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Global Business & Development Law Journal

Volume 16
Issue 1 *Symposium: The Globalization of Corporate and Securities Law in the Twenty-First Century*

Article 13

1-1-2002

Japan's New Equal Employment Opportunity Law: Combating Sexual Harassment in the Workplace

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I. INTRODUCTION

In 2001, a prosecutor from the Takamatsu District Public Prosecutor's Office resigned from his position due to allegations of sexual harassment.[1] A female worker accused the prosecutor of referring to her as "sexy," massaging her

* J.D., University of the Pacific, McGeorge School of Law, to be conferred May, 2003. I would like to give special thanks to my wife, Sook-Mei, and my family, Dad, Mom, Valorie, Daniel, and Nathan, who have provided tremendous support and encouragement during my law school career. Thanks also to *The Transnational Lawyer* staff and my advisor, Professor Julie Davies. I benefited from the wealth of information of Leon Wolff, Faculty of Law, the University of New South Wales. I hope this Comment will foster additional research and writing regarding Japanese employment and labor issues.

1. *See Clerk Cries Foul over Clutches of Lecherous Lawman*, MAINICHI DAILY NEWS, Oct. 5, 2001, *available at* http://www12.mainichi.co.jp/news/mdn/search-news837071/Sexual20Harassment-0-3.html (copy on file with *The Transnational Lawyer*) (explaining that the Takamatsu High Public Prosecutors Office was apologetic about the incident).

shoulders, and forcing her to hold his hand.[2] She reported the incident to a sexual harassment officer in the Prosecutor's Office.[3] After the offender admitted to the allegations, he was severely reprimanded and eventually resigned.[4] The female worker's courage to report her supervisor's misconduct illustrates the positive effect the newly amended Equal Employment Opportunity Law is having on *sekusharu harasumento* or *seku hara* ("sexual harassment") in Japan. An increase in the number of women who are aware of their right to reject and report sexual harassment demonstrates this effect.

Japan first enacted the Japanese Equal Employment Opportunity Law in 1985 ("Old EEOL")[5] in order to specifically address sex discrimination in the workplace. At the time the Old EEOL was enacted, Japanese female employees were optimistic that it would eradicate sexual harassment.[6] However, many scholars believe that the Old EEOL did little to remedy the problem because it lacked a provision directly addressing sexual harassment.[7] Yet, others maintain the statute raised Japanese females' awareness of their right to refuse sexual harassment.[8] Notwithstanding the Old EEOL, sexual harassment in Japan remained severe and pervasive.[9]

Since the Old EEOL failed to deter sexual harassment in the workplace, Japanese employees continued the search for another form of protection against harassment. In 2000, the then Japanese Ministry of Labour[10] reported an increase

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2. *Id.*

3. *Id.*

4. *Id.*

5. Koyo no Bun'ya no okeru Danjo no Kingo na Kikai oyobi Taigu no Kakuho to Joshi-Rdosha no Fukushi no Zoshin ni kansuru Horitsu [An Enactment for the Assurance of Equality of Opportunity and Treatment for Men and Women in Employment and the Enhancement of the Welfare of Female Workers], Law No. 45 of 1985, *reprinted in* JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS 627 (Curtis J. Milhaupt et al. eds., 2001) [hereinafter Old EEOL]. This Act was passed on May 17, 1985 as an amendment to Kinro Fujin Fukushi Ho [Working Women's Welfare Law], Law No. 113 of 1972. *Id.*

6. *See* Jennifer S. Fan, *From Office Ladies to Women Warriors?: The Effect of the EEOL on Japanese Women*, 10 UCLA WOMEN'S L.J. 103, 117 (1999) (noting that the Old EEOL was initially believed to be another legal source of protection for Japanese female workers).

7. *See* Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 HARV. WOMEN'S L.J. 83, 107 (1995) (discussing the views of many scholars who believed that the Old EEOL did little to improve working conditions for women). The nature of the Old EEOL was 'voluntary' and companies had a choice of whether or not to enforce the Old EEOL. *Id.*; *see also* Fan, *supra* note 6, at 114 (mentioning the superficial effect of the Old EEOL).

8. *See* Jacqueline M. Efron, Comment, *The Transnational Application of Sexual Harassment Laws: A Cultural Barrier in Japan*, 20 U. PA. J. INT'L ECON. L. 133 (1999) (indicating the effectiveness of the Old EEOL on Japanese society).

9. *See* Howard W. French, *Fighting Sex Harassment, and Stigma, in Japan*, N.Y. TIMES ABSTRACTS, July 15, 2001, *available at* 2001 WL 2467589 (noting that women are continually dealing with sexual harassment in silence).

10. Japan's Ministry of Labour was established in 1947 as an administrative agency with the objective to secure employment and promote worker welfare. Japan's Ministry of Labour, *Welcome*, *available at* http://www2.mhlw.go.jp/english/welcome/welcome.htm (last visited Jan. 31, 2002) (copy on file with *The Transnational Lawyer*). As of 2001, the Ministry of Labour restructured its agencies to form the Ministry of Health, Labor and Welfare ("Koseirodosho"). E-mail from Leon Wolff, Faculty of Law, University of New South Wales, to Galen Shimoda, J.D. Candidate, University of the Pacific, McGeorge School of Law (Oct. 7, 2002, 07:22 PST) (copy on file with *The Transnational Lawyer*) [hereinafter Wolff E-mail, Oct. 7, 2002].

in the number of sexual harassment claims filed by Japanese employees in both the private and public sector.[11] However, this new-found willingness to report sexual harassment is not readily attributable to the Old EEOL. Instead, the increased filing of sexual harassment claims is likely a result of new case law and legislation providing stricter guidelines and enforcement mechanisms. For example, the Old EEOL was amended in 1999.[12] The New Equal Employment Opportunity Law ("New EEOL") is considered a breakthrough in Japanese sexual harassment jurisprudence. The statute is the first piece of Japanese legislation to specifically address sexual harassment.[13] While the New EEOL fails to provide a complete remedy,[14] it does allow a female employee to realize her[15] right to work in a sexual harassment-free environment.[16] Along with the New EEOL, the Ministry of Labour implemented a set of guidelines to define the scope of sexual harassment and to establish procedures for companies to follow in order to address sexual harassment.[17]

Japan's changing socio-economic climate evidences the importance of the New EEOL to Japanese and foreign companies. In the 1980s, Japan's economy grew at a rate greater than that of the United States.[18] However, in the 1990s, Japan's economy struggled to grow at half the rate of the U.S. economy.[19] In addition, a steadily decreasing population in Japan caused great concern for the

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11. *See Record Number of Sexual Harassment Complaints Lodged in FY '99*, JIJI PRESS ENG. NEWS SERVICE, May 2, 2000, *available at* 2000 WL 17636435 (comparing 7019 reported cases of sexual harassment in 1998 to 9451 reported cases of sexual harassment in 1999).

12. Koyo no Bunya ni okeru Kanjo no Kinto na Kikai oyobi Taigu no Kakuho To ni Kansuru Horitsu [Law Respecting the Guarantee of Equal Opportunity and Treatment Between Men and Women in Employment], Law No. 92 of 1997, *available at* http://natlex.ilo.org/txt/e99jpn01.htm (last visited Sept. 11, 2001) [hereinafter New EEOL] (copy on file with *The Transnational Lawyer*) (translating the New EEOL).

13. *See Violence Against Women in Japan*, THE "YOKOHAMA WOMEN'S FORUM" NO. 14 (Yokohama Women's Association, 1999), *available at* http://www.women.city.yokohama.jp/english/tsushim/14/newscont5.html (last visited Sept. 11, 2001) [hereinafter "YWACN Newsletter"] (copy on file with *The Transnational Lawyer*) (explaining that the growing concern over sexual harassment can be attributed to its legal development over the past few years). Lawsuits have established a woman's right to work in a workable environment and employer liability. *Id.*

14. *See* Hiroko Hayashi, Address at the N.Y. University Lipton Hall (June 5, 2000), *available at* http://www.ne.jp/asahi/wwn/wwin/reporten.html (last visited Jan. 3, 2002) (copy on file with *The Transnational Lawyer*) (mentioning that the New EEOL does not provide a cause of action for victims of sexual harassment).

15. *See* Tadashi Hanami, *Equal Employment Revisited*, 39 JAPAN LAB. BULL. 1, 2.2 (Jan. 1, 2000), *available at* http://www.jil.go.jp/bulletin/year/2000/vol39-01/05.htm (last visited Oct. 23, 2002) (copy on file with *The Transnational Lawyer*) (explaining that the New EEOL was specifically enacted to protect women workers, and not their male counterparts, from sexual harassment).

16. *See* Efron, *supra* note 8, at 162-63 (emphasizing that the New EEOL fails to vest power in any agency to enforce the law or punish violating employers).

17. *See infra* Part IV.C.2 (describing the Ministry of Labour's guidelines in detail).

18. *See* Robert J. Samuelson, *Japan's Harsh Reality Check: A Country that Thought It Was Managing Change Was Trying—Vainly—To Avoid the Unavoidable*, NEWSWEEK, Jan. 10, 2000, *available at* 2000 WL 7524167 (stating that Japan was the undisputed economic leader of Asia, but is suffering from slow economic growth and a low birthrate). In the 1980s, Japan's economy grew at an average annual rate of almost 4%, compared to the U.S. rate of 3%. *Id.* During the 1990s, Japan's economy only grew by 1.5%, while the U.S. economy continued to grow at 3%. *Id.*

19. *Id.*

future of its labor pool.[20] With a slumping economy and a decreasing population, Japanese employers finally realized that female employees were key components to the success of Japanese businesses.[21] With more Japanese female employees than ever before, the creation of a tolerable work environment became crucial.[22] Therefore, Japanese employers believe the New EEOL will be instructive in providing a suitable environment to female employees.[23]

This Comment focuses on the positive influence the New EEOL has on combating sexual harassment in the workplace. Specifically, it provides workers with a greater awareness and understanding of their rights. Part II examines the cultural makeup of Japan and its relation to the evolution of sexual harassment laws. Part III discusses the role of the Old EEOL and the Japanese Civil Code in the fight against sexual harassment in the workplace. Finally, Part IV evaluates the New EEOL and its effect on combating sexual harassment in Japan. The Comment concludes by arguing that the New EEOL, while imperfect and lacking strong enforcement mechanisms, is likely the most effective tool to combat sexual harassment in light of Japan's current cultural biases.

II. CULTURAL BACKGROUND: JAPAN AND SEXUAL HARASSMENT

Japanese culture has shaped its laws and contributed to the way women are treated in the workplace.[24] Japan's traditional culture teaches Japanese females that subordination and acceptance of remedial positions is proper.[25] Working women are routinely placed in auxiliary positions and assigned menial tasks and duties such as copying documents, mailing letters, and answering telephones.[26] Most working women are given no job security, low wages, and few promotional

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20. *See id.* (adding that Japanese women are averaging only 1.5 children according to the U.S. Census Bureau, and its present population of 126 million is expected to drop to 101 million in 2050). Of the estimated 101 million people in the Japanese population, about one third will be older than 65, a 17% increase from the year 2000. *Id.*

21. *See* Efron, *supra* note 8, at 167-68 (finding that sexual harassment against women in the workplace has caused a valuable resource to be lost).

22. *See Women's Working Conditions*, JAPAN ACCESS (Mar. 2001), *at* http://www.japanaccess.org (copy on file with *The Transnational Lawyer*) (indicating that in 1999, 40.7% of the total number of persons employed in all industries in Japan were women).

23. *See* Efron, *supra* note 8, at 169 (noting that the shortage of labor will only assist women in attaining a suitable workplace).

24. *See* Diana Helwig, Note, *Japan's Equal Employment Opportunity Act: A Five-Year Look at Its Effectiveness*, 9 B.U. INT'L L.J. 293, 295 (1991) (describing the Japanese working woman). While there has been a great deal change in Japan with more women working today than ever before, Japanese culture is still quite influential in the workplace. *Id. But see* Wolff E-mail, Oct. 7, 2002, *supra* note 10 (arguing that other scholars see the government, rational self-interest, or politics as the impetus in shaping Japan's laws).

25. *See* Efron, *supra* note 8, at 144 (mentioning that elders teach females to preserve the status quo by remaining silent about the problem).

26. *See* Helwig, *supra* note 24, at 295 (explaining that the majority of women who work in Japan are usually labeled as "Office Ladies"; *see also* Knapp, *supra* note 7, at 89 (discussing the type of discrimination women are subjected to as part of their role in the Japanese workforce).

opportunities.[27] In Japan, it is virtually impossible for women to reach a managerial position because employers fear women might gain too much power.[28] If a Japanese woman does attain a managerial position, she is generally required to perform traditional female tasks such as serving tea and arriving early to clean the office.[29] Because of their lack of status, Japanese women often perform these tasks without complaint.[30]

Moreover, Japanese culture promotes conformity with social passive norms and avoids confrontation with others.[31] This culture, derived from the ancient Confucian philosophy, places great importance on maintaining group *wa* ("harmony").[32] Working in groups and fostering non-confrontational relationships is essential to the creation of a harmonious environment.[33] Under this belief, an individual's non-compliance with the culture's societal or employment norms invites shame and embarrassment.[34]

Because Japan's culture emphasizes conformity and fails to acknowledge the equality of female employees, Japanese women usually avoid filing a claim when they have been sexually harassed.[35] The Japanese believe that filing a lawsuit is "the issuance of a public challenge and provoking a quarrel," which is contrary to the idea of creating a harmonious environment.[36] The Japanese judicial system is

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27. *See* Helen A. Goff, Note, *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, 1153 (1995) (noting that the overwhelming number of females employed in Japan are placed into non-core clerical positions).

28. *See id.* at 1154 (indicating that those women who gain a higher position will advance more slowly than their male counterparts).

29. *See id.* (adding that the hiring process breeds discrimination because women are evaluated on appearance and non-qualitative criteria). Such criteria might include whether the female applicant has a boyfriend or is a virgin. *Id.* at 1154 n.70.

30. *See id.* at 1152 (suggesting that Japanese culture confines women to a specific prototype where they are forced to refrain from expressing anger or frustration about their mistreatment).

31. *See* Efron, *supra* note 8, at 144 (discussing the development of Japanese culture and how Japanese society still conforms to traditional Confucius principles); *see also* Goff, *supra* note 27, at 1151-53 (emphasizing the difficulties Japanese women encounter when seeking equality within society). Japanese culture places great importance on keeping harmony in personal relationships. *Id.*

32. *See* Efron, *supra* note 8, at 144-45 (talking about the beginnings of Japanese society and the effect that Confucianism has on the business and the legal environment of Japan).

33. *See* Goff, *supra* note 27, at 1152 (articulating that Japanese society encourages individuals to make choices that maximize harmony among his peers).

34. *See* Efron, *supra* note 8, at 144-45 (noting that victims of sexual harassment are often dissuaded from bringing their claim for fear that it would result in disharmony).

35. *See* Leon Wolff, Sexual Harassment Law in Japan 1, 5 (Jan. 7, 2002) (unpublished manuscript, copy on file with *The Transnational Lawyer*) (noting that Japanese women would sexually endure sexually harassing acts including requested dates, unwanted touching, and the placement of pornographic photographs in their office desk drawers).

36. *See* John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. OF JAPANESE STUD. 359 (1978), *reprinted in* JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS 118 (Curtis J. Milhaupt et al. eds., 2001) (describing the Japanese as an unusual and deeply rooted culture that prefers mediated settlements of private disputes). Also noting that statistics indicate there are approximately half a million lawyers in the United States compared to approximately 10,000 lawyers in Japan, and Japan has half the population of the United States. *Id. But see* Wolff E-mail, Oct. 7, 2002, *supra* note 10 (suggesting that women might feel embarrassed to bring suit, fear a loss of position, and feel powerless to overcome a predominately male corporate culture).

consistent with its culture, often requiring parties to first attempt alternative dispute resolution before filing a suit.[37] Thus, an employee will utilize mediation and alternative dispute resolution prior to seeking judicial intervention in sexual harassment claims.[38]

Throughout the latter part of the Twentieth Century, Japanese workplaces attempted to address sexual harassment complaints without disrupting the culture.[39] New laws, including the New EEOL, have been embraced with hopes that they will provide the necessary incentive for Japanese female employees to combat sexual harassment.[40] These statutes and laws are essential because employees continue to rely on them for relief from sexual harassment.

III. LEGAL BACKGROUND

While American judicial decisions interpret Title VII of the Civil Rights Act of 1964 to include sexual harassment[41] and recognize a cause of action for an aggrieved employee to bring suit, Japanese courts have not interpreted existing discrimination law in the same way. Sexual harassment is a concept that has only recently evolved in Japan. International pressure persuaded the Japanese government to give female employees greater protection against discrimination.[42] The Old EEOL was the Japanese government's attempt to do this. Still, courts have never relied on the Old EEOL as a basis for finding sexual harassment liability because the statute focused primarily on sex discrimination[43] and did not explicitly address sexual harassment as a form of discrimination.[44]

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37. *See* Efron, *supra* note 8, at 145 (finding that conflicts in Japan are often resolved without courts or lawyers); *see also* Steve Lohr, *Tokyo Air Crash: Why Japanese Do Not Sue*, N.Y. TIMES, March 10, 1982, *reprinted in* JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS 108 (Curtis J. Milhaupt et al. eds., 2001) (summarizing the facts of the crash of Japanese Air Lines flight DC-8, which plunged into Tokyo Bay on the morning of February 9, 1982, killing all 24 passengers). As of March 1982, not one relative of any of the deceased passengers had sued Japan Air Lines. *Id.*

38. *See* Goff, *supra* note 27, at 1152 (stating that especially for Japanese women, society desires that choices be made to maximize harmony, which might include deferring to others).

39. *See* Fan, *supra* note 6, at 110 (noting that working women in Japan face sex discrimination obstacles in the workplace). There must be a change to the current laws of Japan. *Id.*

40. *See* Efron, *supra* note 8, at 162 (explaining that because of the tougher provisions of the New EEOL, many female workers are pleased).

41. *See* Civil Rights Act of 1964 tit. 7, 42 U.S.C. §2000(e) (1994) (stating that employers may not discriminate against "individuals with regard to compensation, terms, conditions or privileges of employment, because of the individual's race, color, religion, sex, or national origin"); *see also* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (interpreting 42 U.S.C. § 2000(e) as the statute defining "sexual harassment").

42. *See* Knapp, *supra* note 7, at 108-09 (explaining the push behind the creation of the Old EEOL and its history).

43. *Id.* at 89. Common forms of sex discrimination in Japan include the following: "1) hiring based on a women's age, physical appearance, and ability to commute from their parents' homes; 2) assigning women to short-term, supplementary chores; 3) paying women lower wages; 4) limiting fringe benefits; 5) restricting promotions; and 6) requiring retirement upon marriage." *Id.*

44. *See* Fan, *supra* note 6, at 127 (stating that courts rely on the Civil Code rather than the Old EEOL to find liability for sexual harassment).

Since the Old EEOL failed to address or even recognize sexual harassment, courts turned to the Japanese Civil Code and case precedent as its primary basis for granting relief from sexual harassment.[45] The Japanese Civil Code gives sexual harassment victims the right to sue under tort and contract theories.[46] However, the Japanese judiciary has not uniformly adopted this approach to combat sexual harassment.[47] Thus, the New EEOL was an attempt by the Japanese government to bring about consistency within the judicial system in establishing a right to be protected from sexual harassment.

A. *Japan's Old Equal Employment Opportunity Law: The Failure to Address Sexual Harassment*

The Old EEOL resulted from international pressure on the Japanese government to acknowledge the importance of treating women equally in the workplace.[48] In an attempt to prove its social standing in the international community, the Japanese government signed the United Nations Convention on the Elimination of All Forms of Discrimination Against Women in 1980.[49] However, the Ministry of Labour did not submit its proposed Equal Employment Opportunity Bill to the Diet[50] for review until 1984.[51] A debate over the new bill ensued between feminists who wanted greater protection and employers who believed that passing the bill would be inconsistent with the harmony of Japan.[52] On May 17, 1985, the Diet passed the bill, and on June 25, 1985, the Japanese government ratified the Convention.[53] Unlike any previous act, the Old EEOL

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45. *See* Carl F. Goodman, *The Somewhat Less Reluctant Litigant: Japan's Changing View Towards Civil Litigation*, 32 LAW & POL'Y INT'L BUS. 769, 772-73 (2001) (explaining that the Japanese government believes it is the appropriate enforcer of legal norms and will not typically draft statutes creating private rights of action for citizens). Even when courts allow private rights of action, the Japanese bureaucracy is likely to close off that litigation avenue in favor of government control. *Id.* at 775.

46. *See* Ryuichi Yamakawa, *We've Only Just Begun: The Law of Sexual Harassment in Japan*, 22 HASTINGS INT'L & COMP. L. REV. 523, 532-41 (1999) (comparing contract and tort remedies in sexual harassment cases).

47. *See infra* Part III.B.1 (illustrating the inconsistencies of Japanese court decisions based on the Civil Code).

48. *See* Knapp, *supra* note 7, at 86-89 (explaining the origins and development of the EEOL); *see also* Efron, *supra* note 8, at 165 (commenting that Japan pledged to take action against the discrimination of women as a response to pressures by the international community); *see also* Fan, *supra* note 6, at 114 (stating that the international focus on women's issues helped bring light to the plight of female Japanese workers).

49. *See* Knapp, *supra* note 7, at 105-06 (emphasizing that the United Nations greatly influenced Japan in reforming its discrimination laws). After the initial convention in 1975, the Ministry of Labor announced a five-year plan to eliminate gender discrimination. *Id.* This led up to the signing of the U.N.'s Convention in 1980. *Id.*

50. The Diet is short for "The Japanese National Diet," which is a bicameral legislature of popularly elected officials. Efron, *supra* note 8, at 140 n.43. The Diet is the highest and only law-making body in Japan. *Id.*

51. Knapp, *supra* note 7, at 85-86.

52. *See id.* at 107 (explaining that employers wanted to keep their sense of tradition within the workplace and felt that the bill would attack the postwar prosperity that Japan has enjoyed). On the other hand, the feminists believed that they deserved more rights than the original proposal was giving. *Id.*

53. *See id.* (noting that the Diet waited for the last possible session before recess to pass the bill).

specifically addressed equal opportunity and the treatment of women in the workplace.[54]

1. A Closer Look at the Old EEOL

While the Old EEOL recognized, for the first time, the rights of female employees not to tolerate sex discrimination, the statute failed to provide a specific provision prohibiting sexual harassment. Critics argued that the bill was passed as a "compromise between the pressure to comply with the Convention and the unwillingness of the business community to concede anything which might affect industrial productivity and profit."[55] Others attributed the passage of the Old EEOL to international social pressure, but felt that in *tatemae* ("the desired appearance of things"), the Japanese government modified its traditional practices on the surface, and in *hone* ("the inside belief"), Japan refused to accept the Old EEOL.[56]

The framework of the Old EEOL had two components, namely *doryoku* ("suggested") and *kinshi* ("required").[57] In other words, the Old EEOL either suggested or required that an employer comply with the Articles depending on the circumstances.[58] For example, Articles Seven[59] and Eight[60] of the Old EEOL were *doryoku*; and therefore, suggested that employers refrain from discriminating against female employees with regard to job advertisement, hiring, placement, and promotion.[61] On the other hand, Article Eleven[62] of the Old EEOL was *kinshi*; and therefore, required employers to refrain from discrimination against female employees on the basis of sex in regard to retirement age, discharge, and voluntary resignation.[63]

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54. *See id.* at 108-09 (speaking specifically about the outcome of the Old EEOL and its provisions).

55. *See id.* at 108-09 nn.210-13 (restating Articles Eight through Eleven of the Old EEOL). Each of the individual articles states that an employer either "shall endeavor" to treat women workers equally or "shall not" discriminate against a female employee. *Id.*

56. *See id.* at 108 (suggesting that Japan conformed to international pressure for it to provide equality to female employees, but within its borders, Japan believed it would allow company control over discriminatory practices).

57. *See* Helwig, *supra* note 24, at 303 (defining *doryuku* and *kinshi*).

58. *See id.* (explaining that under *doryoku*, the employer must use his best efforts "to avoid discrimination between female and male workers").

59. *See* Knapp, *supra* note 7, at 108 n.209 (restating Article Seven of the Old EEOL as "with regard to the recruitment and hiring of workers, employers shall endeavor to give women equal opportunity with men").

60. *See id.* at 108 n.210 (restating Article Eight as "with regard to the assignment and promotion of workers, employers shall endeavor to treat women equally with men").

61. Helwig, *supra* note 24, at 303.

62. *See* Knapp, *supra* note 7, at 109 n.212 (restating Article Eleven as "with regard to loans for housing and other similar fringe benefits as provided by ordinance of the Ministry of Labour, employers shall not discriminate against a woman worker as compared with a man by reason of her being a woman").

63. Helwig, *supra* note 24, at 303.

Yet, the Old EEOL had no provision, *doryoku* or *kinshi*, addressing sexual harassment in the workplace.[64] Increased awareness among Japanese females as to the pervasive nature of sexual harassment is the only likely influence the Old EEOL had on sexual harassment.[65] No criminal sanctions or civil causes of action were mandated under the Old EEOL, and Japanese female employees were forced to rely on dispute resolution as the only means for resolving sexual harassment claims.[66] However, employees could only mediate sexual harassment claims with the consent of the harassing employer.[67] Thus, employees lacked a true remedy against sexual harassment because the Old EEOL did not address sexual harassment and mediation often failed due to the harassing employer's refusal to give consent.

As a result of the lack of provisions addressing sexual harassment under the Old EEOL, many employees felt betrayed by the Ministry of Labour.[68] Employees believed the statute was the Japanese government's fictitious devotion to join developing societies in the fight against sexual harassment.[69] Because the Old EEOL offered no incentive for employees to report sexual harassment, scholars urged the Ministry of Labour and the Japanese government to adopt provisions sanctioning employers for sexual harassment.[70] Furthermore, employees were often denied the opportunity for any future benefits or promotions when they complained.[71] Overall, the majority of scholars agreed that the Old EEOL failed to meet its objectives; and consequently, changes to the law were essential to combat sexual harassment in the workplace.[72] One of the shortcomings of the Old EEOL was the development of the two-track hiring system in Japan.[73]

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64. *See* Fan, *supra* note 6, at 126 (reiterating that the Old EEOL does not explicitly prohibit "sexual harassment").

65. *See* Robert Larsen, *Ryousai Kenbo Revisited: The Future of Gender Equality in Japan After the 1997 Equal Employment Opportunity Law*, 24 HASTINGS INT'L & COMP. L. REV. 189, 192 (2001) (mentioning that many believed that the Old EEOL was a nice compromise to the Japanese culture's social, business, and legal traditions).

66. *See* Knapp, *supra* note 7, at 118 (explaining that dispute resolution is a remedy available for workers who have been harassed or discriminated against); *see also* Helwig, *supra* note 24, at 305-06 (stating that the Ministry of Labour enforced the *doryoku* and *kinshi* duties of the Old EEOL through bureaucratic administrative agencies designated in the Old EEOL).

67. *See* Knapp, *supra* note 7, at 118-19 (noting that if the Women's and Young Workers' Office was able to get the consent of both parties, then it could refer the dispute over to the Equal Opportunity Mediation Commission for mediation).

68. *See* Knapp, *supra* note 7, at 119 (discussing the lack of reliable information provided by the Ministry of Labour to the public). The only guidance that was given was a pamphlet entitled Kinto-ho: Konna Bai wa? (The EEOL: What Would Happen in a Case Like This?). *Id.* The pamphlet was separated into two parts as follows: examples of five categories of disputes (recruitment and hiring, job assignment, vocational training, fringe benefits, and compulsory retirement) and a summary of six disputes handled by a division of the Ministry of Labour. *Id.* The document, however, does not address the most important issues of what will happen when employers are unwilling to cooperate in an investigation and what might happen to employers who continue their discriminatory practices even after the issuance of guidance. *Id.*

69. *Id.*

70. *See* Helwig, *supra* note 24, at 315 (arguing that the Old EEOL should have prohibited sexual harassment); *see also* Efron, *supra* note 8, at 160 (commenting that the Old EEOL is ineffective and fails to protect women from discrimination).

71. *See* Helwig, *supra* note 24, at 310 (indicating that there is a trend that Japanese women would rather not complain of discrimination because of the likelihood that negative repercussions would occur).

72. Linda N. Edwards, *The Status of Women in Japan: Has the Equal Employment Opportunity Law*

2. The Two-Track System: A Shortcoming of the Old EEOL

Following the adoption of the Old EEOL, the two-track hiring system was an unintended result that exposed the weakness of the statute.[74] The two-track system consists of *ippan-shoku* ("standard/general track") and *sogo-shoku* ("management track").[75] *Sogo-shoku* is only available to employees who fit certain management criteria,[76] while *ippan-shoku* is available to all other employees.[77] Those on *sogo-shoku* perform duties relating to planning, development, and negotiations.[78] *Ippan-shoku* employees have duties such as photocopying, serving tea, and performing clerical work.[79] Employee benefits differed significantly between the two tracks.[80]

Japanese companies believed that the implementation of the two-track system would satisfy the requirements of the Old EEOL while maintaining the integrity of a male-dominated company.[81] Employers were able to hide discriminatory practices and perpetuate sexual harassment by setting standards for each track that kept men and women divided.[82] Statistics show a stark difference between

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Made a Difference?, reprinted in JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS 415, 420 (Curtis J. Milhaupt et al. eds., 2001) (quoting an investigator of the Administration Inspection Bureau of the Management and Coordination Agency of the Japanese government that the Old EEOL was "insufficient" and needed "much improvement"); *see also* Knapp, *supra* note 7, at 136 (summing up the effects of the Old EEOL in the workplace). One scholar believed that the non-coercive nature of the Old EEOL was the change Japan needed. *Id.* However, another scholar felt that a forceful approach was needed for Japanese women to break the patriarchy that exists within Japanese companies. *Id.* Knapp concludes that the latter approach is necessary to break the severity and pervasiveness of gender bias in Japanese society. *Id.*

73. *See* Knapp, *supra* note 7, at 121 (discussing the adoption of the two-track hiring policy). Women have difficulty entering the management track, but men have the ability to automatically enter it. *Id.*

74. *See* Fan, *supra* note 6, at 123-25 (explaining that the two-track hiring system was a result of the Old EEOL, and it perpetuated discrimination throughout local businesses); *see also* Knapp, *supra* note 7, at 121-24 (pointing out the already defective Old EEOL and the resulting two-track system); *see also* Hiroko Hayashi, *Sexual Harassment in the Workplace and Equal Opportunity Legislation*, 69 ST. JOHN'S L. REV. 37, 39-44 (1995) (mentioning that the Old EEOL has not evolved from its enactment because of the two-track hiring system).

75. *See* Fan, *supra* note 6, at 123 (distinguishing between the two tracks of the system). Many employers, banks, and large firms adopted the two-track system in order to illustrate their compliance with the Old EEOL. *Id.*

76. *See* Knapp, *supra* note 7, at 91 (explaining that most management track qualifications included a deep sense of loyalty to the company and a great deal of overtime work). Women were not seen as possessing management qualifications because employers believed that they would not have the same sense of loyalty and commitment to stay with a company on a long term basis. *See* Robbi Louise Miller, *Women's Job Hunting in the "Ice Age": Frozen Opportunities in Japan*, 13 WIS. WOMEN'S L.J. 223, 231 (1998).

77. *See* Hayashi, *supra* note 94, at 39 (stating that the two tracks differ substantially with regard to pay and benefits).

78. *See id.* (acknowledging that *sogo-shoku* gives more rigorous standards such as long work hours and numerous job transfers).

79. *Id.*

80. *See* Knapp, *supra* note 7, at 122 (giving an example of a person who is on the management track earning 8.5 million yen per year (approximately $85,000) and a person on the general track earning four million yen per year (approximately $40,000) in the 1980s).

81. *See* Martha J. Baker, *The Different Voice: Japanese Norms of Consensus and "Cultural" Feminism*, 16 UCLA PAC. BASIN L.J. 133, 145-46 (1997) (explaining that the two-track system was used to get around the Old EEOL).

82. *See* Larsen, *supra* note 65, at 210 (noting that early commentators believed that the two-track system offered more opportunities for women than ever before to advance in their position).

the number of men and women placed on *sogo-shoku*, with men substantially outnumbering women.[83] This disparity is a result of women who cannot qualify for *sogo-shoku*, and who are essentially forced to accept *ippan-shoku*.[84] Female employees have a difficult time entering *sogo-shoku* due to its strict requirements. In most companies, women must show their willingness to "choose a career to the exclusion of a family," which many refuse to do.[85] The reality of the two-track system placed female employees at a distinct disadvantage. For example, in order for a woman to qualify for *sogo-shoku*, she and not her male counterpart had to satisfy one or more of the following requirements: graduate from a prestigious university, demonstrate fluency in a foreign language, and take competitive examinations exclusively for women.[86] As a result, the two-track system placed female employees at a greater disadvantage than male employees and caused female employees to accept positions of inferiority.[87]

The two-track system perpetuated sexual harassment in the workplace by causing female employees to feel inferior to male employees.[88] The result is the inability of female employees, given their lack of position, to complain or speak negatively about harassing male employees. Since the Old EEOL failed to eradicate and may have even facilitated the existence of sexual harassment in the workplace, employees turned to the Japanese Civil Code to combat sexual harassment.

B. The Japanese Civil Code

An employee's greatest tool to receive compensation for sexual harassment may be the Japanese Civil Code. Because the Old EEOL completely failed to acknowledge sexual harassment, courts have interpreted the Civil Code as a basis

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83. *See* Knapp, *supra* note 7, at 123-24 (quoting a statistic by the Women's Occupations Foundation (Ministry of Labour division) in June 1990, finding that 3.7% of women, as opposed to 99% of men, were on the management track). Another statistic given was a list of company names, followed by the number of female university graduates hired in 1987, with the number actually accepted to the management track in parentheses: Taiyo Kobe Bank 72 (2); Fuji Bank 230 (30); Sanwa Bank 91 (10); Sumitomo Bank 55 (19); Dai-ichi Life Insurance Company 93 (1); Tokyo Marine and Fire insurance Company 94 (4); Taisho Marine and fire Insurance Company 49 (9); Sumitomo Trading Company 140 (0); Mitsubishi Trading Company 44 (2); Marubeni Trading Company 105 (1). *See id.*

84. *See id.* (noting that most women are engaged in menial tasks on *ippan-shoku*).

85. *See* Fan, *supra* note 6, at 124-25 (stating that many working women find conflict in their lives between the long hours that are required in the office and the strong traditional roles women are forced to take on at home). Many women experience failed marriages or the inability to continue on the management track. *Id.* Other women have chosen to postpone childbirth and marriage for a career. *Id.*

86. *See* Knapp, *supra* note 7, at 122 (finding that these factors make it extremely difficult for women to pursue the management track).

87. *See* Fan, *supra* note 6, at 123 (mentioning that the two-track system failed to complete its objective and actually perpetuated sex discrimination).

88. *See* Nancy Patterson, *No More Naki-Neiri?*, 34 HARV. INT'L L.J. 206, 210 (1993) (discussing the pressures and concerns that male workers have about their female counterparts and a possible reason why male workers sexually harass female workers). Another reason advanced is that women workers who are accepted on the management track might threaten the seniority system because women will likely require maternity leave and a flexible schedule to care for their children. *Id.*

for holding employers liable for sexual harassment.[89] Article 90[90] of the Civil Code is one theory used by employees as a basis for filing sexual harassment claims.

Article 90 of the Japanese Civil Code grants private employees access to a limited judicial remedy for sexual harassment claims.[91] Article 90 states that "[a legal] act which has for its object such matters as are contrary to public policy or good morals is null and void."[92] Although courts typically apply Article 90 to traditional sex discrimination cases,[93] theoretically, courts may apply it to *quid pro quo* sexual harassment cases. *Quid pro quo* sexual harassment is defined as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" used in exchange for favorable treatment.[94] Certain acts labeled *kinshi* under the Old EEOL, namely discharge or training, may constitute a "legal act" under Article 90 because the law requires conformance.[95] *Doryoku*, on the other hand, is not considered a legal act because the law only suggests conformance. In a *quid pro quo* context, a court may hold that the legal act was done in exchange for sexual favors.[96] These acts may include *kinshi* conduct such as a promise not to dismiss or transfer an employee. Therefore, pursuant to Article 90, the legal act may be a violation of "public order and morals" and thus be "null and void."[97] In finding the legal act null and void, the court may allow victims to recover tort or contract remedies.[98] However, because employees bring more hostile environment sexual harassment as opposed to *quid pro quo* suits, they rely on Articles 709 and 715 of the Japanese Civil Code as a basis for the suit.[99]

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89. *See* Yamakawa, *supra* note 46, at 531 (stating that the Japanese Civil Code provides a basis for judicial relief of a sexual harassment claim).

90. MINPŌ, art. 90.

91. *See* Knapp, *supra* note 7, at 98-99 (suggesting that Article 90 might apply in a range of sex discrimination cases).

92. MINPŌ, art. 90.

93. *See* Fan, *supra* note 6, at 113 n.58 (citing *Sumitomo Cement*, 17 ROSHU 1407 (1966) as the precedent for using Article 90 in sex discrimination cases). In *Sumitomo*, the plaintiff was fired for refusing to retire after her marriage, in violation of the company's policy of mandatory retirement. *Id.* The employee was able to sue and collect monetary damages. *Id.*; *see also* Yamakawa, *supra* note 46, at 531-32 (suggesting that Article 90 may be used to establish a claim for *quid pro quo* sexual harassment, but is limited to that purpose). *But see* Wolff E-mail, Oct. 7, 2002, *supra* note 10 (arguing that from a practical view, Article 90 has not been used as a basis for *quid pro quo* sexual harassment).

94. *See* Hayashi, *supra* note 74, at 58 (noting that *quid pro quo* harassment happens when a superior offers a subordinate a raise or promotion in exchange for sexual favors, or a superior threatens a subordinate with dismissal or transfer if sexual requests are denied).

95. Yamakawa, *supra* note 46, at 532.

96. *Id.*

97. *See id.* (indicating that tort remedies are also available if the "legal act" constitutes a tort). In some cases, back pay may be awarded. *Id.*

98. *Id.*

99. *See* Efron, *supra* note 8, at 155 (stating that because of judicial activism, Civil Code Articles 709 and 715 provide redress for sexual harassment).

Article 709 specifically permits a cause of action in tort. It provides that "any person who intentionally or with fault infringes upon another person's rights shall compensate for the damages."[100] Case law interprets the "right" under Article 709 as a "legally protected interest" or an "interest that is considered to need protection under tort law."[101] As such, courts construe Article 709 as granting an employee the legally protected interest to work in a non-hostile environment.[102] Alternatively, courts find that Article 709 directly prohibits hostile environment sexual harassment, which is defined as "conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[103] Since Article 709 only allows an employee to sue an employer individually, employees look to Article 715 as a basis for vicarious liability.[104]

Article 715 gives sexual harassment victims the right to sue employers and hold them vicariously liable for their employee's misconduct.[105] The provision states that "an employer is liable [in] tort [for] its employee's illegal conduct if such conduct is carried out in the course of implementing his [or] her duties for the employer's business."[106] *Shizuoka Sekuhara*[107] was the first in a line of cases relying on Articles 709 and 715 to rule in favor of Japanese female employees in sexual harassment suits.

On December 20, 1990, Judge Akimoto made the first judicial acknowledgment of sexual harassment under the Japanese Civil Code.[108] While working for a hotel, the employee's supervisor harassed her with unwanted touching and kissing.[109] After rumors spread about the employee having an affair with the supervisor, she resigned and instituted a lawsuit against the supervisor.[110] In addition to recovering compensation for the loss of her job, she sought non-pecuniary damages for loss of

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100. *See* Hayashi, *supra* note 74, at 49 (translating MINPŌ, art. 709).

101. *See* Yamakawa, *supra* note 46, at 532-33 (discussing Article 709 in the context of hostile environment sexual harassment).

102. *See id.* at 535 (discussing the holding of a Japanese case that defined what a legally protected interest constitutes in regard to sexual harassment).

103. *See* Hayashi, *supra* note 94, at 58 (explaining that employers and employees create hostile environments by engaging in such acts as unwanted touching, the display of nude posters, and the use of obscene language).

104. *See* Patterson, *supra* note 88, at 214 (suggesting that courts in Japan have recognized *quid pro quo* harassment, but only when the defendant's conduct is egregious).

105. *See* Fan, *supra* note 6, at 113 (acknowledging that in the 1980s, plaintiffs began bringing sexual harassment suits under Articles 709 and 715 of the Civil Code).

106. *See id.* (translating MINPŌ art. 715).

107. *See* Yamakawa, *supra* note 46, at 533 n.42 (noting that in Japan, names of the parties are not used in order to maintain anonymity; instead, the name of the city in which the court and trial was located is used. *Id.*; *see also* Fan, *supra* note 6, at 127 n.157 (citing *Shizuoka Sekuhara* as 745 HANREI TAIMUZU 238 (Shizuoka Dist. Ct., Dec. 20, 1990)). The court recognized sexual harassment as an "unlawful act" under Article 709 of the Civil Code. *Id.* at 127.

108. Fan, *supra* note 6, at 127. *Shizuoka Sekuhara* is regarded as weak authority because the defendant did not appear in court to challenge the plaintiff's claims. Wolff E-mail, Oct. 7, 2002, *supra* note 10.

109. *See id.* (adding that the supervisor defendant told the female employee that he wanted to "see her naked").

110. *See id.* (mentioning that the hotel was not sued).

appetite, psychological anguish, and insomnia.[111] The court found the defendant supervisor liable under Article 709 of the Civil Code for treating the plaintiff as a "mere object of pleasure."[112]

Only one year after *Shizuoka Sekuhara* was decided, a Japanese District Court, *Fukuoka Sekuhara*,[113] handed down another unprecedented decision. *Fukuoka Sekuhara* was the first case to recognize an employee's right to work in a non-hostile environment.[114] The plaintiff worked at a publishing company where she and a male employee were both editors.[115] At one point, the male editor was paid three times the salary of the plaintiff.[116] However, the plaintiff's salary was subsequently increased while the male's salary was decreased.[117] Upset, the male editor spread rumors to co-workers and customers about the plaintiff's sex life.[118] The plaintiff complained to both the President and the Chief Executive Officer of the company about the abusive conduct, but was informed that the dispute concerned only the female and male editor, and not the company.[119] Company officials told the plaintiff she would be forced to resign if she did not resolve the dispute.[120] Finally, after several weeks, the company's officials asked her not to return to work.[121] As a result, the plaintiff filed a sexual harassment suit against the male editor individually and against the publishing company under the theory of vicarious liability.[122]

The court ruled for the plaintiff, awarding her 1,650,000 yen (approximately $15,000 dollars) in damages, and found that the plaintiff had a personal right to work in a non-hostile work environment.[123] Specifically, the court held that the

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111. *Id.*

112. *See id.* (noting that the court awarded the employee $10,000 for intentional infliction of emotional distress and $1000 for attorney fees).

113. *See* Kōno v. Company X, 607 RŌDŌ HANREI 6 (Fukuoka Dist. Ct., Apr. 16, 1992), *translated in* JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS 118 (Curtis J. Milhaupt et al. eds., 2001) (providing a translation for the *Fukuoka Sekuhara* case).

114. *See* Patterson, *supra* note 88, at 216-19 (restating the facts and legal consequences of the *Fukuoka Sekuhara* decision on Japanese employment law). This case arguably had little precedential value to the outcome of other cases because it was decided in Fukuoka District Court, not a higher Japanese court. *Id.* at 214. However, it was used as persuasive precedent for other district courts to hear sexual harassment cases. *Id.*

115. *See* Hayashi, *supra* note 94, at 46-49 (summarizing the facts of the *Fukuoka Sekuhara* decision).

116. *Id.*

117. *Id.*

118. *See id.* at 47 (including rumors that the female editor was involved in many love affairs, drank excessively late at night, suffered from sexual dysfunctions, and won an art contest in which she submitted a pornographic picture).

119. *Id.*

120. *Id.* at 48-49 (noting that the male editor was only given a three day suspension and a 50,000 yen ($450 dollar) deduction from his bonus for his actions).

121. *See* Patterson, *supra* note 88, at 216-17 (acknowledging that the plaintiff sought other remedies after her employment with the publishing company ended). The plaintiff went to the Prefecutral Employment Standards Office to claim wrongful discharge, but was declared ineligible because she was receiving severance pay from the company. *Id.* She also went to Summary Court to file a claim, but was told she was at fault for the problem and should feel ashamed of herself. *Id.*

122. *Id.*

123. *See* Hayashi, *supra* note 94, at 50 (emphasizing the importance of the court's finding that employees have personal rights and that other companies can be liable for permitting a hostile work

comments made to plaintiff's co-workers and customers concerning her sex life made her workplace intolerable, giving rise to the male editor's individual liability under Article 709.[124] The court reasoned that the company failed to take proper measures to improve the plaintiff's work environment.[125] Furthermore, the court held the publishing company vicariously liable for the President's and Chief Executive Officer's negligent failure to protect the plaintiff's personal rights under Article 715.[126] Finally, the court recognized that an employer has a duty to provide a conducive working environment; liability may attach if the employer fails to take appropriate steps to provide a harassment free environment.[127]

Although not explicitly, the *Fukuoka Sekuhara* court recognized for the first time two categories of sexual harassment, *daisho* ("*quid pro quo*") and *kankyo* ("hostile environment"). Most sexual harassment occurring in Japan is hostile environment sexual harassment, similar to the conduct underlying the *Fukuoka Sekuhara* decision.[128] Less than four years later, *Osaka Sekuhara*[129] built upon the *Fukuoka Sekuhara* holding.

Osaka Sekuhara affirmed the impact of *Fukuoka Sekuhara* by re-emphasizing the right of female employees to work in a non-hostile environment.[130] In *Osaka Sekuhara*, the President of a freight company made inquiries into the sexual behavior and virginity of an eighteen-year old female employee.[131] Specifically, the President said he "wanted" the female employee and would bring more money on the next day of work to pay for a night at a hotel with her.[132] The employee began to develop headaches and nausea due to stress, and she was unable to return to work.[133] She then filed a sexual harassment suit under the Japanese Civil Code.[134]

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environment to persist). *Fukuoka Sekuhara* was the first case to recognize the right of an employee to work in a non-hostile environment. *Id.*

124. *See* Yamakawa, *supra* note 46, at 534 (explaining the importance of the *Fukuoka Sekuhara* decision).

125. *See id.* (answering the question of whether a company can be liable for the unlawful acts of its administrative officers in the affirmative).

126. *See id.* (explaining that the third and fourth points of the *Fukuoka Sekuhara* decision involving the passive attitudes that the company's officers had in dealing with the dispute).

127. *See id.* at 534-35 (suggesting that under Article 709, an employee may be held individually liable; and under Article 715, a company might be vicariously liable for an employee's conduct). *Id.* Also, the company must be prompt in its investigation of the matter in order to avoid a worst-case scenario of harassment. *Id.*

128. *See* Hayashi, *supra* note 94, at 59 (noting that hiring and firing are usually done by corporate executives). Therefore, lower level managers usually do not have the ability to cause *quid pro quo* sexual harassment. *Id.*

129. 893 HANREI TAIMUZU 203 (Osaka Dist. Ct., Aug. 29, 1995).

130. *See* Fan, *supra* note 6, at 130 (asserting that *Osaka Sekuhara* establishes a woman's right to a non-hostile working environment); *see also* Leon Wolff, *Eastern Twists on Western Concepts: Equality Jurisprudence and Sexual Harassment in Japan*, 5 PAC. RIM. L. & POL'Y J. 509, 525-26 (1996) (explaining that the result of *Fukuoka Sekuhara* was similar to the result in this case because the court found unlawful acts that infringed upon the personal rights of the plaintiff).

131. *See* Wolff, *supra* note 130, at 526 (noting the similarities of the *Fukuoka Sekuhara* outcome and the *Osaka Sekuhara* judgment).

132. *Id.*

133. *See id.* (indicating that the plaintiff resigned after only four months with the company).

134. *Id.*

Judge Tsuji, the presiding judge, held the President liable under Article 709 of the Civil Code.[135] The court found that the harassment was against the female employee's will and violated her right "to be respected as a woman."[136] This ruling reestablished the precedent created by *Fukuoka Sekuhara*: a woman has the right to work in a non-hostile environment.[137] However, subsequent cases have sporadically followed the decision of *Osaka Sekuhara,* rendering favorable and sometimes not so favorable decisions based on the Japanese Civil Code.

1. The State of Japanese Sexual Harassment Case Law

While *Fukuoka Sekuhara* held that an employee has a right to work in a non-hostile environment, *Fukuoka Sekuhara* and its successors failed to explicitly define sexual harassment.[138] In addition, the decisions did not explain what an employer must do to meet his or her duty of care in establishing a non-hostile environment under the Civil Code.[139] The lack of standards and guidelines led to inconsistencies in court decisions.

For example, the courts in both the *Kyoto Sekuhara*[140] and the *Kanazawa Sekuhara*[141] held that failure to maintain a non-hostile work environment is a breach of contract under Japan's Civil Code and not a tort under Article 709.[142] In addition, some courts have ruled against female employees because they believe women should respond in a particular manner to incidents of sexual harassment.[143] In *Yokohama Sekuhara,*[144] the supervisor of a company hugged the female employee, inserted his hand under her skirt, and rubbed her breasts, hips, and abdomen.[145] The employee did not try to escape, but endured the assault for approximately twenty minutes.[146] The court decided that the employee's testimony was not credible because "no victim of such an intrusive attack as that described by

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135. *See id.* (holding that the defendant President deliberately tried to interfere with the plaintiff's well being through the use of sexually suggestive words and actions).

136. *See* Fan, *supra* note 6, at 129-30 (noting that the defendant was liable under Article 709 because he sexually harassed the plaintiff).

137. *Id.*

138. *See id.* at 52 (addressing the fact that the court did not explicitly state in its opinion the definition of sexual harassment). However, the Ministry of Labour has defined sexual harassment in its recent guidelines as a "communication gap." *Id.* The Council on Female Employment Management and Communications Gaps was established to research sexual harassment in companies, and it characterized sexual harassment as "unpleasant speech or conduct" by sexual references or connotations that create a difficult working environment. *Id.*

139. *See* Patterson, *supra* note 88, at 219 (asking whether employers would be liable for less serious conduct such as anonymous harmful rumors in the workplace or harassment at work by a client or business contact).

140. 716 RŌDŌ HANREI 49 (Kyoto Dist. Ct., Apr. 17, 1997).

141. 707 RŌDŌ HANREI 37 (Nagoya High Ct., Oct. 30, 1996).

142. *See* Wolff, *supra* note 35, at 37 (stating that the court invoked Article 44(1) of the Civil Code in order to find liability).

143. *See id.* at 32 (noting that earlier favorable court decisions have been compromised).

144. *See id.* at 32 n.93 (citing 670 RŌDŌ HANREI 20 (Yokohama Dist. Ct., May 24, 1995)).

145. *Id.* at 32.

146. *Id.*

the plaintiff would have submitted as quietly, for as long, and with as little physical reaction as the plaintiff said she did."[147]

In other lawsuits concerning sexual harassment, courts have awarded damages against the plaintiff for defaming the defendant with unsubstantiated allegations.[148] In *Central Shoes Sekuhara*,[149] a bookkeeper at a shoe manufacturer reported to management that the director had sexually harassed her.[150] The harassing behavior included the use of abusive language in front of other employees and the twice attempted rape of the bookkeeper.[151] The court found the allegations in her sexual harassment claim suspect and held her liable for bringing the claim.[152] Specifically, the bookkeeper was found liable for defamation and ordered to compensate the defendant 300,000 yen (approximately $2500 dollars) for the damage done to his reputation.[153]

These cases represent the inconsistency of current sexual harassment law in Japan.[154] Although the Japanese Civil Code is the primary vehicle to bring suits against employers for sexual harassment, cases such as *Central Shoes Sekuhara* illustrate the greater need for uniformity in sexual harassment law. The New EEOL attempts to bring about consistency by providing stricter standards and accountability for employers who sexually harass their female employees. The true benefit of the New EEOL is the greater understanding and awareness that the statute brings to Japanese employees, empowering them to combat sexual harassment.

IV. JAPAN'S NEW EEOL

The judiciary's inconsistency in addressing sexual harassment and its strong criticism of the Old EEOL prompted the Japanese government to take a closer look at the statute.[155] Japan's Council of Issues of Women submitted a proposal to amend the Old EEOL and remedy flaws pointed out by labor groups and scholars.[156] Labor representatives pushed for revision of the Old EEOL, asking

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147. *See id.* (commenting that Alison Wetherfield, an American attorney with extensive experience in sexual harassment litigation, concluded that the *Yokohama* Court was unfamiliar with the psychological reaction to physical assault known as "Rape Trauma Syndrome"). Other Japanese decisions have found similar judgments in favor of the defendant because the court believed the plaintiff did not act in a "natural way." *Id.*

148. *Id.* at 33.

149. 655 RŌDŌ HANREI 44 (Tokyo Dist. Ct., Apr. 11, 1994).

150. *See* Wolff, *supra* note 35, at 33 (explaining that when there is no concrete evidence to support a claim of sexual harassment, courts might find a plaintiff negligent for allowing a defendant to suffer an unlawful stain on his personal and professional reputation).

151. *Id.*

152. *Id.*

153. *Id.*

154. *See* Fan, *supra* note 6, at 131 (adding that sexual harassment litigation has only progressed to the district court level, except that *Osaka Sekuhara* advanced to the appellate level).

155. *See* Larsen, *supra* note 65, at 189 (explaining the provisions of the New EEOL and their effect on gender equality).

156. *See* Fan, *supra* note 6, at 133-34 (discussing the changes made to the Old EEOL and comparing it to the New EEOL); *see also* Larsen, *supra* note 65, at 213 (noting that the Council of Issues of Young Women

for greater punishment of companies practicing discrimination.[157] On the other side of the debate, company officials felt that any provision giving greater rights to workers, especially women, would hurt their economic success.[158] After this heated debate, the Diet amended the Old EEOL on June 11, 1997 and then adopted the amendments as the "New EEOL."[159] The New EEOL took effect on April 1, 1999.[160]

The New EEOL went further than the Old EEOL by allowing common discriminatory practices to be used as a basis for a *quid pro quo* sexual harassment claim. Specifically, discriminatory practices in hiring,[161] recruiting,[162] and promotion[163] based on gender that were *doryoku* under the Old EEOL were made *kinshi* under the New EEOL.[164] Because of this change, conduct that did not previously constitute a legal act under Article 90 of the Japanese Civil Code may now be recognized as such.[165] Thus, the New EEOL provisions may allow an employee to bring an action for *quid pro quo* sexual harassment against employers who use hiring, recruiting, or promotion practices in exchange for sexual favors.[166] Additionally, Articles 25(1)[167] and 26[168] of the New EEOL allow the Ministry of Labour to publish the names of companies who fail to follow the agency's "advice, guidance, and recommendations" regarding the discriminatory practices

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submitted a report calling for new legislation to combat sex discrimination). The report requested provisions to restrict women's working hours and remove overtime. *Id.*

157. *See* Larsen, *supra* note 65, at 213 (adding that labor representatives opposed removal of any provisions from the Old EEOL that might hurt the rights of female workers).

158. *See id.* (commenting that management favored the abolition of any more special privileges for women and frowned on any further constraint put upon women).

159. *See* Efron, *supra* note 8, at 161 (noting that the amendments were made in response to complaints concerning the ineffectiveness of the Old EEOL).

160. *Id.*

161. *See* New EEOL, *supra* note 12, at art. 5, *available at* http://natlex.ilo.org/txt/e99jpn01.htm ("With regard to the recruitment and hiring of workers, employers shall provide women equal opportunity with men.").

162. *Id.*

163. *Id.* at art. 6. "With regard to the assignment, promotion, and training of workers, employers shall not discriminate against a woman worker as compared with a man by reason of her being a woman." *Id.*

164. *See* Fan, *supra* note 6, at 134 (describing the New EEOL's effect on discriminatory practices). Under the New EEOL, companies are not permitted to use gender specific advertisements such as "waitresses wanted." *Id.*

165. *See* Yamakawa, *supra* note 46, at 551 (explaining that the provisions possibly making *quid pro quo* conduct null and void can be found in Articles 5 through 8 of the New EEOL). These provisions cover discrimination in recruitment, hiring, assignment, and promotion. *Id.*

166. *Id.*

167. New EEOL, *supra* note 12, at art. 25, no. 1, *available at* http://natlex.ilo.org/txt/e99jpn01.htm. "The Minister of Labour may, when he finds it necessary with respect to the enforcement of this Law, request reports of employers and give said employers advice, guidance, and recommendations." *Id.*

168. *Id.* at art. 26.

> Article 26. In the event that an employer is in violation of any of the provisions of Articles 5 through 8, and the Minister of Labour has given a recommendation based on the provisions of paragraph 1 or the preceding article, but the employer has not complied with it, the Minister of Labour may make a public announcement to that effect.

Id.

of hiring, recruiting, and promotion.[169] Although this is the only true sanction found within the New EEOL, the Japanese government has finally placed some responsibility on employers who violate the statute.[170]

With greater recognition of employees' rights, Article 13[171] of the New EEOL allows an aggrieved employee to request mediation with the Equal Opportunity Mediation Commission ("EOMC")[172] without the consent of the employer.[173] However, an employee must first seek guidance or advice from the Director of the Prefectural Women's and Young Workers' Office.[174] If the dispute cannot be resolved and mediation is deemed necessary, the EOMC will then intervene.[175] If an employer does not comply with the mediation or settlement terms of the EOMC, Article 26 allows the Ministry of Labour to publish the name of the violating company.[176]

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169. *See* Fan, *supra* note 6, at 134 (noting that the Ministry of Labour is required to publish the names of companies failing to comply with its administrative guidelines).

170. *See* Larsen, *supra* note 65, at 222 (commenting on the lack of sanctions in the Old EEOL). However, the New EEOL provides the ability of the Ministry of Labour to publish a violating company's name. *Id.*

171. New EEOL, *supra* note 12, at art. 13, no. 1, *available at* http://natlex.ilo.org/txt/e99jpn01.htm.

> Article 13. The Director of the prefectural Women's and Young Workers' Office shall refer to the Equal Opportunity Mediation Commission for Mediation a dispute provided for in paragraph 1 of the preceding Article (except for a dispute on matters provided for in Article 5) when either one or both of the Parties Concerned apply for Mediation and the Director considers Mediation necessary to settle said dispute.

Id.

172. The Equal Opportunity Mediation Commission will be established at each prefectural Women's and Young Workers' Office. *Id.* at art. 14, no. 1. The EOMC will be the primary body that conducts mediations. *Id.* at art. 14, no. 2. The EOMC will consist of three persons with experience and learning and will be selected and appointed by the Minster of Labour. *Id.* at art. 15.

173. *See* Fan, *supra* note 6, at 135 (pointing out that the Old EEOL's remedial provisions required the voluntary consent of the employer in order to begin mediation). Many employees did not even have the opportunity to choose mediation because companies automatically refused consent. *Id.*

174. The Women's and Young Workers' Office is an enforcement arm of the Ministry of Labour that addresses practices of personnel management including recruitment, hiring, assignment, and promotion. *See* The Ministry of Foreign Affairs, FOURTH PERIODIC REPORT BY THE GOVERNMENT OF JAPAN UNDER ARTICLE 40 PARAGRAPH 1(b) OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS pt. 2, art. 3(b), *available at* http://www.mofa.go.jp/policy/human/civil_rep4/article3.html (last visited Oct. 15, 2002) (copy on file with *The Transnational Lawyer*). The Women's and Young Workers' Office annually receives from employees and employers as many as 20,000 requests for consultation. *Id.* It frequently inquires into private companies concerning the treatment of women and compliance with the Old EEOL. *Id.* Furthermore, it continues to attempt to improve compliance with the Old EEOL. *Id.*

175. *See* New EEOL, *supra* note 12, at art. 12, no. 1, *available at* http://natlex.ilo.org/txt/e99jpn01.htm.

> Article 12. The Director of the prefecutral Women's and Young Workers' Office may, when asked either by a woman worker or an employer . . . or by both of them for assistance to settle a dispute between them in respect of such employers' measures relating to equal opportunity and treatment between men and women in employment, as provided by ordinance of the Ministry of Labour, give any necessary advice or guidance or make any necessary recommendation to the Parties Concerned.

Id.

176. *See* Fan, *supra* note 6, at 135 (mentioning that the New EEOL, unlike the Old EEOL, has sanctions against companies that fail to abide by the Ministry of Labour's settlement terms).

Among the New EEOL's provisions, Article 21[177] is the most significant. Article 21 places an affirmative duty on employers to prevent hostile environment or *quid pro quo* sexual harassment.[178] Along with Article 21, the Ministry of Labour has created special guidelines interpreting Article 21 and sexual harassment in more detail.[179] These New EEOL provisions have begun to revolutionize the workplace by fostering greater employee courage and incentive to combat sexual harassment.

A. *The Ability to Mediate at the Request of Either Party*

Since Article 13 of the New EEOL requires employers to submit to mediation at the request of either party, employees may prefer to turn to mediation for dispute resolution.[180] Employees are generally more comfortable with mediation because it comports to Japan's harmonious culture.[181] Article 13 permits an aggrieved employee a better method of bringing a complaint and resolving conflicts while avoiding judicial intervention. Despite the beneficial change, there is still uncertainty about the practical application of the New EEOL's mediation provisions in sexual harassment claims.

Although mediation appears most beneficial in cases where an employee seeks to reverse a company's decision resulting in discrimination on the basis of sex, Article 13 may be most applicable in *quid pro quo* cases.[182] For example, if an employer terminates or fails to promote an employee who has rebuffed requests for sexual favors, the employee may utilize Article 13 to mediate. The employee could then make a strong case explaining why the employer's adverse decision should be overturned. In addition, mediation is useful in those situations where a decision has been made not to investigate allegations of sexual

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177. New EEOL, *supra* note 12, at art. 21, no. 1, *available at* http://natlex.ilo.org/txt/e99jpn01.htm.
Article 21. Employers shall give necessary consideration from the viewpoint of employment management so that women workers they employed do not suffer any disadvantage in their working conditions by reason of said women workers' responses to sexual speech and behavior in the workplace and their working environments do not suffer any harm due to said sexual speech and behavior.

Id.

178. *See id.* at art. 21 (stating that an employer must not allow any woman employee to suffer any disadvantages in the workplace).

179. *See infra* Part IV.A.3.b (explaining that the Ministry of Labour's guidelines help define sexual harassment and its scope in more detail).

180. *See* Efron, *supra* note 8, at 162 (suggesting that Japanese female workers accepted the new mediation provisions with enthusiasm because Japan repealed the Old EEOL provision, only allowing mediation with the consent of the employer).

181. *See id.* at 145 (mentioning that Japanese society frowns on confrontation, avoiding lawyers and courts). *But see* Wolff E-mail, Oct. 7, 2002, *supra* note 10 (arguing that women prefer mediation because it is private, inexpensive, and quick).

182. *See* E-mail from Leon Wolff, Faculty of Law, The University of New South Wales, to Galen T. Shimoda, J.D. Candidate, University of the Pacific, McGeorge School of Law (Jan. 10, 2002, 15:44 PST) (copy on file with *The Transnational Lawyer)* (responding on the topic of Article 13 of the New EEOL, and addressing its applicability to sexual harassment victims).

harassment.[183] Mediation may overturn that decision and permit an investigation into the sexual harassment claim.[184]

In contrast, an employee who wants to stay at her position and have the harassing employee removed through mediation will likely find the application of Article 13 unsatisfactory. Mediation usually takes place between the company and the victim, rather than with the company, the victim, and the harasser as a third party.[185] Companies may feel uncomfortable mediating with a third party involved rather than directly with the victim. Moreover, companies are reluctant to risk a counter-suit by terminating an alleged harasser for inappropriate conduct.[186] Finally, companies are less likely to dismiss an employee who is experienced and valuable to the company solely on the basis of "he-says/she-says" evidence.[187] Therefore, Article 13's effectiveness will likely depend on whether companies are sufficiently motivated to follow the mediation advice of the Ministry of Labour. The only incentive the New EEOL gives to employers to comply with the Ministry of Labour's mediation advice is contained in Article 26.[188]

B. A Deterrent Against Sexual Harassment

In general, the New EEOL does not provide sanctions for employers who violate its provisions. However, Article 26 allows the Ministry of Labour to publicly publish names of violating employers when the employer fails to comply with any advice, guidance, or recommendations given by the Ministry of Labour.[189] For example, when a company disregards the Ministry of Labour's request for the company to discontinue its practice of *quid pro quo* sexual harassment, its name may be published.[190] The Ministry of Labour has already ordered thousands of Japanese businesses to resolve sexual harassment incidents.[191]

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183. *Id.*

184. *Id.*

185. *See id.* (explaining the practical difficulties of a sexual harassment settlement).

186. *See id.* (noting that although courts are recognizing a company's decision to terminate an employee for committing sexual harassment, the possibility of insufficient evidence to support a company's decision is likely).

187. *See id.* (finding that, empirically, most sexual harassment cases involve women of inferior positions). Thus, companies will likely keep male employees over female employees. *Id.*

188. *See* New EEOL, *supra* note 12, at art. 26 (stating that "[i]n the event that an employer is in violation of any of the provisions of Article 5 through 8, and the Minister of Labour has given a recommendation . . . but the employer has not complied with it, the Minister of Labour may make a public announcement to that effect.").

189. *Id.*

190. *See* Yamakawa, *supra* note 46, at 531 (explaining that most *quid pro quo* sexual harassment will fall into the categories of hiring, assignment, promotion, and termination covered under Articles 5 through 8 of the New EEOL).

191. *See Harassment Proved Biggest Beef Between the Sexes in 2001*, MAINICHI DAILY NEWS, May 27, 2002, *available at* 2002 WL 19060746 (mentioning that in fiscal 2001, the Ministry of Labour ordered some 5800 businesses in Japan to resolve 3500 sexual harassment incidents).

Although Article 26 may not prevent sexual harassment entirely, the new provision may act as a deterrent for employers who disrupt the harmony and unity within Japanese society.[192] Because the Japanese live in a homogenous and group-oriented society, any disruption to the harmony of the group might cause embarrassment or dishonor.[193] A company that is denounced for failing to comply with the New EEOL will suffer embarrassment, disrupting the societal harmony.[194] The shame that results from non-compliance may be sufficient to deter sexual harassment in the workplace.[195]

In addition, the possibility of tainting a company's reputation through public exposure can also serve as a deterrent to harassment.[196] Reputation is extremely important to Japanese companies for several reasons.[197] First, there are a decreasing number of laborers in the workforce due to an increasing aging population.[198] This forces Japanese companies to rely greatly on their reputation when recruiting new employees.[199] Second, business partners know and depend upon one another's reputation when engaging in business transactions.[200] Because a company's reputation is essential in order to stay competitive and profitable, a company will avoid tarnishing its name by being published as a violator of social norms under the New EEOL. The potential harm to a company's reputation is sufficient to motivate them to comply with the New EEOL.[201]

Finally, when a company or business in Japan injures or harms a person, tradition requires a formal apology to be made.[202] The Japanese have a strong belief that the existing relationship between the group and the community must be given

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192. *See* Larsen, *supra* note 65, at 222 (stating that Takashi Araki, a University of Tokyo law professor, believes that the New EEOL provision allowing the Ministry of Labour to publicize the names of non-complying employers will be effective to discourage discriminatory practices). In addition, Professor Araki feels that the enactment of the New EEOL "cured a significant defect" in the Old EEOL. *Id.*

193. *See* Baker, *supra* note 81, at 134 (discussing the ways that Japanese law and society interacts with one another). Japanese society is based on community values and "groupism" that is formed between Japanese people. *Id.*

194. *See id.* at 135-36 (noting that the failure to comply with laws or agreements will result in disgrace).

195. *See id.* (mentioning that there must be a strong relationship and sense of connection between the societal group for Japan's legal system to work).

196. *See id.* at 135 (commenting on the importance of reputation in Japan).

197. *Id.*

198. *See* Efron, *supra* note 8, at 152-53 (noting an increase in Japanese women workers within Japan due to improved educational opportunities, labor shortages, and an aging population).

199. *See* Larsen, *supra* note 65, at 222 (explaining the influence that a smaller labor pool has on the Japanese economy).

200. *See* Baker, *supra* note 81, at 135 (indicating that businesses rely on the strength of their relationships with other businesses). In Japan, contract terms are usually negotiated and impliedly understood, with only minimal terms actually committed to writing. *Id.*

201. *See id.* at 134 (implying that enormous emphasis is placed on strong community relationships and reputations).

202. *See* FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (1987), *reprinted in* JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS 111-14 (Curtis J. Milhaupt et al. eds., 2001) (discussing a Japanese tort case where the plaintiffs demanded a personal apology from the company's president for his actions in addition to obtaining a judgment in their favor).

the utmost priority in its maintenance of peace and harmony.[203] An apology benefits a victim of sexual harassment because it restores the harmony lost by the employer's misconduct.[204] Article 26 helps aggrieved employees who have been sexually harassed gain a less formal "apology" through public acknowledgment of a harassing Japanese employer and include his or her inappropriate conduct. Although publicly acknowledging a company's wrongdoing is different than an actual statement of apology, a victim usually desires a public acknowledgement as a means to be made whole.[205] Thus, Article 26 deters sexual harassment by the threat of harming a company's harmony and reputation, and it provides compensation for a sexual harassment victim by public acknowledgment of the company's misconduct. In addition to these incentives to comply with the advice of the Ministry of Labour, the New EEOL provides a new definition of sexual harassment in Japan.

C. Recognizing Sexual Harassment for the First Time

The Japanese government finally recognized sexual harassment as a distinct form of sex discrimination by placing an explicit provision in the New EEOL dealing with this problem.[206] Specifically, Article 21 of the New EEOL places an affirmative duty on employers to prevent sexual harassment.[207] The provision states:

> Employers shall give necessary consideration from the viewpoint of employment management so that women workers they employ do not suffer any disadvantage in their working conditions by reason of said

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203. *See* J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989), *reprinted in* JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS 122-29 (Curtis J. Milhaupt et al. eds., 2001) (explaining the relationship between Japanese society and litigation).

204. *See* Lohr, *supra* note 37 (mentioning that after the Japan Air Lines crash in 1984, Yasumoto Takagi, president of Japan Air Lines, visited the families of those passengers who died in the crash). He apologized profusely and paid respect to them by kneeling before Buddhist funeral alters in their homes. *Id.* This act of apology by Takagi is common in Japanese society and fosters harmony between community and business. *Id.*

205. *See BOJ, Ex-Branch Head to Pay 7 Mil. Yen over Sexual Harassment*, JAPAN POL'Y & POL., March 26, 2001, *available at* 2001 WL 10217146 (discussing a Kyoto Court decision where the Bank of Japan and a former branch manager were forced to pay approximately seven million yen ($54,000 dollars) to a former female worker for sexual harassment in 1997). The employee also requested that the central bank post an apology in its offices, but the judge refused to grant her request. *Id.* The plaintiff felt that a victory was not complete without public acknowledgement of the bank's wrongdoing. *Id.*; *see also Bank of Japan Ordered to Pay Damages in Sexual Harassment Case*, AGENCE FRANCE-PRESSE, Mar. 22, 2001, *available at* 2001 WL 2367940 (summarizing the finding of the Osaka High Court (appellate court) affirming the decision of the Kyoto lower court).

206. *See* Christine Parker & Leon Wolff, *Sexual Harassment and the Corporation in Australia and Japan: The Potential for Corporate Governance of Human Rights*, 28 FED. L. REV. 509 (2000) (commenting that the enactment of the New EEOL finally addressed Japan's lack of response to sexual harassment).

207. *See* Yamakawa, *supra* note 46, at 551-52 (stating that under the new provision of the New EEOL, an employer has a duty to prevent sexual harassment regardless of whether it is *quid pro quo* or hostile environment harassment).

> women workers' responses to sexual speech and behavior in the workplace and their working environments do not suffer any harm due to said sexual speech and behavior.[208]

Therefore, the New EEOL illustrates an attempt by the Japanese government to move beyond prior statutes and case law to provide women with a direct avenue to combat sexual harassment in the workplace.

Although Article 21 does not explicitly use the term sexual harassment,[209] it addresses both *quid pro quo* and hostile environment sexual harassment.[210] Under the New EEOL, employers must consider any adverse treatment based upon an employee's response to sexual overtures and any harm to the working environment due to sexual speech and behavior that gives rise to a substantial impediment to an employee's work.[211] The Japanese government broke new ground by acknowledging sexual harassment in the New EEOL, but failed to provide the needed incentives to force compliance with Article 21.

The New EEOL does not give an employee the right to bring a legal action for violations of Article 21.[212] Nor does the New EEOL authorize the Ministry of Labour to publish names of any company that violates Article 21.[213] Therefore, Article 21 fails to provide sanctions or any other enforcement mechanism to motivate companies to comply with their duty to prevent sexual harassment. The question then becomes what is the effect of Article 21 on civil litigation and sexual harassment in the workplace.

1. The Effect of Article 21 in the Workplace

Although the New EEOL is relatively new, some scholars argue that Article 21 has already had a positive effect on combating sexual harassment. One argument is that the new duty under Article 21 creates an implied duty in the employment contract to prevent sexual harassment.[214] This allows for employer

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208. New EEOL, *supra* note 12, at art. 21, no. 1, *available at* http://natlex.ilo.org/txt/e99jpn01.htm.

209. *See* Wolff, *supra* note 35, at 39 (expressing frustration that the New EEOL does not even expressly outlaw acts of sexual harassment).

210. *See* Yamakawa, *supra* note 46, at 552 (explaining the guidelines given by the Minister of Labor regarding Article 21(1) of the New EEOL); *see also* Fan, *supra* note 6, at 135-36 (explaining that employers have a duty under Article 21(1) to prevent *quid pro quo* and hostile environment sexual harassment).

211. *See* Yamakawa, *supra* note 46, at 552 (summarizing the two subdivisions of Article 21 of the New EEOL).

212. *See* Hayashi, *supra* note 14, *available at* http://www.ne.jp/asahi/wwn/wwin/reporten.html (discussing Article 21 of the New EEOL and noting the limitations of the new duty of care it imposes).

213. *See* Yamakawa, *supra* note 46, at 544 n.112 (mentioning that Article 26 does not allow the Ministry of Labour to publish a company's name when there is a violation of Article 21). Article 26 only allows the publishing of a company's name when there has been a violation of Articles 5 through 8. *Id.* Articles 5 through 8 address discrimination based on hiring, recruiting, and promotion. New EEOL, *supra* note 12, at arts. 5-8, *available at* http://natlex.ilo.org/txt/e99jpn01.htm.

214. *See* Yamakawa, *supra* note 46, at 552-53 (noting that the New EEOL did not resolve all potential issues, but it does allow some arguments to be made).

liability based on a contract rather than a tort theory.[215] In addition, Article 21's definition of sexual harassment may be helpful to courts in determining employer liability for sexual harassment.[216] Other scholars, such as Leon Wolff, believe that the benefit of Article 21 has been to educate and inform companies about sexual harassment.[217] In fact, Wolff believes the new duty does not add much to the adjudication of sexual harassment cases because the Civil Code, specifically Articles 709 and 715, has already established a vehicle for litigating sexual harassment.[218]

The new duty created under Article 21 primarily provides added courage for victims to file sexual harassment lawsuits against employers. For example, Moeko Tanaka,[219] a former campaign worker and student, sued Knock Yokoyama, the now former governor of Osaka, for sexual harassment in Osaka District Court in 1999.[220] Tanaka explained that while campaigning with Yokoyama, she found herself in the back of a campaign van sitting next to Yokoyama.[221] Because she was feeling ill, Yokoyama proceeded to drape a blanket over them and began to grope Tanaka for thirty minutes in the presence of other campaign workers.[222] After the incident, Tanaka initiated a lawsuit against Yokoyama. Tanaka was awarded nearly nine million yen ($89,000 dollars), the largest award of damages in Japan for a sexual harassment victim to date.[223] Yokoyama addressed the court and said, "I accept the verdict. I apologize deeply to the victim and hope [Tanaka] recovers as soon as possible."[224]

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215. *See id.* at 553 (giving another perspective that Article 21 merely subjects employers to administrative guidelines and does not affect employment contracts).

216. *Id.*

217. *See* E-mail from Leon Wolff, Faculty of Law, The University of New South Wales, to Galen T. Shimoda, J.D. Candidate, University of the Pacific, McGeorge School of Law (Jan. 7, 2002, 16:19 PST) (copy on file with *The Transnational Lawyer*) (stating that the New EEOL contributes little to the litigation of sexual harassment cases).

218. *See id.* (mentioning that Article 21 will most likely be used as a defense in sexual harassment suits). Companies will likely raise the defense when accused of failing to provide an adequate system to police sexual harassment. *Id.*

219. This is not the name of the victim. Because of the sensitivity of sexual harassment incidents, victims' names are not disclosed in these types of cases. *See* Howard W. French, *Fighting Sex Harassment, and Stigma, in Japan*, N.Y. TIMES, July 15, 2001, *available at* http://www.dadsanddaughters.org/new_york_times_7-16-01.htm (copy on file with *The Transnational Lawyer*) (noting that Tanaka has not revealed her true identity because of her fear of persecution and harassment).

220. *See* Gregg Jones, *Women Changing Japan's Male-Dominated Society*, DALLAS MORNING NEWS, Oct. 31, 2000, *available at* http://infoweb9.newsbank.com/bin/gate.exe (copy on file with *The Transnational Lawyer*) (discussing the challenge that the plaintiff had in trying to sue a powerful man in a male-dominated society); *see also* French, *supra* note 219, *available at* http://www.dadsanddaughters.org/new_york_times_7-16-01.htm (discussing the difficulties that the victim had in bringing her lawsuit and the effect it had on her afterwards). Also, even though the victim brought the lawsuit, the fact that she has not revealed her true identity reveals the ever prevalent male power that exists in Japan. *Id.*

221. *See* Cameron W. Barr, *Court Case and Women's Protests Fell Japanese Politician*, CHRISTIAN SCI. MONITOR, Dec. 23, 1999, *available at* http://www.csmonitor.com/durable/1999/12/23/p7s1.htm (copy on file with *The Transnational Lawyer*) (discussing briefly the facts of the *Yokoyama* case).

222. *See* French, *supra* note 219, *available at* http://www.dadsanddaughters.org/new_york_times_7-16-01.htm (summarizing the facts of the *Yokoyama* case).

223. *Id.*

224. *Id.*

Yokoyama resigned from his gubernatorial position when prosecutors filed criminal charges against him, and ironically, Japan's first female governor, Fusao Ota, replaced him.[225]

Japanese women and activist groups believe that the judgment was a step towards greater empowerment of women in their quest to combat sexual harassment.[226] Professor Tajima, a well-known feminist activist, believes that Tanaka was able to come forward because she was able to "take[ ] advantage of the systems for redress now available."[227] This includes new laws against sexual harassment such as the New EEOL and important case precedents under the Japanese Civil Code.[228] Although what role the New EEOL will play substantively in Japan's future is unknown, the law certainly will be beneficial to victims such as Tanaka by providing added awareness to employees bringing sexual harassment lawsuits.

In addition, the New EEOL fosters judicial awareness of sexual harassment. Such awareness has never existed before in Japan.[229] Article 21 provides Japanese judges with concepts and terminology that can eventually support a Japanese doctrine of sexual harassment.[230] Judge Yukio Yamaguchi of Tokyo District Court found Nomura Holdings, a major Japanese securities company, liable for sex discrimination.[231] The Japanese company used the two-track system[232] to keep 2859 female employees of its total 11,054 employees on the *ippan-shoku* track.[233] Judge Yamaguchi proclaimed that the "company ha[d] made the mistake of illegally continuing sexual discriminatory practices even after the Equal Employment Opportunity Law was amended."[234] Although this case involved liability for sex discrimination, the court took a momentous step by relying on the

225. *See* Jones, *supra* note 220, *available at* http://infoweb9.newsbank.com/bin/gate.exe (noting that the milestone victory led to another milestone, the election of the first female Japanese governor).

226. *See* Barr, *supra* note 221, *available at* http://www.csmonitor.com/durable/1999/12/23/p7s1.htm (discussing reactions to the record-breaking judgment in the *Yokoyama* case). Yoko Tajima, a University of Tokyo Professor, exclaimed that "a woman has been recognized as a human being." *Id.*

227. *Id.* The quote of Professor Tajima follows a discussion of the New EEOL and revisions to the statute of labor standards in Japan. *Id.*

228. *Id.*

229. *See* Parker & Wolff, *supra* note 206, at 539 (stating that the earlier government barriers in recognizing sexual harassment have slowly broken down and a legal response has emerged).

230. *See id.* (adding that Japanese judges are beginning to construct a network of civil law concepts to support a doctrine of sexual harassment).

231. *See Nomura Ordered to Pay for Sexism*, YOMIURI SHIMBUN, Feb. 21, 2002, *available at* 2002 WL 369869 (awarding 12 female workers a total of 56 million yen (approximately $500,000) although they demanded 660 million yen (approximately $5.5 million)).

232. *See supra* Part III.A.2 (suggesting that the two-track system places employees on either *ippan-shoku* (the general track) or *sogo-shoku* (the management track)). Female employees have a difficult time advancing to *sogo-shoku* because companies assign additional tasks only to female workers. *Id.* In reality, this allows a company to continue to practice sex discrimination while appearing to offer promotional opportunities to female employees. *Id.*

233. *See Nomura Ordered to Pay for Sexism*, *supra* note 231 (explaining that nine of the 12 female plaintiffs worked for the company for as long as 36 to 40 years without being promoted to the *sogo-shoku* track). Male employees were placed on the *sogo-shoku* track on average after their thirteenth year with the company. *Id.*

234. *Id.*

New EEOL in holding the defendant liable.[235] Because this court relied on the New EEOL as a basis for liability, it is feasible that other courts may rely on Article 21 and the New EEOL to hold employers liable for sexual harassment.

To incorporate Article 21 into Japanese business policies, the New EEOL delegates the responsibility of creating specific guidelines to the Ministry of Labour.[236] The Ministry of Labour implemented and published new guidelines ("Guidelines") on March 13, 1998 in order to further define sexual harassment and outline an employer's role in addressing sexual harassment.[237]

2. *The Ministry of Labour's Guidelines*

The Guidelines go a step further than the New EEOL by explicitly defining hostile environment sexual harassment. It is defined as "unwelcome sexual conduct that makes a woman's working environment uncomfortable and gives rise to substantial impediment to her work causing serious, adverse effects on the full use of the woman's skills and abilities."[238] Thus, the scope of sexual harassment is clarified by phrases such as "substantial impediment" and "serious adverse effects."[239] In addition to providing a definition, the Guidelines contain examples of sexual harassment as well as remedies employers should use to deal with this problem.[240]

Under the Ministry of Labor's Guidelines, employers must take three steps in order to address claims of sexual harassment.[241] First, employers must clarify and disseminate policies against sexual harassment and educate employees through means such as handbooks and seminars.[242] Second, employers must set up an objective system to address complaints and grievances.[243] Third, employers are obligated to be prompt in responding to sexual harassment claims, and they should implement investigative and disciplinary actions.[244] The Guidelines also instruct employers to protect the privacy of employees who file sexual

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235. *See id.* (emphasizing that this case is the first case since the passing of the New EEOL to recognize discrimination caused by placing employees in two categories).

236. *See* New EEOL, *supra* note 12, at art. 21, no. 2, *available at* http://natlex.ilo.org/txt/e99jpn01.htm (stating that "the Minister of Labour shall formulate guidelines with regard to the matters for employers' consideration based on the provisions of the preceding paragraph (Article 21(1)").

237. *See* Fan, *supra* note 6, at 136 (commenting that the Ministry of Labour published its Guidelines as *Guidelines for Employers Related to Problems Arising from Sexual Remarks and Behavior at the Workplace in the Context of Employment Administration*).

238. Yamakawa, *supra* note 46, at 552.

239. *See id.* (explaining that the scope of the Guidelines has been tailored towards conduct serious in nature).

240. *See* Fan, *supra* note 6, at 135 (describing the provisions set out in the Minister of Labor's Guidelines).

241. *See id.* at 136 (laying out the procedures a company must follow when it encounters a sexual harassment claim); *see also* Yamakawa, *supra* note 46, at 552 (setting forth the three measures of care included in the Guidelines).

242. Yamakawa, *supra* note 46, at 552.

243. *Id.*

244. *Id.*

harassment complaints and adopt anti-retaliation policies.[245] However, like Article 21, the Guidelines fail to provide any sanctions permitting the Ministry of Labour to take action against companies that engage in sexual harassment.[246] Under the Guidelines, a company will have full discretion on whether sexual harassment complaints are ever resolved and over the creation of sexual harassment policies.[247]

Because there are no strict sanctions to enforce the Guidelines, there lies great uncertainty on how far companies will go to carry out their duties.[248] Although the effectiveness of the Guidelines towards curtailing sexual harassment is questionable, statistics show that corporations are taking notice of these rules. According to the 1999 Survey on Women Worker's Employment Management conducted by the Ministry of Labour, there was an improvement in human resource management policies in approximately 6000 companies surveyed.[249] Understanding the importance of promoting an environment free from harassment, fifty-five percent of the firms surveyed have incorporated regulations aimed to prevent sexual harassment.[250] Furthermore, seventy-three percent of firms with over 3000 employees have also implemented policies against sexual harassment.[251]

In addition, the Ministry of Labour conducted another survey for the fiscal year of 1999 and found that employees made over 9500 requests for consultations concerning sexual harassment, which represents a thirty-five percent increase from the previous year and ten times the amount from 1993.[252] Half of these complaints were filed by women, while the remaining half were filed by companies trying to cope with increasing problems of sexual harassment.[253] The statistics represent a growing awareness among companies of the dangers of sexual harassment and their desire to inform themselves of this growing problem.[254] The Guidelines allow a company to attain information about its duty and implement methods to prevent sexual harassment.[255]

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245. *Id.*

246. *See* Efron, *supra* note 8, at 140-41 (noting that complaints of sexual harassment will be handled internally and in accordance with the company's sexual harassment policy).

247. *See id.* (elaborating on the fact that the Guidelines do not require companies to file their policies with or to report the creation of a policy to any agency such as the Bureau of Women's and Youth Affairs).

248. *See id.* at 142 (according to traditional corporate governance, directors are merely required to use their business judgment in making decisions). Companies have a duty to maximize wealth as opposed to creating a better society. *Id.*

249. Ryoji Kanno, *Sexual Harassment—What It Is, What It Isn't, and What We Can Do to Stop It*, YOMIURI SHIMBUN, Dec. 29, 1999, *available at* 1999 WL 29832700 (quoting from a private research institute that surveyed over 3500 companies).

250. *Id.*

251. *Id.*

252. *See Harassment Claims Soar in Japan*, BBC NEWS, May 2, 2000, *available at* http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_733000/733609.stm (copy on file with *The Transnational Lawyer*) (focusing on the climbing reports of sexual harassment in Japan).

253. *Id.*

254. *See id.* (noting that the sharp increase in complaints might be related to the New EEOL which made companies responsible for preventing sexual harassment and discrimination in the workplace).

255. *Id.*

Article 21 and the Guidelines work in conjunction to prevent sexual harassment in the workplace.[256] As the New EEOL and the Guidelines continue to foster understanding and awareness among employees, more sexual harassment suits will be brought.[257] A number of new sexual harassment cases have already been filed in Japanese courts since the *Yokoyama* judgment and the enactment of the New EEOL.[258] With the number of sexual harassment lawsuits on the rise, male victims have also recognized the need to be protected under the New EEOL and sexual harassment laws.

D. A New Victim of Sexual Harassment: Male Employees

Not only are female employees taking a stand against sexual harassment, but male employees are also beginning to realize the importance of being protected from sexual harassment under the New EEOL. However, the New EEOL does not protect male victims from sexual harassment and specifically states that women workers and not male workers shall be protected from sexual harassment.[259] This results in uncertainty regarding the real effectiveness of the New EEOL because it was enacted to foster "equal opportunity."[260] Moreover, not only does the New EEOL provide that women should be equal to men, but the Ministry of Labour has explicitly stated that the New EEOL is more concerned with harassment against women than men and does not include men who are harassed.[261]

The exclusion of men from the New EEOL has been magnified in statistics and cases. In a government workplace study by the National Personnel, a survey of 2055 men showed that thirty-seven percent of males faced workplace sexual harassment at least once since April 1999.[262] The survey also revealed that twenty-three percent of the male respondents felt uncomfortable witnessing the harassment of others.[263] An article in the Yomiuri Shimbum, a daily Japanese

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256. *See* Efron, *supra* note 8, at 161 (explaining that the new EEOL specifically addressed the prevention sexual harassment).

257. *See* Jones, *supra* note 220, *available at* http://infoweb9.newsbank.com/bin/gate.exe (mentioning that that since the *Yokoyama* case, more women have come forward with sexual harassment claims).

258. *See id.* (explaining that in April 2000, a 22-year old female was hired as a "cherry blossom ambassador" for the city of Joretsu). She initiated a sexual harassment lawsuit for $114,000 after being allegedly groped by the mayor of the city during city events. *Id.*

259. New EEOL, *supra* note 12, at art. 21, *available at* http://natlex.ilo.org/txt/e99jpn01.htm. However, male employees may bring suit under Articles 709 and 715 of the Japanese Civil Code. Wolff E-mail, Oct. 7, 2002, *supra* note 10.

260. *See* Hanami, *supra* note 15, *available at* http://www.jil.go.jp/bulletin/year/2000/vol39-01/05.htm (discussing the New EEOL as being one-sided because it allows discrimination against men, but tries to curtail discrimination against women).

261. *See id.* (noting that the irony of the New EEOL is its ability to keep women in less advantageous positions such as temporary or part-time).

262. *See* Mari Yamaguchi, *Female Government Workers Face Harassment*, ASSOC. PRESS, Dec. 27, 2000, *available at* 2000 WL 30837071 (stating that the study did not give any details of complaints made by male employees).

263. *See id.* (mentioning that 35% of the men surveyed felt that too much attention was given to sexual harassment).

newspaper, relates an advice column letter written by a male worker explaining his frustrations at work.[264] The male writer was irritated because a male co-worker continues to verbally and physically attack him and finds any excuse to touch him during work.[265] The replier to his letter, *Troubleshooter*, responded that men are forgotten as possible victims of sexual harassment because the fight against the problem has been such a struggle for women.[266] Because the New EEOL focuses on eradicating sexual harassment of women, lawsuits filed by male employees have been fruitless.

A lawsuit filed in 1998 demonstrates the need for the New EEOL and sexual harassment laws to protect male employees to the same extent it protects female employees.[267] Seiko Matsuda, a popular Japanese star with a knack for managing the media, was the first woman to be sued for sexual harassment in Japan.[268] Christopher Conte toured with Matsuda for several years and allegedly had an intimate relationship with Matsuda during his employment.[269] Conte claimed that Matsuda threatened to fire him if he did not comply with her demands, and he sought compensation for three million dollars.[270] This case illustrates that more male employees will bring lawsuits for sexual harassment and demonstrates the need for sexual harassment laws to protect male employees.

In addition, same-sex sexual harassment is becoming more common in Japan. The case of a Fukuoka employee who filed a lawsuit against his former male supervisor illustrates this phenomenon.[271] The supervisor denied any charges, stating that "he might have touched the man's waist to relieve stress but 'never [has he] made any sexual advances.'"[272] The plaintiff claimed his former supervisor touched him while he was asleep during a business trip and made sexual advances towards him while he was washing dishes.[273] Previously, same-sex sexual harassment was unheard of in Japan, and such cases in any civil court of Japan were rare.[274]

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264. *Troubleshooter*, YOIMURI SHIMBUN, Oct. 14, 2000, *available at* 2000 WL 25273451.

265. *Id.*

266. *Id.*

267. Nicole Gaouette, *Japan Abuzz over Sexual Harassment*, CHRISTIAN SCI. MONITOR, Apr. 14, 1998, *available at* http://www.csmonitor.com/durable/1998/04/14/p1s4.htm (copy on file with *The Transnational Lawyer*) (summarizing the facts of the Seiko Matusda lawsuit).

268. *Id.*

269. *See id.* (noting that Conte toured with Matsuda from 1992 to 1997).

270. *Id.*

271. *See Fukuoka Man Accuses Former Male Boss of Sexual Harassment*, JAPAN WKLY. MONITOR, Nov. 13, 2000, *available at* 2000 WL 30239708 (reporting that the plaintiff asked for 3 million yen ($25,000) in compensation in addition to nullification of his dismissal from employment).

272. *Id.*

273. *See id.* (claiming that his former boss said, "Ever since your job interview here, I noticed you because you resemble a girl who was my first love.").

274. *See id.* (commenting that usually same-sex incidents are treated as indecent assaults under the criminal laws of Japan); *see also Man Files Suit over Sexual Harassment*, YOIMURI SHIMBUN, Nov. 11, 2000, *available at* 2000 WL 25274311 (noting that a nationwide network of lawyers specializing in sexual abuse stated that it is extremely rare for one man to sue another man in a sexual harassment lawsuit).

In yet another suit, a famous male Kabuki actor, Shinichi Morita,[275] was sued for sexually harassing a former male student.[276] The student filed the lawsuit in Tokyo District Court in September 2001, asking for approximately twelve million yen ($102,400 dollars) in damages for emotional suffering.[277] The former student alleged that on a tour during 1996, Morita fondled him at a hotel.[278] As more male sexual harassment cases are brought in Japan, male employees will demand the right to fight sexual harassment perpetrated by other male or female workers.

Many male employees hope that these types of harassment, female to male and same-sex harassment, can be countered. Scholars believe that the *Matsuda* case will raise awareness about sexual harassment among both genders.[279] The *Matsuda* suit, as well as the same-sex sexual harassment suits, illustrates a heightened awareness of the need for greater protection of male employees.

E. Society and the Future of the EEOL

For many decades, Japanese society accepted what we now think of as sexual harassment as part of the normal workplace environment. Thus, many Japanese workers were unaware of the seriousness of the problem.[280] Many women endured acts of sexual harassment from co-employees and supervisors without putting up much resistance.[281] These women believed that making a complaint would negatively impact their work evaluations or result in their discharge.[282] After the *Yokoyama* decision,[283] Tanaka explained that the term sexual harassment did not exist in Japan ten years ago and that some women still do not understand the term today.[284] Tanaka represents the new breed of Japanese employees who are learning how to overcome Japan's cultural bounds and resist sexual harassment. Despite the fact that the Japanese are increasingly recognizing their rights to work in an environment free of

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275. Morita joined the kabuki theater in 1956 and quickly gained fame playing "onnagata" (female) roles. *Famous Japanese Kabuki Actor Sued for Sexual Harassment*, AGENCE FRANCE-PRESSE, Sept. 26, 2001, *available at* 2001 WL 25022096. Morita is unmarried and has made many tours overseas since the 1980s. *Id.*

276. *See id.* (mentioning that a spokesman at the Tokyo court confirmed that the suit had been filed).

277. *See id.* (quoting an advocate of Morita as saying, "The lawsuit is totally groundless and plaintiffs (the boy and his family) will not be able to win the case . . .").

278. *See id.* (defending the actor by arguing that the former student was dismissed because he was mentally unstable and failed to appear when he needed to perform).

279. *See id.* (discussing the New EEOL as an improvement to the Old EEOL; with the New EEOL taking effect, a greater awareness of sexual harassment may be achieved).

280. *See* Wolff, *supra* note 35, at 46 (stating that sexual harassment law has evolved from ignorance to awareness).

281. *See id.* at 5 (suggesting that women seldom resisted sexual harassment because they were afraid of negative work evaluations or termination).

282. *See id.* (adding that many women felt like they had no choice but to endure sexual harassment and often cried themselves to sleep).

283. *See supra* notes 218-25 and accompanying text (reciting the facts of the *Yokoyama* case in which Tanaka, a campaign worker, succeeded in suing former Osaka governor Knock Yokoyama).

284. *See* French, *supra* note 219, *available at* http://www.dadsanddaughters.org/new_york_times_7-16-01.htm (adding that Tanaka endured many challenges during the trial, and one of them was keeping anonymous).

sexual harassment, the New EEOL and future amendments must continue to provide greater rights to all workers.

The New EEOL must set up enforcement mechanisms to deal with companies violating the statute or the Guidelines.[285] The New EEOL should be amended to allow for an administrative agency such as the Ministry of Labour to create enforcement provisions to force companies to comply with the law.[286] Once control over the enforcement of the New EEOL and the Guidelines is taken out of the hands of companies and placed under governmental supervision, these laws will become a serious force in combating sexual harassment in the workplace.[287] This will bring about greater incentive and courage to resist and combat sexual harassment.[288]

In addition, the Japanese media has caused confusion about the meaning and scope of sexual harassment law.[289] Much of the confusion can be blamed on the way the media covers sexual harassment.[290] Japanese media tends to focus on the lurid and shocking aspects of sexual harassment, which add to public misunderstanding of the concept.[291] A reporter for the Yomiuri Shimbun, Takeshi Esaki, believes that journalists did not do justice to the victim of the *Yokoyama* case and stated that "[they] readily accept the criticism that [their] description of what happened does not give the readers a full picture of how malicious Yokoyama's actions were."[292] Esaki summed up the importance of media in promoting Japanese sexual harassment laws, such as the New EEOL, by concluding that "journalists should make it [their] duty to give serious consideration to how molestation and sexual harassment cases should be reported."[293]

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285. *See* Parker & Wolff, *supra* note 206, at 545 (stating that the legal community is contemplating further revisions of the judicial doctrine regarding sexual harassment in Japan). Nevertheless, Japan lacks a strong background regulator. *Id.*

286. *See* Efron, *supra* note 8, at 162-63 (stating the New EEOL does not allow enforcement by any agency, and future legislation must provide specifically for enforcement). An example of proper enforcement would be the establishment of a special court with expertise in labor law. *Id.*

287. *See* Wolff, *supra* note 35, at 45 (concluding that the Guidelines are essentially shifting the boundaries in favor of corporations as where sexual harassment disputes are handled). A reservation of power to control unfettered discretion by companies is necessary. *Id.* The New EEOL is taking the power to resolve disputes away from courts and placing it into the hands of companies. *Id.*

288. *See id.* at 17 (discussing the feminist movement in Japan, and that more women are taking a stand against the cultural environment that permits gender discrimination).

289. *See* Parker & Wolff, *supra* note 206, at 545 (mentioning that the future of sexual harassment in Japanese companies is complicated by the social and legal responses to sexual harassment).

290. *See* Wolff, *supra* note 35, at 16 (stating that the media could be a powerful tool to help further awareness of sexual harassment, but has proved to be a stumbling block). The media uses headlines such as "Can't Tell Dirty Jokes Anymore," "Don't Use Familiar Forms of Address to Your Female Employees," and "American Sexual Harassment Cases Reap Million Dollar Damages Verdicts," further hindering the eradication of sexual harassment. *Id.*

291. Parker & Wolff, *supra* note 206, at 545 (adding that the media coverage of sexual harassment cases must focus on the issues).

292. Takeshi Esaki, *Sex-Crime Reporting Raises Ethical Issues for Journalists*, YOMIURI SHIMBUN, Apr. 12, 2000, *available at* 2000 WL 4645963. Esaki explains that the difficulty of reporting the *Yokoyama* case was due to the belief that being too specific would possibly harm the victim's anonymity, as well as its ability to expose children to the articles. *Id.*

293. *Id.*

Finally, Japan must find a balance between its own culture and Western cultures when trying to develop legal remedies to curtail sexual harassment in the workplace. American jurisprudence, for example, teaches legal principles through deterrence, punishment, and exorbitant damage awards.[294] Conversely, the Japanese approach teaches legal principles through personal contact and negotiation.[295] Both approaches have advantages. America's approach affirmatively deters sexual harassment, while the Japanese approach avoids the abuse of lawsuits associated with a litigation-based society.[296] Yet, Japan's approach of avoiding litigation places employees at a disadvantage by allowing employers to escape punishment for sexual harassment. Japan should continue to develop its sexual harassment laws consistent with its culture while incorporating the positive aspects of Western legal thinking.

IV. CONCLUSION

Many academic scholars view the New EEOL as another failed attempt to give employees rights to resist sexual harassment. Westerners tend to judge the effectiveness of the New EEOL by their own experiences and knowledge of sexual harassment laws. However, the Japanese view the New EEOL and current sexual harassment laws much more favorably because Japanese sexual harassment law is extremely new. At least in terms of creating enforceable remedies, Japan's sexual harassment laws are not on the same level as that of Western societies, but the New EEOL is a momentous step towards eradicating and recognizing sexual harassment.

Japan has made great strides in addressing sexual harassment in the workplace. With a record number of sexual harassment cases being filed and a strong social movement against sexual harassment, Japan may become the Pacific Rim leader in combating sexual harassment. Despite this great step forward, the Japanese government should amend its sexual harassment laws to give greater protection and rights to employees while carefully considering its own culture. The New EEOL may be the best solution that the Japanese society can expect to accomplish in its current political and societal climate. Dr. Hiroko Mizushima, a newly elected female representative of the Japanese Parliament, said, "Japan is changing, very slowly, but steadily."[297]

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294. *See* Hanami, *supra* note 15 (comparing the Western approach towards equality with the Japanese mindset on employment).

295. *Id.*

296. *See id.* (arguing that the United States has become such a litigious society that employers are heavily burdened). The number of employment cases filed in Japanese federal courts increased from 10,771 to 23,154 between 1992 and 1996 as a result of the Civil Rights Act Amendments of 1991, which gave plaintiffs the right to collect punitive awards and shifted the burden of proof onto employers. *Id.*

297. Jones, *supra* note 220, *available at* http://infoweb9.newsbank.com/bin/gate.exe.

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