra* notes 205-63 and accompanying text.

285. But see LAM, *supra* note 124, at 12. In respect to Japanese managers, Japanese citizenship and gender are in fact highly correlated. Merely one percent of all Japanese working women are managers or officials. See *id.*

286. See *supra* Part III.

287. See *supra* notes 29, 74, and 75.

288. See *supra* notes 272-79 and accompanying text.

289. See *id.*

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tion softens the harshness of the FCN Treaty and Title VII exemptions in regard to discrimination based on citizenship.²⁹⁰

Application of the *Goyette* approach will enable more U.S. women to gain access to key positions at Japanese-owned companies, provided that these employers cannot demonstrate that Japanese citizenship is truly a necessary criterion for the position at issue.²⁹¹ This approach prevents these employers from using the Treaty as an absolute bar.²⁹² The *Goyette* approach accordingly recognizes and balances the interests of both parties, by simply assuring that the employee selected truly possesses the qualifications actually needed to perform the position competently.²⁹³

PART V. CONCLUSION

Striking cultural and legal differences exist between the United States and Japan. The mounting claims against Japanese employers function as notice that the institutional dissimilarities which serve to diminish U.S. women's employment rights must be acknowledged and addressed. The commercial operating treaty that permits Japanese employers to conduct business in the United States perpetuates glass ceilings for women and exposes women to increased risks of sex discrimination. Mandatory education for these employers and judicial reinterpretation, by adopting the *Goyette* test to adjudicate claims of sex discrimination in selection, will help soften the potentially discriminatory effects of the Japanese culture in the U.S. workplace.

Furthermore, the entrance of foreign-owned companies into the United States will most likely continue to increase, as the world economy becomes more global in nature. Women in most foreign cultures possess far fewer employment rights than U.S. women. United States women therefore may face sex discrimi-

290. *See id.*

291. *See Goyette v. DCA Adver. Inc.*, 830 F. Supp. 737, 749 (S.D. N.Y. 1993).

292. *See id.*

293. *See supra* notes 278-79 and accompanying text.

nation by a host of incoming foreign employers in the future. Courts must take the appropriate steps, beginning with Japanese-owned companies to ensure that our desire to attract foreign investment and participate fully in the global economy is not accomplished at the expense of women employees, or at humankind's expense if we lose the valuable contributions of qualified women.

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