POWER HARASSMENT:
The Tort of Workplace Bullying in Japan

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I. Introduction

As *U.S. News & World Report* contributor Alison Green put it, in America, "[b]ullying or being a jerk is bad management, but it's not illegal."[1] In fact, as Professor Yamada points out, the American legal system "expressly embraces rank and hierarchy in the workplace."[2] As no law directly addresses the hostility that can result from the systemic power imbalance between employees and their employers,[3] employers who see no legal liability for acts of bullying stemming from workplace hierarchies tend to ignore the problem.[4] Though workplace bullying or harassment based on discrimination is an obvious concern in American employment law, courts applying bias-based harassment standards have self-consciously restrained themselves from mandating civility in the workplace.[5] In this way, although the American law of workplace harassment was a model for workplace discrimination law throughout the world, American law has resisted the developments taking place in Western Europe and Québec, where courts are expounding tort concepts to protect the dignity of workers in general, as well as the United Kingdom's model of protecting workers from bullying in the workplace by statute.[6]

As law outside America has changed to protect workers against bullying and general harassment rather than just bias-based harassment, a unique way of addressing this issue is currently developing in Japan. Specifically, Japanese law has begun to acknowledge a workplace tort theory called power harassment (*pawā harasumento* or *pawahara*), which protects employees from abuses by those who have (or at least have access to) greater organizational or social power.[7] Despite some

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1. Alison Green, *Can My Boss Do That?*, U.S. News & World Report (Apr. 7, 2014), http://money.usnews.com/money/blogs/outside-voices-careers/2014/04/07/can-my-boss-do-that.

2. David C. Yamada, *Dignity, Rankism, and Hierarchy in the Workplace: Creating a Dignitarian Agenda for American Employment Law*, 28 Berkeley J. Emp. & Lab. L. 305, 315 (2007).

3. *Id.*

4. *Id.* at 321.

5. Kerri Lynn Stone, *From Queen Bees and Wannabes to Worker Bees: Why Gender Considerations Should Inform the Emerging Law of Workplace Bullying*, 65 N.Y.U. Ann. Surv. Am. L. 35, 37 (2009).

6. Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 Colum. J. Eur. L. 241, 241–42 (2003); *see also* Susan Harthill, *Bullying in the Workplace: Lessons from the United Kingdom,* 17 Minn. J. Int'l L. 247, 250–51 (2008). In European discourses, this approach is often called "moral harassment." *See, e.g.*, Loïc Lerouge, *Moral Harassment in the Workplace: French Law and European Perspectives*, 32 Comp. Lab. L. & Pol'y J. 109 (2010).

7. *See, e.g.*, Rochelle Kopp, *Power Harassment - Japanese Workplace Bullying*, Japan Cultural Consulting (Apr. 2, 2014), http://www.japanintercultural.com/en/news/default.aspx?newsID=292; Shohei Makiuchi, *'Power Harassment' By Bosses Gnaws at the Back of Workers' Mind*, The Asashi Shimbun (Oct. 31, 2013), http://ajw.asahi.com/article/behind_news/social_affairs/AJ201310310008; *The Problem of Power Harassment*, The Japan Times (Jan. 22, 2013), http://www.japantimes.co.jp/

English-language coverage of this new turn in Japanese law, American legal scholars do not seem to be discussing power harassment or its comparison to workplace norms in American law at any depth.[8]

Workplace bullying has become an issue a majority of Americans want to see addressed by policymakers.[9] There are 26 state legislatures currently considering passing comprehensive statutes to prevent and remedy workplace bullying.[10] As comparative modalities can help to shape and guide legal discussions of new and developing policy, and because Japanese law is an interesting topic of its own right,[11] this paper seeks to develop a primer on power harassment to the American legal community. To accomplish this goal, the paper will lay out the development and definitions of power harassment, example cases to illustrate what power harassment looks like, and how power harassment compares to American law.

II. The Development and Definitions of Power Harassment

Though power harassment and related labor claims have picked up attention in recent years, the concept and the problems it describes are not novel. For example, by 1995, the Tokyo Metropolitan Government was already recognizing workplace bullying as actionable and accepting labor complaints on that basis.[12] The issue has come to the fore recently due to the increase in reported incidents over the last decade: in the 2000s, Tokyo Metropolitan Government labor claims alleging bullying rose from 3,160 in 2002 to 5,960 in 2008.[13]

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opinion/2013/01/22/editorials/the-problem-of-power-harassment/.

8. For example, a search of secondary sources available on Westlaw reveals only two articles that mention power harassment at all. One of the articles only mentions power harassment as an example of a labor claim handled through extrajudicial processes. Kazuo Sugeno, *The Birth of the Labor Tribunal System in Japan: A Synthesis of Labor Law Reform and Judicial Reform*, 25 Comp. Lab. L. & Pol'y J. 519, 526 (2004). The other, in a notably uncritical way, sets power harassment out as an example of trouble an American doing business in Japan could run into due to 'cultural' differences. B. Joseph Wadsworth, *Some Japanese Cultural and Legal Basics for Idaho Attorneys*, 55 Advocate (Idaho) 27, 29 (2012).

9. According to the Workplace Bullying Institute, as much as 35% of American workers may be experiencing workplace bullying, and as much as 64% of Americans would support the adoption of a statutory cause of action to hold employers accountable for bullying. Gary Namie, *The WBI U.S. Workplace Bullying Survey*, Workplace Bullying Institute 2, 15 (2010), http://workplacebullying.org/multi/pdf/WBI_2010_Natl_Survey.pdf.

10. Randi Melnick, *Understanding Workplace-Bullying Legislation*, American Bar Ass'n (Aug. 13, 2014), http://apps.americanbar.org/litigation/committees/employment/articles/summer2014-0814-understanding-workplace-bullying-legislation.html.

11. Tom Ginsburg, *Studying Japanese Law Because It's There*, 58 Am. J. Comp. L. 15, 25 (2010).

12. Masaomi Kaneko, Pawā Harasumento: Naze Okoru? Dō Fusegu? [Power Harassment: Why Does It Happen? How to Prevent It?] 15 (2009).

13. *Id*. at 16.

Though civil and administrative claims for labor violations have been on the rise generally since the economic turmoil of the Lehman shock,[14] power harassment claims seem to be rising at a disproportionate rate. Throughout Japan, proportion of power harassing behaviors claims have gone from 6.4% of all civil labor complaints made to local labor departments in 2002 to 20.3% of all such complaints in 2012.[15] The predominance of complaints of power harassing behaviors in 2012 made power harassment the single highest category of workplace behavior about which workers complained.[16] The number of reports tracks loosely with the approximate 25.3% of Japanese workers estimated to have experienced power harassment in the last three years.[17]

Despite the clear increase in administrative complaints, power harassment's development as a distinct and litigable tort theory has been less defined. As in most civil law jurisdictions, tort law in Japan is based largely on a statutory obligation for individuals to compensate for harms they cause to others.[18] Japanese employers also have a general "duty of care to ensure that [an] employee's mental and physical health is not damaged by the excess accumulation of . . . mental stress accompanying the execution of work."[19] Plaintiffs alleging power harassment rest their claims for damages on this broad provision and duty rather than on a particular, defined tort.[20] Though these legal theories have come together

14. Yasuko Okuda & Izumi Inao, Pawā Harasumento [Power Harassment] 16-17 (2011).

15. *Sūji de Miru Pawahara Jijō [Seeing the Power Harassment Situation in Numbers]*, Ministry of Health, Labour, and Welfare (2013), http://www.no-pawahara.mhlw.go.jp/statistics/state [hereinafter MHLW Numbers].

16. *Id.*

17. *Id.* (referring to the three year period between 2009 and 2012). However, this number is complicated by the fact that only 7.3% of workers surveyed felt that they themselves had engaged in power harassing behaviors or had been accused of it in the same period. *Id.* It may be possible that increased complaints to local labor departments about power harassment have not translated to an increase in complaints being made within companies of such workplace issues, even though 45.4% of workers report that their employers are undertaking power harassment prevention and resolution efforts. *See Kurashi no Oyakutachi Jōhō: Korette Pawahara? [Helpful Life Information: Is This Power Harassment?]*, Ministry of Health, Labour, and Welfare (Apr. 1, 2013), http://www.gov-online.go.jp/useful/article/201304/1.html [hereinafter MHLW Information].

18. The Civil Code creates liability for "[a] person who has intentionally or negligently infringed any rights of others, or legally protected interest of others . . . to compensate any damages" that result. Minpō [Civ. C.]1896, art. 709 (Japan), *translated in* Eri Osaka, *Reevaluating the Role of the Tort Liability System in Japan*, 26 Ariz. J. Int'l & Comp. L. 393, 394 n. 5 (2009); *see also* Kazuaki Sono & Yasuhiro Fujioka, *The Role of the Abuse of Right Doctrine in Japan*, 35 La. L. Rev. 1037, 1037 (1975) (describing the four elements of a Japanese tort as the objective infringement of a right, the subjective intent or negligence of the tortfeasor, damage, and causation).

19. Saikō Saibansho [Sup. Ct.] Mar. 24, 2004, 54(3) Saikō Saibansho Minji Hanreishh [Minshū] 1155, (Japan) *translated in* Curtis J. Milhaupt et al., The Japanese Legal System 655 (2d ed. 2012).

20. *See, e.g.*, Tōkyō Kōtō Saibansho Dainijūsan Minjibu [Tokyo High Ct., Civ.

to create tort liability for workplace harassment, causing legally compensable harms to employees, courts have been coy about defining exactly which behaviors are actionable as power harassment and which are not.

Despite the courts' lack of specificity, working definitions of power harassment do exist. Masaomi Kaneko, founder and head researcher of the Workplace Harassment Research Institute,[21] defines power harassment as: "Behavior in the workplace that worsens the work environment by repeatedly causing mental or physical harm to another person in a weaker social or organizational position in a way that infringes the rights of working people."[22] It is worth contrasting this definition with that of the Tokyo Metropolitan Government in 1995, which defined power harassment as: "Workplace behavior that worsens the work environment by inflicting mental or physical harm against a worker with a weak standing in society or human relationships, as a result infringing the worker's right to work."[23] The Ministry of Health, Labour, and Welfare has also offered its own definition of power harassment: "[A]ny kind of behavior in which a superior takes advantage of his or her position in the workplace to cause co-workers physical pain or emotional distress, whether the person is superior by means of relative work position, physical size, or otherwise."[24]

These definitions have common contours. First, there is no requirement that the behavior be intentional; thus, negligence is a sufficient basis for liability. Second, the victim of the power harassing behavior must usually be in a lower social or organizational position than the perpetrator. While these general features of power harassment are clear from these definitions, there are discrepancies and un-defined or under-defined terms. For example, the definitions disagree on whether, or to what extent, the power harassing behavior must be repetitive. The definitions also do not agree on the locus of the harm analysis: Is power harassment an infringement of an individual's right to work, an objective concept focusing on the rights of working people generally, or about only the actual physical and emotional damages it causes? Most importantly, the definitions do not depict concrete examples of what kind of behavior is actually actionable in tort.

Suffice it to say, the definitions on offer are a bit imprecise. Based solely on these frameworks, it is easy to see why employers seem weary of power harassment and feel that they do not know whether or not they

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Part 23] Aug. 31, 2013, Hei 22 (Ne) no. 794, 2–3 (Japan).

21. *Kenkyūsho Annai [Research Institute Guide]*, Shokuba Harasumento Kenkyūsho [Workplace Harassment Research Institute] (last visited May 12, 2014), http://www.harassment.jp/labo.html.

22. *See* Kaneko, *supra* note 12, at 9.

23. *Id.* at 15.

24. David McManus & Lisa Yano, *Power Harassment in the Workplace*, Morgan Lewis Brockius (Feb. 28, 2012), http://www.morganlewis.com/pubs/ml-tmi_lf_japanpowerharassmentworkplace_28feb12/.

are committing power harassment.[25] As such, the best guidance on what power harassment is comes from examples where the government and courts have identified it in the context of actual cases and complaints.

III. Examples of Power Harassment

The range of behaviors and situations identified as power harassment by the government and courts is rather wide. This section will cover common examples cited by the government and courts to illustrate the behaviors and harms that constitute power harassment.

A. *Power Harassment: Government Recognition.*

The Ministry of Health, Labour, and Welfare has identified six categories of behaviors which could constitute power harassment. These categories are physical attacks, emotional attacks, isolation from human relationships, excessive demands, demeaning demands, and individual intrusions.[26] The following table, modeled on two widely-cited tables produced by the government, summarizes the government's examples and categories.

Power Harassment Identified by the Ministry of Health, Labour, and Welfare

Behavior Type	Example Case (with Victim Information)
Physical Attacks Assaults and other acts of violence.	– Being kicked (woman above 50) – Being grabbed by the lapels, having his hair pulled, and a lit cigarette thrown at him (man in his 40's) – Being poked in his head (man above 50)
Emotional Attacks Threats, character assassination, insults, and cruelty.	– Being reprimanded in front of everyone in a loud voice, having things thrown at her, having mistakes announced in front of everyone (woman in her 30's) – Having character repudiated, being told at a meeting the company would be 3,000,000 yen better off if he quit (man in his 20's) – Being told about his incompetence in front of colleagues (man above 50)
Isolation from Human Relationships Being left out, ignored, and segregated.	– Being ignored even when saying hello, boss refusing to hold a conversation with her (woman in her 30's) – Having others told not to help him (man above 50) – Having reports on business affairs ignored, not being invited to work meals (woman in her 30's)

25. See the discussion of the confusion among bosses and employees in the introduction of Okuda & Inao, *supra* note 14, at 3-5. In fact, the dust jacket of this book advertises it to employers, asking "Could you be a perpetrator without knowing it?"

26. *See* MHLW Numbers, *supra* note 15.

Behavior Type	Example Case (with Victim Information)
Excessive Demands Being assigned clearly unnecessary or impossible assignments and interfering with normal work.	– Being given heavy work to do right before the end of the work day (woman in her 40's) – Being given tasks that do not end even on days off (man in his 30's) – Being given work that clearly cannot be done by one person (man in his 20's)
Demeaning Demands Being assigned low-level work unrelated to job duties, experience, and abilities and being denied assignments.	– Being assigned low-level work by roll call so that all other employees can hear (woman in her 20's) – Being forced, during the work day, to do more shopping and inventory sorting than necessary (man in his 40's) – Being asked to do weeding (man above 50)
Individual Intrusion Excessive interference with employees' private lives.	– Being asked private questions, having married person pressuring her as a single person to be in a relationship (woman in her 20's) – Being asked if she has a relationship and being excessively told to get married (woman in her 30's) – Having her religion repudiated and spoken poorly of in front of everyone (woman above 50)

Source: Ministry of Health, Labour, and Welfare.[27]

However, these examples are not *per se* power harassment. The Ministry of Health, Labour, and Welfare has been careful to state that while physical attacks, emotional attacks, and social isolation are likely not within the "reasonable scope of business," situations may exist where the "reasonable scope of business" could include excessive or demeaning demands and intrusiveness into an employee's private life.[28] In this way, while the government's guidelines give some helpful insights into what kinds of behaviors employers and employees should avoid, ultimately, the question is left to subjective and context-driven interpretations of what kind of workplace employees should reasonably expect based on their interactions with their employer.

These government examples are deficient not only for their potential vagueness but also because they do not come from the judiciary. These examples came from the 25.3% of the around 9,000 workers the government surveyed who reported that they had recently suffered power harassment.[29] Therefore, these examples are not necessarily ones any

27. This information comes from a combination of tables found in MHLW Numbers, *supra* note 15, and MHLW Information, *supra* note 17.

28. *See* MHLW Information, *supra* note 17.

29. *See* Japanese Ministry of Health, Labour, and Welfare, Shokuba no Pawā Harasumento ni Kansuru Jittai Chōsa Hōkokusho (Gaiyōhan) [Investigative Report on the Current Status of Workplace Power Harassment (Outline Version)] 2 (2012), http://www.mhlw.go.jp/stf/houdou/2r9852000002qx6t-att/2r9852000002qx99.

court would accept as power harassment. In the next section, this paper will explore actual cases where courts have addressed whether particular behaviors were legally recognizable power harassment.

B. *Power Harassment: Judicial Precedent.*

Courts dealing with power harassment in Japan have not defined what is, and is not, actionable workplace bullying with any specificity. To be sure, none has given a definition of power harassment as a tortious act separate from any other tortious conduct. This section, therefore, will cite to example cases that demonstrate themes in the types of behavior courts have recognized as tortious and the workplace harms they have compensated. Although no case does, or could,[30] give a final impression of how subsequent courts would come out in cases with similar facts, cases serve as a helpful way to put the instances of power harassment in their perspective as litigable torts. For ease, these cases will be grouped by major themes they represent.

1. Worker Suicides

Perhaps the most famous examples of successful power harassment cases are those where workplace bullying was so severe that it caused the employee to commit suicide. For example, in 2012, a court in Saitama awarded damages to the parents of a deceased nurse against his coworker and against his employer because of repetitive bullying that caused him to commit suicide.[31] In this case, the employer, a hospital, had a rule requiring nurses to follow any order given by senior nurses,[32] and the senior nurse abused his authority to engage in a course of bullying. The senior nurse bullied his subordinate by:

- making his subordinate do personal chores like taking care of his eldest son and washing his car;
- having his subordinate wait in line for him at pachinko parlors and pick him up from brothels;
- forcing his subordinate to pay to socialize with his superiors;
- telling his subordinate repeatedly to shut up, die, and that he would be glad if he died; and
- exploding at his subordinate and scolding him violently whenever he made mistakes at work.[33]

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pdf (giving the number of respondents as 9,000); *see also* MHLW Information, *supra* note 17 (explaining that the answers came from the free responses of respondents who answered they had suffered power harassment in the last three years).

30. As a civil law judiciary, Japanese courts are not bound by prior decisions. However, code sections in civil law societies are often understood through the reasoning of prior decisions and academic commentaries on those decisions. *See* Martin Shapiro, Courts: A Comparative Political Analysis, 126–48 (1981).

31. *See* Okuda & Inao, *supra* note 14, at 29.

32. *Id.* at 30.

33. *Id.*

The deceased, in telling his friends about the bullying in his workplace, had even said "If I die, please tell everyone about what was done to me."[34]

There are similar cases of authoritarian discipline and humiliation leading to suicide. In 2011, a court in Shizuoka awarded damages to the parents of a deceased member of the Self Defense Air Forces against an Air Force Technical Sergeant and the state for their son's suicide.[35] As part of teaching his subordinate "discipline," the Technical Sergeant routinely took away his identification paperwork, forcing him to write one hundred reflection statements or letters of resignation before "excessively scolding" him about the behaviors about which he had been forced to write.[36] A 2007 decision from Osaka ordered damages for the representatives of an employee who committed suicide after his boss announced that the employee was "failing" and that "no matter what, [the employee] does it wrong" at a major research conference where the company's president and board members were among the attendees.[37] In 2006, a Nagoya court awarded a labor insurance payout to a widow whose husband had committed suicide by self-immolating during his commute home.[38] Among the work-related stressors the court found to have contributed to the deceased's depression and suicide in that case,[39] the court cited to (excessively) high expectations,[40] excessive (and sometimes public) scoldings,[41] pressures and reproaches "outside the proper boundaries" of business,[42] and the employee's manager criticizing, and then forcing him not to wear, his wedding ring.[43]

Though there are several other example cases, the clear pattern is that workplace bullying that leads to suicide—or maybe even just suicidal thoughts[44]—is power harassment upon which courts will award damages.

However, an employer is not totally liable for just any employee suicide. For example, a court in Osaka declined to attribute an employee's suicide to an employer's actions where the employee was only back

34. *Id.*
35. *Id.*
36. *Id.* at 31.
37. Tōkyō Kēēsha Kyōkai [Tokyo Employers Association], *Pawā Harasumento ni Kakawaru: Hōteki Ryūiten (3) [On Power Harassment: Legal Points to Keep in Mind (3)]*, Jitsumu Shirīzu [Practice Series] No. 2010–4–003, 2 (2010), http://www.tokyo-keikyo.jp/practical/2010-4-003.pdf (citing the "State/Nara Chief of Labor Standards (Japan Health Industry) Case") [hereinafter *Practice Series 3*].
38. Nagoya Chihō Saibansho Minji Daiichibu [Nagoya Dist. Ct., Civil Part 1] May 17, 2006, Hei 15 (gyo-u) no. 18, 6 (Japan).
39. *Id.* at 117.
40. *Id.* at 33.
41. *Id.*
42. *Id.* at 34.
43. *Id.*
44. Tōkyō Kōtō Saibansho Dainijūsan Minjibu [Tokyo High Ct., Civ. Part 23], *supra* note 20, at 24–25 (identifying a victim's suicidal thoughts as one of the bases upon which tort liability had been found by the lower court in upholding a power harassment-driven tort verdict).

at work due to a premature discharge from a hospital.[45] The disruption in causation was founded primarily on the fact that the employer would not have been on notice that the employee was still mentally unstable enough to be pushed to suicide.[46] Additionally, though an employer generally has a duty to create a safe and healthy workplace—at the very least, one that is not suicidogenic—the extent of liability for causing someone else psychological injury is always judged objectively by the standard of a "person with normal psychological resilience."[47] Though courts have not given a consistent answer on when it would be reasonable for an employer to know when an employee might commit suicide for the purposes of legal liability, employers must, to some extent, take precautions with any employee who seems to be depressed or losing emotional stability. Acting carelessly or maliciously toward someone in such a state is far below that standard of care.

Given the seriousness of suicide as a social and individual harm, it is not surprising that workplace harassment that leads to suicide is often considered tortious. Though suicide is a preoccupation of the power harassment conversation in Japan,[48] as a legal matter, suicide is not a necessary part of transforming workplace bullying into an actionable tort.

2. Poor Management

In some cases, poor management practices can be enough to form the basis of a power harassment verdict. In a 2009 decision, a court in Tottori awarded damages to an employee who had succumbed to stress-induced depression and eventually left his job after managers scolded him on a few occasions in front of other employees.[49] The managers' style of harshly scolding the employee repeatedly and in front of others was actionable despite the fact that the employee had in fact violated company

45. Ōsaka Chihō Saibansho Daijūgo Minjibu [Ōsaka Dist. Ct., Civil Part 15] Feb. 15, 2010, Hei 19 (wa) no. 9070, 49 (Japan). However, the court did find a violation of the employer's duty to create a safe workplace for having induced enough stress to hospitalize the employee in the first place.

46. *Id.* at 48.

47. Naohiro Ishigami, *Ihōsē no Handan Kijun [The Judgment Standards for Illegality]*, Ministry of Health, Labour, and Welfare, http://www.no-pawahara.mhlw.go.jp/judicail-precedent/archives/14 (last visited May 5, 2014) (analyzing a Fukuoka High Court case from 2008 that allowed recovery to survivors of a navy member who committed suicide following bullying from a superior).

48. Indeed, the Japanese Ministry of Justice's official awareness video about power harassment focuses on the image of an employee who becomes depressed about bullying he experiences at work. As the video culminates, the power harassing boss receives a tearful admonishment from his daughter for his cruelty, as she reminds him that "people end up committing suicide" over power harassment. Zenkoku Jinken Yōgo Iin Rengōkai [National Federation of Consultative Assemblies of Civil Liberties Commissioners], *Pawā Harasumento [Power Harassment]*, YouTube (May 16, 2011), http://www.youtube.com/watch?v=ZOXaFH806Sk.

49. *Practice Series 3*, *supra* note 37, at 3 (discussing the "Fukoku Sēmē Hoken Hoka Jiken [Fukoku Life Insurance, et al. Case].").

policy and deserved the reprimand.[50] Similarly, repeatedly threatening to damage an employee's automobile and using the word "kill" as part of scolding an employee can form the basis for liability.[51] This seems to be true even if the employee has reason to know that the employer has a rough personality and probably is not communicating actual threats.[52]

The cases touching on poor management extend beyond employee discipline to other aspects of interacting with problem employees. For example, an employer was held accountable under a theory of negligent harassment when, on the back of an itemized bonus statement, a branch manager had stuck a label that read "Unnecessary?" which was inadvertently left on the statement when the employee received it.[53] Because the employee had already complained that another of his bosses was engaging in power harassment, the court found that, because of the note, "there is plenty of reason for the plaintiff to be caused to think 'I am thought of as an unnecessary person to the branch office,' and it is easy to infer that that is something that could cause the plaintiff great mental anguish."[54] This behavior was tortious because it was "thoughtless," "far too careless," and was socially unacceptable to do to an employee who already felt bullied.[55]

Other cases treat employment practices involving abuse of performance evaluations as actionable torts. For example, an employer was liable when a boss interfered with an employee's legal rights at work, coercing an employee not to use legally mandated paid time off with threats of lowered performance evaluations.[56] However, not every instance of a supervisor negatively evaluating an employee is power harassment. For example, in 2013, a Tokyo district court found no power harassment where an employer "appropriately" scolded an employee, encouraged

50. *Id.*

51. Naohiro Ishigami, *Haken Rōdōsha ga Shūrōsaki de Pawahara wo Uketa toshite Hakensakini Isharyō Nado wo Sēkyū Shita Jian [A Circumstance Where a Dispatch Worker Demanded Solatium, etc. Because of Power Harassment Suffered Away from Work]*, Ministry of Health, Labour, and Welfare, http://www.no-pawahara.mhlw.go.jp/judicail-precedent/archives/21 (last visited May 5, 2014) (analyzing an *Ō*saka High Court case from 2013).

52. *Id.*

53. Naohiro Ishigami, *Kashitsu ni Yoru Fuhōkōi Sekinin Oyobi Hakensenkaisha no Shiyōsha Sekinin [Tort Liability Stemming from Negligence and a Dispatch Company's Employer Liability]*, Ministry of Health, Labour, and Welfare, http://www.no-pawahara.mhlw.go.jp/judicail-precedent/archives/15 (last visited May 5, 2014) (analyzing a Takamatsu High Court case from 2006). As a translation note for Japanese speakers, the label read "fuyō de wa?".

54. *Id.* It is worth noting that for the ease of the inference of great mental anguish, the plaintiff recovered around 100 USD.

55. *Id*. As a translation note for Japanese speakers, the court said the behavior "lack[ed] *shakaiteki sōtōsē*."

56. Naohiro Ishigami, *Yūkyūkyūka no Shutoku Bōgai [Interference with Taking Paid Time Off]*, Ministry of Health, Labour, and Welfare, http://www.no-pawahara.mhlw.go.jp/judicail-precedent/archives/17 (last visited May 5, 2014) (analyzing an Ōsaka High Court case).

the employee to quit by giving low evaluations, and put pressure on a person who had written a letter of reference for the employee and the employee's family to encourage the employee to improve or to quit.[57]

These power harassment cases do set some norms for the day-to-day employer-employee relationship. These cases demonstrate both a need to hold employers to some standards of civility and to make sure that employers understand how to properly manage employees they probably wish would quit. Setting these boundaries is especially important in Japan where it is notoriously difficult to fire employees.[58] The difficulty of firing employees creates obvious perverse incentives to treat problem employees poorly in hopes that they will quit on their own.[59] Cases tend to demonstrate that courts prefer, unsurprisingly, reasonable attempts at managing employees up or out rather than systematically making their work lives so intolerable that they stop reporting for duty.

However, power harassment cases encompass more than craven or unfair management practices. Courts and litigators have also extended the label power harassment to address obnoxious and other socially unacceptable behaviors that occur at work.

3. Outrageous Behavior

Several instances of power harassment seem to commingle with other types of harassment. For example, a court may find power harassment predicated on sexual harassment. In 2006, a plaintiff alleged power harassment where, among other things, in retaliation for the employee turning down his sexual advances,[60] a boss lowered her performance evaluations[61] and accused her of spreading rumors about him until she quit.[62] In that case, the court awarded damages for the emotional suf-

57. Naohiro Ishigami, *Sabetsuteki Toriatsukai wo Uketa Nado no Shuchō ga Mitomerarenakatta Jian [A Situation Where a Charge of Discriminatory Treatment was not Recognized]*, Ministry of Health, Labour, and Welfare, http://www.no-pawahara.mhlw.go.jp/judicail-precedent/archives/22 (last visited April 23, 2014) (analyzing a Tokyo District Court case from 2013).

58. The Civil Code provides that all private rights must conform to the public welfare, must be exercised in good faith, and may not be abused. Minpō [Civil Code], art. 1 (Japan). This abuse of right doctrine applies to the employer's right to terminate an employee—and the standards for when an employer is abusing the right to fire are highly favorable to employees. *See From Hiring to Firing: A Basic Guide to the Japanese Employment Law Life Cycle*, DLA Piper Tokyo Partnership, May, 2013, at 9-10, http://www.dlapiperuknow.com/export/sites/uknow/products/files/uknow/From_hiring_to_firing_Japan.pdf (describing the factors Japanese courts consider when determining whether a particular termination was lawful).

59. In the United States, this practice is known as constructive discharge, which, under the sparse federal employment law standards in which it is forbidden, describes "working conditions so intolerable that a reasonable person would have felt compelled to resign." Pa. State Police v. Suders, 542 U.S. 129, 147 (2004).

60. Kyōto Chihō Saibansho Dairoku Minjibu [Kyoto Dist. Ct., Civil Part 6] Apr. 27, 2006, Hei 17 (wa) no. 761, 6 (Japan).

61. *Id.*

62. *Id.* at 7.

fering caused by the sexual and power harassment, without dwelling on which was which.[63] Power harassment could also result from so-called *aruhara*,[64] or alcohol harassment, as in a case where, among other things, a boss forced his employee to drink until he vomited at a drinking party that took place after work hours.[65]

Other outrageous behavior courts have recognized as power harassment involve bare abuses of power and other tortious acts by management and colleagues. A court awarded damages to plaintiffs whose boss fixed a fan to blow cold air on them from December to June, forced employees to write written apologies purporting to waive their right to complain about whatever punishment they might receive, called employees "wage thieves" and forced them to write confessions of "not doing work while receiving a salary," kicked and hit employees, and ridiculed an employee's spouse at a work lunch.[66] In cases like these, the bullying manifests gross abuses of power and goes beyond any bounds of what a reasonable employee should be expected to withstand at work.

Outrageous behavior can be enough to constitute power harassment, even when other common features of power harassment are absent. In 2013, the Fukuoka High Court found power harassment between two high-ranking employees of different departments where the tortfeasor had on three occasions made comments alleging, apparently falsely, that the plaintiff was engaged in an adulterous relationship.[67] The defendant's baseless and slanderous rumors about his target's character, the court found, violated his duty to base business decisions on what happens at work and his duty not to intervene in others' personal lives at work.[68]

63. *Id.* at 20. However, the court denied her lost wages from her constructive discharge claim.

64. *See generally* Mayuko Watanabe, *Arukōru Harasumento wo Shuzai Shite [Covering Alcohol Harassment]*, Cocolog-Nifty (June 15, 2012), http://mediaw.cocolog-nifty.com/blog/2012/06/post-7ea7.html (defining alcohol harassment as "conduct of forcing someone else to drink alcohol in a vertical relationship like boss and employee, . . . or else using the power relationships of work.").

65. Naohiro Ishigami, *Shizen Taishoku Atsukai Shain kara no Pawahara wo Riyū toshita Songaibaishō Nado Sēkyū [A Claim for Damages, etc. Based on Power Harassment from an Employee Quitting]*, Ministry of Health, Labour, and Welfare, http://www.no-pawahara.mhlw.go.jp/judicail-precedent/archives/16 (last visited May 5, 2014) (analyzing a Tokyo High Court case from 2013 where recovery was denied because there was no real causal nexus between the plaintiff's psychological injuries and the power harassing behavior).

66. Naohiro Ishigami, *Jōshi kara Uketa Pawahara wo Riyū toshita Songaibaishō Sēkyū [A Request for Compensatory Damages Based on Power Harassment Received from a Boss]*, Ministry of Health, Labour, and Welfare, http://www.no-pawahara.mhlw.go.jp/judicail-precedent/archives/18 (last visited May 5, 2014) (analyzing a Tokyo District Court case from 2010).

67. Naohiro Ishigami, *Shozokubusho ga Kotonaru Nisha Aida No, Hanpuku Kēzokusē ga Atta to Ienai Pawā Harasumento [Power Harassment Between Two People Belonging to Different Departments and Where There was no Continuous Repetition]*, Ministry of Health, Labour, and Welfare (last visited May 5, 2014), http://www.no-pawahara.mhlw.go.jp/judicail-precedent/archives/20.

68. *Id.*

Even though there was not really a continuous repetition of the course of behavior, and even though the defendant did not have organizational or social power over the plaintiff, the negative effect of such careless statements could cause so much harm to one's workplace and reputation at work that it amounted to power harassment.[69] The outrageous conduct cases demonstrate that power harassment, while definitionally about protecting the vulnerable from bullying at work by the powerful, is also about finding a catchall for injurious conduct that occurs at work or else affects the workplace.

C. *Power Harassment: Yet Undefined.*

The courts and government alike are still working out exactly what constitutes power harassment and why. However, it might be more accurate at this stage of its development to think of power harassment as an umbrella term that refers to a wide range of harmful behaviors that take place at work. This umbrella covers not only behaviors abusing the authority of a vertical relationship, but also behaviors that have a tendency to create, and then negatively leverage, power imbalances in the workplace. Thus, rather than attempting to operationalize power harassment into a comprehensive definition, it seems most accurate to conceive of power harassment as a floating signifier[70] for any potentially actionable workplace-related harms that create a reasonable threat of worker suicide or that are caused by poor management or outrageous behavior.

IV. A Comparison with American Law

As power harassment has developed as a tort concept in Japan, jurisprudential patterns have emerged that mirror, and significantly differ from, American employment law. This section will explore these similarities and differences, with a view to suggesting how American lawyers who work to fight or prevent employment harassment might use power harassment as a framework for their own advocacy.

A. *Employment Discrimination.*

American antidiscrimination law stems mostly from statutes modeled on Title VII of the Civil Rights Act of 1964.[71] The enactment of this statute "profoundly changed working life in the United States" by prohibiting employment discrimination against employees in certain protected

69. *Id.*

70. For an explanation of this concept, see the description of Lévi-Strauss's concept of the floating signifier as a symbol without meaning and able to take on any expedient meaning recounted in Jeffrey Mehlman, *The "Floating Signifier": From Lévi-Strauss to Lacan*, 48 Yale French Studies 10, 23 (1972).

71. 42 U.S.C. § 2000e, *et seq.* (2012).

classes.[72] Since Title VII, several federal,[73] state,[74] and local[75] laws have expanded the rights of employees to nondiscrimination in the workplace. Most of these enactments also have anti-retaliation provisions that further forbid employers to treat an employee poorly because an employee took steps to oppose or participate in ending unlawful discrimination.[76]

Pulling from the examples in Section III, some of the power harassment behaviors identified by the Japanese government could be violations of American antidiscrimination standards. For example, having a boss repudiate one's religion in front of coworkers could violate Title VII's prohibition of religious harassment.[77] In New York, where state law prohibits workplace discrimination based on marital status,[78] harassment in the form of pressuring an employee to marry or trying to disrupt an employee's intent to wed is a form of unlawful discrimination.[79]

However, most of what Japanese courts and the Japanese government call power harassment is not motivated by a forbidden discriminatory

72. Merrick Rossein, Employment Discrimination Law and Litigation § 1:1 (2013); *see also* 42 U.S.C. § 2000e-2 (prohibiting workplace discrimination because of an individual's race, color, religion, sex, or national origin).

73. *See, e.g.*, 42 U.S.C. § 12112 (prohibiting workplace discrimination against people with disabilities); 42 U.S.C. § 2000ff-1 (prohibiting workplace discrimination on the basis of employees' genetic information); 29 U.S.C. § 623(a) (prohibiting workplace discrimination against people over age 40); 29 U.S.C. § 206(d)(1) (prohibiting discrimination in pay on the basis of sex); 38 U.S.C. § 4311(a) (prohibiting workplace discrimination against a person who is a member of, applies to be a member of, performs, or has an obligation to perform in a uniformed service); 8 U.S.C. § 1324b(a) (prohibiting certain types of workplace discrimination, except as required by immigration law, because of citizenship or documented immigration status).

74. States vary widely on the statuses they protect in addition to those protected by federal law. *See, e.g.*, Cal. Gov't Code § 12940(a) (West 2014) (prohibiting workplace discrimination because of ancestry, medical condition, marital status, gender identity, gender expression, age, sexual orientation); Haw. Rev. Stat. § 378-2 (West 2014) (prohibiting workplace discrimination because of sex including gender identity or expression, sexual orientation, age, ancestry, marital status, arrest and court record, or domestic or sexual violence victim status); Tex. Lab. Code Ann. § 21.051 (West 2014) (prohibiting workplace discrimination because of age); 775 Ill. Comp. Stat. Ann. § 5/2-102(A-5) (West 2014) (prohibiting employers from preventing employees from speaking their native language); Mich. Comp. Laws Ann. § 37.2202(1) (West 2014) (prohibiting workplace discrimination because of, *inter alia*, age, height, weight, or marital status).

75. *See, e.g.*, N.Y.C. Admin. Code N. § 8-107(1)(a) (prohibiting workplace discrimination because of actual or perceived age, race, creed, color, national origin, gender, disability, military status, partnership status, sexual orientation, or alienage or citizenship status).

76. *See, e.g.*, 42 U.S.C. § 2000e-3(a).

77. The EEOC Compliance Manual gives the following example of "unwelcome" statements or comments about an employee's religion which could be the basis for a claim of religious harassment: "where an employee is upset by repeated mocking use of derogatory terms or comments about his religious beliefs or observance by a colleague." EEOC Compl. Man. (BNA) § 12, 33 (July 22, 2008).

78. N.Y. Exec. Law § 296(1)(a) (McKinney 2014).

79. *See, e.g.*, McGrath v. Nassau Health Care Corp., 217 F. Supp. 2d 319, 332–33 (E.D.N.Y. 2002).

or retaliatory impulse required to make the conduct actionable in America. In fact, even where it might be, the Supreme Court has, for example, specifically recognized the exclusion of "petty slights, minor annoyances, and simple lack of good manners"[80] and "personality conflicts at work that generate antipathy [and] 'snubbing' by supervisors and coworkers"[81] from the types of materially adverse treatment that are actionable under Title VII's anti-retaliation provisions.[82] While the Court envisions circumstances in which such behavior could be actionable,[83] "Title VII does not set forth a general civility code for the American workplace."[84] Though Japanese courts reviewing power harassment have never mandated bare civility in those terms, the power harassment model is much more open to the notion that employers who treat employees poorly should change their behavior, rather than employees changing "unreasonable" expectations of being treated well.

Power harassment also addresses workplace discrimination in a much more inclusive way than American antidiscrimination law, and it is not just because American courts seem more tolerant of workplace conflicts. The protected-group focus of American law allows for anomalies where explicitly harmful behavior can be immunized from actionability by committing the same behavior against employees both inside and outside the protected group.[85] Since the power harassment framework focuses more on the boundaries of coworkers' interactions than on an employee's sociological characteristics, it allows for a more comprehensive way to address workplace harms by punishing harmful behavior rather than harmful intergroup dynamics.

B. *Employee Suicides.*

Power harassment allows for the survivors of employees who commit suicide due to workplace bullying and other unreasonable working conditions to recover for the death. To an extent, American law provides similar relief: Several states also allow for employees' families and

80. Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006).

81. *Id.* (internal quotation and citation omitted).

82. The law requires that an employee alleging unlawful retaliation must show the employer subjected her to "material adversity" that would dissuade a reasonable employee from further opposing or reporting discrimination. *Id.* To be sure, the Court's conception of a reasonable employee is somewhat detached from reality.

83. One hypothetical example the Court gives is refusing to invite an employee to lunch. Normally, this would be "trivial, a nonactionable petty slight." *Id.* at 69. However, if the lunch were a regularly scheduled business lunch important to the employee's advancement, the lack of an invitation could be actionable. *Id.*

84. Onacle v. Sundower Offshore Services, Inc., 523 U.S. 75, 80 (1998).

85. The most notable example comes from sexual harassment law, where a female employee cannot maintain a claim if her harasser equally sexually harasses a man. *See* Smith v. Pefanis, 652 F. Supp. 2d 1308, 1325 (N.D. Ga. 2009); *see also* Robin Applebaum, *The "Undifferentiating Libido": A Need for Federal Legislation to Prohibit Sexual Harassment by a Bisexual Harasser*, 14 Hofstra Lab. L.J. 601, 602-03 (1997); Sandra Levitsky, *Footnote 55: Closing the "Bisexual Defense" Loophole in the Title VII Sexual Harassment Cases*, 80 Minn. L. Rev. 1013, 1014 (1996).

dependents to recover worker's compensation insurance where an employee's suicide is the result of abnormally stressful working conditions that lead to mental illness and suicide.[86] In states that do not allow this recovery, an employee's intentional act of self-harm is an absolute bar to recovery.[87] However, in those states that do allow recovery, the central burdens the claimants must carry are to show that the suicidal impulse was not a "purely subjective reaction to normal working conditions" and that the psychological injury caused by those working conditions precluded the ability to form "the deliberate intent to intentionally injure [oneself] in an act of suicide."[88]

In one illustrative case from New York, survivors were allowed to recover damages from an employee suicide caused by workplace stress.[89] The employee's stress was caused by an inability to handle "criticisms and conflicting directions issued by his supervisors."[90] Since there was a causal nexus between the stress and the employee's depressive state that led to his suicide, his survivors were entitled to compensation.[91] Conversely, New York employers are not liable, even where there is a causal nexus between workplace stress and suicide, when the stress is caused by good-faith employer actions stemming from "a lawful personnel decision involving a disciplinary action."[92] Much as in the power harassment framework, the American law on this issue allows for an analysis of whether, and to what extent, the employer created an unreasonably suicidogenic work environment as a basis for recovery.

One significant difference between cases of power harassment and American federal law is that the power harassment framework applies to military hierarchies. In the United States, though the Federal Tort Claims Act generally waives sovereign immunity in employment tort claims,[93] members of the armed services may not, by statute, maintain suit against the government for injuries related to their military service during a time

86. For a discussion of the split among the states on this issue, see 2 Modern Worker's Comp. § 115:5 (2015) *available at* Westlaw. *See generally* Tarver v. United States, 25 F.3d 900 (10th Cir. 1994) (showing the possibility of recovering under the Federal Employees Compensation Act for suicide attributable to intentional harassment by a supervisor in a federal job).

87. 2 Modern Worker's Comp. § 115:5.

88. *Id.*

89. Matter of Potter v. Curtis Lbr. Co., Inc., 10 A.D.3d 819, 819 (N.Y. App. Div. 2004).

90. *Id.*

91. *Id.* at 820.

92. Matter of Veeder v. N.Y. State Police Dep't, 102 A.D.3d 1072, 1072-73 (N.Y. App. Div. 2013). This concept derives from a statutory defense, which excludes from the definition of injury "an injury which is solely mental and is based on work related stress if such mental injury is a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer." N.Y. Workers' Comp. Law § 2(7) (McKinny 2014).

93. 28 U.S.C. § 1346(b) (2013).

of war.[94] This "time of war" language from the statute has been broadened to include almost any suit by military members against the government for things that happen in the course of their service.[95] As such, a service member's suicide while serving in an armed service or that arises out of her military service is a suit over which an American court would simply have no jurisdiction.[96]

It is worth noting that this doctrine of immunity has sustained significant criticism.[97] Justice Scalia has opined that this broad common law exception "deserves the widespread, almost universal criticism it has received," and that the current state of the law is an unjustified "failure to apply the [Federal Tort Claims Act] as written."[98] Considering that suicide rates in the U.S. armed forces are at historic levels,[99] the time may finally have come to rein in the military's immunity from suits brought by the survivors of service members who have committed suicide. The example of power harassment's application to the Japanese Self-Defense Forces provides some framework for conceptualizing just what such a change might look like, particularly in cases where abuses of power form the background of a service member's suicide.

Power harassment has proved a powerful tool for framing the problem of employee suicide in Japan. Power harassment could also provide advocates in the United States working to address suicide at work with some additional frames to develop better law on this critical issue.

C. *Tort Liability for Outrageous Conduct at Work.*

Power harassment's breadth encompasses several types of behavior that are covered by other torts. For example, American plaintiffs already can and do bring cases that revolve around physical attacks or inappropriate touching against their employers as battery.[100]

Moreover, some of the power harassing behavior recognized by Japanese courts could be sufficiently outrageous and contemptible to rise to the level of intentional infliction of emotional distress.[101] In one

94. 28 U.S.C. § 2680(j) (2006).

95. Feres v. United States, 340 U.S. 135, 146 (1950).

96. *See, e.g.*, Purcell v. United States, 656 F.3d 463, 466-67 (7th Cir. 2011) (barring recovery to the survivors of a Navy serviceman who committed suicide at a naval base).

97. See the wealth of criticism cited in Selbe v. United States, 130 F.3d 1265, 1266 (7th Cir. 1997).

98. United States v. Johnson, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting).

99. James Dao & Andrew W. Lehren, *Baffling Rise in Suicides Plague the U.S. Military*, N.Y. Times (May 15, 2013), http://www.nytimes.com/2013/05/16/us/baffling-rise-in-suicides-plagues-us-military.html.

100. *See, e.g.*, Evans v. Wash. Ctr. for Internships & Academic Seminars, 587 F. Supp. 2d 148, 149-51 (D.D.C. 2008) (barring a claim of sexual harassment by an unpaid intern, but permitting her to sustain a case for battery against a supervisor who repeatedly touched her at work).

101. *See* Restatement (Third) of Torts, § 46 (describing the tort of intentional infliction of emotional distress).

Texas case with facts closely mirroring several power harassment cases, the court allowed for recovery against an employer for a supervisor's physical and verbal threats on employees, his constant vulgarity, his repeated attempts to intentionally humiliate and embarrass employees, and his hot-tempered habit of yelling at his supervisees.[102]

However, the threshold for outrageous conduct under this tort framework in the United States is much higher than it is in Japan. For example, in the case referenced above, the Texas Supreme Court was most motivated by the pattern of the supervisor's horrendous behavior, saying, "[o]ccasional malicious and abusive incidents should not be condoned, but must often be tolerated in our society."[103] An employer's behavior can be "callous, meddlesome, mean-spirited, officious, overbearing, and vindictive" without reaching the required dimension of being "utterly intolerable in a civilized community" required to find tort liability.[104] Given this higher standard, an employer who sent a memorandum to an employee implying that he was lazy and that he should be fired could not, in that instance, be liable for intentional infliction of emotional distress.[105]

Comparing this latter case from Texas to the Takamatsu High Court case described in note 53, supra, is particularly instructive. In Japan, it can be tortious for an employer to attach to a monetary commendation a note lending itself to the construction that the employee is unnecessary. In the United States, it may not be tortious to receive a memorandum from an employer containing personal insults and threats of termination. Contrasted to the Japanese cases discussed in Section III, American tort law requires much more of employees who claim that their superiors' bullying has caused them mental anguish and other harms.[106] The distinction between the American framework of tolerating the occasional malicious incident at work versus the far more capacious notion of power harassment is great, and it demonstrates how far the American common law is from being an effective regime to combat commonplace forms of undesirable workplace bullying.

D. *Power Harassment and the General Duty under the O.S.H. Act.*

As discussed above, power harassment arose primarily out of the broad duty, under Japanese law, for employers to provide their employees a safe and healthy workplace. Though the common law duty between employers and employees in the United States is far more constrained,[107] the

102. GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 613-15 (Tex. 1999).

103. *Id.* at 617.

104. Creditwatch, Inc. v. Jackson, 157 S.W.3d 814, 817-18 (Tex. 2005).

105. Cunningham v. Richeson Mgmt. Corp., 230 Fed. App'x 369, 370-71 (5th Cir. 2007).

106. Moreover, some states have held that even intentional workplace torts are precluded by workers' compensation's exclusive remedy provisions. Recovery under this framework can be greatly reduced. See the discussion of this issue in Restatement (Third) of Torts, § 46 cmt. D (1998).

107. *See* Restatement (Third) of Torts, § 40(b)(4) (providing that an employer

federal Occupational Safety and Health Act ("O.S.H. Act") does impute an obligation similar to the Japanese legal standard. The O.S.H. Act mandates that an employer provide its employees "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[108] This general duty provision allows for a much broader conception of employee rights to workplace safety when compared to specific regulations based on the O.S.H. Act.[109]

The growth of power harassment from the general employer duty to create a safe and healthy workplace demonstrates how workplace bullying protections can develop from general concepts of workplace safety. Professor Harthill has suggested that similar civil law concepts from Europe and Québec could be imported through the O.S.H. Act's general duty provision.[110] As scholars and lawyers advocate for the expansion of an employer's liability for harms from bullying, the Japanese example should add more perspective on how and under what circumstances such changes could be possible.

V. Conclusion

Japan's courts, government, and scholars are still working out exactly what power harassment is. While a single, reliable definition of power harassment is hard to achieve at the current stage of the law's development, the examples from both the government and the courts show that power harassment currently operates as a general framework for understanding specific torts and harmful behaviors that plague the workplace. This open-ended quality of power harassment allows for a broad heuristic with which Japanese employees and employers are negotiating the intersection of human rights with the employment relationship.

The open-endedness of the power harassment framework is often operationalized as a problem that leads to a gross excess of potential claims of "harassment" and the prohibition of too many common workplace and social behaviors.[111] However, such critiques are hardly novel—

owes a duty of reasonable care to an employee who, while at work, comes into imminent danger or becomes injured or ill and is "thereby rendered helpless").

108. 29 U.S.C. § 654(a)(2).

109. *See, e.g.*, Sec'y of Labor v. Seaworld of Fla., LLC, OSHRC Docket No. 10-1705, at 17-18 (June 11, 2012) (finding that Seaworld violated its general duty to its employees by allowing trainers to work directly with trained orcas).

110. *See generally* Susan Harthill, *The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 U. Cin. L. Rev. 1250 (2010).

111. Americans writing about Japanese harassment in popular press tend to be particularly scathing. One great example is Dōshisa Law School professor Colin P.A. Jones's recent write up about the proliferation of harassment-styled ideas as indicative of a tendency toward self-victimization and resistance to maturation. Colin P.A. Jones, *Blame It on the Hara: Harassment Vocabulary Makes Us All Victims*, The Japan Times (Jan. 28, 2013), http://www.japantimes.co.jp/community/2013/01/28/issues/blame-it-on-the-hara-harassment-vocabulary-makes-us-all-victims/.

they were the bedrock of policy arguments in the United States against counting unwelcome sexual behavior as a form of actionable discrimination under Title VII.[112] Just as the legal dialectic has settled that sexual harassment is not an acceptable, even if common, employment practice, norms prohibiting power harassment will likely come to be understood as a fundamental component of any acceptable employment environment, even in the absence of a concrete definition for liability.

As power harassment develops, it may become easier to pin down exactly what Japanese courts will compensate and how this concept can or will be deployed in the United States. In the meantime, American lawyers can use power harassment as an organizing principle for raising awareness of the unacceptability of workplace bullying in general and to break the conception that bullying and the occasional malicious act are normal hazards of working life.

112. *See, e.g.*, Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 556-57 (D.N.J. 1976).