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Fan, Jennifer S.

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# RECENT DEVELOPMENTS

## FROM OFFICE LADIES TO WOMEN WARRIORS?: THE EFFECT OF THE EEOL ON JAPANESE WOMEN

Jennifer S. Fan\*

### ABSTRACT

In this Article, Jennifer Fan argues that existing laws in Japan do not adequately protect working women from sex discrimination. Specifically, Fan examines the Equal Employment Opportunity Law (EEOL), a law designed to prevent discrimination against women in the workplace, and concludes that the EEOL is little more than a paper tiger that preserves the status quo. After briefly discussing the legal sources of protection for working women in Japan before the passage of the EEOL, Fan examines the creation of the EEOL, its substantive provisions, and its legal impact. Through her analysis of recent sexual harassment cases in light of the EEOL and recent 1999 amendments to the EEOL, Fan illustrates that the EEOL does little to improve the working environment for women. Fan concludes that additional revisions to the EEOL are needed to ensure the effectiveness of the EEOL and to bolster women's rights in the workplace.

### TABLE OF CONTENTS

I. INTRODUCTION.....	104
II. OVERVIEW OF LEGAL SOURCES OF PROTECTION FOR WORKING WOMEN IN JAPAN BEFORE THE EEOL .....	111

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\* Associate, Cooley Godward LLP, Palo Alto, CA. B.A. *with distinction* Stanford, 1995; J.D. University of Pennsylvania, 1998. This Article is dedicated to my parents for all of their love and support. Special thanks to Professor Jacques deLisle, Richard S. Au, Lily C. Wong, and the staff of the *UCLA Women's Law Journal* for their invaluable help.

A.	<i>Constitution</i> .....	111
B.	<i>Labor Standards Act</i> .....	112
C.	<i>Civil Code</i> .....	112
III.	EQUAL EMPLOYMENT OPPORTUNITY LAW .....	113
A.	<i>History of the Law</i> .....	114
1.	International Pressures .....	114
2.	Domestic Influences .....	115
3.	The Outcome .....	117
B.	<i>Provisions of the EEOL</i> .....	118
C.	<i>Administrative Guidance as a Remedy Under the EEOL</i> .....	120
D.	<i>The Two-Track System: The Unintended Result of the EEOL</i> .....	123
E.	<i>The Limited Effect of the EEOL in Combating Sexual Discrimination</i> .....	126
IV.	SEXUAL HARASSMENT CASES IN LIGHT OF THE EEOL .....	126
A.	<i>Shizuoka Sexual Harassment Case</i> .....	127
B.	<i>Fukuoka Sexual Harassment Case</i> .....	127
C.	<i>Osaka Sexual Harassment Case</i> .....	129
V.	THE AFTERMATH OF <i>FUKUOKA</i> .....	130
A.	<i>Categorization of Sexual Harassment</i> .....	130
B.	<i>Governmental Involvement</i> .....	131
C.	<i>Businesses' Response</i> .....	131
D.	<i>Public Perception and Response</i> .....	132
VI.	WINDS OF CHANGE?: AMENDMENTS TO THE EEOL AND LSA .....	133
A.	<i>Prohibition of Discriminatory Treatment</i> .....	134
B.	<i>Request for Mediation by Employees</i> .....	135
C.	<i>The Recognition of Sexual Harassment</i> .....	135
VII.	POSSIBLE REMEDIES TO STRENGTHEN THE 1999 EEOL .....	136
A.	<i>Enforcement Mechanisms</i> .....	137
B.	<i>Procedural Requirements</i> .....	137
C.	<i>Governmental Involvement</i> .....	138
D.	<i>Potential Results of a Revised 1999 EEOL</i> .....	139
VIII.	CONCLUSION .....	139

## I. INTRODUCTION

In the years before, and even after, the enactment of the Equal Employment Opportunity Law (EEOL) in 1985, the conditions for Japanese working women have undergone relatively

little change.<sup>1</sup> Before the 1960s, the majority of female employees in Japan were young and unmarried.<sup>2</sup> Moreover, women typically "serve[d] a mere ornamental role in the labor force as 'office flowers' [or office ladies]."<sup>3</sup> Until recently, women were pressured to "retire" from the workplace upon marriage or the birth of their first child.<sup>4</sup> Among corporate heads, the sentiment that women do not work as hard as men still exists. For example,

Executives at Japanese companies contend that while equal opportunity laws are admirable, women cannot cope with long working hours and other vigorous demands that must be met when maintaining a long-term career. 'Women cannot keep up,' said a manager who declined to be named. He points out that working hours for a male employee, including unpaid overtime work, amount to 2,508 hours a year. According to the Prime Minister's Office, a female employee works an average of 2,002 hours a year. Her European counterpart works an average of 1,600 hours a year.<sup>5</sup>

Currently, the participation rate in the labor force for college-educated women in Japan is 60%, compared with a little over 80% in the United States, France, and Germany.<sup>6</sup> Only 8% of Japanese working women have managerial level jobs, whereas in the U.S. and Britain the numbers are at 42% and 33%, respectively.<sup>7</sup> Moreover, "[a]ccording to Japanese government surveys, about one in four working women in Japan has experienced harassment in the workplace, from lewd remarks to physical attacks. Women's rights advocates say the real figures are far higher."<sup>8</sup> Additionally, in Japan, the average wage for women is 63% of

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1. See Hiroko Hayashi, *Sexual Harassment in the Workplace and Equal Employment Legislation*, 69 ST. JOHN'S L. REV. 37, 40 (1995).

2. See FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 125 (1987). See also discussion regarding the 1960s as a turning point for Japanese women *infra* Part II.

3. Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 HARV. WOMEN'S L.J. 83, 84 (1995).

4. See UPHAM, *supra* note 2, at 125.

5. Suvendrini Kakuchi, *Labor-Japan: Women Stumble on the Corporate Ladder*, INTER PRESS SERVICE, Apr. 3, 1998, available in LEXIS, News Library, INTL File.

6. See Japan Institute of Labor, *Working Women in Quest for a New Social System: White Paper on National Lifestyle*, JAPAN LABOR BULLETIN, Jan. 1998, at 1 [hereinafter *Working Women in Quest*].

7. See Edwina Gibbs, *Change Inevitable; Japan's Aging Society Will Push More Women Into the Workforce*, CHI. TRIB. Dec. 7, 1997, at 9, available in LEXIS, News Library, INTL File.

8. Coco Kubota, *Is Japan's Workplace Equality Still a Dream?*, DEUTSCHE PRESSE-AGENTUR, Apr. 2, 1999, available in LEXIS, News Library, Wire Service Stories.

their male counterparts; in contrast, women earn 80% of what their male counterparts do in the United States.<sup>9</sup> Further, these wage differentials are more striking as women become older. For example, single women between twenty to twenty-four years of age in Japan earn 90% of what their male counterpart do, however, working women between fifty-five and fifty-nine years of age earn only 55% of what working men make.<sup>10</sup>

Despite the negative view of female employees and their low stature in the workplace, women are a statistically important part of the labor force in Japan today. According to the Ministry of Labor, the number of Japanese working women has increased more than 22% since 1980, with four of every ten workers being female.<sup>11</sup> As of August 1998, 63% of working-age women were employed in Japan; in comparison, a little more than 70% of working age-women were employed in the United States.<sup>12</sup> Women's participation in the labor market also increased significantly during the decade since the EEOL became effective.<sup>13</sup> In 1985 and 1996 the number of women workers were 15,480,000 and 20,840,000, respectively.<sup>14</sup> Additionally the ratio of women workers in the Japanese labor market was 35.9% and 39.2% in 1985 and 1996, respectively.<sup>15</sup> However, discriminatory treatment was still evident, especially in the recruitment and hiring of female graduates in the 1990s after the collapse of the bubble economy.<sup>16</sup> The coverage of this phenomenon by the media emphasized the limitations of the current regulations.<sup>17</sup> Moreover, 80% of college-educated women in the United States, France, and Germany participate in the labor market, as compared to only 60% in Japan.<sup>18</sup>

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9. See Indira A.R. Lakshmanan, *Japanese Women's New Roles, Attitudes Change at Home, Work*, BOSTON GLOBE, Aug. 25, 1998, at A1, available in LEXIS, News Library, Prior Two Years File.

10. See Kakuchi, *supra* note 5.

11. See Lakshmanan, *supra* note 9.

12. See *id.*

13. Takashi Araki, *Recent Legislative Developments in Equal Employment and Harmonization of Work and Family Life in Japan*, JAPAN LAB. BULL., Apr. 1998, at 5, 5-6 <<http://www.jil.go.jp/bulletin/year/1998/vol37-04/05.htm>>.

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.* Please note that the bubble economy refers to the ever-growing, but fragile state of the Japanese economy during the 1980s.

18. See *Working Women in Quest*, *supra* note 6, at 1.

The rising numbers of women in the Japanese workforce can be explained by recent social changes. Such changes include declining birth rates,<sup>19</sup> increased life expectancies of Japanese people,<sup>20</sup> a labor shortage in Japan,<sup>21</sup> and the return of women to the workplace in their late forties, once their child-rearing responsibilities have ended.<sup>22</sup> Ultimately, "Japan's aging population is forcing it to utilize all its able workers in order to maintain desired production levels."<sup>23</sup>

In addition to economic considerations necessitating that women work outside the home, today's Japanese women are better educated.<sup>24</sup> For instance,

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19. In 1947, the total fertility rate in Japan was 4.54. During the 1950s, however, the fertility rate dropped considerably. For example, in 1950 it was 3.65 and in 1955 it was 2.37. By 1960, the fertility rate declined to 2.00. In the 1970s the downward trend continued; in 1975 the total fertility rate was 1.91. In the mid-1980s, the total fertility rate was a mere 1.5. See Kazuko Tanaka, *Changing Marriage and Family Structure: Women's Perspective*, JAPAN LAB BULL., ¶8, (Jan. 1, 1992) <<http://www.jil.go.jp/bulletin/year/1992/vol31-01/05.htm>>. Many women expressed outrage at the government's perceived bribery. "One mother said, 'The Government's thinking is so simplistic. They figure if they pay a little money, the mother will have another baby, just like a machine. I won't be influenced by it. My freedom is more important than 5,000 yen.'" Nancy Patterson, *No More Naki Neiri? The State of Japanese Sexual Harassment Law: Judgment of April 16, 1992, Fukuoka Chiho Saibansho, Heisei Gannen (1989) (wa) No. 1872, Songai Baisho Jiken (Japan)*, 34 HARV. INT'L L.J. 206, 208 (1993) (quoting Vivien Ng, *Sexuality, Gender and Social Scripting in Japan and China*, 4 YALE J.L. & FEMINISM 65, 67 (1991)).

20. In 1994, the Bureau of Census reported that the life expectancy for both genders was the highest in the world: 76 years for men and 82 for women. See Michael Elliott & Christopher Dickey, *Body Politics: Population Wars*, NEWSWEEK, Sept. 12, 1994, at 26.

21. According to 1998 statistics, Japan's unemployment rate is 3.6% (2.46 million jobless people). See Kakuchi, *supra* note 5. "Japanese working women face one of the gravest employment markets in postwar Japan. The economic recession does not spell a secure future for them." *Id.*

22. "A chart that categorizes Japanese working women by age is called the 'M curve' as it is shaped like the letter 'M,' according to the report. The number of working women in their early 20s is high, but fewer women in their late 20s and 30s work as many of them leave their jobs after they have children. The curve rises again as women in their late 40s reenter the work force after their children are nearly grown." *Jottings Nov. 5*, THE DAILY YOMIURI, Nov. 6, 1997, at 3, available in LEXIS, News Library, Daily Yomiuri File.

23. Patterson, *supra* note 19, at 207.

24. In Japan, according to the statistics compiled by the Ministry of Education, the percentage of female high school graduates who continue their education has increased from 36.8% in 1989 to 49.4% in 1998; in comparison, the numbers for male students are 35.8% and 47.1%, respectively. See *Childbirth Often Ends Trip Along Career Path: Women Lament Lack of Day Care Services*, THE NIKKEI WEEKLY, Aug. 9, 1999, at 1, available in LEXIS, New Library, Nikkei Weekly File [hereinafter *Childbirth Often Ends Trip*].

The Ministry of Education reported that in 1988, the annual number of female college graduates surpassed the one hundred thousand level for the first time. This increase in women graduates has helped narrow the gap in the employment rate between male and female graduates to 3.6%, a substantial improvement from 16.9% in 1986. In 1993, 19% of women, in contrast to 36.6% of men, entered universities. The comparable figures in 1965 were 4.6% for women and 20.7% for men.<sup>25</sup>

As such, women want to enter the workplace with their new skills.

Finally, women today have greater self-awareness. The traditional Japanese notion that women's only sources of fulfillment are marriage and motherhood is gradually being replaced with a more career-minded attitude.<sup>26</sup> One indication of this attitudinal shift is that women seem less eager to get married, as evidenced by the increase in the average age of a woman for her first marriage.<sup>27</sup>

Women now feel less eager or compelled to marry than men or than was exhibited in earlier periods, a tendency that is strongest among highly educated women in their twenties with professional skills. A growing number of . . . young people (28 percent of men and 37 percent of women surveyed) agree that 'women should not necessarily get married if they can get along on their own.' Among single women . . . 41 percent responded affirmatively to this statement, a remarkable change from the days when marriage determined destiny.<sup>28</sup>

A government report found the following: the average marrying age of Japanese women is now 26.7 years of age; Japanese women are staying single in record numbers (5.1%); they are divorcing at a higher rate (222,650 divorces in 1997); they are having fewer children (1.39); and a record number, 78.5%, wish to continue working after marriage.<sup>29</sup>

However, despite their increasing numbers, working women are still facing broad forms of discrimination. Typical examples of discrimination include the following: (1) hiring based on wo-

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25. These are the latest statistics available. The percentage of college-educated women should increase over time. Knapp, *supra* note 3, at 94-95.

26. The results of a survey by the Nikkei Weekly shows that the desire to become a housewife and full-time mother and housewife is waning while having a fulfilling career is becoming increasingly important to Japanese women. See *Childbirth Often Ends Trip*, *supra* note 24, at 1.

27. See Lakshmanan, *supra* note 9.

28. SUMIKO IWAO, *THE JAPANESE WOMAN: TRADITIONAL IMAGE AND CHANGING REALITY* 63 (1993).

29. See Lakshmanan, *supra* note 9.

men's age, physical appearance, and ability to commute from their parents' homes; (2) assigning women to short-term, supplementary chores; (3) paying women lower wages; (4) limiting fringe benefits; (5) restricting promotions; and (6) requiring retirement upon marriage.<sup>30</sup>

Moreover, Japanese employers routinely hire college-educated women<sup>31</sup> to fill merely auxiliary positions in the workforce.<sup>32</sup> These women are known as "office ladies" (OLs).<sup>33</sup> And, women perceived to be independent and nontraditional are often actively discriminated against by their employers. For example, Kinokuniya Shoten, a Japanese bookstore chain, once characterized unsuitable female employee candidates as "divorcees, women who belong to political or religious groups, women who respect passionate artists such as Vincent Van Gogh, . . . women living in rented rooms and daughters of professors or wives of teachers."<sup>34</sup>

Additionally, women's behavior and appearance in the workforce are matters of unique concern. For instance, "[u]gly women," "short women — those less than 140 centimeters," and "women with spectacles" fall into the "undesirable employee" category.<sup>35</sup> A former employee of Kentucky Fried Chicken Japan stated, "If I wore a nice dress to work, my male colleagues and bosses would joke around by asking how I . . . found such a small dress to fit me."<sup>36</sup> They also asked her whether she was born by Caesarean because of her short stature.<sup>37</sup> Some women will take drastic measures to ensure that their physical appearance comports with company standards by undergoing cosmetic surgery.<sup>38</sup> Others receive training in different forms of etiquette. For example, female workers at Nomura Securities "are drilled

30. Patterson, *supra* note 19, at 209.

31. See Knapp, *supra* note 3, at 94.

32. See *id.* at 89.

33. See Patterson, *supra* note 19, at 209.

34. *Exposure of an In-house Document From a Leading Japanese Bookstore Has Drawn Attention to Japanese Management's New Secret Weapon: Women*, JAPAN ECON. NEWSWIRE, Mar. 11, 1983, available in LEXIS, News Library, INTL File.

35. *Id.*

36. Kubota, *supra* note 8.

37. See *id.*

38. "Some large trading and securities firms and banks hire women partly for their physical appearance. This practice has motivated some women to turn to cosmetic surgery to enhance their career opportunities." Knapp, *supra* note 3, at 89.

by former Japan Air Lines stewardesses in bowing, walking, smiling, telephone etiquette, tea service, and sitting.”<sup>39</sup>

Women respond to these forms of discrimination in different ways. Some OLs, for example, rebel against male managers' or co-workers' harassing treatment, including pinching and fondling.<sup>40</sup> As a symbol of their developing sense of self-identity, many educated, young Japanese women poke fun at men by characterizing them as “dull corporate drones.”<sup>41</sup> Alternatively, some of these educated, young Japanese women adopt such “traditional male behavioral traits” as playing golf on weekends, chain smoking, and using masculine forms of speech — essentially transforming themselves into “oyaji gyaru,” (good-old-boy girls) to “meet their Japanese bosses on equal turf.”<sup>42</sup>

Because of the many obstacles women face in the workplace, including sexist attitudes, legal changes are necessary to address the discrimination. This Article argues that existing laws in Japan do not adequately protect working women from sex discrimination. Part II gives an overview of the legal sources of protection for working women in Japan before the passage of the EEOL, a law designed to prevent discrimination against women in the workplace. Part III examines the creation of the EEOL, its substantive provisions, and its legal impact. Part IV discusses recent sexual harassment cases in light of the EEOL and illustrates that the EEOL does little, if anything, to improve the working environment for women. Part V analyzes what occurred in the aftermath of the sexual harassment cases and the implications for working women. Part VI discusses 1999 amendments to the EEOL and the Labor Standards Act (LSA), which signify a turn in the right direction in preserving the rights of women in the workplace. Finally, Part VII sets forth possible remedies that the Japanese Ministry of Labor and businesses should consider to ensure the effectiveness of the revised EEOL and to bolster women's rights in the workplace.

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39. William H. Lash III, *Unwelcome Imports: Racism, Sexism, and Foreign Investment*, 13 MICH. J. INT'L L. 1, 21 (1991).

40. See Patterson, *supra* note 19, at 209.

41. Vivien Ng, *Sexuality, Gender and Social Scripting in Japan and China*, 4 YALE J.L. & FEMINISM 65, 66 (1991).

42. Patterson, *supra* note 19, at 209.

## II. OVERVIEW OF LEGAL SOURCES OF PROTECTION FOR WORKING WOMEN IN JAPAN BEFORE THE EEOL

Beginning in the 1960s, Japanese women sought redress for the unequal treatment of women in the workplace.<sup>43</sup> Specifically, women addressed the issue of mandatory retirement-at-marriage clauses in their contracts.<sup>44</sup> Theoretically, Japan's Constitution, which explicitly outlaws sex discrimination, should have given women a legal basis upon which to file their claims, but judicial interpretations have not sufficiently assisted women in their battle against sexual discrimination. Additionally, the LSA addressed only the narrow issue of wage discrimination. Thus, it too, was a limited tool in women's fight for equality. Therefore, in the absence of laws that protected women in the workplace, women turned to the Civil Code for redress.

### A. Constitution

According to the Japanese Constitution, Article 14, "(1) All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin."<sup>45</sup> Essentially, Article 14 is an equal rights amendment outlawing sex discrimination. However, "judges have interpreted it to apply only to 'unreasonable' discrimination by State action."<sup>46</sup>

According to the Supreme Court of Japan, Article 14 should be "construed as prohibiting differentiation without reasonable grounds therefor. It does not prohibit some differential treatment in view of the nature of the matter."<sup>47</sup> Determining reasonableness depends upon "the special nature of the case at issue, the background of the times, and social and political conditions."<sup>48</sup> Moreover, Article 14 only creates a cause of action for discrimination in the public sector; Article 14 does not regulate acts of discrimination in the private sector.<sup>49</sup> Therefore, the so-called constitutional right to equality is considerably limited.

43. UPHAM, *supra* note 2, at 124-65.

44. *See id.* at 131.

45. Kenpo, art. XIV.

46. M. Diana Helweg, Note, *Japan's Equal Employment Opportunity Act: A Five-Year Look at its Effectiveness*, 9 B.U. INT'L L.J. 293, 297 (1991).

47. Jan M. Bergeson & Kaoru Yamamoto Oba, *Japan's New Equal Employment Opportunity Law: Real Weapon or Heirloom Sword?*, 1986 B.Y.U. L. REV. 865, 869 (1986).

48. 2 KODANSHA ENCYCLOPEDIA OF JAPAN 230 (1983).

49. *See* Knapp, *supra* note 3, at 96.

### B. *Labor Standards Act*

The Labor Standards Act<sup>50</sup> set forth the basic law dictating labor management relations before the 1985 enactment of the EEOL.<sup>51</sup> Generally, it provided guidelines relating to labor contracts, wages, work hours, health and accident compensation, and safety. Article 4 of the LSA enjoined sex discrimination in terms of wages, but failed to enjoin other aspects of employment, such as hiring, promotion, or retirement. This provision provided only that "the employer shall not discriminate women against men [sic] concerning wages by reason of the worker being a woman."<sup>52</sup>

In contrast, Article 3 provided that "[e]mployers are forbidden to engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed, or social status of any worker."<sup>53</sup> However, Article 3 did not include sex as a protected category. Thus, as with the Constitution, the LSA provided only a limited basis for sexual discrimination claims.

### C. *Civil Code*

Given that women did not have a clear constitutional or specific statutory right of action, they looked to the Japanese Civil Code for redress.<sup>54</sup> Unlike the Constitution, which only regulates government action, the Civil Code applies to "[a]ny collective agreement, work rule, or individual labor contract . . . ."<sup>55</sup> Article 1 dictates that the Civil Code be "construed from the standpoint of the dignity of the individuals and the essential equality of the sexes."<sup>56</sup> The remaining provisions of the Civil Code provide for gender-neutral standards of conduct. When read in conjunction with Article 1, Articles 90, 709, and 715 of the Civil Code provide women means to redress sex discrimination and harassment.

Article 90 states that a "juristic act which has for its object such matters that are contrary to public policy or good morals is

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50. See Rodo Kijunho, Law No. 49 of 1947, art. 5 [hereinafter LSA].

51. See UPHAM, *supra* note 2, at 130.

52. LSA, *supra* note 50, at art. 4.

53. *Id.* at art. 3.

54. See Minpo, No. 89 of 1896, No. 9 of 1898.

55. Knapp, *supra* note 3, at 98.

56. Minpo, *supra* note 54, at art. 1.

null and void."<sup>57</sup> In the *Sumitomo Cement*<sup>58</sup> case, judges first interpreted Article 90 broadly to prohibit sex discrimination.<sup>59</sup> In this case, Suzuki Setsuko, an employee of Sumitomo Cement, refused to retire after she married, defying company policy that mandated that all its female employees retire at either marriage or thirty-five years of age.<sup>60</sup> As a result, she was fired.<sup>61</sup> Subsequently, she sued and won monetary damages, thus setting the precedent for similar discriminatory "firing upon marriage" cases that were heard in the 1960s and 1970s.<sup>62</sup>

In the 1980s, plaintiffs began to bring sexual harassment suits against employers, invoking Articles 709 and 715 of the Civil Code as the bases of their claims. Article 709 provides for a cause of action in tort giving rise to damages; it prohibits "unlawful acts" in the workplace. Article 715 establishes vicarious liability.<sup>63</sup> It "provides that an employer is liable for tort with respect to its employee's illegal conduct if such conduct is carried out in the course of implementing his/her duties for the employer's business."<sup>64</sup> These articles, when read in conjunction with Article 1, enabled women to characterize their coworkers' sexually harassing behavior as "unlawful acts" for which their employers could be held liable in tort.

### III. EQUAL EMPLOYMENT OPPORTUNITY LAW

Due to the international focus on women's issues in the mid-1970s to mid-1980s, Japan was forced to confront a need for a law that was specifically tailored to address the issue of protection of women's rights in the workplace. Initially, the EEOL held great promise as another legal source of protection for working women in Japan. However, domestic pressures, most notably that of the business community, which opposed the EEOL, resulted in the

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57. Minpo, *supra* note 54, at art. 90.

58. See *Sumitomo Cement*, 17 Roshu 1407 (1966).

59. "In applying Article 90, the court evaluates the reasonableness of the employer's conduct to determine whether it is void as against public policy." Knapp, *supra* note 3, at 98.

60. See *id.*

61. See *id.*

62. See UPHAM, *supra* note 2, at 131-139. Please note that because Japan has a civil law system the *Sumitomo Cement* case did not establish a precedent. It was, however, significant because it was the first time that a plaintiff had confronted a gender-role stereotype through the law.

63. See discussion on Articles 709 and 715 of the Civil Code *infra* Part IV.

64. Ryuichi Yamakawa, "Personal Rights" in the Workplace: *The Emerging Law Concerning Sexual Harassment in Japan*, JAPAN LAB. BULL., Sept. 1, 1997, at 5, 8.

EEOL's superficial effect. Additionally, because the EEOL ultimately relied on administrative mechanisms that worked within the bureaucratic framework, rather than radical change, it maintained the Japanese notion of *wa* that the Japanese people consider important to maintaining harmony with their society.<sup>65</sup>

## A. *History of the Law*

### 1. International Pressures

As previously discussed, the international focus on women's issues brought the plight of Japanese working women to the forefront of Japan's consciousness because Japan desired to enhance its global image.<sup>66</sup> The United Nations (U.N.), in particular, focused the world's attention on women's issues during the 1970s. The year 1975 was designated as U.N. International Women's Year.<sup>67</sup> This was followed by the U.N. Decade for Women, which commenced on January 1, 1976.<sup>68</sup> Thereafter, the U.N. passed another proclamation: the U.N. Convention Concerning the Elimination of All Forms of Discrimination Against Women (U.N. Convention).<sup>69</sup>

To ratify the U.N. Convention, a signatory state was required to take "all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."<sup>70</sup> Eager to prove its social advancement was commensurate with its economic success,<sup>71</sup> Japan agreed to sign and ratify the U.N. Convention by 1985.<sup>72</sup> "While domestic [Japanese] voices also clamored in support of the law, undoubtedly the deadlines im-

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65. See discussion regarding '*wa*' *infra* Part III.C.

66. "Japan's concern for its own global image played a vital role in the passage of the EEOL." Knapp, *supra* note 3, at 108.

67. See International Women's Year, G.A. Res. 3010, U.N. GAOR 3d Comm., 27th Sess., 2113d plen. mtg., Supp. No. 30, at 66, U.N. Doc. A/8730 (1972).

68. See World Conference of the International Women's Year, G.A. Res. 3520, U.N. GAOR 3d Comm., 30th Sess., 2441<sup>st</sup> plen. mtg., Supp. No. 34 at 94, U.N. Doc. A/10034 (1975) [hereinafter U.N. Decade for Women].

69. See Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 180, U.N. GAOR 3d Comm., 34th Sess., 107th plen. mtg., Supp. No. 46 at 193, U.N. Doc. A/34/46 (1979) [hereinafter U.N. Convention].

70. *Id.* at 193, 195.

71. See Loraine Parkinson, Note, *Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change*, 89 COLUMB. L. REV. 604, 621 (1989).

72. See *id.* at 616 n.40.

posed by the U.N. Convention [in 1986] helped move the law through the Japanese Diet."<sup>73</sup>

On July 15, 1980, acting Prime Minister Ito and his cabinet decided to sign and ratify the U.N. Convention by July 17, 1985. The Minister of Labor and the Director of the Women's and Young Workers' Office (Office) stated that the EEOL was passed to make Japan eligible to ratify the U.N. Convention. Indeed, the Director of the Ministry of Labor's (MOL) Women's Bureau posited that in the absence of the aforementioned U.N. Convention, Japan never would have enacted an equal opportunity law by the end of 1985.<sup>74</sup>

Japan's interest in keeping pace with the international community's treatment of women, however, waned once the issue of discrimination towards women was no longer in the global consciousness. In essence, Japan only made cosmetic changes in the workplace to advance the interests of women. The poor quality of Japan's attempts to create a more hospitable working environment for women is borne out by statistics that show the low status of Japanese women as compared to their counterparts in industrialized countries. In 1999, the U.N. ranked Japan

[thirty-eighth] among 102 countries on the GEM [Gender Empowerment Measure] scale, one of the worst rankings of any advanced nation. Surprisingly, Japan [had] ranked [twenty-seventh] in 1995. The GEM index was devised by the U.N. Development Program based on four factors: the percentage of parliamentary seats held by women; the percentage of female administrators and managers; the percentage of female professionals and technical workers; and women's share of earned incomes. While other low-ranking nations show an imbalance among these elements, Japan does poorly in all.<sup>75</sup>

## 2. Domestic Influences

International pressures were not the only force that led to the adoption of the EEOL; domestic influences played a role as well. Ultimately, the corporate world most greatly influenced the contours of the EEOL.

The key players in the debate regarding the rights the EEOL would give women in the workplace were employers (businesses) and labor unions on one side and the government and feminists

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73. See Helweg, *supra* note 46, at 299.

74. Bergeson & Oba, *supra* note 47, at 872 n.38.

75. *A Promise of Change for Women*, JAPAN TIMES, May 1, 1999, at 1, available in LEXIS, News Group File, Most Recent Two Years File.

on the other.<sup>76</sup> The latter wished to pass the EEOL in order to sign the United Nations Convention.<sup>77</sup> In contrast, businesses wanted to preserve traditional employment practices; they claimed that "equality in employment would mean the end of [the] pillars of postwar growth and social stability, permanent employment and seniority-based compensation."<sup>78</sup> For similar reasons of preserving the status quo, labor unions also did not want the EEOL to become law because they opposed the removal of the protective provisions for women in the Labor Standards Law.<sup>79</sup>

Specifically, there were several rationales behind businesses' opposition to the EEOL. First, businesses did not think that women could fulfill the "corporate warrior"<sup>80</sup> role expected of men. Women were perceived as having other societal obligations that would interfere with the traditional lifetime employment system, such as raising children and caring for aging parents.<sup>81</sup>

Second, in a nonlitigious society such as Japan, which values *wa*<sup>82</sup> or harmony, significant change is a difficult concept to accept. Therefore, by structuring the EEOL such that it had an administrative scope rather than a litigation based scope, the business community preserved the harmony it sought by creating a passive rather than active law for women's rights in the workplace.

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76. See Knapp, *supra* note 3, at 107.

77. See *id.*

78. UPHAM, *supra* note 2, at 150.

79. See Knapp, *supra* note 3, at 107.

80. "Under traditional Japanese management, guaranteed lifetime employment obligated men to work at the cost of their private lives. Some of these 'corporate warriors' put in more than 3000 work hours per year." *Id.* at 83. Indeed, it is postulated that such self-sacrifice and death from overwork (*karoshi*) resulted in Japan's rapid ascent as a world economic leader. See generally Esaka Akira & Kusaka Kimindo, *Farewell to the Corporate Warrior*, 17 JAPAN ECHO 37 (Special Issue, 1990).

81. "After female employees spend a few years performing clerical duties with little chance of promotion, employers often expect, and sometimes force women to retire upon marriage or pregnancy." Knapp, *supra* note 3, at 84.

82. "[W]a is not active: it is the recognition of the natural order and the satisfaction of taking one's proper station in it." Anita Bernstein & Paul Fanning, "Weightier Than a Mountain": *Duty, Hierarchy, and the Consumer in Japan*, 29 VAND. J. TRANSNAT'L L. 45, 62 (1996).

### 3. The Outcome

In the end, the MOL drafted the EEOL in April 1984 and submitted it to the Diet one month later.<sup>83</sup> Four political parties — the Socialist Party, the Komei Party, the Democratic Socialist Party, and the Social Democratic Federation — wanting stronger enforcement and the creation of an independent relief agency, led a heated debate in the Diet.<sup>84</sup> Eventually, the EEOL was enacted on May 17, 1985, with only the support of the Liberal Democratic Party (the largest political party in Japan), and became effective on April 1, 1986.<sup>85</sup> Unlike the Civil Code and the LSA, the EEOL was enacted specifically to address women's equal opportunity and equal treatment in the workplace. It was, however, shaped by two contrasting forces: international pressures and domestic business opposition.<sup>86</sup> In fact, one critic opined that the EEOL signified a "compromise between the pressure to comply with the *Convention* and the unwillingness of the business community to concede anything which might affect industrial productivity and profit."<sup>87</sup> Thus, while international pressure pushed the law through the Japanese Diet,<sup>88</sup> the business community limited the contents and parameters of the EEOL. In essence, "since the legislation was only possible through a compromise between labor and management or liberal and conservative parties, the EEOL took a reserved attitude towards intervening in established male-centered employment practices."<sup>89</sup>

In sum, the law was a compromise between international expectations and what the business community was willing to accept. Although the business community modified their employment practices in theory, in reality, it did not accept the concept of equality in the workplace.<sup>90</sup>

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83. Although the Diet possesses legislative powers, the ministries draft most of the legislation. See Knapp, *supra* note 3, at 107.

84. See *id.*

85. See Parkinson, *supra* note 71, at 618.

86. See Bergeson & Oba, *supra* note 47, at 871-72.

87. Masako Kamiya, *Women in Japan*, 20 U. BRIT. COLUM. L. REV. 447, 460 (1986).

88. Chapter IV of the Japanese Constitution defines the Diet as "the highest organ of the state power, and . . . sole law-making organ of the State." Art. 41. It consists of two Houses—the House of Representatives and the House of Councillors. See Art. 42.

89. Araki, *supra* note 13, at 5.

90. See Knapp, *supra* note 3, at 108.

B. *Provisions of the EEOL*<sup>91</sup>

The EEOL establishes duties for employers to achieve and maintain equality in the workplace. It does not recognize a private right of action, nor does it provide criminal or civil sanctions against employers who violate it.<sup>92</sup> According to the EEOL, employers have two duties: *doryoku* (best efforts) and *kinshi* (prohibited).<sup>93</sup> *Doryoku* requires that the employer "endeavor" not to discriminate in job advertisements, hiring, placement, and promotion.<sup>94</sup> The *kinshi* duties are more stringent and "prohibit" the employer from discriminating against female workers regarding retirement age, discharge, and voluntary resignation.<sup>95</sup> Even with *kinshi* duties, however, no penalties exist for employers who do not comply.<sup>96</sup> Thus, without penalties, it is very difficult to ensure that employers will follow the standards of the EEOL.

A section of the EEOL entitled "Measures to be Taken by Employers to Promote Equality of Opportunity and Treatment for Female Workers" introduces the rules employers theoretically must follow.<sup>97</sup> Specifically, Articles 7 and 8 of the EEOL establish the employer duty, *doryoku*. Article 7 tells employers to "endeavor to afford women and men equal opportunities with regard to recruitment and hiring."<sup>98</sup> Article 8 asks that employers "endeavor to treat women and men equally with regard to job assignment and promotion."<sup>99</sup> Although the language of Articles 7 and 8 promotes the standards of *doryoku*, in practice, employers can easily circumvent these standards given that Articles 7 and 8 fail to establish a bright-line rule by only requiring employers to "endeavor" not to discriminate. Therefore, employers can escape the standards of *doryoku* for recruitment, hiring, job

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91. See Koyo no Bun'yo ni Okeru Danjo no Pinto na Kikai oyobi Taigu no Kakuho to Joshi-Rodosha no Fukushi no Zoshin ni Kansuru Horitsu [An Enactment for the Assurance of Equality of Opportunity and Treatment for Men and Women in Employment and the Enhancement of the Welfare of Female Workers], No. 45 (1985); passed on May 17, 1985, as amendment to the Kinro Fujin Fukushi Ho [Working Women's Welfare Law], No. 113 (1972) [hereinafter EEOL].

92. See Helweg, *supra* note 46, at 303.

93. See Masahiro Ken Kuwahara, *The Equal Employment Opportunity Act*, 7 *DOING BUS. IN JAPAN* 4-1, 4-5 (1989).

94. See *id.* at 4-5.

95. See *id.*

96. See *id.* at 4-5 to 4-6.

97. See EEOL, *supra* note 91, at arts. 7-11.

98. *Id.* at art. 7.

99. *Id.* at art. 8.

assignment, and promotion even though they constitute the more common discriminatory practices.<sup>100</sup>

Articles 9, 10, and 11 exact the stricter *kinshi* duty on employers.<sup>101</sup> Article 9 requires that “[e]mployers shall not discriminate against women workers by reason of sex with regard to education and training designated by [a] Labor Ministry ordinance for developing basic skills necessary for job performance.”<sup>102</sup> Article 10 states that “[e]mployers shall not discriminate against women workers by reason of sex in providing monetary assistance for the construction or purchase of houses or for other purposes as designated by Labor Ministry ordinance.”<sup>103</sup> Lastly, Article 11 reiterates what court cases have prohibited since the 1960s and 1970s: “Employers shall not discriminate against women workers by reason of sex with regard to mandatory retirement age, retirement or dismissal.”<sup>104</sup>

Article 12 sets forth standards for the MOL to use in providing guidelines for fair labor practices.<sup>105</sup> The EEOL empowers the MOL to alter the guidelines as it deems appropriate as long as the MOL follows the EEOL standards, such as the needs of women workers and society dictate.<sup>106</sup> Article 12 also lists occupations, such as security and crime prevention jobs, that are exempt from the guidelines of the EEOL.<sup>107</sup> Additionally, the EEOL amended the LSA’s prior limitations on women’s working

100. See Helweg, *supra* note 46, at 303.

101. *Id.*

102. EEOL, *supra* note 91, at art. 9.

103. *Id.* at art. 10.

104. *Id.* at art. 11.

105. See *id.*, at art. 12.

106. See *id.*

107. These include:

- a. jobs in which employers need to employ men: (i) positions in art or entertainment, (ii) security and crime prevention jobs and (iii) jobs with the equivalent necessity as (i) and (ii);
- b. cases in which it is impossible for employers to accord women and men workers equal treatment because of the restrictions or prohibition of certain kinds of work for women in the Labor Standards Act (restriction of overtime and holiday work, prohibition of night work, underground work and hazardous work); and
- c. cases in which it is inappropriate for employers to accord men and women equal opportunity or treatment because of special circumstances, such as employment in a foreign country where different customs or ways of life make it difficult for women to utilize their abilities.

*Id.*

conditions.<sup>108</sup> For example, after the EEOL, women could work over six hours of overtime per week and after 10:00 at night.<sup>109</sup> Working pregnant women "can [now] work until six weeks before their due dates and can return to work six weeks after childbirth, if they agree to work at a job which a doctor certifies is not harmful to them."<sup>110</sup>

C. *Administrative Guidance*<sup>111</sup> as a Remedy Under the EEOL

Notwithstanding the absence of a right of action or sanctions against employers in the EEOL, remedies do exist in the form of administrative guidance from bureaucratic agencies specified in the EEOL.<sup>112</sup> Professor Michael Young defines administrative guidance as action by administrators "of no coercive legal effect that encourages regulated parties to act in a specific way in order to realize some administrative aim."<sup>113</sup> In other words, administrative guidance delineated in the EEOL only encourages people to obey the law, but provides no sanctions for violations nor the option of litigation.

This focus on administrative guidance is explained by the fact that the Japanese strive for the maintenance of *wa* (harmony or accord).<sup>114</sup> "[T]he spirit of *wa* characterizes Japanese behavior: people strive to maintain harmony among themselves, even to the detriment of self-interest."<sup>115</sup> Indeed, legal causes of action against one's own employer can be viewed as a "radical, threatening act to fellow employees as well as to management."<sup>116</sup> Administrative guidance, on the other hand, does not disturb *wa* to the same degree because it facilitates consensus-

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108. See Helweg, *supra* note 46, at 304.

109. See EEOL, *supra* note 91, at arts. 61, 64-2, 64-3.

110. LSA, *supra* note 50, at art. 65.

111. Administrative guidance, *ogyosei shido*, is defined as "the means by which administrative organs exercise influence by non-authoritative means without binding legal directives in order to guide the recipient by way of consent and cooperation towards the realization of administrative aims by positive act or omission." Wolfgang Pape, *Gyosei Shido and the Antimonopoly Law*, 15 LAW IN JAPAN 12, 14 (1982).

112. See Helweg, *supra* note 46, at 305.

113. Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUMB. L. REV. 923, 923 (1984).

114. See Bergeson & Oba, *supra* note 47, at 867.

115. Knapp, *supra* note 3, at 101.

116. UPHAM, *supra* note 2, at 140.

building. Professor Frank Upham, a noted expert on Japanese law, describes bureaucracy involvement as follows:

[T]he bureaucracy tries to gauge the fundamental direction of social change, compares it with the best interests of society from the perspective of the ruling coalition of which it is a part, and then attempts to stimulate and facilitate the creation of a national consensus that supports its own vision of correct national policy. . . . At times . . . litigation can be the vehicle for making [the government bureaucracy] aware of serious social discontent and spurring it to take remedial action . . . [but] it is not allowed to develop into an institutional channel for resolving disputes or setting national policy because either role would destroy [the bureaucracy's] control of the process as well as the substance of policymaking.<sup>117</sup>

However, the desire for *wa* cannot be the only explanation for the lack of sanctions and litigation alternatives under the EEOL. “[O]ther laws [such as the Civil Code] substantiate the administrative guidance with actual sanctions [financial or criminal penalties] and causes of action.”<sup>118</sup> One reason the EEOL is not supported by actual sanctions and litigation may be because the EEOL was crafted to appease the business community that opposed any real change.

The EEOL created three formal levels of administrative process for parties seeking to resolve disputes in the workplace.<sup>119</sup> The first level suggests that the parties come before an in-house employer-employee grievance resolution committee to discuss the complaint in question. The MOL is not involved in this stage of dispute.<sup>120</sup>

The second level prescribes resolution with the assistance of the Women’s and Young Workers’ Office.<sup>121</sup> Depending on the nature of the case, the Office is empowered by the MOL “to give any necessary advice or guidance or make any necessary recom-

117. *Id.* at 21–22.

118. Helweg, *supra* note 46, at 306.

119. *See* EEOL, *supra* note 91, at arts. 13–16.

120. Specifically, the provision reads:

The employers shall endeavor to resolve voluntarily any complaint made by a woman worker with regard to job assignment, promotion, education and training, welfare, compulsory retirement, and dismissal by such means as referral of the complaint to a grievance resolution body of the workplace that is used to resolve worker complaints and that is composed of representatives of labor and management, and so forth.

*Id.* at art. 13.

121. *See id.* at art. 14.

mentation to the parties concerned"<sup>122</sup> based on the voluntary submission of relevant information by both parties.<sup>123</sup>

The third level of process offers mediation by the Equal Opportunity Mediation Commission (Commission).<sup>124</sup> The Commission, comprised of three persons of "learning and experience," appointed by the MOL,<sup>125</sup> proposes the settlement.<sup>126</sup> However, unlike court decisions, such settlements are not binding.<sup>127</sup> Instead, the Commission can only recommend that businesses follow the terms of the settlement; this lack of enforcement power<sup>128</sup> may account for the infrequent use of the third level. In the thirteen years since the EEOL's passage, only 106 employees from fourteen companies applied for mediation with the Commission. Of those applications, only one case involving one company and seven petitioning employees has been mediated.<sup>129</sup>

To help employees make sense of the three level process and the options available to them should harassment occur, the MOL distributes annually a two-part pamphlet entitled *The EEOL: What Would Happen in a Case Like This?* The first part of the pamphlet, entitled "Examples of Consultations," interprets the EEOL provisions regarding recruitment and hiring, job assignment, vocational training, fringe benefits, and compulsory retirement; the second part, entitled "Examples of Resolved Disputes," summarizes several real-life disputes handled by the Office.<sup>130</sup> The pamphlet is a limited informational source for female employees, because it does not address issues that could potentially arise under the EEOL. For example, the pamphlet does not explain to either female employees or their employers how the Office responds to employers who are uncooperative while the Office is investigating an allegation of discriminatory practices against female employees.<sup>131</sup> Thus, the effectiveness of this three-level administrative remedy remains unclear as the MOL

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122. *Id.*

123. *See id.*

124. *See id.* at art. 15.

125. *See id.* at art. 17, para. 2.

126. *See id.* at art. 19.

127. *See Knapp, supra* note 3, at 119.

128. *See id.*

129. JAPAN INSTITUTE OF LABOUR, *Revised Equal Employment Opportunity Law Came into Effect on April 1*, JAPAN LAB. BULL., June 1999, at 2, 2.

130. *See Knapp, supra* note 3, at 119-20.

131. *See id.*

fails to offer “detailed explanations of the procedure used by the Office in providing advice, guidance, and recommendations.”<sup>132</sup>

Further, the effectiveness of the process is difficult to assess because the MOL’s disclosure of the number of disputes handled per year may be exaggerated and, therefore, misleading. Additionally, inaccurate information leaves the public wondering what exactly the Office accomplishes. For instance,

The [MOL] claims that the total number of cases handled by all the prefectural Offices throughout Japan amounts to approximately ten thousand per year. . . . A “case” may refer to one phone call, one document, or one visit. This terminology means that even when a woman calls the Office regarding the same claim on five different occasions, the Office will count those five phone calls as five “cases”.<sup>133</sup>

Because the public is left misinformed, the Office essentially operates free from public scrutiny. As a result, no check exists to determine whether or not the committee is competently fulfilling its function.

#### D. *The Two-Track System: The Unintended Result of the EEOL*

After the passage of the EEOL, many employers, banks, and large firms, in particular, attempted to comply by implementing a new personnel policy for women: the two-track hiring system.<sup>134</sup> The two hiring tracks are *ippan-shoku* (standard/general track) and *sogoshoku* (management track).<sup>135</sup> The standard track involves traditionally female duties such as serving tea and clerical work.<sup>136</sup> In contrast, management duties encompass development, negotiations, and planning.<sup>137</sup> However, this two-track system fails to achieve its ostensible goal of eliminating sex discrimination; in many ways, the system actually perpetuates discrimination.

According to a report published by the Prime Minister’s Office in 1995, only 9.2% of all women were in managerial jobs.<sup>138</sup> This low percentage can be explained, in part, by the fact that

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132. *Id.* at 119.

133. *Id.* at 121.

134. See *id.* at 123.

135. See KAZUO SUGENO, *JAPANESE LABOR LAW* 132 (Leo Kanowitz trans., 1992).

136. See Knapp, *supra*, note 3, at 123.

137. See *id.*

138. *General Survey: 1995 White Paper on Working Women* (May 1, 1996) <<http://www.jil.go.jp/bulletin/year/1996/vol35-05/01.htm>>.

female management track candidates must fulfill special requirements, unlike their male counterparts who are automatically considered. Female candidates must take a written examination, be interviewed, and submit a recommendation. Sometimes, a more competitive examination, separate from the initial written examination, is also administered to further reduce the number of "qualified" female applicants.<sup>139</sup> Other tactics that employers used to reduce the number of female applicants include establishing hiring criteria that require fluency in three foreign languages, having the ability to commute to work within an hour, and residency with one's parents.<sup>140</sup> In essence, women must persuade their employers that they possess "strong aspirations," great competence, and a willingness to sacrifice family for a career.<sup>141</sup> Simply enabling women to apply for the management track has not stopped companies from discriminating in hiring women for management track positions. One study shows that of firms that

recruited for so-called *sogoshoku* comprehensive positions, 78.5 percent 'recruited both men and women' and 21.5 percent 'recruited men alone.' But only 27.6 percent hired both males and females and 72.3 percent employed only males. . . . [T]he reality is that [the two-track hiring system is] obviously an expedient means of differentiating between men and women.<sup>142</sup>

Further, women who actually are accepted into the management track experience discord as their managerial duties are incompatible with the domestic responsibilities that Japanese women exclusively bear. Traditional Japanese managers are obligated to work at the expense of their private lives — sometimes working more than 3,000 hours per year.<sup>143</sup> However, Japanese women overwhelmingly are expected to be responsible for cooking, cleaning, shopping, household finances, and childcare.<sup>144</sup> Successfully fulfilling their corporate duties while being a good

139. See Knapp, *supra* note 3, at 124.

140. See *id.*

141. Parkinson, *supra* note 71, at 631.

142. Sachiko Imada, *Female Labor Force After the Enforcement of the Equal Employment Opportunity Law*, JAPAN LAB. BULL., ¶ 11 (Aug. 11, 1996) <<http://www.jil.go.jp/bulletin/year/1996/vol35-08/05.htm>>. See also Robbi Louise Miller, *Women's Job Hunting in the "Ice Age": Frozen Opportunities in Japan*, 13 WIS. WOMEN'S L.J. 223, 249 (1998).

143. See Knapp, *supra* note 3, at 83–84.

144. See Jacqueline M. Efron, *The Transnational Application of Sexual Harassment Laws: A Cultural Barrier in Japan*, 10 U. PA. J. INT'L ECON. L. 133, 145 n.81 (1999).

wife and mother prove to be almost impossible. In one case, a woman on the managerial track, with two children in elementary school, would return home as late as eleven o'clock.<sup>145</sup> As a result, her marriage failed because balancing work and family was too great of a burden.<sup>146</sup> Indeed, the low fertility rate of women in Japan has been partially attributable to the fact that women cannot have both a career and a family as Japanese society is currently structured.<sup>147</sup> "Women who wish to continue their career tend to postpone childbirth, or even forego having children entirely, because amidst the current Japanese practices it would be nearly impossible to be able to balance both work and family responsibilities simultaneously."<sup>148</sup> Among Japanese working couples, wives spend an average of three hours and thirty-one minutes each day on domestic chores, while husbands spend an average of eight minutes. Women's primary commitment to family conflicts with the demands of Japanese businesses, which require long hours and after-work socializing with customers and coworkers.<sup>149</sup>

Moreover, although the management track appears to allow women to pursue their career goals, a significant discrepancy exists between their expectations and the assignments they receive.<sup>150</sup> Women on the management track still are expected to fulfill traditional roles. For example, one woman employed on a bank managerial track was required to clean ashtrays, wipe off desks, and boil water for tea before the rest of the staff arrived.<sup>151</sup>

In sum, "[a] few women have been assigned to previously all-male jobs and have been promoted, but only as examples and for publicity."<sup>152</sup> In reality, most women continue to perform traditional OL roles. Additionally, women are saddled with non-work obligations, such as the care of a child, and a husband who will have little or nothing to do with household matters.<sup>153</sup> Women on the management track are expected to fulfill "manly"

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145. See Knapp, *supra* note 3, at 125.

146. See *id.*

147. See Araki, *supra* note 13, at 8.

148. *Id.*

149. Efron, *supra* note 144, at 145-46.

150. See Knapp, *supra* note 3, at 125.

151. See *id.*

152. Omori Maki, *Gender and the Labor Market*, 19 J. JAPANESE STUD. 79, 90 (1993).

153. See Lakshmanan, *supra* note 9.

management responsibilities while still fulfilling menial tasks. Thus, the two-track system fails to achieve equality.

E. *The Limited Effect of the EEOL in Combating Sexual Discrimination*

As the preceding section indicates, traditional conceptions of Japanese women's role in society constrained women's advancement in the workplace. Women's precarious status in the workforce meant that they bore the brunt of Japan's prolonged economic recession. "Women most acutely felt the reductions in hiring as companies hiring new graduates favored men. The job market climate for women, chilly in the early 1990s, grew even colder through 1996."<sup>154</sup>

IV. SEXUAL HARASSMENT CASES IN LIGHT OF THE EEOL

Nowhere is the ineffectiveness of the EEOL in improving women's working conditions more apparent than in the area of sexual harassment. No law explicitly prohibits "sexual harassment" per se. The term sexual harassment is relatively new in Japan. Previously, sexual harassment was termed *seitaki iyagarase* (unwelcome sexual advances). "[S]exual harassment (*sekushuaru harasumento*, commonly abbreviated as 'seku hara') did not become part of commonly accepted language use until 1989. Accordingly, sexual harassment remains a relatively foreign concept to most Japanese people. Even in academic circles, sexual harassment was only introduced as a topic of . . . interest in 1983."<sup>155</sup>

Currently, courts recognize two forms of sexual harassment: quid pro quo harassment and environmental harassment or hostile work environment. In essence,

[t]he law of sexual harassment in Japan has developed as case law based on provisions of the Civil Code regarding torts. Instead of finding recourse in a legal framework which delineates employment discrimination, courts have held that sexual harassment is illegal when it infringes women's personal interest [sic]. The employer [sic] liability when one of its employees engages in sexual harassment is predicated on the employee's conduct within the scope of the employment as

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154. Miller, *supra* note 142, at 235.

155. Leon Wolff, *Eastern Twists on Western Concepts: Equality Jurisprudence and Sexual Harassment in Japan*, 5 PAC. RIM. L. & POL'Y J. 509, 517-18 (1996).

well as on the failure of the employer to take appropriate steps to adjust the working environment.<sup>156</sup>

In examining the forthcoming cases, it is striking that the Civil Code rather than the EEOL is relied upon. In part, this illustrates the glaring limitations of the EEOL. Also, it reflects the inadequate bureaucratic response to the problem of sexual harassment in the workplace. Two sexual harassment cases in particular, the *Shizuoka* case and the *Fukuoka* case, set the contours of the sexual harassment litigation and illustrate the shortcomings of the EEOL.

#### A. Shizuoka Sexual Harassment Case

Judge Akimoto of the Shizuoka District court made the first judicial statement on sexual harassment.<sup>157</sup> For the first time, the court recognized a cause of action for sexual harassment, defining sexual harassment as an "unlawful act." In *Shizuoka*, a female hotel employee sued her immediate superior for sexual harassment (the hotel was not sued). The defendant told her he wanted to "see her naked" and touched and kissed her repeatedly against her will.<sup>158</sup> Eventually, the plaintiff resigned as a result of false rumors that she had an affair with the defendant. She sued for the loss of her job and for nonpecuniary losses including loss of appetite, psychological anguish, and insomnia.<sup>159</sup> Judge Akimoto, relying on Civil Code Article 709, which prohibits "unlawful acts" in work-related settings, found that the defendant's behavior constituted an "unlawful act" because the defendant "treat[ed] her as a mere object of pleasure, a plaything, rather than as an individual with a human character."<sup>160</sup> The court held that the defendant was liable for \$10,000 for intentional infliction of emotional distress and \$1,000 for attorney's fees.

#### B. Fukuoka Sexual Harassment Case

Despite the groundwork laid by *Shizuoka*, it was not until *Fukuoka* that sexual harassment came to the forefront of Japa-

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156. Yamakawa, *supra* note 64, at 5, 9.

157. See Judgment of Dec. 20, 1990, Shizuoka District Court, 745 Hanrei Taimuzu 238, 580 Rodo Hanrei 17 (1991) [hereinafter *Shizuoka Sexual Harassment Case*].

158. *Id.*

159. See *id.*

160. *Id.*

nese society; indeed, *Fukuoka* would be the first time an employer was found vicariously liable for an employee's sexually harassing conduct.<sup>161</sup> In *Fukuoka*, the plaintiff, a female editor at a small publishing company successfully sued the president, chief executive, and supervisor for creating a hostile work environment.<sup>162</sup> She based her claims on Civil Code Article 709, prohibiting "unlawful acts" in the workplace, and on Article 715, which prescribes a duty of care.

The incident resulting in this sexual harassment law suit began when a male editor received a reduction in pay at the same time the plaintiff's salary increased by 20,000 yen per month.<sup>163</sup> The male editor reacted by spreading rumors about the plaintiff's sex life stating that she "play[ed] around and [had] many love affairs" and "often [went] out drinking after working late."<sup>164</sup> When the plaintiff was hospitalized for an ovarian tumor, the male editor took that opportunity to tell a customer that she had "something wrong down below."<sup>165</sup> When she won the Fukuoka Citizen's Art Festival prize for her novel, the male editor claimed the plaintiff's novel was pornographic.<sup>166</sup> Other disparaging comments followed.

On March 10, 1988, absent any authority, the male editor attempted to force the plaintiff to resign.<sup>167</sup> Consequently, the plaintiff approached the chief executive to compel the male editor to apologize to those customers who asked about the false statements that the male editor had spread about her.<sup>168</sup> When the chief executive refused, she went to the company president.<sup>169</sup> The president, thinking the conflict resulted from the wide salary discrepancy, raised the plaintiff's salary.<sup>170</sup> However, the dispute between the editors escalated.<sup>171</sup> Eventually, the

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161. See Wolff, *supra* note 155, at 518.

162. In this particular case, the judge issued a default judgment upholding the plaintiff's claims, because the defendant did not enter a defense. See Judgment of April 16, 1992, Fukuoka Chiho Saibansho, Heisei Gannen (1989) (Wa) No. 1872, Songai Balsho Seikyu Jiken (Japan), 1426 Hanji 49 [hereinafter *Fukuoka Sexual Harassment Case*].

163. See *id.*

164. *Id.*

165. *Id.*

166. See *id.*

167. See *id.*

168. See *id.*

169. See *id.*

170. See *id.*

171. See *id.*

plaintiff claimed that the male editor had sexually harassed her.<sup>172</sup> Ultimately, both editors were penalized, but the plaintiff was compelled to resign while the male editor only received a three-day suspension and an insignificant pay cut.<sup>173</sup>

The Fukuoka District Court found that the male editor violated Article 709 of the Civil Code by committing unlawful acts: spreading rumors about her sex life, damaging her reputation, and forcing her to resign.<sup>174</sup> The court held the president and chief executive legally liable for their negligence in failing to resolve the dispute between their employees.<sup>175</sup>

The Fukuoka District Court also found that the employer violated Article 709 because the male editor created a hostile working environment.<sup>176</sup> At last, an employee's right to a nonhostile work environment was recognized and upheld in a Japanese court.<sup>177</sup>

Lastly, the court found that under Article 715 of the Civil Code, employers are responsible for sexual harassment in the workplace.<sup>178</sup> Therefore, a liable employer must compensate a harassed employee.<sup>179</sup> Ultimately, the court awarded the plaintiff \$16,500 for intentional infliction of emotional distress and attorney's fees. The *Fukuoka* decision was important because an employee's right to a nonhostile working environment was recognized. However, it left unclear what an employer must do to meet its duty of care in order to avoid liability.<sup>180</sup>

### C. *Osaka Sexual Harassment Case*

The *Osaka* case illustrates the impact of *Fukuoka*. In this case, a newly-recruited eighteen-year-old female employee was questioned by the president of a medium-sized freight company about her virginity and the sexual behavior of her peers at her

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172. *See id.*

173. *See id.*

174. *See Hayashi, supra* note 1, at 50.

175. *See id.*

176. *See id.*

177. *See* Steven R. Weisman, *Landmark Sex Harassment Case in Japan*, N.Y. TIMES, Apr. 17, 1992, at 3 (recognizing the significance of the first successful legal action against harassment in Japan); Terry McCarthy, *Sayonara Sex Harassment: Japanese Turning the Tide*, TORONTO STAR, Apr. 24, 1992, at C 18 (noting that the nature of the defendant's harassing conduct was verbal).

178. *See Hayashi, supra* note 1, at 51.

179. *See id.*

180. *See Patterson, supra* note 19, at 219.

high school.<sup>181</sup> The president stated that he "wanted" the plaintiff and wished to spend a night at a hotel with her.<sup>182</sup> As a result of the president's verbal harassment, the plaintiff suffered physical symptoms such as headaches and nausea.<sup>183</sup> After less than four months at the company, she resigned.<sup>184</sup>

Under Article 709 of the Civil Code, the defendant president was found liable for unlawful acts because of his sexual harassment of the plaintiff. Specifically, he used sexually suggestive mannerisms and speech that made the plaintiff uncomfortable.<sup>185</sup> The harassment in question was against the plaintiff's will and thus violated her right "to be respected as a woman."<sup>186</sup> Therefore, similar to *Fukuoka*, the Civil Code was invoked to establish a woman's right to a nonhostile working environment.

## V. THE AFTERMATH OF *FUKUOKA*

*Fukuoka* had a myriad of effects on Japanese society. This section will discuss its effect on the government, business, and public sectors.

### A. *Categorization of Sexual Harassment*

Following *Fukuoka*, Japanese courts acknowledged two types of sexual harassment: quid pro quo harassment and hostile work environment (also known as environmental harassment). Quid pro quo harassment "occurs when a superior offers to promote an employee or raise an employee's wages in exchange for sexual favors or the toleration of sexual harassment, and threatens to disadvantage an employee who rejects such requests by methods such as dismissal and unfair transfer."<sup>187</sup> A hostile work environment "exists when employers, executives, supervisors, coworkers, or customers create a hostile or unpleasant work environment by discussing sex with the victims or by engaging in conduct which diminishes the employee's work spirit."<sup>188</sup> Japanese courts recognized *Fukuoka* as a hostile work environment case.

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181. See Judgment of August 29, 1995, Osaka District Court, 893 Hanrei Taimuzu 203 (1996) [hereinafter *Osaka Sexual Harassment Case*].

182. *Id.* at 205.

183. See *id.*

184. See *id.*

185. See *id.*

186. *Id.*

187. Hayashi, *supra* note 1, at 58.

188. *Id.*

### B. *Governmental Involvement*

“The Japanese government has responded both nationally and locally by issuing pamphlets and by offering advice on instituting company sexual harassment policies.”<sup>189</sup> For instance, in an effort to educate the public about sexual harassment, the MOL distributed a video that included examples of harassment and measures to combat it.<sup>190</sup>

In recent cases, such as *Osaka*, the court reaffirmed the unlawfulness of sexual harassment established in *Fukuoka*. The court’s ruling confirms that acts of sexual harassment may constitute a tort under Article 709 of the Civil Code.<sup>191</sup> However, sexual harassment litigation has only progressed to the District Court level.<sup>192</sup> An exception is the *Osaka* case. Here, the defendant has appealed the decision.<sup>193</sup> The High Court has yet to rule on the issue.<sup>194</sup>

### C. *Businesses’ Response*

Employers initially reacted to the *Fukuoka* decision by endeavoring to decrease the occurrence of sexual harassment among coworkers. With the advent of *Fukuoka*, many companies began conducting seminars and publishing brochures addressing the issue of sexual harassment — striving to decrease its occurrence among workers.<sup>195</sup> However, this initial enthusiasm has waned. According to a recent statistic, “[o]nly about ten percent of Japanese companies have [sexual harassment] guidelines or even mention the problem to employees.”<sup>196</sup>

Few Japanese companies are concerned about sexual harassment in the workplace, with some [sixty percent] of them unwilling to take any preventive measures, according to a survey by Japan’s largest business organization. The poll by the Fed-

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189. Patterson, *supra* note 19, at 221.

190. *Video to Raise Awareness of Workplace Sexual Harassment*, JAPAN ECON. NEWSWIRE, May 9, 1994, available in LEXIS, News Library, News Groups Beyond Two Years.

191. See Wolff, *supra* note 155, at 520.

192. See *id.*

193. See *id.* at 520 n.75.

194. From an organizational standpoint, the court system in Japan is similar to the court system in the U.S.

195. See Yomiuri Shimbun, *Sexual Harassment Awareness is Rising in Japan*, DAILY YOMIURI, Feb. 9, 1994, at 13, available in LEXIS, News Group File, Beyond Two Years File.

196. See *Japanese Businesses Launching Fight Against Sexual Harassment*, CHI. TRIB. Apr. 27, 1997, available in 1997 WL 3543249.

eration of Economic Organizations (Keidanren) found about [eighty percent] of 274 major companies doing nothing to prevent sexual harassment, with [sixty-one percent] having no plans to do so in the future.<sup>197</sup>

In a recent survey of about 5,000 national female civil servants, 70% of women employees reported that they were sexually harassed at work through touching and/or offensive jokes.<sup>198</sup> Also, "more than 18% of women working for the Self-Defense Forces or other Defense Agency organizations have been forced to engage in sexual relationships with male bosses or colleagues."<sup>199</sup> According to a survey conducted in October 1998 by the Tokyo Metropolitan Government, 20.5% of enterprises with 300 or more regular employees had already taken measures to prevent sexual harassment and 19.5% were actively considering such steps.<sup>200</sup> In contrast, only 6.8% of enterprises with less than fifty employees had taken measures to prevent sexual harassment, and 71% responded that they "did not feel it necessary to take action."<sup>201</sup>

#### D. *Public Perception and Response*

The outcome of the *Fukuoka* case provoked a strong public response. The Dai-ni Tokyo Bar Association conducted a one-day telephone hotline to survey sexual harassment victims.<sup>202</sup>

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197. *Few Japanese Firm Hard on Sexual Harassment*, JIJi PRESS LTD., Jan. 31, 1997, at 1, available in LEXIS, News Library, Jij Press Ticker Service File. In a survey conducted from 1992-1994, nearly one out of every four female workers had uncomfortable gender-related experiences in the workplace. See The Japan Institute of Labor, *Cases of Sexual Harassment: Survey Commissioned by Ministry of Labor* (Jan. 1994) at ¶ 7. <<http://www.jil.go.jp/bulletin/year/1994/vol33-01/03.htm>>. According to the women surveyed, 76.4% reported being made a victim of gender-related jokes and teasing; 72.5% were touched by someone; 36% were persistently approached for dinner or other activities unrelated to work; and 13.7% received a letter or phone call with sexual overtones. See *id.*

198. See also *id.* *Sex Harassment Policy Should Apply After Work*, JAPAN TIMES, Sept. 3, 1998, available in LEXIS, News Library, Japan Times File.

199. *Japanese Businesses Launching Fight Against Sexual Harassment*, *supra* note 196.

200. See Japan Institute of Labour, *Measures to Prevent Sexual Harassment in the Workplace*, JAPAN LAB. BULL., Aug. 1999, at 2, 3. Please note that the effective response rate of the survey was 46.8%.

201. *Id.*

202. See *Lawyers Plan Sexual Harassment Hotlines*, Japan Econ. Newswire, Sept. 26, 1989, available in LEXIS, News Library, Wires File. Results of the survey were published in numerous types of publications. See, e.g., *Bosses Forced Sex on 25 Women, Hotline Told*, Japan Econ. Newswire, Oct. 7, 1989, available in LEXIS, News Library, Wires File. Subsequently, more surveys were conducted under the auspices of other organizations. See generally, *Two in Three Female Workers Have No Wish*

The ages of the harassment victims ranged from the teens through the sixties, while approximately two-thirds of the victims were women in their thirties and forties. A large number of the reports of sexual harassment actually constituted violations of the criminal law, such as rape, assault and battery, obscenity, and false imprisonment. "Many victims felt compelled to resign or were at least actively contemplating resigning."<sup>203</sup>

One article found that "Japanese men have no idea what sexual harassment is."<sup>204</sup> Additionally, approximately 30% of men in one survey were uncertain of whether they were guilty of sexual harassment.<sup>205</sup> Moreover, lower level employees were not the only ones who suffered sexual harassment.<sup>206</sup> Female executives and female teachers also confronted sexual harassment.<sup>207</sup>

*Fukuoka* also inspired a public backlash. In Tokyo, some nightclubs have advertised themselves as "sekuhara" bars.<sup>208</sup> "Decorated like corporate offices, they feature scantily clad hostesses who encourage their clientele to 'enjoy doing what is forbidden in the real workplace.'"<sup>209</sup>

Popular culture [also] . . . trivialized sexual harassment by publishing sarcastic articles with titles like 'I Love Sexual Harassment.' Even news reporters fail[ed] to take sexual harassment seriously. On a morning news program, two reporters jokingly downplayed a sexual harassment case in which a female high school baseball manager was ordered to wash the backs of some of the male players.<sup>210</sup>

## VI. WINDS OF CHANGE?: AMENDMENTS TO THE EEOL AND LSA

Recently, amendments to the EEOL and LSA addressed many of the laws' previous shortcomings. The Council of Issues

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*for Promotion*, Japan Econ. Newswire, Oct. 11, 1991, available in LEXIS, News Library, Wires File (reporting the Ministry of Labor's finding that 69.9% of women do not wish to be promoted and 63.5% report that their bodies had been touched).

203. Hayashi, *supra* note 1, at 53.

204. Robert Stem, *Japan's Women Given Tough Lesson in Sexual Harassment*, TIMES (London), Feb. 19, 1994.

205. See *Survey Shows Sexual Harassment Reaches 20%*, NIKKEI WEEKLY, Aug. 29, 1994, Issues & People, at 22, available in LEXIS, World Library, ALLWLD File.

206. See Nigel Smith, *Dirty Work: Japanese Women Are Standing Up to Harassment at Work, But Still the Men's Comics are Full of Sexual Violence*, GUARDIAN (London), Feb. 1, 1993, at 12.

207. See *Half of Female Teachers Suffer Sexual Harassment*, Japan Econ. Newswire, Aug. 5, 1994, available in LEXIS, News Library, Wires File.

208. Mikiko Taga, *Scoffing at 'Sekuhara'?*, WORLD PRESS REV., Feb. 1992, at 26.

209. Patterson, *supra* note 19, at 221 (quoting Taga, *supra* note 211).

210. Efron, *supra* note 144, at 141-142.

of Women and Young Workers, a tripartite advisory body, submitted a unanimously agreed upon proposal to revise the EEOL. The proposal was passed by the Diet in June 1997, to become effective in April 1999.<sup>211</sup> The 1999 EEOL is much stronger than the 1986 EEOL, because it uses prohibitory language, allows mediation to be conducted at the request of only one party, and codifies sexual harassment law.<sup>212</sup>

While the 1986 EEOL encourages companies to use their best efforts to avoid sex discrimination, the 1999 EEOL requires companies to treat women equally in recruitment, hiring, placement, and promotion. Although the 1986 EEOL allowed companies to set aside certain typically nonmanagerial jobs for women, this practice is now prohibited. Additionally, under the EEOL's previous formulation, both parties had to agree to arbitration in order to access the administrative process. Under the 1999 EEOL, however, mediation may be sought by either party and does not require both parties' consent. And, finally, the 1986 EEOL was deficient for failing to provide sanctions of any kind. In contrast, the 1999 EEOL does provide for sanctions, albeit limited ones; the MOL is required to publish the names of companies that fail to comply with its administrative warnings.

In light of these revisions to the EEOL, changes in the LSA were necessitated as well. Previously, the LSA limited the amount of overtime and holidays that a woman could work and barred women from working the midnight shift.<sup>213</sup> In September 1998, the Diet approved legislation that repealed these restrictions effective as of April 1999.

#### A. *Prohibition of Discriminatory Treatment*

The 1999 Amendments will make discriminatory practices in such areas as hiring, recruiting, and promotion illegal. Past practices such as publishing advertisements asking for "females only" or detailing the number of males and females to be hired are no longer allowed.<sup>214</sup> Additionally, companies are prohibited from using gender specific job titles such as "waitress."<sup>215</sup> More im-

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211. See Araki, *supra* note 13, at 6.

212. See Hiroyuki Takahashi, *Working Women in Japan: A Look at Historical Trends and Legal Reform*, JAPAN ECONOMIC INSTITUTE REPORT, Nov. 6, 1998, at 1, 7-8.

213. See *id.* at 1, 9.

214. See JAPAN INSTITUTE OF LABOR, *supra* note 129, at 2.

215. See *id.*

portantly, the 1999 EEOL provides for sanctions against employers for violations. Under Article 25, paragraph 1, and Article 26 of the 1999 EEOL, the labor minister can publicize the name of a violating employer as well as an employer who fails to comply with the labor minister's advice as to how to remedy the violation.

#### B. *Request for Mediation by Employees*

Under the 1986 EEOL, the level three mediation procedure was used just once, because both parties were required to agree to mediation before it could commence.<sup>216</sup> The 1999 EEOL, in contrast, enables employees to request mediation without the consent of the other party. Additionally, under the previous EEOL, refusal to participate in mediation or to abide by suggested settlement terms was not sanctioned. However, in the case of employer noncompliance, the 1999 EEOL authorizes the MOL to publish the names of the violating employers.

Additionally, the 1999 EEOL addresses an employee's fear of retaliation in the event she chooses to pursue mediation.<sup>217</sup> Article 13 prohibits "retaliatory treatment, including dismissal by reason of the worker's application for the mediation . . . ."<sup>218</sup>

#### C. *The Recognition of Sexual Harassment*

The 1999 EEOL also goes one step farther than its 1986 counterpart by recognizing sexual harassment as a distinct offense. The impact of such legal recognition is evidenced by the brisk sales of *A Handbook for the Prevention of Sexual Harassment*, published on February 15, 1999 by Nikkeiren (Japan Federation of Employers' Associations) — 80,000 copies were sold during the first six weeks.<sup>219</sup> Article 21, Paragraph 1 of the 1999 EEOL provides that

an employer must pay due attention in employment management to see that a woman worker's reaction to sexual speech or conduct in the workplace does not cause any disadvantages concerning terms and conditions of employment nor cause detriment to her working environment. Therefore, the employer has a duty of care to prevent sexual harassment in the workplace, whether it be of the *quid pro quo* type or the hos-

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216. Araki *supra* note 13, at 7

217. *Id.*

218. *Id.*

219. *Revised Equal Employment Opportunity Law Came into Effect on April 1*, JAPAN LAB. BULL., ¶6, <[http:// www.jil.go.jp/bulletin/year/1999/vol38-06/02.htm](http://www.jil.go.jp/bulletin/year/1999/vol38-06/02.htm)>.

tile working environment type. However, the impact of the new provision on sexual harassment suits remains to be seen.<sup>220</sup>

After the amendments were approved, the MOL published *Guidelines for Employers Related to Problems Arising from Sexual Remarks and Behavior at the Workplace in the Context of Employment Administration*, which defined sexual harassment and outlined the employer's obligations in addressing such harassment.<sup>221</sup> The guidelines provided examples of sexual harassment and the accompanying remedies that employers should take when addressing differing variations of either quid pro quo or hostile working environment harassment.<sup>222</sup> Under the guidelines, employers encountering claims of harassment are required to take three steps.

First, they must clarify their policy concerning sexual harassment and make it thoroughly known to their employees. Second, the employers should have in place a system for dealing with complaints and counseling concerning sexual harassment. The system must allow for an adequate and flexible response to situations involving harassment. Third, employers have an obligation to move promptly to assess the extent to which sexual harassment has occurred and to cope effectively with it.<sup>223</sup>

## VII. POSSIBLE REMEDIES TO STRENGTHEN THE 1999 EEOL

Although the 1999 EEOL promises to be useful to Japanese women combating sex discrimination at work and in the courts, it still has glaring deficiencies, particularly in the area of sexual harassment. Most notably, the 1999 EEOL fails to provide effective enforcement mechanisms and makes only superficial procedural requirements of employers to comply with its standards. This section will suggest additional revisions to the EEOL, concentrating specifically on improving enforcement mechanisms and procedural requirements. This Article argues that additional revisions to the EEOL are needed to provide more substantial legal protection for Japanese working women.

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220. Araki *supra* note 13, at 8.

221. JAPAN INSTITUTE OF LABOR, *Ministry of Labour Presents Guidelines for Sexual Harassment*, JAPAN LAB. BULL., Sept. 1998, at 4, 4.

222. *See id.* *See also* discussion on different categories of sexual harassment *supra* Part V.A.

223. *Id.*

### A. *Enforcement Mechanisms*

Currently, the enforcement mechanisms set forth by the 1999 EEOL are deficient. Without effective penalties, companies have no incentive to follow the law. The 1999 EEOL should be revised to bolster its treatment of enforcement mechanisms. Instead of simply publishing the name of a company that has violated the 1999 EEOL, heavy fines should be imposed; for companies where a pattern of sex discrimination has been established, criminal sanctions should be imposed. Additionally, the settlements proposed by the third level mediation Commission should have a binding effect, giving rise to more serious sanctions for noncompliance. Whereas the present formulation of the EEOL only chastises noncompliance companies without imposing any significant penalties, enacting these measures would provide women with more effective forms of redress. Revising the EEOL in this way would significantly increase its effectiveness.

### B. *Procedural Requirements*

Further, the 1999 EEOL's provisions for procedural requirements are not as effective as they could be. Currently, the 1999 EEOL prohibits discrimination in hiring, promotion, assignment, and recruitment. While in theory these prohibitions indirectly address the issue of the reemployment of women who have been out of the workplace due to child rearing or other familial reasons,<sup>224</sup> they do not establish procedural requirements detailing how to reincorporate these women into the workforce. By failing to establish such requirements, a harmonization between women's careers and their families cannot be achieved. For example, procedures should be implemented that would allow women flexibility in their work habits — working part-time or working from home are two realistic alternatives. Given that women are

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224. The Child Care Leave Law of 1991 allows a worker a leave of absence from work to care for his or her child, including an adopted one who is less than one-year-old, upon his or her request. In 1995, this law was revised and renamed the Child Care and Family Care Leave Law. Under the 1995 amendment of the law, in effect April 1, 1999, a worker may request a leave of absence from work so that he or she may care of a family member (including a spouse, parent, child, parent of the worker's spouse, and the worker's grandparents, siblings, and grandchildren, provided that they reside with and are dependents of the worker) for a period not to exceed three months, who requires constant care for two weeks or more because of injury, sickness, or physical or mental disability. However, the law does not provide for social security benefits nor social security premium exemption. See Araki, *supra* note 13, at 8-9.

still viewed as the primary domestic caretakers, accommodations must be made so that women do not have to sacrifice home lives for their careers or vice versa.

Additionally, the EEOL could be revised to include different and more flexible types of gender neutral managerial positions. For example, women or men could be employed on a part-time basis during the duration of his or her respective paternity or maternity leave thereby allowing women and men to strike an effective balance between their corporate and domestic lives. Moreover, this type of arrangement may also cause men to reconceptualize their duties on the home and work fronts.

Without adequately providing for uniform procedural requirements regarding prohibited practices, women will not be able to reintegrate themselves successfully into the workplace when they leave for child care or other reasons. Women should have a realistic right to both a career and a family. Therefore, revising the EEOL by altering its treatment of procedural requirements, would allow women to achieve a balance between their professional and personal lives.

### C. *Governmental Involvement*

The government must also provide incentives to businesses to accommodate working women. For example, the Diet could provide tax benefits to businesses that create business policies favorable to women, such as establishing the practice of hiring or promoting women or providing day care centers for working mothers.<sup>225</sup> The government could also overhaul the current system of company spousal benefits and the tax and pension system, in which benefits no longer apply and taxes and premiums increase if spouses earn more than a certain amount.<sup>226</sup> Instead, women should receive these benefits regardless of how much money they make; they should still pay pension premiums, however, but at a rate commensurate with how much they get paid in comparison to their male counterparts. Additionally, the government could sponsor a media campaign about sexual discrimina-

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225. "Childbirth is considered a more serious turning point than marriage for working women . . . . Only 25.2% [of women who responded to the survey] plan to keep working after childbirth, while 56.1% said they would be forced to stop working and devote a lot of time to child-care because of the inflexible schedules of day-care centers." *Childbirth Often Ends Trip*, *supra* note 24, at 1. Further exacerbating problems is the fact that daycare centers are not typically open after 7 p.m. and often will not allow children to attend if they have a slight fever.

226. See Gibbs, *supra* note 7.

tion and publicize hotlines available for female employees to address their grievances.

D. *Potential Results of a Revised 1999 EEOL*

Ultimately, it can only be hoped that a revised 1999 EEOL — one that establishes stringent enforcement mechanisms and clear procedural requirements — will be a step toward overcoming Japan's embedded sexist attitudes and practices, which undergird current conditions of sex discrimination and inform the government's and employers' reluctance and inability to adequately address the problem. Clearly, radically changing long-standing societal notions of gender roles is a daunting task. Still, as changing economic tides spur even larger numbers of Japanese women to join the workforce, radical changes in the status quo seem not only necessary, but inevitable. Thus, revising the 1999 EEOL to reflect a true commitment to achieving gender equality in the workplace may bring about a broader revolution in Japanese perceptions of gender roles.

### VIII. CONCLUSION

While the 1986 EEOL and its predecessors did not provide Japanese women with adequate tools to battle sex discrimination in the workplace, the 1999 EEOL heralds an era that may lead working women in Japan to their long-awaited goal of true equality. But, while the 1999 EEOL addresses many of the defects in the 1986 EEOL, more needs to be done. Thus, Japan must work toward overhauling its present legal system to eradicate more incidents of sex discrimination and enable women who experience sex discrimination to challenge it effectively — whether it be in the courtroom or in mediation procedures. Moreover, Japan must work to implement quickly the 1999 EEOL so that the present inadequate system for handling sex discrimination may be dismantled. The changing composition of Japan's labor force reflecting ever larger female participation demands that the role of Japanese women in the workplace, and beyond, be reexamined.

Ultimately, achieving equality of the sexes through the court system may be difficult given the nonlitigious nature of Japanese society. Moreover, any legal reforms achieved likely will be limited unless also accompanied by a simultaneous shift in social perspectives on gender roles in general. Nevertheless, the 1999 EEOL provides a good starting point from which to pursue change. Additionally, strengthening the 1999 EEOL's enforce-

ment mechanisms and procedural requirements would prevent the 1999 EEOL from being merely a paper tiger like its 1986 predecessor. Thus, revising the 1999 EEOL to reflect a true commitment to achieving gender equality in the workplace may bring about a broader revolution in Japanese perceptions of gender roles.