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Women in the Workplace: Sexual Discrimination in Japan

by Kelly Barrett

JAPANESE LEGAL AND SOCIAL NORMS HISTORICALLY relegated women to the private roles of mother and caretaker and excluded them from the public roles of serious entities in the workforce. Gradually, however, legal and political changes began to favor gender equality. The passage of the 1997 Equal Employment Opportunity Law (EEOC) and international legal pressure resulting from Japan's ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) paved the way for progressive legal changes. The success of female plaintiffs in a string of recent cases demonstrates a move toward gender equality in the workplace. Despite these legal changes, however, the realities of Japanese cultural and social norms have, as a practical matter, prevented greater progress.

Although Japanese women have attained some legal equality in the workplace, further actualization of this goal will require both social and legal progress. Only when gender equality becomes a goal in the minds of employers as well as lawmakers will gender discrimination more swiftly meet its demise. Without a new perspective on old societal norms, the law, despite its frequent changes, will remain powerless against entrenched stereotypes.

THE PARTICIPATION OF WOMEN IN THE JAPANESE WORKFORCE

TRADITIONAL JAPANESE SOCIETAL NORMS STRESS THAT WOMEN should learn to self-cultivate the Confucian ideal of a *ryousai kenbo*, meaning "good-wife, wise mother." The slogan became popular during the Meiji period, the late-nineteenth century reform era known for Japan's opening up to the West, as a way for the government to encourage the raising of loyal female citizens and repress the growing popularity of the modern working-girl movement. By imposing a deliberate social policy focusing on the woman's role as mother and educator within the home, the government dictated that the first priority for Japanese women should be the home and family.

This cultural prioritizing resulted in an M-curve participation of women in the Japanese workforce. Women experienced their peak participation in the workforce at ages 20-24 and then again at ages 35-50 as part-time workers, thereby protecting the permanent positions of men. This phenomenon is known today as the "low cost welfare system" and is one way that women are excluded from the core of the Japanese workforce. Although economically advantageous, this phenomenon effectively excludes Japanese women from attaining equal opportunity in the workplace.

Further, women historically played a vastly different role than men in the workforce. Women employees are historically referred to as "office flowers" because of the emphasis employers place on their physical appearance. As opposed to those duties designated for their male counterparts, "female" duties include copying, mailing, answering the phone, and making tea for the other employees.

In recent years, however, deeply rooted cultural mores concerning women in the workplace have evolved. Japanese youth are more independent and less concerned about the impact of their actions on society as a whole, and are thus better suited to break from existing stereotypes and to entertain new ideas about the role of women in the

workplace. They are less committed to the notion that the woman's primary role is to get married and serve as a housekeeper and caretaker. In fact, only 12% of junior high school students surveyed by the Japan Youth Research Institute believe that marriage is a necessity. Similarly, only 30% of people in their twenties think that "a woman's happiness is found in marriage." This new generation of Japanese youth may provide the progressive thinking necessary to change traditional views about the role of women in the workplace. For the present, however, the law and culture of Japan still reflect decades of discriminatory thinking.

BACKGROUND ADVANCES CULMINATING IN THE 1997 EEOC

IN AN ATTEMPT TO ADDRESS MOUNTING CRITICISMS about sex discrimination in the Japanese workplace, the Japanese diet, a bicameral legislative body established during the Meiji period, passed the EEOC in 1997. The EEOC focuses on creating equal opportunity for both sexes in the workplace and on prohibiting discrimination in the areas of recruitment, hiring, job assignment, and promotion. Although the enactment of the law seemed revolutionary, it was actually the culmination of many years of piecemeal efforts to achieve equality in the workplace.

In 1942, the Japanese diet passed a new constitution which contains the foundation of women's rights in article 14. Article 14 provides that "all of the people are equal under the law and there shall be no discrimination in political economic or social relations because of race, creed, sex, social status or family origin."

That same year, the Japanese diet enacted several important statutory provisions protecting the right to equal opportunity in the workplace. The Labor Standards Law (LSL) provides general guidelines about workplace conditions and employer-employee relations. For example, article 4 of the LSL prohibits gender-related wage discrimination. Although still good law, the LSL has been largely unsuccessful at securing equality for women, because it deals only with the issue of equal pay and does not deal with the problem of excluding women entirely from fields of so-called "men's work."

The diet also passed a civil code that gave women the rights to own and inherit property, and obtain a divorce. Article 90 of the code provides that any "juristic act whose object is such as to be contrary to public order and good morals is null and void." Articles 1 and 2 of the code require that the code be interpreted by courts "from the standpoint of the dignity of individuals and the essential equality of the sexes." In a 1966 case, *Sumitomo Cement v. Suzuki*, the Tokyo District Court applied the code to find in favor of a woman plaintiff who filed suit against her employer for discrimination. The court held that forced retirement of women upon marriage was unreasonable. As a result, other courts subsequently struck down mandatory retirement of women workers upon childbirth or at any age lower than that required for men. Standing alone however, this provision lacked the force to achieve equality of women in the workplace.

Despite the passage of these statutory provisions, Japan continued to face international pressure to eliminate gender discrimination. In 1979, the United Nations adopted the Convention on the Elimination of All Forms of Discrimination against Women. In order to become a signatory of the convention, a state is required to enact

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legal measures to effectively prohibit domestic gender discrimination. Japan, feeling pressure as an international economic power, signed the treaty and agreed to ratify it by 1985. Further pressure in the form of renewed international support of women's equality likely motivated the Japanese government to move towards eliminating discrimination.

LEGAL AND SOCIAL ANALYSIS OF THE 1997 EEOL

JAPAN PASSED ITS FIRST EQUAL EMPLOYMENT OPPORTUNITY Law in 1985 to comply with the requirements for the ratification of CEDAW. The original EEOL contained two standards: best efforts and prohibition. As an example of the best efforts standard, the 1985 EEOL included a clause in articles 7 and 8 asking employers to "endeavor not to discriminate." As part of the prohibition standard, the EEOL banned employers from discriminating with regards to training, employee benefits, and retirement or dismissal.

The 1985 EEOL, however, did not afford Japanese citizens a private right of action. Nor did it invoke criminal penalties. Instead, the Office of Women's and Young Worker's Affairs of the Ministry of Labor tried to remedy violations of the law. The 1985 EEOL implemented a three-stage dispute resolution process. First, the employer voluntarily addressed the issue privately within the corporation. Failing that, the parties took their dispute to the Regional Director of the Prefectural Women's and Young Worker's Bureau, which attempted to mediate. Finally, if mediation proved unsuccessful and both parties consented to arbitration, the parties brought their dispute before the Regional Equal Opportunity Conciliation Committee, which would arbitrate the dispute. If the parties did not consent, there was no further remedy for the individual bringing the complaint. Even if the Committee made a recommendation for a remedy, the recommendation was just that, a non-binding suggestion.

Due to the passage of the 1985 EEOL, more women entered the labor force. Women in the workforce increased from 15.4 million in 1985 to 20.8 million in 1996, an increase of 35.9% to 39.2%. The 1985 law enhanced social consciousness regarding equal employment between men and women, but discrimination continued to run rampant.



Professional women in Japan.

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CREATION OF THE 1997 EEOL

THE 1997 EEOL ATTEMPTED TO REMEDY THE WEAKNESSES of the 1985 EEOL and provided ground-breaking improvements for women seeking equality in the workplace. While the revised EEOL, implemented on April 1, 1999, still does not require criminal sanctions for violations or provide for a private right of action, it took several steps to strengthen the provisions in the 1985 EEOL. First, and most significantly, it eliminated the "best efforts" standard embodied

in articles 7 and 8 and replaced it with an outright prohibition on discrimination in recruitment, hiring, assignment, and promotion. The revised EEOL also provided sanctions for violations of the law. Now, if an employer fails to comply with the Ministry of Labor's advisory opinions in the dispute resolution process, the Ministry of Labor may "make a public announcement to that effect." Because of deep-seated cultural norms, the theory behind this sanction is that the threat of public embarrassment will be enough to prevent companies from discriminating on the basis of gender.

The 1997 EEOL has also made tremendous progress in enabling women to seek remedies for discrimination in the workplace. Importantly, the 1997 EEOL eliminated from the arbitration process the dual consent requirement. Because arbitration may now continue with the consent of only one party, female plaintiffs facing corporate defendants are more likely to have their claims arbitrated by the Ministry of Labor. Article 13 of the revised EEOL also restricts employers from retaliating against women who seek mediation, thereby allowing victims to freely bring their claims to the Ministry of Labor.

Finally, and perhaps most revolutionary, the 1997 EEOL added a protection in an area not even contemplated by the 1985 EEOL—protection against sexual harassment in the workplace. Article 21 of the 1997 EEOL recognizes sexual harassment as a bona fide basis for a legal cause of action. Article 21 provides that "employers shall give necessary consideration . . . so that women workers they employ do not suffer any disadvantage in their working conditions by reason of [their] responses to sexual speech and behavior . . . and their working environments do not suffer harm due to said sexual speech and behavior."

Prior to the 1997 EEOL, "sexual harassment" was a non-existent term in the Japanese vocabulary, let alone something against which the law protected. The 1997 EEOL provided legal protection for women in the workplace and has also helped to increase overall awareness about the prevalence of the problem. Unfortunately, the 1997 EEOL still fails to afford victims a private cause of action. Open, public litigation would provide better awareness and a precedent for other women in similar situations. A more public process would also provide an incentive for employers to end discriminatory practices, in order to avoid the embarrassment of public controversy.

JURISPRUDENCE IMPLEMENTING THE 1997 EEOL

AS A RESULT OF THE IMPETUS CREATED BY CEDAW, which culminated in the passage of the 1997 EEOL, there is no question that Japan made advancements against sexual discrimination on an international and national level. In fact, Japan has since become a leader in the fight against sexual harassment in Asia, sponsoring a three-day seminar in October of 2001 addressing sexual harassment in the Asia-Pacific region. At the seminar, Japanese delegates presented a study which revealed that over 67% of Japanese women surveyed reported sexual harassment in the workplace. To note, Japan's willingness to share information regarding sexual harassment and its collaboration with other countries to fight gender discrimination in the Asia-Pacific region mark a significant improvement in Japanese efforts to combat sexual discrimination.

On a national level, however, the realization of a Japanese workplace without discrimination is moving slowly due to the cultural barriers that individual claimants face. In 1999, immediately after the enactment of the revised EEOL, the Ministry of Labor received 9,000 complaints regarding sexual harassment in the workplace, although not all of these complaints were actually litigated. Japan is a civil law jurisdiction, as opposed to a common law juris-

diction, thereby emphasizing statutory law rather than judicial decisions. Since statutes rather than judicial decisions drive the direction of the law, judicial decisions are not binding on subsequent cases, and as a result, inconsistent decision-making is prevalent. Litigation is also very costly in Japan, and on average, cases take at least five years or more to litigate through the District Court level, which is a second-level trial court subject to review by a High Court or the Supreme Court.

Litigation is also unattractive in Japan for cultural reasons. Traditional Japanese cultural and social values place a great deal of importance on the effect of one's actions on the community as a whole. Japanese citizens are often self-conscious of how their actions will affect those around them. With this *group* mentality in place, litigation, as an attempt to right *individual* wrongs, is a very unattractive option for most Japanese women.

The more prevalent system of dispute resolution is mediation through a consensus system, which is a bureaucratic process. Any woman who attempts to litigate instead of going through the consensus system will likely receive criticism from others, thus giving rise to the Japanese saying, "the nail that sticks out gets hammered down." A woman litigating a sexual discrimination case could fear humiliation and embarrassment from her peers such that she would likely not bring suit at all.

Notwithstanding these cultural barriers, the number of cases filed in response to the EEOL is increasing, and for the limited cases that actually make it to court, many women are achieving victories. For example, in July 1999, a 56-year old woman, Hisami Naka, won 30 million Yen (\$280,000) in the *Shionogi & Co.* case after a judge found that her company failed to treat her as equal to her male co-workers. The judge upheld her claim that the pharmaceutical company where she worked for thirty years violated her right to equal pay under the 1997 EEOL. Naka's lawyers successfully rebutted the company's argument that her lower pay was justified on the basis of shortcomings in her work. This case represented a landmark decision for both its holding and its application of the 1997 EEOL on the issue of wage discrimination.

Similarly, in the 2000 *Shiba Shinkin Bank* decision, filed in 1987 as the first case filed in the wake of the 1985 EEOL, the Tokyo District Court recognized for the first time the prevalence of sexual discrimination in corporate promotions. Interestingly, although the bank required its employees to pass a test in order to qualify for promotion, the company policy nevertheless permitted the use of personnel evaluations to take the place of objective tests. Thus, the company promotion policy allowed head officials to use their discretion to determine whom to promote. As a result, most male employees were promoted to section head positions, while female employees were not promoted at all. In 2000, the court finally ruled in favor of the thir-

teen female plaintiffs against their employer, the Shiba Shinkin Bank, and mandated that the female employees be promoted to the post of section head and be given compensation for damages, including back pay. The fact that the court took fifteen years to decide this case illustrates the extremely lengthy litigation process in Japan which is a major deterrent to the litigation of sexual discrimination suits.

In 2001, the Osaka District Court disallowed employers from harassing women for continuing to work after marriage. In the *Sumitomo Life Insurance Co.* case, company officials continually berated the plaintiffs' work and criticized its quality solely based on the fact that each of the plaintiffs married and continued working. Judge Tetsuo Matsumoto awarded Yasuko Watanabe and the 19 other plaintiffs 90 million Yen (roughly \$840,000) and declared that maternity leave is guaranteed by law.

Most recently, in January, 2004, after eight years of litigation, the Osaka District Court mediated a settlement in the *Sumitomo Electric Industries* case. The judge ordered 10 million Yen (\$93,400) to be paid to two women for sexual discrimination in the workplace. Both women were hired as clerical workers in the 1960s but were never given the same training as the men in their company and were repeatedly passed up for promotions. The judge ordered the company to promote both women on the basis that they had not been given the same opportunities or training as similarly situated men despite their equally long work history with the company.



Ryan Hathaway

Downtown Tokyo still lacks gender equity in the workplace.

THE DISCONNECT BETWEEN THE LEGAL IMPLICATIONS OF THE EEOL AND THE ENTRENCHED SOCIAL NORMS THAT PREVAIL IN THE WORKPLACE

DESPITE THESE PROGRESSIVE LEGAL ADVANCES, gender discrimination continues to prevail in the Japanese workplace due to the resilience of traditional cultural and social mores. Employers continue to believe that women do not have the knowledge, experience, or analytical abilities essential for managerial positions. Women generally still work fewer years than men and retire before reaching managerial positions. For example, only 55% of women work full time, compared to 85% of men. Companies do little to appoint women to higher positions in the company, and the corporate practice of subordinating women to clerical positions is still widely practiced. Among 30 countries that are members of the Organization for Economic Cooperation and Development, Japan ranked 19th on the index for "degree of work ease for women." This ranking actually represents a drop from 16th place in 1990. Thus, after the passage of the revised EEOL, Japan's ranking actually dropped. The M-shaped employment pattern continues, and the household care-giver stereotype of women persists. According to one survey, over 86% of Japanese individuals still believe that women should be the sole household manager, and

the popular media continues to portray them as such.

The fact that 40% of women composed the Japanese workforce in 2002 is somewhat misleading, since the jobs they occupied were not equivalent to those occupied by men. Although there are opportunities for women to enter the working world, there is no other industrialized nation in the world where gender discrimination in the workplace is more prevalent. Even after the passage of the 1997 EEOL, as of 2002, 70% of women continued to experience sexual harassment or discrimination.

Further, despite a 2002 Osaka District Court case openly condemning Japan's two-tier hiring system, in which women are automatically placed on a secretarial track, Japan's business structure continues to divide new business recruits into the career track and the general clerical track. Moreover, the revised EEOL eliminated preferential treatment for either sex (affirmative or negative action) in favor of equality. This portion of the law was designed to restrict job advertisements targeted to "women only," or recruitment of women only for part-time work. Nevertheless, at job interviews aimed at screening candidates for the career and general clerical tracks, employers often ask women applicants questions that have nothing to do with their professional qualifications, focusing instead on their plans for marriage.

As a result, women continue to hold only 2.8% of all section chief positions, 1.3% of department head positions, and 9% of management posts. Not surprisingly, 80% of women are placed on the second career track for clerical work. As of 2002, women earn 60% of their male counterparts working in similar positions.

CONCLUSION

THE 1997 EEOL AND THE CASE LAW IMPLEMENTING it undoubtedly sparked progressive breakthroughs in attaining the goal of gender equality in the Japanese workplace. Because the problem of inequality is deeply rooted in cultural and social norms, it is not possible for the government, acting alone, to affect the full spectrum of change needed to secure universal equality. Social change in Japan has already been set in motion through a combination of progressive changes brought about by the 1997 EEOL, continued international pressure, and the Japanese youth culture. Gender equality has certainly made substantial legal breakthroughs in recent years, but Japan continues to lag behind other modern industrialized nations as it takes baby steps towards achieving the social change necessary to actualize the legal changes already in place.

As litigation increases in the wake of the 1997 EEOL, more companies will be less willing to engage in the practice of sexual discrimination, since lawsuits bring negative attention to the company and are extremely embarrassing—two ramifications that are unacceptable in Japanese culture. Moreover, as a new generation of Japanese workers emerge from Japan's progressive youth culture, a new set of social values will displace many of the traditional cultural mores that have kept women from attaining equality in the workplace for so long. These changing cultural values in combination with the legal backing of the 1997 EEOL indicate that it is only a matter of time before Japanese women will achieve this equality. In the meantime, continued international pressure, as well as efforts within Japan to ease litigation of sexual discrimination cases and more severely penalize non-compliant companies will likely expedite the process and bring equality to women in the workplace on a more universal level. *HRB*

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