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We've Only Just Begun: The Law of Sexual Harassment in Japan

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I. Introduction

Discussions about sexual harassment in Japan first began about ten years ago. Since then, Japanese case law evolved, and Japanese courts rendered more than twenty decisions on this issue.[1] In many of these decisions, courts held defendants, employers as well as individual employees who engaged in sexual harassment, liable.[2] However, unlike U.S. courts, which rely on anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964,[3] Japanese courts usually rely on tort law as a basis of liability for sexual harassment.

Until the 1997 amendment,[4] Japan's Equal Employment

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1. For a list of decisions, see MINISTRY OF LABOR, SHOKUBA NI OKERU SEKUSHUARU HARASUMENTO BOSHI MANUARU [MANUAL FOR THE PREVENTION OF SEXUAL HARASSMENT IN THE WORKPLACE] 90-115 (1998) [hereinafter MINISTRY OF LABOR MANUAL].

2. *See id.* A topic outside the scope of this article is the fact-finding method utilized by Japanese courts. In recent years, some Japanese courts have relied on the psychological study of victims of sexual harassment by looking at issues such as the "rape trauma syndrome" in determining the credibility of plaintiffs' testimony. *See, e.g.*, Yokohama sekuhara case (2d instance), 728 RODO HANREI 12, 21-22 (Tokyo High Ct., Nov. 20, 1997). In an article published in Japan, one U.S. commentator suggested the use of such psychological studies. *See* Alison Wetherfield, *Amerika Jin Bengoshi no Mita Nihon no Sekushuaru Harasumento (2) [Sexual Harassment in Japan: From the Viewpoint of a U.S. Lawyer* (pt.2)], 1080 JURISUTO 75, 79-80 (Michiyo Kurokawa trans., 1995).

3. 42 U.S.C. §§ 2000e-2000e-17 (1994).

4. The amendment took effect on April 1, 1999. *See* Koyo no Bunya ni okeru Danjo no Kinto na Kikai oyobi Taigu no Kakuho To ni Kansuru Horitsu [Law Respecting the Guarantee of Equal Opportunity and Treatment Between Men and

Opportunity Law did not include a provision on sexual harassment. Instead, Japanese case law responded with a jurisprudence that has distinctive characteristics regarding the nature of liability for sexual harassment. First, applying Civil Code tort liability, Japanese courts created a doctrine that sexual harassment constitutes a tort because it infringes on women's "personal rights"[5] or on her rights to the dignity of her personality regarding sexuality. In other words, in deciding sexual harassment liability, Japanese case law did not approach the issue from the angle of employment discrimination.

Second, Japanese courts quite often held employers liable for sexual harassment by supervisory employees of subordinates. A number of decisions found that such supervisory employees engaged in conduct creating a hostile working environment in the course of implementing their duties.[6] At the same time, Japanese courts developed a doctrine that employers or supervisors in charge of personnel management have a duty to adjust the working environment, and found a breach of this duty when they did not take action to deal with sexual harassment in the workplace of which they were aware.[7] Furthermore, two recent decisions characterized this as a duty arising in contract rather than tort.[8] According to these decisions, employers have a contractual duty to adjust the working environment to protect their employees from sexual harassment.

The 1997 amendment to the Equal Employment Opportunity Law strengthened the regulation to a considerable degree. Among other things, the revised Law contains a provision specifically related to sexual harassment.[9] Under this provision, employers owe a duty to take precautions or other measures to prevent sexual harassment. However, it remains to be seen how this provision will influence the civil liability of employers.[10] Also, it is notable that this provision only explicitly protects women from sexual harassment. The reason is that the language of the Equal Employment Opportunity Law prohibits employment discrimination against women but not men. Even

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Women in Employment], Law No. 92 of 1997 [hereinafter Equal Employment Opportunity Law].

5. For the origin of the notion of "personal rights," see *infra* note 69 and accompanying text.

6. *See infra* notes 124-30 and accompanying text.

7. *See infra* note 57 and accompanying text.

8. *See infra* note 81 and accompanying text.

9. *See infra* note 33 and accompanying text.

10. *See infra* notes 156-58 and accompanying text.

outside the context of the law, there is little discussion regarding sexual harassment of men or same-sex harassment.

This article compares the Japanese law of sexual harassment with U.S. jurisprudence. Part II briefly describes the present situation regarding sexual harassment in Japan, relying on a wide-scale survey conducted in 1997. In Part III, this article focuses on the legal bases of liability for sexual harassment under Japanese law and compares them with U.S. law. Part IV discusses Japanese law regarding employer liability for sexual harassment, including the new provision in the Equal Employment Opportunity Law. Part IV attempts to compare employer liability in Japanese and U.S. law. This article concludes by summarizing the features of Japanese law on sexual harassment and commenting on future prospects.

II. The Reality of Sexual Harassment in Japan

A. Overview

Before turning to legal analysis, it is necessary to understand facts about sexual harassment in Japan based on objective statistics prepared by the Study Group on Sexual Harassment in the Workplace (hereinafter "Report").[11] The Ministry of Labor established this Study Group in 1997 as a tripartite committee to conduct research and make policy recommendations to the Ministry. As stated above, the 1997 amendment to the Equal Employment Opportunity Law created article 21, under which employers have a duty to prevent sexual harassment of women in the workplace. Under paragraph 2 of this provision, the Minister of Labor must issue administrative guidelines regarding the measures that employers should take to implement the amendments. One of the purposes of the Study Group was to make recommendations on the contents of the guidelines.

In 1997, the Study Group conducted a large-scale survey, sending out questionnaires to 2,254 companies and 6,762 employees of those companies.[12] The survey results indicate that sexual harassment exists

11. *Shokuba ni Okeru Sekushuaru Harasumento ni Kansuru Kenkyukai, Shokuba ni Okeru Sekushuaru Harasumento ni Kansuru Kenkyukai Hokoku* [*The Study Group's Report on Sexual Harassment in the Workplace*], *in* MINISTRY OF LABOR MANUAL, *supra* note 1, at 45-89 [hereinafter *Study Group Report*].

12. The ratio of response was 34.8 percent for the companies and 29.6 percent for employees. *Id.* at 69.

in Japan, and most employers and employees feel it is necessary to take appropriate measures to prevent it. However, the survey also shows that only a small percentage of employers actually have such measures in place. The following subsections briefly illustrate several significant findings of this Report as well as recommendations made by the Study Group.

B. Existence of Sexual Harassment

The Study Group's questionnaire first asked subject employees whether and how often sexual harassment takes place in their workplace. Rather than provide specific definitions, the questionnaire merely illustrated "sexual harassment" by way of examples such as the "posting of nude calendars in the office."[13]

Among the female respondents, 59.7 percent reported that there are incidents of sexual harassment in their workplace. Of those, approximately 8 percent replied that sexual harassment "occurs," whereas 51.4 percent replied that it "occurs only once in a while." For male respondents, 4.6 percent said sexual harassment "occurs" and 39.7 percent said it occurs "only once in a while." (Figures 1 and 2).[14] Employers also were asked whether they thought sexual harassment occurred in their workplace. About 37 percent of the respondents answered affirmatively (Figure 3). Such a perception was more common in medium and large-sized companies: about half of the companies that employ more than three hundred workers acknowledged the possibility of sexual harassment (Figure 4).

In addition, the questionnaire asked female workers whether they were ever victims of sexual harassment. About 62 percent of the respondents replied that they were sexually harassed at least once (Figure 5). The questionnaire further asked these respondents what type of sexual harassment they experienced. About 11 percent of these respondents replied that they had experienced a quid pro quo type of harassment. On the other hand, 45.1 percent answered that they had been subject to a hostile working environment (Figure 6). It must be noted, however, that the language "quid pro quo" or "hostile working environment" in the questionnaire does not mean conduct that amounts to sexual harassment that is illegal under Japanese law.[15]

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13. *See, e.g., Study Group Report, supra* note 11, at 49.

14. See Appendix for all Figures. Survey results are reported in *Study Group Report, supra* note 11, at 78-88.

15. *See infra* Part IIIA for circumstances under which sexual harassment becomes

The questionnaire also asked who engaged in the sexual harassment in the workplace. Of those women who said that they experienced sexual harassment, 60 to 70 percent answered that their supervisors had sexually harassed them in some form. Fifteen percent replied that co-workers harassed them, although the ratio was 25.3 percent with respect to hostile working environment cases (Figure 7). Only a small number of respondents reported that customers or company presidents harassed them.

C. Response of Victims and Employers to Sexual Harassment

The Study Group also investigated how victims and employers respond when sexual harassment occurs. First, the questionnaire inquired into women's responses to sexual harassment.[16] About 56 percent of the respondents answered that they simply ignored such conduct, while 34.7 percent indicated that they voiced protest to those who engaged in sexual harassment. About 6 percent consulted with their supervisors, and only 0.2 percent filed a complaint with a grievance board or counseling system within the workplace (Figure 8).

Only a small percentage of employers in Japan have a system to prevent sexual harassment or to handle related grievances (Figure 11). Indeed, 30.9 percent of the respondents who experienced sexual harassment noted their hope that their employer would establish a company-wide system to handle the problem. In addition, 26.9 percent expressed their wish that their employer would investigate the matter and take appropriate action against the offenders (Figure 9).

The employers generally recognized the need for measures to prevent sexual harassment in the workplace. About 90 percent of the employer respondents replied that such steps should be taken. This

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illegal under the Civil Code. In addition to quid pro quo and hostile working environment harassment, the questionnaire listed two other choices for answers: conduct based on sexual bias (e.g., ordering only female employees to serve tea) and conduct outside working hours (e.g., forcing women to sit beside male employees at an office party after work). While either of these may constitute sexual harassment, certain behavior falling into these categories may not be considered impermissible sexual harassment in a legal sense.

16. The survey conducted by the Study Group directed certain questions only to women, including this one. Thus, it appears that the Study Group and survey presumed that women were the relevant targets of sexual harassment in the workplace. Therefore, certain questions will appear on their face to be directed only toward women.

percentage outnumbered that of male and female workers who had the same opinion (both 81.4 percent). As to the contents of the measures, the following are the responses in order of perceived importance: a prompt response after the incident occurs (66.7 percent); clarification of the company policies (52.1 percent); and establishment of grievance schemes or counseling systems (44.4 percent) (Figure 10).

In actuality, however, few companies have taken such measures. When the questionnaire asked employers if they implemented measures to prevent sexual harassment, only 5.5 percent replied that they already had done so. About 14 percent of the respondents answered that they are considering or planning to implement such measures. According to 79.9 percent of the respondents, no measures are in place (Figure 11).

This is the context of the difficulty that supervisors encounter when victims ask for resolution of problems related to sexual harassment. Seventeen percent of the supervisor-respondents replied that the lack of clear-cut policies against sexual harassment was the source of such difficulty. About 16 percent replied that the reason was the absence of a grievance procedure and the unavailability of counseling services.

The situation differs depending on the company's size. In very large companies that employ more than 5,000 workers, 22.6 percent already implemented measures to prevent sexual harassment. That percentage is only 1.5 with respect to companies that employ one to twenty-nine workers (Figure 12). These statistics indicate that the problem is more serious in small and medium-sized companies.

D. The Study Group's Analysis

The survey, therefore, established that problems of sexual harassment do exist in the Japanese workplace. The survey also demonstrated that only a small percentage of employers implemented or considered measures to prevent sexual harassment or to handle related grievances, although most employers are aware of the problem itself and the need to take action. Based on the survey's results, the Study Group examined the background of sexual harassment as well as substantive measures that employers should take.

The Study Group's Report first noted the employer's perception of female employees in terms of human resources management.

More specifically, the Study Group reported that when employers presume male employees have the major role in the workplace, they often fail to recognize female employees as being equally important.[17] In addition to the failure to recognize women as equal, the Report referred to the tendency of men to view women as objects of sexual desire, even in the context of the workplace.[18] According to the Report, if women enter a male-dominated workplace, that perception of women may give rise to the feeling that women are invading the men's territory. A number of publications stated a similar understanding regarding the background of sexual harassment in the workplace.[19] The Study Group's Report confirmed this understanding based on its large-scale survey.

Relying on its findings, the Study Group recommended a series of appropriate measures for employers to take in addressing sexual harassment.[20] These recommendations were mostly incorporated into the guidelines issued by the Minister of Labor on March 13, 1998 ("Guidelines").[21] The Guidelines define sexual harassment, give illustrations and enumerate measures that employers should take to carry out their duty of care to prevent sexual harassment in the workplace.[22] The substantive contents of the Guidelines will be analyzed further in Part IV.

III. The Legal Basis of Liability for Sexual Harassment

A. *Sexual Harassment Under Japanese Law*

1. *Sexual Harassment Under Current Japanese Labor Law*

In the United States, sexual harassment may constitute employment discrimination under Title VII of the Civil Rights Act of

17. *See Study Group Report, supra* note 11, at 55.

18. *See id.*

19. *See, e.g.*, MIZUHO FUKUSHIMA ET AL., SEKUSHUARU HARASUMENTO [SEXUAL HARASSMENT] 18-29 (new ed. 1998).

20. *See Study Group Report, supra* note 11, at 57-63.

21. *Jigyo Nushi ga Shokuba ni Okeru Seitekina Gendo ni Kiinsuru Mondai ni Kanshite Koyo Kanri Jo Hairyosubeki Jiko ni Tsuite no Shishin* [*Guidelines for Employers on Matters Involving Problems Arising from Sexual Conduct in the Workplace*], Rodosho Kokuji [Notification of the Ministry of Labor], No. 20 of 1998, *cited in* MINISTRY OF LABOR MANUAL, *supra* note 1, at 41-44 [hereinafter Ministry of Labor Guidelines].

22. *See infra* notes 151-55 and accompanying text.

1964.[23] In contrast, neither Japanese statutory labor nor employment laws specifically regulated sexual harassment until the 1997 amendment to the Japanese Equal Employment Opportunity Law. The Labor Standards Law, one of the most fundamental statutes regulating employment relations, prohibits sex discrimination only with respect to wages.[24] Regarding working conditions other than wages, the Labor Standards Law only prohibits discrimination based on nationality, creed and social status.[25] The premise of equal treatment is lacking under the Labor Standards Law[26] because it contains several provisions that give special protections for women, such as the prohibition on labor by women in mines and pregnant women from labor requiring the lifting of heavy objects.[27]

Additionally, unlike Title VII, the Equal Employment Opportunity Law has no catchall provision for employment discrimination. Instead, it regulates the specific conduct of employers, i.e., recruitment and hiring,[28] assignment, promotion and training,[29] fringe benefits[30] and termination of employment.[31] Moreover, until the 1997 amendment, provisions regarding recruitment, hiring, assignment and promotions did not strictly prohibit discrimination but instead only required employers to make a good faith effort to achieve equal employment opportunity ("moral duty provision").[32] Furthermore, while the amendment converted the

23. *See infra* notes 98-104 and accompanying text.

24. *See* Rodo Kijunho [Labor Standards Law], Law No. 49 of 1947, art. 4.

25. *See id.* at art. 3.

26. Formerly, the Labor Standards Law provided special protections for women including their working hours. However, the 1997 Law and its amendments abolished these provisions. *See generally* Ryuichi Yamakawa, *Overhaul After 50 Years: The Amendment of the Labor Standards Law*, JAPAN LAB BULL., Nov. 1, 1998, at 5. Although article 3 was not amended to include sex as a basis of impermissible discrimination, the Equal Employment Opportunity Law was substantially enhanced in 1997. *See generally* Takashi Araki, *Recent Legislative Developments in Equal Employment and Harmonization of Work and Family Life in Japan*, JAPAN LAB. BULL., Apr. 1, 1998, at 5.

27. *See* Rodo Kijunho [Labor Standards Law], arts. 64-2 to 68; Josei Rodo Kijun Kisoku [Enforcement Regulations for Women's Labor Standards], Enforcement Regulations no. 3 of Jan. 27, 1986, as amended, Mar. 13, 1998, art. 2.

28. *See* Danjo Koyo Kikai Kinto Ho [Equal Employment Opportunity Law], Law No. 92 of 1997, art. 5.

29. *See id.* at art. 6.

30. *See id.* at art. 7.

31. *See id.* at art. 8.

32.Koyo no Bunya ni okeru Danjo no Kinto na Kikai oyobi Taigu no Kakuho To ni Kansuru Horitsu [Law Respecting the Guarantee of Equal Opportunity and

moral duty provision into a mandatory provision, it did not change the type of prohibited conduct. Although most quid pro quo sexual harassment will fall into the categories of hiring, assignment, promotion, training or termination and therefore will be prohibited, the amendment does not directly prohibit conduct that creates a hostile working environment. On the other hand, the amendment created a new provision for sexual harassment,[33] under which employers have a duty of care to prevent sexual harassment whether it is quid pro quo or hostile working environment. As stated below, however, it is doubtful whether this provision can be a basis of a private cause of action for women to bring lawsuits against their employers.[34] In sum, even after the 1997 amendment, the Equal Employment Opportunity Law is limited as to the scope of available relief.

2. *Sexual Harassment Under the Japanese Civil Code*

a. *Quid Pro Quo*

The Japanese Civil Code provides a basis of judicial relief for sexual harassment. First, as to quid pro quo harassment, case law established that a legal act, such as dismissal or transfer, may be deemed null and void as a violation of "public order and morals" (hereinafter "public policy") under article 90 of the Civil Code when such act is done on the basis of the employee's gender. Article 90 provides that "the legal act that violates public order or good morals shall be null and void." There is little doubt under Japanese case law that public policy contains the principle of equality between the sexes[35] provided by article 14 of the Constitution of Japan.[36] Thus, as

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Treatment Between Men and Women in Employment], Law No. 113 of 1972, arts. 7-8, *amended by* Law No. 92 of 1997.

33. *See* Danjo Koyo Kikai Kino Ho [Equal Employment Opportunity Law], Law No. 92 of 1997, art. 21.

34. The main measure of enforcement of article 21 is the administrative guidance based on the guidelines. Article 25(1) provides, "When the Minister of Labor considers it necessary with respect to the enforcement of this Law, the Minister may request employers to submit reports or give employers advice, guidance or recommendations." *Id.* at art. 25(1) (translation by author).

35. *See* Nissan Jidosha K.K. v. Nakamoto, 35 MINSHU 300, 303 (Sup. Ct., Mar. 24, 1981) (invalidating a work rules mandatory retirement system that set the retirement age for men at the age of 60 and for women at 55 as violating article 90 of the Civil Code).

36. Article 14(1) of the Japanese Constitution provides, "All of the people are equal under the law and there shall be no discrimination in political, economic or

long as quid pro quo sexual harassment is carried out in the form of a legal act, it can be deemed "null and void" under article 90. When article 90 invalidates a legal act that violates public policy, the court can also grant a contractual remedy for the loss of income resulting from such legal act (e.g., back pay in the case of illegal dismissal).[37] Also, a tort remedy is available if such legal act constitutes a tort.[38]

Alternatively, a discharge as quid pro quo harassment or retaliation may be null and void without relying on article 90 since case law established that a discharge without reasonable cause constitutes an abuse of an employer's right to dismiss.[39] A discriminatory discharge has no reasonable cause. One lower court decision invalidated a discharge of a female employee who reported to the president an incident of sexual harassment by her co-worker.[40]

However, certain types of quid pro quo harassment do not involve a legal act. For example, a refusal to hire or promote is not a legal act but an omission, and there is nothing to declare null and void under article 90 of the Civil Code under such circumstances. With respect to such conduct, only tort relief under the Civil Code is available, just as the case of sexual harassment involving hostile working environment.

b. Hostile Working Environment

(1) Remedy Under Tort Law

(a) The *Fukuoka Sekuhara* case

As discussed above, article 90 of the Civil Code cannot invalidate sexual harassment creating a hostile working environment since, in most cases, such conduct does not take the form of a legal act. Therefore, under the Civil Code, the only available remedy is compensation for tort damages. Regarding the basis of tort liability, article 709 of the Civil Code provides that a person who intentionally or negligently infringes on another person's right is subject to liability

social relations because of race, creed, sex, social status or family origin." KENPO [CONSTITUTION OF JAPAN], art. 14(1), *translated in* MINISTRY OF LABOR, LABOR LAWS OF JAPAN 1995 12 (1995).

37. KAZUO SUGENO, RODO HO [LABOR LAW] 447 (5th ed. 1999).

38. *See* MINPO [CIVIL CODE], art. 709.

39. *See id.* at art. 1(3). *See, e.g.,* Kochi Hoso K.K. v. Shiota, 268 RODO HANREI 17, 18 (Sup. Ct., Jan. 31, 1977).

40. *See* Chuo Takushi case, 707 RŌDŌ HANREI 91 (Tokushima Dist. Ct., Oct. 15, 1996).

to compensate for damages resulting from such conduct. According to established case law, the "right" in this provision does not need to be statutory but is interpreted as a "legally protected interest" or an "interest that is considered to need protection under tort law."[41] In cases where sexual harassment amounts to defamation, invasion of privacy, assault, battery or rape, it is unequivocal that such conduct infringes on legally protected interests and constitutes a tort. However, sexual harassment does not necessarily contain the elements of defamation, invasion of privacy and so forth. Therefore, a question arises as to what, if any, interest is legally protected in the case of sexual harassment that creates a hostile working environment.

A leading case on this issue is *Fukuoka Sekuhara*.[42] Several years after the plaintiff was hired and began working as an editor in a small publishing company, the plaintiff's role in editing became increasingly important because the company's chief editor sought to concentrate on unrelated sales activities.[43] The plaintiff and her immediate supervisor often determined editing policy, taking on additional responsibility while the chief editor's role in editing policy declined because he concentrated on sales activities, alienating himself from the main operations of the company.[44] In the presence of other employees or business customers, the chief editor made comments about the plaintiff's private life, including her alleged promiscuity, unfitness as a role model for working women, suitability for "night work" and so forth.[45] He also said to the managing director of the company that the plaintiff's relationships with men disrupted the company's business, and he commented that a novel the plaintiff wrote was pornographic and based on the plaintiff's own experiences.[46]

The relationship between the two deteriorated as the chief editor urged the plaintiff to resign.[47] Since their relationship began to affect the operation of the business, the managing director decided that one

41. Matsumoto v. Iguchi (Daigakuyu case), 4 MINSHU 670, 676 (Gr. Ct. Cass., Nov. 28, 1925).

42. 607 RODO HANREI 6 (Fukuoka Dist. Ct., Apr. 16, 1992). In Japan, cases involving sexual harassment are cited as "X case" to protect the privacy of the parties.

43. *See id.* at 15-21.

44. *See id.*

45. *See id.* at 18-21.

46. *See id.* at 20.

47. *See id.* at 18.

of the two should leave the company.[48] After consulting with the plaintiff about the possibility of reconciliation with the chief editor, and plaintiff's refusal and demand for an apology, the managing director told her that she should resign, which she did.[49] In contrast, the chief editor only received a three-day suspension and a reduction in his bonus.[50]

The plaintiff sued the chief editor contending that his conduct constituted a tort, and she sued the company contending that it was vicariously liable for the conduct of the chief editor and the managing director.[51] As for the conduct of the managing director, the plaintiff argued that he failed to take reasonable measures when he knew the plaintiff was being subjected to sexual harassment.[52]

The Fukuoka District Court rendered judgment for the plaintiff.[53] First, the court held that the chief editor's comments about the plaintiff's private sex life to her, to other employees in the workplace or in other places related to company business, made her work environment intolerable and gave rise to liability under article 709 of the Civil Code since such conduct violated her personal dignity and her interest in "working in an environment that is conducive to working."[54] Based on this holding, the court ruled that the chief editor's conduct constituted a tort, finding that his comments and gossip regarding her private life degraded her social reputation as a working woman and, therefore, were slanderous as well as an invasion of her personal rights.[55] Also, since the chief editor carried out such conduct in the course of his supervisory duties, the company was vicariously liable for his conduct under article 715 of the Civil Code.[56]

The court went on to establish that the employer has a duty of care to "prevent employment relations from evolving in ways that infringe upon an employee's human dignity and diminish their ability to perform their job, or to take appropriate action which will ensure

48. *See id.* at 17.
49. *See id.* at 18.
50. *See id.*
51. *See id.* at 11.
52. *See id.* at 11-12.
53. *See id.* at 7.
54. *Id.* at 21.
55. *See id.* at 22.
56. *See id.*

that the workplace is conducive to working."[57] If a workplace manager fails to fulfill this duty of care, liability will result under article 709, and the employer will be vicariously liable under article 715 for the manager's failure.[58] The court stated that in this case, although the managing director and the president of the company were well aware of the confrontation between the plaintiff and the chief editor, they failed to take appropriate measures to adjust the plaintiff's work environment by prompt fact-finding or to attempt to avoid the worst-case scenario that one party to the conflict would resign.[59] The court also held the company liable for the managing director's discriminatory response to the plaintiff's intolerable working environment. The court presumed, in light of the discriminatory attitude shown towards the plaintiff, the managing director, in attempting conciliation of the conflict, assumed that it was the plaintiff who should resign without any justification.[60]

(b) The "Interest in Working in an Environment Conducive to Working"

One of the most important features of the decision in *Fukuoka Sekuhara* is that the court created a doctrine that the "interest in working in an environment conducive to working" can be a legally protected interest and a basis of tort liability. In this case, the court did not need to create a new legal doctrine to the extent that the chief editor's conduct constituted defamation or invasion of privacy. Nevertheless, the court clarified that sexual harassment is conduct that infringes on a new, distinctive category of legally protected interests. This holding is significant in that it may afford a basis for tort liability in cases where neither defamation nor invasion of privacy are found. For example, sexual comments that do not pertain to the plaintiff's personal matters or the posting of sexually provocative posters in the workplace can constitute a tort only when courts rely on the doctrine of the "interest in working in an environment conducive to working."[61]

It must be noted, however, that many cases involving sexual harassment do not rely on this doctrine. In fact, most of the decisions

57. *Id.*
58. *Id.*
59. *See id.* at 23.
60. *See id.*
61. Ryuichi Yamakawa, *Sekushuaru Harasumento to Fuho Koi* [*Sexual Harassment and Torts*], 1005 JURISUTO 48, 51 (1992).

after *Fukuoka Sekuhara* did not refer to the "interest in working in an environment conducive to working."[62] This is mainly attributable to the factual circumstances of each case. In most of these cases, the conduct alleged to be sexual harassment was forced physical contact or even rape (or attempted rape).[63] In some other cases, the supervisor demanded sexual favors from the plaintiff.[64] In holding defendants liable, the courts usually state that such conduct infringes on plaintiffs' personal rights,[65] the right to self-determination in sexual matters,[66] personal dignity[67] or sexual freedom.[68] In contrast, *Fukuoka Sekuhara* did not involve sexual desire on the part of the chief editor. He merely wanted to oust the plaintiff from the workplace. In this sense, the case provided suitable factual circumstances for the new doctrine.

In any event, the "interest in working in an environment conducive to working" can be classified as one of the "personal rights," "personality rights" or "personal interests." Although the

62. An exception is the Kanazawa sekuhara case (1st instance), where the court held that the offender's conduct caused the deterioration of the plaintiff's working environment. *See* Kanazawa sekuhara case, 650 RODO HANREI 8, 13 (Kanazawa Dist. Ct., Wajima branch, May 26, 1994), *aff'd*, 707 RODO HANREI 37 (Nagoya High Ct., Kanazawa branch, Oct. 30, 1996).

63. *See, e.g.*, Yokohama sekuhara case (2d instance), 728 RODO HANREI 12 (Tokyo High Ct., Nov. 20, 1997); Kanazawa sekuhara case (2d instance), 707 RODO HANREI 37 (Nagoya High Ct., Kanazawa branch, Oct. 30, 1996); Hyogo sekuhara case, 726 RODO HANREI 100 (Kobe Dist. Ct., July 29, 1997); Asahikawa sekuhara case, 717 RODO HANREI 42 (Asahikawa Dist. Ct., Mar. 18, 1997); Tokyo sekuhara (dispatched worker) case, 716 RODO HANREI 105 (Tokyo Dist. Ct., Jan. 31, 1997); Tokyo sekuhara (advertising agency) case, 707 RODO HANREI 20 (Tokyo Dist. Ct., Dec. 25, 1996); Sapporo sekuhara case, 933 HANREI TAIMUZU 172 (Sapporo Dist. Ct., May 16, 1996); Osaka sekuhara (funeral home) case, 1589 HANREI JIHO 92 Osaka Dist. Ct., Apr. 26, 1996); Nara sekuhara case, 903 HANREI TAIMUZU 163 (Nara. Dist. Ct., Sept. 6, 1994); Nyu Fujiya Hoteru case, 580 RODO HANREI 17 (Shizuoka Dist. Ct., Numazu branch, Dec. 20, 1990).

64. *See, e.g.*, Osaka sekuhara (freight company) case, 893 HANREI TAIMUZU 203 (Osaka Dist. Ct., Aug. 29, 1996).

65. *See, e.g.*, Yokohama sekuhara case (2d instance), 728 RODO HANREI at 24; Wakayama sekuhara case, 1658 HANREI JIHO 144 (Wakayama Dist. Ct., Mar. 11, 1998); Hyogo sekuhara case, 726 RODO HANREI at 110; Osaka sekuhara (freight company) case, 893 HANREI TAIMUZU at 205.

66. *See, e.g.*, Kanazawa sekuhara case (2d instance), 707 RODO HANREI at 48.

67. *See, e.g.*, Asahikawa sekuhara case, 717 RODO HANREI at 62. The *Asahikawa sekuhara* court also held that sexual harassment in this case infringed on the plaintiff's right to continuing employment. *Id.*

68. *See, e.g.*, Yokohama sekuhara case (2d instance), 728 RODO HANREI at 24; Chiba sekuhara case, 1658 HANREI JIHO 160 (Chiba Dist. Ct., Mar. 26, 1998); Sapporo sekuhara case, 933 HANREI TAIMUZU at 175.

notion of "personal interests" or "personal rights" may be unfamiliar to common law countries, it appears to be derived from German law.[69] Such personal interests may include, not only established rights such as privacy, but also interests that are not yet recognized as "rights" but still should be protected under tort law. For example, the Supreme Court of Japan once held that school teachers could claim a tort remedy in a case where the defendant infringed their "personal interest in the serenity of a private life" by distributing handbills that criticized their job performance and resulted in various types of harassment by parents of pupils.[70] Relying on this personal rights theory, the court in *Fukuoka Sekuhara* created the new legal doctrine that the "interest in working in an environment conducive to working" provides a basis of tort liability in sexual harassment cases.

Just as one has an interest in privacy regarding one's private life, the interest in working in an environment conducive to working may constitute one of the personal interests protected under tort law. However, the "interest in working in an environment conducive to working" appears to be too broad and, therefore, could be applied in contexts where no sexual harassment exists. Read literally, there could be an infringement of this interest whenever a worker feels discomfort in the work environment. The more accurate language to describe this interest would be "an interest in working in an environment free from discomfort arising from sexuality."[71] As long as sexuality is irrelevant to the work at issue and belongs in one's private sphere, an employee has an interest in working in an environment free from harassment of that nature. In the sense private life should be left to personal determination, this interest should be protected in the same way that privacy is protected. By defining the protected interest in this manner, it will be an appropriate framework for cases relating to sexual harassment.

(c) The Nature of Conduct

It is still necessary to delineate the scope of tort liability from another perspective. Under traditional Japanese tort theory, the liability of the tortfeasor is determined by (i) the nature of the

69. *See generally* KIYOSHI IGARASHI, JINKAKUKEN RON [A STUDY ON PERSONAL RIGHTS] 2-3, 122-23 (1989). "Personal right" is a translation of a German legal term, "Persönlichkeitsrecht," which may also be translated as a "right to the dignity of personality."

70. *See* Ebihara v. Katsuma, 43 MINSHU 2252, 2259 (Sup. Ct., Dec. 21, 1989).

71. *See also* Yamakawa, *supra* note 61, at 51.

infringed legal interest, and (ii) the manner in which the conduct infringed on such interest ("relational theory").[72] Conduct that infringes upon established rights such as human life, property or privacy constitutes a tort regardless of how the conduct is carried out, so long as the offender is negligent.[73] By contrast, if the interest is not yet established but is being developed, the seriousness or egregiousness of the conduct becomes significant. Obviously, the "interest in a working environment conducive to working" (or free from discomfort arising from sexual harassment) is not yet an established right. Therefore, in determining tort liability for sexual harassment based on a hostile working environment, it is necessary to consider how the conduct was carried out.

In 1996, the Kanazawa branch of the Nagoya High Court provided general criteria on this point.[74] The court first acknowledged that where a male supervisor takes advantage of his position and engages in sexual conduct with a female subordinate employee against her will, such conduct is not always illegal.[75] According to the court's opinion, however, that conduct is illegal as an infringement of the subordinate's personal rights—sexual freedom or the right to self-determination on sexual matters—if the conduct is inappropriate "from a social point of view" (*shakai teki sotosei*) in light of the totality of the circumstances.[76] Factors considered include the nature of the conduct, rank and age of the supervisor and the subordinate, marital history of the subordinate, relationship between the two, place of the conduct, frequency and continuity of the conduct and response of the subordinate and others.[77]

Similarly, in *Yokohama Sekuhara*, the Tokyo High Court stated that, although a male supervisor's unwelcome physical contact with his female subordinate does not always infringe on sexual freedom or personal rights, the conduct may be illegal when the conduct has sexual significance and is impermissible under "social common sense" (*shakai tsunen*) in the totality of circumstances.[78] The Tokyo High

72. *See* 19 CHŪSHAKU MINPO [COMMENTARY ON THE CIVIL CODE] 33 (Ichiro Kato ed., 1965).

73. *See* MINPO [CIVIL CODE] arts. 709-710.

74. *See* Kanazawa sekuhara case (2d instance), 707 RODO HANREI 37 (Nagoya High Ct., Kanazawa branch, Oct. 30, 1996).

75. *See id.* at 48.

76. *See id.*

77. *See id.*

78. *See* Yokohama sekuhara case, 728 RODO HANREI 12 (Tokyo High Ct., Nov.

Court considered the conduct's objective elements: the part of the body touched, the manner and degree of contact (including frequency and continuity), purpose of the offender, degree of the discomfort felt by the victim, time and place of the conduct (including whether any third parties were present), whether the conduct took place during work hours, status of the supervisor and the relationship between the supervisor and the victim.[79]

Although the factors listed by these courts are quite comprehensive, some appear to be more important than others. Among the most important are the nature of the offender's conduct and its frequency or continuity, because these are most likely to affect the seriousness of the conduct, which is, as previously described, an important element in determination of tort liability. In fact, some Japanese commentators contend that the conduct must be either repetitive or severe in order to constitute a tort under the Civil Code.[80] This view reflects the practical necessity for clarifying the scope of impermissible behavior that creates a hostile working environment as a developing legal concept, which is currently still elusive. On the other hand, such a requirement is not necessary when the conduct constitutes battery, assault, defamation or invasion of privacy.

(2) Remedy Under Contract Law

In recent years, two lower court decisions held that relief based on an employment contract is available when an employee is subject to harassment that creates a hostile working environment.[81] According to these decisions, the employer has an affirmative duty under the employment contract to make adjustments in the working environment. This duty apparently has its origin in *Fukuoka Sekuhara*, where the court stated that the employer has a duty of care[82] under tort law to keep the working environment conducive to working.[83]

20, 1997).

79. *See id.* at 23.

80. *See, e.g.*, Shozo Yamada, *Sekushuaru Harasumento no Hōri* [*The Law of Sexual Harassment*], 155 KIKAN RODO HO 52, 57 (1990); Yamakawa, *supra* note 61, at 51.

81. *See* Mie sekuhara case, 729 RODO HANREI 54 (Tsu Dist. Ct., Nov. 5, 1997); Kyoto sekuhara case, 716 RODO HANREI 49 (Kyoto Dist. Ct., Apr. 17, 1996).

82. Since this statement was made in the context of tort liability, the court used the term "duty of care."

83. *See* Fukuoka sekuhara case, 607 RODO HANREI 6, 22 (Fukuoka Dist. Ct., Apr.

On the other hand, recent decisions based this duty on the employment contract. For example, in *Mie Sekuhara*, the court held that the employer owes a duty ancillary to the contract to keep the workplace conducive to work for the employees.[84] Under the Japanese Civil Code, a contractual remedy has advantages for a plaintiff. For example, the statute of limitations is ten years if the right to compensation for damages is based on contract,[85] whereas the period is three years if such right is based on tort.[86] Some commentators have already seized upon the contractual duty as the better framework from the perspective of the plaintiff, compared to the duty based on tort.[87]

The elements of this duty vary depending on the facts of each case. In *Kyoto Sekuhara*, the court held that the employer has a duty to make adjustments in the working environment so that the employees' privacy will not be invaded.[88] The court even held that the employer has a duty to make adjustments in the working environment so that the employees will not involuntarily resign.[89] Taken literally, such understanding could lead to a result where whenever an employee involuntarily leaves his or her job, the employer is contractually liable for violation of such a duty. Thus, critics argue that such an understanding of the duty to adjust the working environment is excessively broad.[90] Since there are only two decisions that relied on the contractual duty theory, it remains to be seen

16, 1992).

84. *See* Mie sekuhara case, 729 RODO HANREI at 59.

85. *See* MINPO [CIVIL CODE], art. 167, para. 1.

86. *See id.* at art. 724.

87. *See, e.g.*, Mizuho Fukushima, *Sekushuaru Harasumento to Ho* [*Sexual Harassment and the Law*], 1005 RODO JUNPO 16, 17 (1989).

88. *See* Kyoto sekuhara case, 716 RODO HANREI 49, 53-54 (Kyoto Dist. Ct., Apr. 17, 1996).

89. *See id.* at 54.

90. *See* Ryūichi Yamakawa, *Jitsumu kara Mita Saikin no Rodo Hanrei no Mondai Ten* [*Issues Regarding Recent Labor Cases from the Viewpoint of a Legal Practice*], 1662 RODO KEIZAI HANREI SOKUHO 22, 36 (1997). Another criticism is that since the employer's duty to adjust the working environment is limited to making arrangements to prevent and remedy sexual harassment, an individual employee's tortious conduct does not automatically constitute a breach of such duty. *See Zadankai, Sekushuaru Harasumento no Horitsu Mondai* [*Roundtable Discussion: Legal Issues Concerning Sexual Harassment*], 956 JURISUTO 12, 30 (1990) (statement by Koichiro Yamaguchi). *But see* Ken Noma, *Sekushuaru Harasumento to Shiyōsha no Shokuba Kankyo Hairyo Gimu* [*Sexual Harassment and Employer's Duty to Take Care of Working Environment*], 91 NIHON RODO HO GAKKAI SHI 126, 132 (1998) (preferring contractual liability to tort liability).

whether the theory will gain popularity among Japanese courts. In addition, the scope of this duty is unclear. Since the duty is meant to protect the interest in working in an environment conducive to working, which developed in the context of tort law, its scope, if properly delineated, may not be different from the scope of the duty under tort law.

B. Comparative Analysis

1. A Brief Look at U.S. Law

In the United States, sexual harassment in the workplace is usually discussed in the context of employment discrimination. Of course, remedies under tort or contract law are available depending on the facts of each case.[91] For example, conduct involving physical attack may constitute battery or assault.[92] Also, quid pro quo harassment, such as dismissal for refusing a request for sexual favors may, in certain states, lead to the finding of the violation of public policy[93] or the covenant of good faith and fair dealing.[94] Furthermore, conduct that creates a hostile working environment may result in liability as an intentional infliction of emotional distress,[95] invasion of privacy[96] or defamation.[97] However, while the scope of these common law liabilities is limited to specific factual circumstances, the remedy under employment discrimination law provides a more general scope of liability.

Meanwhile, regarding conduct that creates a hostile working environment, a question was raised whether such conduct constitutes "discrimination" with respect to "compensation, terms, conditions, or privileges of employment" under Title VII of the Civil Rights Act of 1964.[98] The U.S. Supreme Court answered this question affirmatively

91. For tort remedies, see generally Krista J. Schoenheider, *Note, A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461 (1986).

92. *See, e.g.*, Skousen v. Nidy, 367 P.2d 248 (Ariz. 1961).

93. *See, e.g.*, Lucas v. Brown & Roots, Inc., 736 F.2d 1202 (Ark. 1984).

94. *See, e.g.*, Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974).

95. *See, e.g.*, Shaffer v. Nat'l Can Corp., 565 F. Supp. 909 (E.D. Pa. 1983).

96. *See, e.g.*, Phillips v. Smalley Maintenance Serv., Inc., 435 So. 2d 705 (Ala. 1983).

97. *See, e.g.*, Arenas v. Ladis Co., 619 F. Supp. 1304 (D.Wis. 1985).

98. Section 703(a) of Title VII of the Civil Rights Act of 1964 provides:

It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise

in *Meritor Savings Bank, FSB v. Vinson,*[99] holding that sexual harassment in hostile working environment cases violates Title VII when the harassment is sufficiently severe or pervasive to alter the working conditions of victims.[100] In other words, it is the change of the victim's terms and conditions of work by virtue of the working environment that turns sexual harassment into employment discrimination.

There is still another threshold for liability under U.S. employment discrimination law: the element of "sex" discrimination. Sexual harassment must be discrimination "because of sex" in order to constitute a violation of Title VII.[101] While this element usually exists in the case of sexual harassment, a problem arises regarding same-sex harassment and bisexual harassment. Although the Supreme Court acknowledged that same-sex harassment is prohibited under Title VII,[102] there is uncertainty regarding bisexual harassment, since the offender engages in harassing conduct toward both men and women.[103] In sum, the legal framework under U.S. anti-discrimination statutes can be labeled as the "employment discrimination" approach, whereas Japanese case law can be characterized as the "personal rights" approach.[104]

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to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1994).

99. 477 U.S. 57 (1986).

100. *See id.* at 67; *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

101. *See* Oncale v. Sundowner Offshore Serv., Inc., 118 S. Ct. 998, 1002 (1998).

102. *See Oncale,* 118 S. Ct. at 1001-02.

103. *See generally* 1 EMPLOYMENT DISCRIMINATION LAW 808-09 (Barbara Lindemann & Paul Grossman eds., 3d ed. 1994)

104. Japan is not the only country that adopts the "personal right" approach. One can find a similar approach in some European countries. For example, a German statute defines sexual harassment as conduct based on sexual intent that harms an employee's dignity. *See* MINISTRY OF LABOR MANUAL, *supra* note 1, at 118; MINISTRY OF LABOR MANUAL, *supra* note 1, at 118; *see also* Akira Okuyama, *EU Shokoku ni Okeru Sekushuaru Harasumento no Ho Kisei* [*Regulation of Sexual Harassment in EU Countries*], 1147 JURISUTO 17, 122 (1998).

2. *Features of Japanese Law*

Japanese sexual harassment jurisprudence is distinctive because of its "personal rights" approach. One of the differences between the "personal rights" approach and the "employment discrimination" approach of U.S. courts is the requirement of "severity" or "pervasiveness" in U.S. hostile working environment cases.[105] Under the latter approach, this requirement is necessary for courts to find "employment" discrimination in terms of working conditions under Title VII. On the other hand, under the "personal rights" approach, there is no need for such a requirement in theory, since an infringement on personal rights can occur regardless of a change in working conditions.

As stated above,[106] however, Japanese cases and scholarly opinions agree that it is necessary to delineate the scope of liability for the infringement of "personal rights," such as an interest in working in an environment conducive to working. In doing so, the frequency and severity of conduct plays an important role in determining tort liability. The reason is that under the "relational theory," such factors can be a basis for the seriousness of conduct, which can, in turn, be a basis of tort liability regarding developing legal interests.[107] However, such a limitation is not inherent in the "personal rights" approach itself. If, in the future, "personal rights" becomes an established right like the right to privacy, this limitation will be unnecessary even under the relational theory.

Additionally, as the element of "discrimination" is not a prerequisite under the "personal rights" approach, there is little problem in finding liability for conduct outside the scope of discrimination, such as bisexual harassment.[108] Of course, the element of discrimination plays an important role in determining tort liability. Under the relational theory, the court will find tort liability more easily when the conduct violates public policy.[109] Since equality between sexes is a fundamental public policy in Japan, sexual harassment constituting sex discrimination is a public policy violation and therefore leads to tort liability. Nevertheless, discrimination is not an indispensable element determining liability.

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105. *See, e.g., Meritor*, 477 U.S. 57, 67 (1986).
106. *See supra* notes 74-80 and accompanying text.
107. *See supra* note 72 and accompanying text.
108. *See supra* note 104 and accompanying text.
109. *See* 19 CHŪSHAKU MINPO, *supra* note 72, at 34-35.

On the other hand, Japanese law on sexual harassment has its own limitations. Among other things, corrective as well as preventive measures are limited in Japan. Relief for sexual harassment is essentially based on the Civil Code, except for the new provision in the Equal Employment Opportunity Law. Under the Civil Code, courts can grant relief for sexual harassment based on hostile working environment[110] only in the form of monetary damages. Unlike courts in the United States that have broad equitable powers to fashion remedies under section 706(g) of Title VII,[111] Japanese courts cannot issue injunctions or other forms of affirmative relief except in the case of defamation, where courts may order defendants to post notices of apology under article 723 of the Civil Code.

Even though the amended Equal Employment Opportunity Law has a provision regarding sexual harassment, the law merely provides administrative guidance as an enforcement mechanism. While the Minister of Labor has authority to publish the names of employers who violate certain provisions prohibiting employment discrimination (article 26), the provision regarding the employer's duty of care to prevent sexual harassment is not included in these provisions.[112] Similarly, a special mediation procedure under article 13 of the Equal Employment Opportunity Law is not available in situations involving an employer's violation of duty of care regarding sexual harassment.[113]

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110. In the case of quid pro quo harassment, courts can declare legal actions null and void as a violation of public order or an abuse of employer's rights. *See supra* notes 34-37 and accompanying text. This is also true when the conduct violates mandatory provisions of the Equal Employment Opportunity Law. *See* Danjo Koyo Kinto Ho [Equal Employment Opportunity Law], Law No. 113 of 1972, arts. 5-8.

111. *See* 42 U.S.C.A. § 2000e-5(g) (1994).

112. Article 26 states that the Minister of Labor may publish the fact that an employer violated articles 5 to 8 if the employer does not abide by the Minister's recommendations under article 25. *See* Danjo Koyo Kikai Kinto Ho [Equal Employment Opportunity Law], Law No. 92 of 1997, art. 25. Thus, the Minister may not publish the names of employers who violated article 21, which provides for the duty of care regarding sexual harassment.

113. Article 13 of the Equal Employment Opportunity Law provides that the Director of the Prefectural Women's and Young Workers' Office must refer disputes to the Equal Opportunity Mediation Commission if those disputes are the subject of administrative adjustment as provided in article 12. *See* Danjo Koyō Kikai Kintō Hō [Equal Employment Opportunity Law], art. 13. According to article 12, the specifics of disputes subject to administrative adjustment are left to the Enforcement Regulations. *See id.* at art. 12. However, article 2 of the Enforcement Regulations does not include disputes regarding sexual harassment. *See* Koyo no Bunya ni okeru Danjo no Kinto na Kikai no Kinto ni Kansuru Shiko Kisoku [Enforcement Regulations for the Equal Employment Opportunity Law], Enforcement Regulations no. 2 of Jan. 27, 1986, as amended, Mar. 13, 1998, art. 2.

More importantly, although not limited to remedies for sexual harassment, but relevant to civil remedies under dispute resolution systems in general, the enforcement mechanisms under Japanese law are weak when compared with those under U.S. law. Jury trials, class actions, punitive damages and comprehensive discovery systems do not exist in Japanese law. Although there is a counterpart for compensatory damages called *isha-ryo* (consolation money), the amount awarded is quite small. In cases of sexual harassment, the maximum amount of *isha-ryo* awarded thus far was three million yen, approximately 25,000 U.S. dollars.[114] Although the analysis of the role of the judiciary in Japanese society is beyond the scope of this article, it is certain that judicial relief for sexual harassment is less effective as a deterrent in Japan than it is in the United States.[115]

IV. Sexual Harassment and Employer's Liability

A. *Employer's Liability Under Japanese Law*

1. *Respondeat Superior (article 715 of the Civil Code)*

In Japan, tort law quite often provides relief for sexual harassment, as discussed in Part III. Although the tort liability of a person who engaged in sexual harassment is based on the "personal rights" doctrine, the liability of the employer for the conduct of its employees needs a separate legal basis. In this respect, article 715 of the Civil Code of Japan provides a rule that is, to a certain extent, comparable to the doctrine of respondeat superior or vicarious liability under Anglo-American common law. Under article 715(1), an employer is liable for harm caused to a third person by an employee "in the course of implementing his duties."[116]

Japanese courts have construed this "course of duties" requirement liberally since duties under the employment contract cannot include tortious conduct. First, if the employee engages in

114. *See, e.g.*, Chiba sekuhara case, 1658 HANREI JIHO 160, 165 (Chiba Dist. Ct., Mar. 26, 1998).

115. *See* Ryūichi Yamakawa, *Wagakuni ni Okeru Sekushuaru Harasumento no Shihoteki Kyusai* [*Private Law Remedies for Sexual Harassment in Japan*], 1097 JURISUTO 69, 74 (1996).

116. In cases where tortious conduct is carried out by a director of a corporation, article 44(1) provides for liability of the company for such conduct. The requirement under article 44 is essentially the same as under article 715. *See* MINPO [CIVIL CODE], art. 44(1).

conduct that appears to be within the scope of his duties, the employer is vicariously liable for that conduct.[117] Second, the employer is also vicariously liable if the employee's tortious conduct is closely related to the implementation of his duties.[118] For example, the Japanese Supreme Court held a construction company liable for the injury caused by one of its employees to another as a result of a quarrel arising from a dispute over the manner of work.[119]

Article 715 of the Civil Code, however, provides for an affirmative defense to employer liability, stating that an employer is not liable for the torts committed by an employee if the employer took reasonable care in assigning the employee as well as in supervising the implementation of his duties. However, this provision is interpreted narrowly, reflecting the notion that vicarious liability under article 715 is based on the principle that an employer should assume the risk of its business activities since it is the employer that creates the risk and makes a profit due to its employees.[120] No reported case since World War II has granted this immunity.[121]

2. *Sexual Harassment and Conduct "In the Course of Implementing Duties"*

a. *Vicarious Liability for the Conduct of the Offender*

Under article 715 of the Civil Code, the pivotal question regarding employer liability for sexual harassment is whether the employee carried out the tortious conduct in the course of implementing his other duties. There are basically three types of tortious conduct in sexual harassment cases. First, an exercise of the employer's authority over personnel by supervisors as quid pro quo harassment may constitute a tort as well as a breach of the employment contract or violation of statutory labor laws. Second, in

117. *See, e.g.*, Mitsukoshi Hosei K.K. v. Chabatake, 11 MINSHU 1254, 1258 (Sup. Ct., July 16, 1957). A similarity can be found in this case law with the "apparent authority" doctrine under the common law of agency in the United States. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958).

118. *See, e.g.*, Nakaoka Kensetsu K.K. v. Mizuno, 23 MINSHU 2079, 2081 (Sup. Ct., Nov. 18, 1969). This is similar to common law vicarious liability because it is based on conduct "within the scope of employment." Differences between the Japanese and U.S. doctrines are examined later. *See infra* notes 176-88 and accompanying text.

119. *See* 23 MINSHU at 2080-81.

120. *See* TAKASHI UCHIDA, SAIKEN KAKURON [THE LAW OF OBLIGATION-SPECIFIC SUBJECTS] 445 (1997).

121. *Id.* at 446.

hostile working environment cases, tort liability may be found in the harassing conduct of supervisors or co-workers carried out in the course of implementing their duties. Third, the workplace manager's failure to take reasonable measures to make adjustments in the working environment itself may also constitute a tort.[122]

Of these three types of conduct, quid pro quo harassment by supervisors will hardly create problems in determining employer liability because it is clear that the exercise of authority over personnel or tangible employment action by supervisors is an implementation of the supervisor's duties carried out on behalf of the employer. This is also the case with the manager's failure to take reasonable measures to adjust the working environment. Since one of the workplace manager's duties is to take reasonable measures in managing the workplace, the failure to do so constitutes a tort in the course of implementing his duties as supervisor.[123] Thus, the most problematic situation involves the second type of liability noted above: liability for a supervisor or co-worker's harassing conduct. The central question is whether the hostile working environment harassment can constitute conduct carried out in the implementation of the offender's duties.

There are many decisions finding that under the factual circumstances of each case, the offender's conduct was carried out in the implementation of his duties. For example, in *Fukuoka Sekuhara*, the chief editor, as the direct supervisor of the victim, exploited his position and made degrading comments and spread rumors about the plaintiff to his supervisor and subordinates in the workplace as well as to business clients.[124] Based on these findings, the court held that the chief editor engaged in harassing conduct in the course of implementing his duties and, therefore, vicarious liability existed.[125] Similarly, in *Yokohama Sekuhara*, the Tokyo High Court held the employer vicariously liable for the supervisor's unwelcome and forced physical contact with one of his subordinates while in the workplace.[126] Thus, the court found that his tortious conduct arose

122. *See supra* notes 57-60 and accompanying text.

123. The scope of this duty will be discussed later. *See infra* notes 141-47 and accompanying text.

124. *See* Fukuoka sekuhara case, 607 RODO HANREI 6 (Fukuoka Dist. Ct., Apr. 16, 1992).

125. *Id.* at 22.

126. *See* Yokohama sekuhara case, 728 RODO HANREI 12, 25 (Tokyo High Ct., Nov. 1997).

out of and was clearly related to the implementation of his duties.[127] The court also noted that the motive of the supervisor, his own personal sexual desire, was irrelevant in determining vicarious liability.[128]

In holding employers liable, a number of lower courts relied on similar reasoning.[129] It is possible to glean from these decisions the following factors relevant in determining vicarious liability: the time and place of the harassing conduct; the nature of the content and audience of verbal comments; the job positions of the offender and the victim; whether the offender took advantage of his status as the victim's supervisor; and the continuity of harassment in cases where a portion of the conduct took place outside of working hours or the workplace.[130]

However, in *Mie Sekuhara*, the court declined to find vicarious liability for conduct that allegedly created a hostile working environment.[131] In this case, a nurse was subject to unwelcome physical contact by her direct supervisor while on night shift duty when she and her supervisor were alone in the employees' break room and the nurse laid down to rest.[132] The court held that, since the supervisor did not intend to wake up or call on the nurse, his conduct was merely personal and had no close relation to his duties as her supervisor.[133] A criticism of this holding is that this narrow interpretation of article 715 is inconsistent with prior case law.[134]

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127. *See id.*

128. *See id.*

129. *See, e.g.*, Kanazawa sekuhara case (2d instance), 707 RODO HANREI 37, 49 (Nagoya High Ct., Kanazawa branch, Oct. 30, 1996); Chiba sekuhara case, 1658 HANREI JIHO 160, 165 (Chiba Dist. Ct., Mar. 26, 1998); Asahikawa sekuhara case, 717 RODO HANREI 42, 62 (Asahikawa Dist. Ct., Mar. 18, 1997); Hyogo sekuhara case, 726 RODO HANREI 100, 110 (Kobe Dist. Ct., July 29, 1997); Osaka sekuhara case, 1589 HANREI JIHO 92, 95 (Osaka Dist. Ct., Apr. 26, 1996); Sapporo sekuhara case, 933 HANREI TAIMUZU 172, 175 (Sapporo Dist. Ct., May 16, 1996); Tokyo sekuhara case (advertising agency), 707 RODO HANREI 20, 25 (Tokyo Dist. Ct., Dec. 25, 1996). In some of these cases, the court applied article 44 regarding the conduct of directors.

130. In *Asahikawa sekuhara*, the president of the company visited the victim's home and engaged in physical contact with her. *See* Asahikawa sekuhara case, 717 RODO HANREI at 62. Similarly, in *Tokyo sekuhara (advertising agency)*, the court held the employer liable for its supervisor's physical contact with his female subordinate that occurred in a hospital when she took sick leave. Tokyo sekuhara case, 707 RODO HANREI at 25.

131. *See* Mie sekuhara case, 729 RODO HANREI 54, 59 (Tsu Dist. Ct., Nov. 5, 1997).

132. *See id.* at 58.

133. *See id.* at 59.

134. *See* Yamakawa, *supra* note 90, at 36.

Also, it is notable that the court nevertheless held the employer liable for failure to take reasonable care to make adjustments in the working environment. The imposition of liability was based on the theory that the employer has a contractual duty to keep the working environment conducive to working.[135] In any event, since there is only one other similar ruling at present,[136] it remains to be seen whether there will be more decisions that adopt such an interpretation.

b. *Employer Liability for Failure to Adjust the Working Environment*

Employer liability for sexual harassment also can be based on a non-harassing workplace manager's failure to make necessary adjustments in the working environment after the harassment by other individuals occurred if the workplace manager had management authority over the victims' workplace.[137] The premise is that the workplace manager individually owes a duty of care under tort law to make such adjustments. Since the workplace manager is supposed to implement this duty as an exercise of his personnel management authority, the failure to carry out such duties leads to employer liability under article 715 of the Civil Code.

Japanese courts have already relied on similar reasoning in cases involving workers' compensation. When a workplace manager charged with responsibility for overseeing safety in the workplace is negligent in carrying out this duty, the workplace manager is individually liable under tort law, and the employer is vicariously liable for the workplace manager's negligence.[138] Moreover, as discussed in Part III, a few lower court decisions stated that the duty to adjust the working environment is a contractual one.[139] According to such an understanding, it is not the workplace manager but the employer who owes a duty as a party to the employment contract. However, whether based on contract or tort, there appears to be little difference in the substantive content of the duty.

The significance of this theory becomes clear where the court cannot find vicarious liability for the offender's conduct in

135. *See* Mie sekuhara case, 729 RODO HANREI at 60.

136. *See* Kyoto sekuhara case, 716 RODO HANREI 49, 53 (Kyoto Dist. Ct., Apr. 17, 1996).

137. *See supra* notes 57-60 and accompanying text.

138. *See, e.g.*, Araki v. Kainan Tokushu Koki K.K., 497 RODO HANREI 92, 98 (Tokyo Dist. Ct., Mar. 27, 1987).

139. *See supra* note 81 and accompanying text.

implementing his duties.[140] For example, when a hostile working environment is created by a co-worker with no supervisory authority over the victim, it is usually difficult to find that the conduct is carried out in the course of implementing his duties. This is also true when it is difficult to ascertain the offender who engages in sexual harassment anonymously. Furthermore, with respect to sexual harassment by customers or business clients, the doctrine of vicarious liability based on the employee's conduct in implementing his duties has no application. The theory of employer liability for failure to adjust the working environment is useful in these situations to find vicarious liability.

Problems do remain, however, regarding those circumstances where courts find that the employer or workplace manager failed to adjust the working environment. In *Fukuoka Sekuhara*, the court determined that such a failure existed, since the managing director, who supervised both the chief editor and the plaintiff, failed to conciliate the dispute between the two.[141] More importantly, the court stressed that the managing director manifested a discriminatory posture since he assumed it was the plaintiff who should resign if the conflict remained unresolved.[142]

In *Mie Sekuhara*, an employer was held liable for a supervisor's unwelcome physical contact.[143] In that case, the employer investigated the matter six weeks after the plaintiff first complained and responded with disciplinary action against the supervisor, as well as an apology to the plaintiff.[144] The court found that, in light of the delay and the fact that the supervisor often engaged in obscene conduct even before the complaint was first made, the employer's response was not prompt in waiting six weeks to act.[145] Thus, in that case, it was the tardiness of the employer's response that served as a basis for employer liability.

Although only a few decisions relied on the duty to adjust the working environment, the facts of these cases suggest that there are some pertinent factors that impact whether the employer or workplace manager failed to carry out their respective duties. First, it

140. Yamakawa, *supra* note 61, at 52-53.

141. *See* Fukuoka sekuhara case, 607 RODO HANREI 6, 23 (Fukuoka Dist. Ct., Apr. 16, 1992).

142. *See id.*

143. *See* Mie sekuhara case, 729 RODO HANREI 54, 60 (Tsu Dist. Ct., Nov. 5, 1997).

144. *See id.* at 59-60.

145. *See id.* at 60.

is necessary to promptly and fairly investigate the problem, as shown in both *Fukuoka* and *Mie Sekuhara*. Second, once the conduct amounting to sexual harassment occurs, the employer must take prompt preventive or remedial action (*Mie*)[145] in a neutral and fair manner (*Fukuoka*).[147] However, it appears difficult to apply this doctrine where the employer or workplace manager was not, or at least could not have been, aware of the conduct amounting to sexual harassment, even though the conduct was carried out in the course of implementing the offender's duties. Thus, this doctrine is not a complete substitute for the doctrine of vicarious liability.

3. *Equal Employment Opportunity Law*

a. *A New Provision on Sexual Harassment*

The Diet passed the bill revising the Equal Employment Opportunity Law on June 11, 1997.[148] This amendment, which took effect on April 1, 1999, makes considerable changes to the framework of equal employment opportunity law in Japan.[149] For example, the amendment abolishes the "moral duty" provisions regarding discrimination in recruitment, hiring, assignment and promotion.[150] Under the amended law, discrimination is prohibited under the mandatory provisions of articles 5 through 8. Therefore, conduct that constitutes quid pro quo harassment may be null and void when it is a legal act that violates these provisions.

Moreover, the amendment creates a new provision that focuses on sexual harassment. Article 21(1) provides that the employer shall take due care in employment management so that female workers will not be subject to adverse treatment due to complaints about harassment and that their working environment will not be disrupted by such sexual conduct. Paragraph 2 states that the Labor Minister will issue administrative guidelines for the measures of care that employers should take, which the Labor Minister did on March 13, 1998.[151] Under the revised Equal Employment Opportunity Law, the employer has a duty of care to prevent sexual harassment in the

146. *See id.*

147. *See* Fukuoka sekuhara case, 607 RODO HANREI at 23.

148. *See* Danjo Koyo Kikai Kinto Ho [Equal Employment Opportunity Law], Law No. 92 of 1997.

149. *See generally* Araki, *supra* note 26.

150. *See supra* note 32 and accompanying text.

151. *See* Ministry of Labor Guidelines, *supra* note 21, at 41-42.

workplace, whether it is quid pro quo or hostile working environment harassment.

The Guidelines consist of two parts. The first part defines sexual harassment. Under article 21, sexual harassment is defined as (1) an adverse treatment of female workers because of her response to sexual conduct in the workplace (quid pro quo); and (2) creation of a hostile working environment through such sexual conduct (hostile working environment). The Guidelines define sexual harassment based on hostile working environment 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.[152] The scope of sexual harassment is defined through the use of phrases like "substantial impediment" and "serious adverse effects."[153] There is a similarity between this guideline and case law[154] in that both intend to limit the scope of illegal sexual harassment to cases where the conduct is of a serious nature.

More importantly, the Guidelines illustrate the measures of care that employers should take under article 21. They include the following three elements: (a) clarification and dissemination of an employer's policy against sexual harassment and education of employees through measures such as employee handbooks and seminars; (b) establishment of neutral systems for processing grievances and counseling; and (c) prompt and appropriate responses, when a complaint is filed regarding sexual harassment, including investigation and disciplinary action.[155] The Guidelines also advise employers to implement measures for the protection of privacy, as well as to adopt an anti-retaliation policy.

b. Influence on Civil Litigation

The administrative guidelines, however, did not resolve all potential issues raised by the new provision. First, it can be argued that the duty to prevent sexual harassment is now incorporated into the employment contract through article 21 of the Equal Employment

152. *See id.*

153. *See id.* at 42.

154. *See supra* notes 74-80 and accompanying text.

155. As shown later, these elements appear to be derived from U.S. case law. *See infra* notes 176-78 and accompanying text.

Opportunity Law.[156] In other words, employer liability for sexual harassment can be based on contract rather than on tort. On the other hand, it can be argued that the new provision merely subjects employers to administrative regulation and does not affect the employment contract.[157] Since the Equal Employment Opportunity Law does not explicitly or by implication express its intent regarding the incorporation of its contents into employment contracts, the latter view is more persuasive.

Second, it is uncertain whether the new provision sets forth criteria to determine when sexual harassment amounts to illegal conduct. So long as article 21 does not create a private cause of action regarding sexual harassment, the resolution of these issues will be left to the judiciary. The Ministry of Labor Guidelines will undoubtedly provide guidance to courts in determining whether the conduct in question constitutes impermissible sexual harassment. Likewise, the Guidelines' description of the duty of care will be helpful for courts in determining employer liability for sexual harassment by its employees.[158]

B. Comparative Analysis

1. A Brief Look at U.S. Law

In *Meritor Savings Bank v. Vinson*, the U.S. Supreme Court focused on whether and in what circumstances sexual harassment constitutes employment discrimination under Title VII, without clarifying the criteria for the vicarious liability of employers. The Court stated only that common law agency principles should be relied on to determine employer liability under Title VII.[159] Thus, the precise criteria remained uncertain, and lower courts expressed various views on this point.[160]

156. Regarding the provision prohibiting discrimination in promotions, one commentator suggested that this provision created a contractual duty for employers to promote female workers in the event that they suffer from discrimination in promotion. *See* Michiko Nakajima, *Kaisei Kintoho Rokiho Wo Do Ikasuka* [*How We Should Utilize the Amended Equal Employment Opportunity Law*], 1116 JURISUTO 58, 61 (1997). This reasoning may also be applied to article 21.

157. Taeko Ishii, *Kigyo no Sekuhara Boshi Gimu to Hoteki Taiyo* [*The Employer's Duty to Prevent Sexual Harassment and Legal Responses*], 186 KIKAN RODO HO 52, 54 (1998).

158. *Id.* at 59.

159. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

160. *See generally* 1 EMPLOYMENT DISCRIMINATION LAW, *supra* note 103, at 812-

In June 1998, the Supreme Court clarified the framework of employer liability in *Burlington Industries, Inc. v. Ellerth*[161] and *Faragher v. City of Boca Raton*.[162] *Ellerth* involved sexual harassment by a supervisor who made threats to deny tangible job benefits to the plaintiff but did not carry out the threats.[163] Although the conduct was classified as hostile working environment harassment, the Court noted that it is not the distinction between quid pro quo and hostile working environment harassment but agency principles that provide guidance in determining employer liability.[164] In *Faragher*, the plaintiff claimed employer liability for a hostile working environment created by her supervisor's sexual comments and physical contact.[165] In both cases it was the plaintiff's supervisor who created the hostile working environment, despite the difference in the content of the conduct. Furthermore, in these cases, the employers had anti-harassment policies and grievance procedures in place, regardless of their effectiveness.

Thus, in both cases the issues are essentially identical: (1) the criteria of employer liability for sexual harassment by supervisors; and (2) the legal ramifications of preventive or corrective measures adopted by the employer. The Supreme Court held that (1) "[a]n employer is subject to vicarious liability for an actionable hostile working environment created by a supervisor with immediate (or successively higher) authority over the employee;"[166] and (2) "when no tangible employment action was taken, a defending employer may raise an affirmative defense."[167] This defense consists of the following two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[168]

In reaching this conclusion, the *Ellerth* Court analyzed agency

21.

161. 118 S. Ct. 2257 (1998).

162. 118 S. Ct. 2275 (1998).

163. *See Ellerth*, 118 S. Ct. at 2259.

164. *See id.* at 2265.

165. *See Faragher*, 118 S. Ct. at 2277.

166. Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998); *Faragher*, 118 S. Ct. at 2292-93.

167. *Ellerth*, 118 S. Ct. at 2270; Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2293 (1998).

168. *Ellerth*, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2293.

law in detail. With respect to employer liability for the employee's conduct within the scope of employment,[169] the Court held, "The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment."[170] The next relevant standard is called "aided in agency relationship standard"[171] under which an employer is vicariously liable for an employee's conduct when the employee was aided in accomplishing the tort by the existence of the agency relationship.[172] While acknowledging that this standard is appropriate to determine employer liability for a supervisor's harassing conduct, the Court distinguished between cases where the supervisor engaged in sexual harassment by taking a tangible employment action and cases where there was no such action.[173] Although in both cases the employer was liable for the supervisor's conduct, only in the latter case did the employer have an opportunity to assert the affirmative defense.[174] According to the Court, this affirmative defense should be based on the need to accommodate the agency principles and Title VII's policy encouraging the creation of anti-harassment policies and effective grievance mechanisms.[175]

The Court did not clarify the precise level of reasonable care to prevent and correct sexually harassing behavior that would satisfy the requirement of the affirmative defense. However, the Court noted the importance of the promulgation of an anti-harassment policy and complaint procedures.[176] Indeed, in *Meritor*, the Supreme Court implied that such policy and procedures would insulate employers

169. Section 219(1) of the Restatement (Second) of Agency states, "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." *See* RESTATEMENT (SECOND) OF AGENCY § 219(1).

170. *Ellerth*, 118 S. Ct. at 2267.

171. *See id.* at 2267-71. In addition, the Court acknowledged the employer's liability because of its negligence when it "knew or should have known about the conduct and failed to stop it." *Id.* at 2267. There was no dispute over the negligence theory in *Ellerth*. Another theory is called the "apparent authority standard." According to this theory, the employer is liable when its employee commits torts by relying upon apparent authority. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d). The Court stated that this standard is inappropriate in usual cases, since "a supervisor's involvement involves misuse of actual power." *Ellerth*, 118 S. Ct. at 2268.

172. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d).

173. *See* Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2261 (1998).

174. *See id.* at 2268-70.

175. *See id.* at 2270.

176. *See id.*

from liability for sexual harassment by their employees.[177] Since then, the employer's effective policy to prevent sexual harassment and its policy for prompt remedial action are two principal elements of an employer's rebuttal in hostile working environment cases.[178] This is the case even when the basis for tort liability is the employer's negligence rather than its vicarious liability, which the Supreme Court clarified in *Ellerth* and *Faragher*. In other words, the Supreme Court made this defense available to the employer not only against claims based on negligence, but also against claims of vicarious liability when the conduct does not involve tangible employment actions.

2. *The Features of Japanese Law in Light of U.S. Law*

In Japan, many lower court decisions held employers liable under tort law for their employees' conduct that created a hostile working environment, reasoning that such conduct was carried out in the course of implementing the employee's duties.[179] By contrast, U.S. case law generally has held that such conduct is beyond the scope of employment under agency principles since sexual harassment cannot constitute a duty under the employment contract.[180] The Supreme Court in *Ellerth* endorsed this interpretation.[181] Thus, article 715 of the Japanese Civil Code appears to have broader coverage than the "within the scope of employment" standard under U.S. agency law: under the former provision the employer is liable for the employee's conduct if the conduct is closely related to the employee's duties[182] without regard to intent.

However, the *Ellerth* Court clarified that employers may be liable for sexual harassment by their supervisors under the "aided in the agency relation standard," even when the charged conduct is not within the scope of employment.[183] In Japan, the "aided in the agency relation standard" has not developed as an interpretation of article

177. The Court in *Meritor* held that the employer's grievance procedures were not sufficiently effective, since an employee was first required to file a complaint with her supervisor. It was the supervisor who engaged in sexual harassment in *Meritor*. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72-73 (1986).

178. *See generally* BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 192-96 (1992).

179. *See supra* notes 120-29 and accompanying text.

180. *See* 1 EMPLOYMENT DISCRIMINATION LAW, *supra* note 103, at 812; LINDEMANN & KADUE, *supra* note 178, at 226-27.

181. Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2270 (1998).

182. *See supra* note 118 and accompanying text.

183. *Ellerth*, 118 S. Ct. at 2267-70.

715. Nevertheless, in cases where courts held an employer liable for its supervisor's sexual harassment that created a hostile working environment, the court considered whether the supervisor took advantage of his position as the victim's supervisor in determining if the harassment was carried out in the course of implementing the supervisor's duty.[184] Thus, even though the standard of employer liability varies, there is certain substantive similarity in the circumstances under which the employer is liable for the conduct of supervisors.

Another theory of employer liability under Japanese law is the duty to adjust the working environment to prevent and correct disruptive behavior,[185] whether the liability is based on tort or contract. In *Mie Sekuhara*, the court held the employer liable under this theory even when the offender was not acting in the course of implementing his duties.[186] Also, this theory is available in cases of harassment by co-workers where the element of the abuse of supervisory status is lacking.[187] The basis of this theory is the employer's failure to take sufficient action to eradicate sexual harassment even though the employer was aware of (or should have known about) the charged conduct. Thus, this theory is a counterpart to the "negligence standard" developed in the United States.[188]

One of the most notable differences between U.S. and Japanese sexual harassment law is that Japanese case law has not developed with respect to the employer's defense of having implemented anti-harassment policies and having taken corrective actions. Article 715

184. *See, e.g.*, Yokohama sekuhara case (2d instance), 728 RODO HANREI 12, 25 (Tokyo High Ct., Nov. 20, 1997); Hyōgo sekuhara case, 726 RODO HANREI 100, 110 (Kobe Dist. Ct., July 29, 1997); Asahikawa sekuhara case, 717 RODO HANREI 42, 62 (Asahikawa Dist. Ct., Mar. 18, 1997) (status as representative director); Tokyo sekuhara case (advertising agency), 707 RODO HANREI 20, 25 (Tokyo Dist. Ct., Dec. 25, 1996) (status as chairman of the board); Osaka sekuhara case, 1589 HANREI JIHO 92, 95 (Osaka Dist. Ct., Apr. 26, 1996) (status as chairman of the board); Sapporo sekuhara case, 933 HANREI TAIMUZU 172, 175 (Sapporo Dist. Ct., May 16, 1996); Fukuoka sekuhara case, 607 RODO HANREI 6, 22 (Fukuoka Dist. Ct., Apr. 16, 1992).

185. *See supra* notes 57-58, 81-84 and accompanying text.

186. *See* Mie sekuhara case, 729 RODO HANREI at 59-60.

187. In the Kyoto sekuhara case, a co-worker of the plaintiff secretly videotaped her and other female employees in a locker room. The court held that the employer was liable for the failure to prevent such conduct since its president was aware of the incident but did not take sufficient actions to prevent it. *See* Kyoto sekuhara case, 716 RODO HANREI 49, 54 (Kyoto Dist. Ct., Apr. 17, 1996).

188. *See generally* 1 EMPLOYMENT DISCRIMINATION LAW, *supra* note 103, at 814-27.

(1) of the Japanese Civil Code has a proviso that employers are exempt from vicarious liability if they took sufficient care in assigning and supervising their employees. However, as stated above,[189] courts rarely grant this exemption. As a matter of policy, the prevention and correction of sexual harassment are more desirable for victims and employers than time-consuming and unforeseeable litigation. Therefore, some commentators contend that employers should be exempt from liability when they demonstrate that they took sufficient action.[190] In addition, administrative guidelines under the amendment of the revised Equal Employment Opportunity Law provide guidance regarding the employer's duty to prevent sexual harassment. These Guidelines may, albeit indirectly, influence courts in determining employer liability.[191] In light of these new developments, the direction of case law remains to be seen.

V. Conclusion

Japanese case law on sexual harassment has two distinctive features when compared with U.S. law. First, courts quite often rely on the "personal rights" approach as a basis of tort liability for sexual harassment, in contrast with the "employment discrimination" approach under Title VII of the Civil Rights Act of 1964. Although the Japanese and U.S. approaches are not exclusive of each other, the "personal rights" approach may have wider applicability in cases where courts cannot find that working conditions were adversely altered by sexual harassment or that the harassing conduct was carried out because of gender.[192] This is especially true when the harassment infringes upon an interest in a working environment being "conducive to working"[193] or "free from discomfort due to one's sexuality."[194] Although the recent amendment of the Equal Employment Opportunity Law has a provision for an employer's duty to prevent sexual harassment, unless it is incorporated into employment contracts it does not provide for a private cause of

189. *See supra* notes 120-21 and accompanying text.

190. *See, e.g.*, Yamakawa, *supra* note 115, at 73; Ishii, *supra* note 157, at 59.

191. *See supra* note 158 and accompanying text.

192. *See* Ryuichi Yamakawa, *"Personal Rights" in the Workplace: The Emerging Law Concerning Sexual Harassment in Japan*, JAPAN LAB. BULL., Sept. 1, 1997, at 5, at 7; *see also* Wetherfield, *supra* note 2, at 78 (commenting that this theory is advanced, compared with the notion of "hostile working environment").

193. *See supra* note 54 and accompanying text.

194. *See supra* note 71 and accompanying text.

action.[195] Thus, Japanese courts are likely to continue to rely on the "personal rights" approach.

The second distinctive feature with respect to employer liability is that Japanese courts have held that an employer is liable under tort law for its supervisor's conduct that creates a hostile working environment when such conduct is carried out in close connection with that supervisor's duties. This case law appears to be broader than U.S. case law regarding vicarious liability based on an employee's conduct within the scope of employment. However, Japanese case law is similar to another theory of vicarious liability based on an employee's conduct aided by the existence of an agency relationship, since the relationship between supervisor and victim was taken into account when determining whether the supervisor engaged in harassing conduct in the course of implementing his duties. Rather, a notable difference lies in the affirmative defense available to employers. While recent U.S. Supreme Court decisions held that an employer may assert an affirmative defense based on its exercise of reasonable care to prevent sexual harassment in supervisor's working environment harassment cases,[196] such discussion has only just begun in Japan. The recent development in U.S. case law is quite helpful for further discussions on Japanese sexual harassment law.

195. *See supra* notes 156-57 and accompanying text.
196. *See supra* notes 166-68 and accompanying text.

Appendix

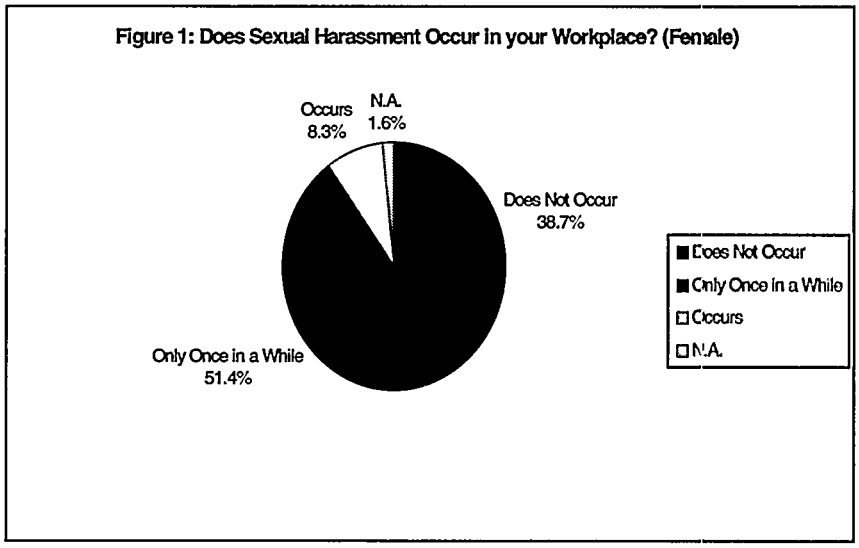


Figure 1: Does Sexual Harassment Occur in your Workplace? (Female)
Occurs 8.3%
N.A. 1.6%
Does Not Occur 38.7%
Only Once in a While 51.4%
Does Not Occur
Only Once in a While
Occurs
N.A.

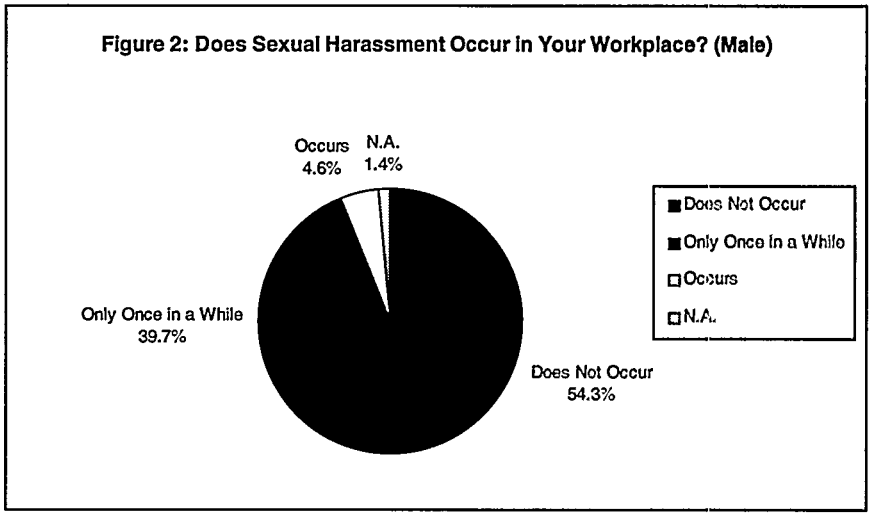
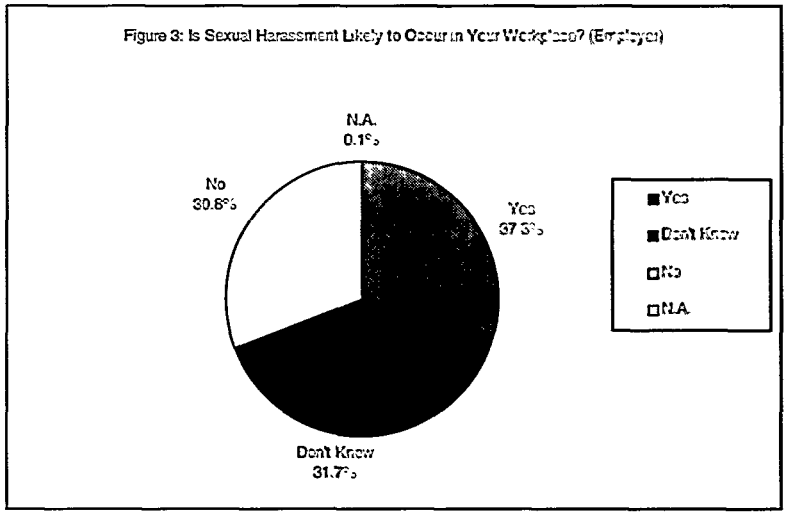
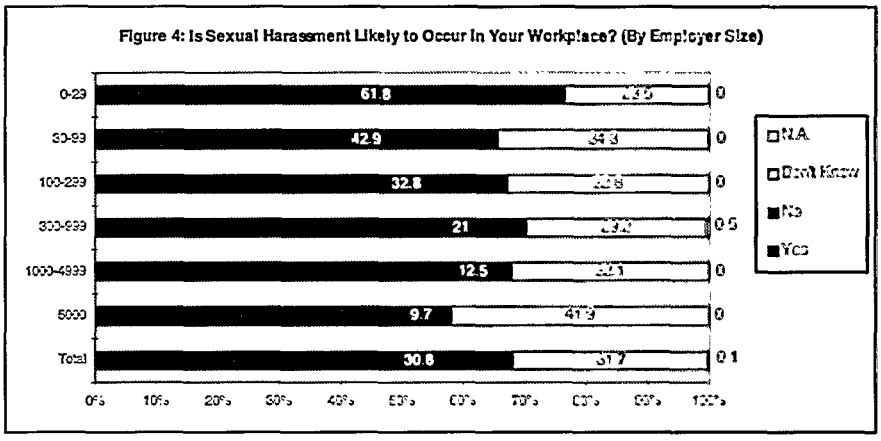


Figure 2: Does Sexual Harassment Occur in Your Workplace? (Male)
Occurs 4.6%
N.A. 1.4%
Only Once in a While 39.7%
Does Not Occur 54.3%
Does Not Occur
Only Once in a While
Occurs
N.A.


N.A.
0.1%
No
30.8%
Yes
37.3%
Don't Know
31.7%
Yes
Don't Know
No
N.A.


0-29
30-99
100-299
300-999
1000-4999
5000
Total
61.8
42.9
32.8
21
12.5
9.7
30.8
0
0
0
0.5
0
0
0.1
0%
10%
20%
30%
40%
50%
60%
70%
80%
90%
100%
N.A.
Don't Know
No
Yes

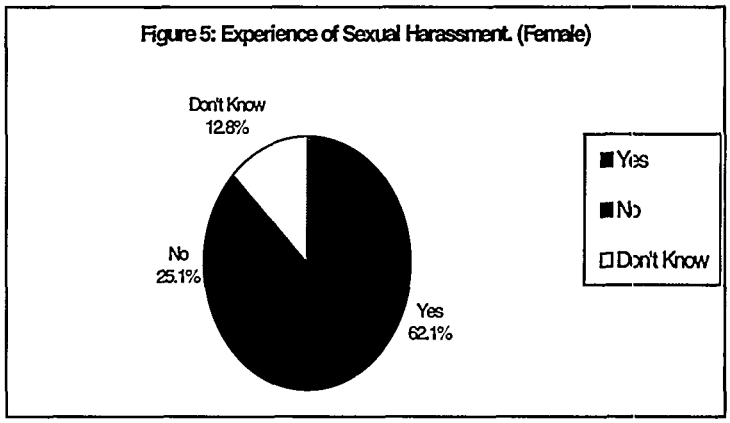


Figure 5: Experience of Sexual Harassment. (Female)
Don't Know
12.8%
No
25.1%
Yes
62.1%
Yes
No
Don't Know

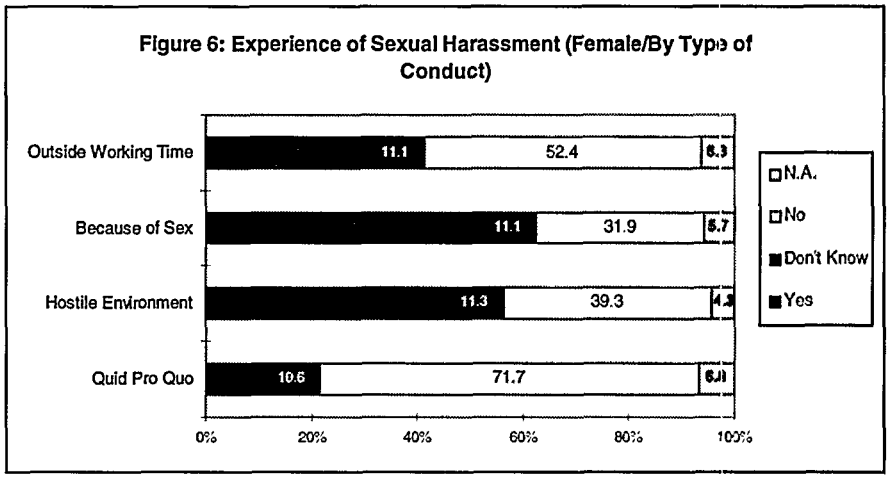


Figure 6: Experience of Sexual Harassment (Female/By Type of Conduct)
Outside Working Time
11.1
52.4
Because of Sex
11.1
31.9
Hostile Environment
11.3
39.3
Quid Pro Quo
10.6
71.7
0%
20%
40%
60%
80%
100%
N.A.
No
Don't Know
Yes

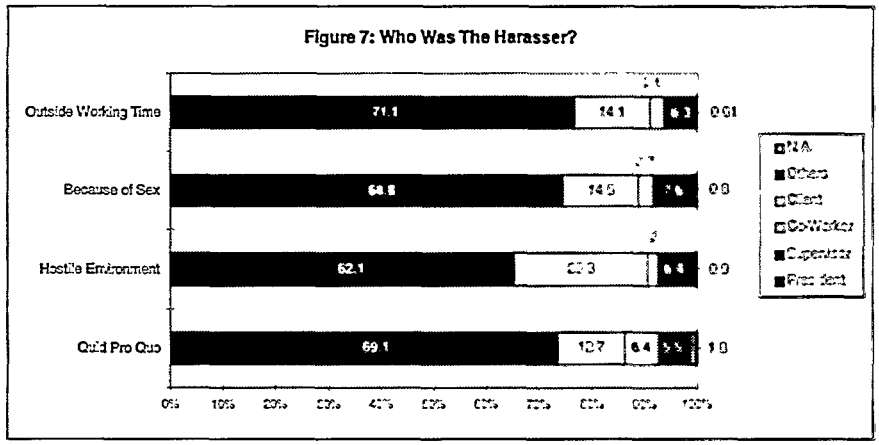


Figure 7: Who Was The Harasser?
Outside Working Time
71.1
14.1
6.3
0.01
Because of Sex
64.8
14.5
7.6
0.8
Hostile Environment
62.1
20.3
6.4
0.9
Quid Pro Quo
69.1
12.7
6.4
1.8
N.A.
Others
Client
Co-Worker
Superiour
President

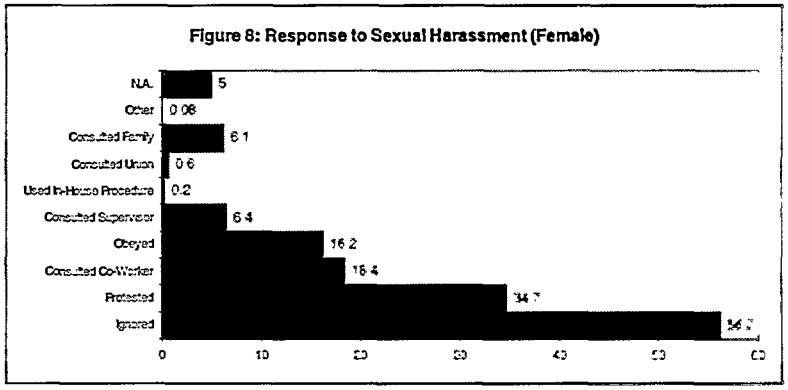


Figure 8: Response to Sexual Harassment (Female)
N.A.
5
Other
0.06
Consulted Family
6.1
Consulted Union
0.6
Used In-House Procedure
0.2
Consulted Supervisor
6.4
Obeyed
16.2
Consulted Co-Worker
16.4
Protested
34.7
Ignored
0
10
20
30
40
50
60

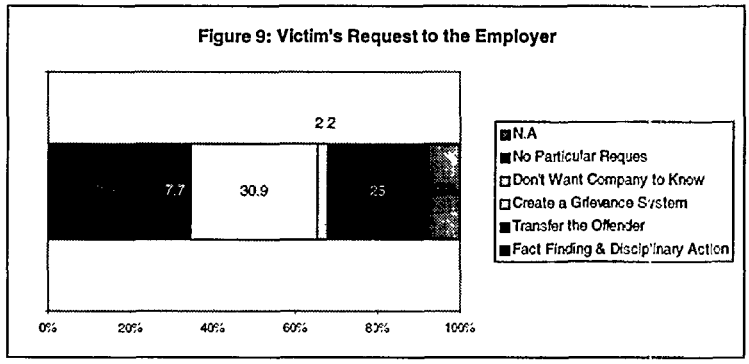


Figure 9: Victim's Request to the Employer
2.2
7.7
30.9
25
N.A
No Particular Reques
Don't Want Company to Know
Create a Grievance System
Transfer the Offender
Fact Finding & Disciplinary Action
0%
20%
40%
60%
80%
100%

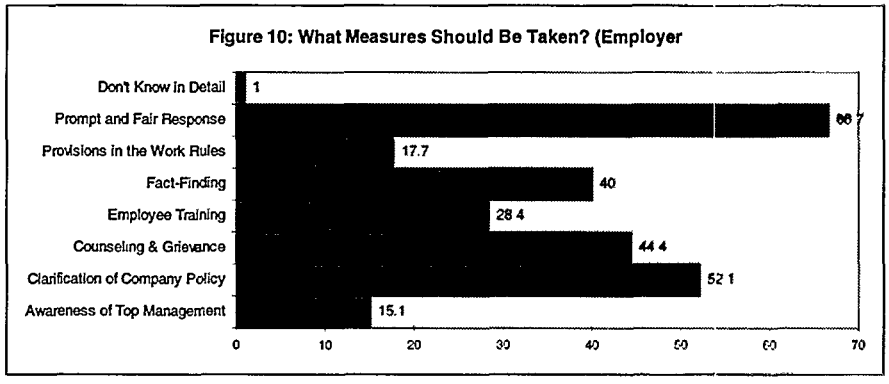


Figure 10: What Measures Should Be Taken? (Employer
Don't Know in Detail
Prompt and Fair Response
Provisions in the Work Rules
Fact-Finding
Employee Training
Counseling & Grievance
Clarification of Company Policy
Awareness of Top Management
1
17.7
40
28.4
44.4
52.1
15.1
0
10
20
30
40
50
60
70

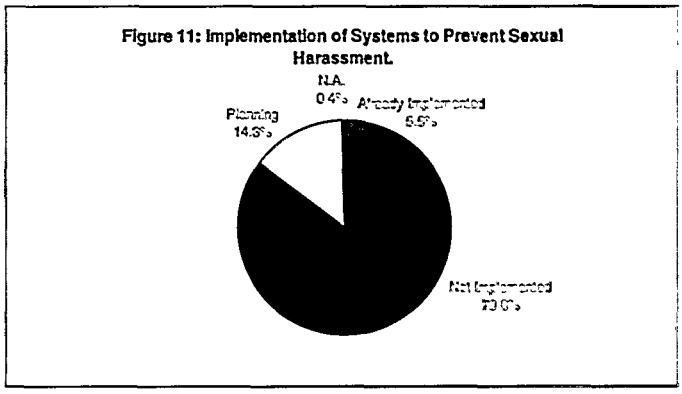


Figure 11: Implementation of Systems to Prevent Sexual Harassment
N.A.
0.4%
Already implemented
5.5%
Planning
14.8%
Not implemented
79.0%

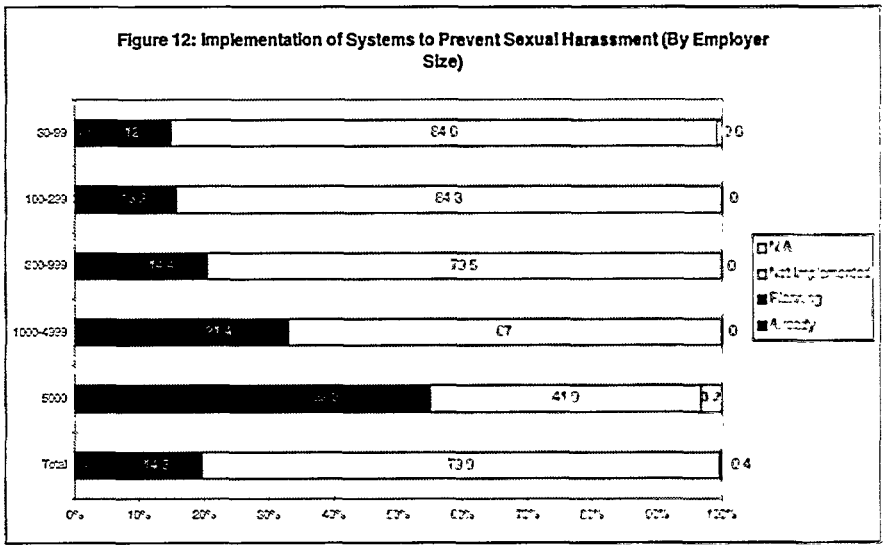


Figure 12: Implementation of Systems to Prevent Sexual Harassment (By Employer Size)
30-99
100-299
300-999
1000-4999
5000
Total
84.0
84.3
73.5
67
41.9
73.9
0%
10%
20%
30%
40%
50%
60%
70%
80%
90%
100%