
Equal Employment Opportunity Act, Having Passed the Quarter-Century Milestone

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A quarter-century has passed since the enactment of the Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment. When this Act was initially established, its scope of regulations and legal effect were not sufficient, and it had the nature of a law to provide protection from discrimination only for women workers. However, through the revision in 1997 and 2006, the Act has transformed into a law against gender discrimination in a precise sense, and it currently contains not only the anti-discrimination provisions but also the provisions regarding positive action and sexual harassment. This paper reviews the history of the Act while explaining the legal issues that were discussed in the enactment and revision process, and identifies the issues with the Act that remain to be addressed, such as the concept of discrimination under the Act, the relationship between freedom of recruitment and prohibition of discrimination, and how to ensure effective positive action.

I. Introduction

The Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment (hereinafter referred to as the “Equal Employment Opportunity Act” or the “Act”) was established as Japan’s first comprehensive law that prohibits discrimination against the following background.

The United Nations (UN) made 1975 the International Women’s Year, with the objective of enhancing the efforts to further gender equality, realize full participation of women in the overall life planning, develop friendly and cooperative relations among nations, and recognize an increasing contribution by women toward strengthening the world peace. After that, the UN proclaimed the decade from 1976 to 1985 “United Nations Decade for Women,” and in 1979—the midpoint of this decade—, adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which requires the Member States to take all appropriate measures, including legislation, to eliminate discrimination against women in all fields including employment (effective in September 1981).

Responding to such movements led by the UN, Japan also set up the Headquarters for the Planning and Promoting of Policies Relating to Women in 1975, following the end of the first World Conference on Women, and laid down a National Plan for Action in 1977, and finally, enacted the Equal Employment Opportunity Act in 1985 in order to meet the conditions for ratifying the CEDAW.

Before the enactment of the Equal Employment Opportunity Act, Article 4 of the

Labor Standards Act which provides for the principle of equal pay for equal work for men and women had been the only rule under labor law for prohibiting discrimination against women. Therefore, at that time, when challenging discriminatory labor practices against women except for wage discrimination, women had had no legal basis to rely on other than the general rules under the Civil Code, that is, the law of public policy (Article 90) regarding juridical acts and the tort law (Article 709) regarding other acts. For instance, the following labor practices were judged to be against public policy: the system for requiring only women to leave jobs upon marriage (Sumitomo Cement Case, the judgment of the Tokyo District Court, December 20, 1966, 17 *Rodo Kankei Minji Saibanreishu* 1407); dismissal of a women worker by reason of her marriage (Hokoku Sangyo Case, the judgment of the Kobe District Court, September 26, 1967, 18 *Rodo Kankei Minji Saibanreishu* 915); the system for requiring women to retire at a younger age than men (Tokyu Kikan Kogyo Case, the judgment of the Tokyo District Court, July 1, 1969, 20 *Rodo Kankei Minji Saibanreishu* 715); the system for requiring women to leave jobs upon childbirth (Mitsui Engineering and Shipbuilding Case, the decision of the Osaka District Court, December 10, 1971, 22 *Rodo Kankei Minji Saibanreishu* 1163); and the system for requiring women to retire five years younger than men (Nissan Motor Case, the judgment of the Third Petty Bench of the Supreme Court, March 24, 1981, 35 *Saikosai Minji Saibanreishu* 300). Meanwhile, after the Equal Employment Opportunity Act took effect, in the case in which female employees of a local government—who are excluded from the application of this Act—complained about the criteria for encouraging women to retire at a younger age than men, the court judged that encouraging these employees to retire according to such criteria constitutes a tort (Tottori Prefecture Board of Education Case, the judgment of the Tottori District Court, December 4, 1986, 486 *Rodo Hanrei* 53). Although containing this exception to government employees, the Equal Employment Opportunity Act started its life as Japan's first comprehensive anti-discrimination law.

According to a survey, in 2011, which marked the 25th anniversary of the Equal Employment Opportunity Act, the number of women workers was 26.32 million persons (down 0.4 % year on year), and the ratio of women of all workers was 42.0%, remaining at the same level as the previous year.¹ Looking at the wage gap between men and women in 2011 on the basis of predetermined salary, that is, the women's salary as a percentage of men's salary, among regular employees (excluding part-time workers), women's scheduled cash earnings were 71.9% (up by 1.4% year on year) and their predetermined salary was 73.3% (up by 1.2% year on year) of men's, while among non-regular employees, the former was 73.9% (up by 1.8% year on year) and the latter was 77.5% (up by 2.8% year on year). Thus, the wage gap by gender has been diminishing, but the wages difference between men

¹ 21st Century Job Foundation, *Josei Rodo no Bunseki 2011* [Analysis of women's work 2011] (21st Century Job Foundation, 2012), 2.

and women is the highest in the developed countries.² As for the actual conditions of women's promotion, the rate of promotion of female managers increased during the period between 1980 and 2011 from 1.0% to 5.1% among section chiefs and from 3.1% to 15.3% among subsection chiefs, thus showing a less than-satisfactory but certain degree of upward trends over a period of nearly 30 years.³

Although it may be difficult to statistically demonstrate to what extent the anti-discrimination laws, including the Equal Employment Opportunity Act which is the main topic of this paper, have contributed to improving the situation concerning gender equality in employment, it can at least be said that this Act did have a significant influence.

This paper reviews the legislative process and revision history of the Equal Employment Opportunity Act that has passed the quarter-century milestone since its enactment in 1985, while referring to the court rulings involving this Act, with the objective of identifying the issues for the future.

II. Developments of the Equal Employment Opportunity Act

Since its enactment in 1985 until today, the Equal Employment Opportunity Act has undergone revision twice, in 1997 and 2006. The initial and revised versions of this Act are explained in detail below.

1. The 1985 Act

The 1985 Act pressed for a big change in Japan's legal framework for gender equality in employment, by attempting to prohibit discrimination in all stages of employment, from recruitment, to assignment, promotion, education/training, and to termination of employment (including dismissal and mandatory retirement).⁴ However, the 1985 Act had some shortcomings in that (a) it designated only women as the subject of its anti-discrimination provisions (one-sided protection against discrimination), and (b) it did not literally prohibit employers from treating employees in a discriminatory manner but only required them to try to avoid such treatment in recruitment, assignment and promotion (Articles 7 and 8), which are important factors in the context of prohibition of discrimination.

On point (a), the conventional recruitment approaches such as limiting eligible candidates to "university graduates in the case of men and university or junior college graduates in the case of women" or limiting the available employment status to "full-time em-

² *Id.* at 26.

³ *Id.* at 165.

⁴ As prohibition of wage discrimination between men and women is provided for in Article 4 of the Labor Standards Act, the Equal Employment Opportunity Act provides for other types of gender discrimination, such as discrimination in recruitment and working conditions. Specifically, Article 4 of the Labor Standards Act prohibits the application of different wage schedules or different initial salaries between men and women, whereas any wage gap caused by gender discrimination in assignment or promotion shall be regulated under the Equal Employment Opportunity Act.

ployment in the case of men and full-time and part-time employment in the case of women” were regarded as treating women “more favorably” than men, and for this reason, they were not considered to be in violation of the Equal Employment Opportunity Act. However, in reality, these recruitment approaches led to recruitment of “men who graduated from university and women who graduated from junior college” or “full-time male employees and part-time female employees.” It is ironic that placing emphasis on one-sided protection and allowing preferential treatment for women under the new legislation instead resulted in letting discrimination against women be preserved. In the first place, the legislation of such preferential treatment for women should have been dealt with as an issue of positive action for the benefit of women to the necessary extent while prohibiting discrimination against both genders.

On point (b), the reason why the 1985 Act only required employees’ efforts to avoid discriminatory treatment in recruitment, assignment and promotion instead of literally prohibiting such treatment has been accounted for quite often from the standpoint of the purpose or principle of the Act, i.e. gradual advancement. Specifically, based on the proposal of the Council for Women that, “Enactment, revision or repeal of any law must look into the future but must not lose touch with the present situation,” the legislative purpose was explained as follows: (i) consideration should be given to the present situation of the Japanese society and economy in relation to women’s work, including their actual conditions of work and job attitudes, employment practices and social notions regarding women’s work; (ii) under the employment management system adopted by Japanese firms, which was based on the prerequisite of lifelong commitment, the length of service was considered as an important factor and the average gender gap in terms of this factor cannot be ignored; and (iii) accordingly, in the areas of recruitment, assignment and promotion, where employment is managed in consideration of the length of service expected for the future, it would be appropriate to place employers under the obligation to make efforts for the time being.⁵

Another argument provides the following explanation. This obligation to make efforts was codified in such a situation where the gender role-based employment system existed and the job attitudes of men and women were in alignment with this system, while, on the other hand, the measures to protect women under the Labor Standards Act that contradict the principle of gender equality (e.g. prohibition of assignment of women to night work, restrictions on assignment of women to overtime work and work on days-off) cannot be abolished in the face of the reality that women assume many duties at home. Therefore, the 1985 Act did not adopt the form of a ‘hard law’ (a binding law) for the entire scope of regulations but partially chose the form of a ‘soft law’ by stipulating the obligation to make efforts, and aimed at urging employers to change their attitudes and employment practice by

⁵ It is construed that the breach of the obligation to make efforts could constitute breach of public policy. Shintaro Shirai, *Danjo Koyo Kikai Kintoho Kaisei Rodo Kijunho no Jitsumu Kaisetsu* [Commentary on practice under the Equal Employment Opportunity Act and the Revised Labor Standards Act] (Institute of Labor Administration, 1985), 57–58.

way of the administrative guidance to be issued according to the guidelines in which the details of this obligation are specified, so that the principle of gender equality would permeate the society.⁶

However, these arguments cannot be justified because it is irrational that the Equal Employment Opportunity Act, which was established for the purpose of eliminating gender-oriented discriminatory employment practice, was forced to restrain from providing for strict rules in consideration of the employment management system currently operated by firms, and because taking into consideration women workers' length of service in the process of making a law is equal to adopting the theory of statistical discrimination and it is contradictory in legal terms for the Equal Employment Opportunity Act, which must prohibit statistical discrimination, to use this factor as its basis.⁷ And the most serious point among all things is that equality under the law—a human right guaranteed under Article 14 of the Constitution—is guaranteed only by means of the obligation to make efforts. It should be remembered that the basic policy of the Act is that the principle of gender equality must be interpreted focusing on individual men and women rather than viewing them as gender groups, in line with the principle of respect for individuals under Article 13 of the Constitution.

The 1985 Act codified the prohibition of discrimination in terms of the access to education/training and fringe benefits. However, as for the former, it limited the scope of measures subject to prohibition of discrimination to off-the-job training, and excluded on-the-job training that was absolutely necessary for employees to develop their ability to perform duties. Moreover, it only confirmed by statute of the case law that discriminatory treatment for women in relation to termination of employment (including mandatory retirement and dismissal) constitutes the breach of public policy.

Embracing these limitations as described above, however, the 1985 Act undoubtedly took the first step as Japan's first comprehensive law on discrimination against women (due to such nature, this situation was metaphorically described as "Have a small baby and raise the baby to grow big").

2. The 1997 Act

The most important revision incorporated in the 1997 Act is that the Act transformed the abovementioned obligation to make efforts to avoid discriminatory treatment in recruitment, assignment and promotion, into the prohibition of such treatment. Other areas of revision include the codification of employers' obligation to give consideration to sexual harassment at the workplace, and the abolition of the limitation to make all education-

⁶ Takashi Araki, *Rodoho* [Labor law] (Yuhikaku, 2010), 87.

⁷ According to the administrative interpretation of Article 4 of the Labor Standards Act, it would be in violation of this Article to discriminate against women in terms of wage by reason of "their lower efficiency in general or in average, shorter period of service, or not being the primary breadwinner, etc."

al/training programs subject to prohibition of discrimination. These changes deserve appreciation.

The transformation of the obligation to make efforts to implement equal treatment in recruitment, assignment and promotion into the prohibition of discriminatory treatment, achieved by the 1997 Act (Article 6), had an immediate impact on court rulings. In the Nomura Securities Case, female employees claimed illegality of the gender-segregated career system (recruiting and assigning men to the main, managerial career track and women to routine, clerical work, and discriminating between men and women in treatment, promotion and other aspects; the judgment of the Tokyo District Court, February 20, 2002, 822 *Rodo Hanrei* 13). The court judged that this career system was illegal under Article 6 of the 1997 Act and therefore should be declared void from April 1, 1999, the day on which the Act incorporating the prohibition of discrimination in job assignment took effect; however, until that day, employers had only been required to make efforts to avoid such discrimination, and therefore the career system in dispute cannot be regarded as violating the Equal Employment Opportunity Act (this reasoning was also confirmed in the Okaya Koki Case, the judgment of the Nagoya District Court, December 22, 2004, 888 *Rodo Hanrei* 28). Thus, according to the basic standards seen in the past court rulings, April 1999—when the 1997 Act took effect—was considered to be the turning point for making the prohibition of discrimination in recruitment, assignment and promotion legally effective.

However, even though the Act requires employers to avoid discrimination only in the form of the obligation to make efforts, they must assume this obligation in legal terms, and if they neglect the obligation required by law, nothing would preclude finding their conduct to be against public policy. This reasoning was affirmed by the judgment of the Tokyo High Court, through the medium of the theory of rule of private law over employment relationships. In the Showa Shell Sekiyu Case (the judgment of the Tokyo High Court, June 28, 2007, 946 *Rodo Hanrei* 76), the court held that Article 8 of the 1985 Act which provides for employers' obligation to make efforts to avoid discrimination imposes a statutory obligation on employers to make such efforts, and hence, if employers make no efforts to achieve this purpose and do not try to implement equal treatment but willfully maintain unequal treatment, or they take measures to further increase gender discrimination in assignment and promotion, their conduct runs counter to the spirit of said Article and should be made subject to the administrative guidance to be issued by the Minister of Health, Labour and Welfare, and what is more, the rule of private law over employment relationships, based on which the illegality of an alleged tort should be determined, also covers the spirit of said Act as described above.

Another notable change through the 1997 revision is the introduction of employers' obligation to give consideration to sexual harassment in the course of employment management, which led to the establishment of the Sexual Harassment Guidelines. Specifically, these guidelines provided for the three major tasks that employers must undertake as their obligation to give consideration to sexual harassment: (i) clarify the policy for dealing with

sexual harassment (stipulating it in the rules of employment, setting out disciplinary rules, etc.) and increase employees' awareness thereof (conducting training, etc.); (ii) deal with complaints and requests for consultation (clarifying the consultation and complaint handling section, making appropriate and flexible response upon request for consultation, etc.); and (iii) take prompt and proper measures *ex post facto*.

It may be natural to argue that as long as sexual harassment can be dealt with under the provisions of the Penal Code and the Civil Code (especially the provisions on tort), there is no need to incorporate provisions on sexual harassment into the Equal Employment Opportunity Act, as if *gilding the lily*. However, on a daily basis in the workplace, women workers feel uncomfortable due to men's sexual words and deeds which may not be found to constitute a tort (a tort cannot be established unless the alleged conduct violates the victim's rights or legal interest; Article 709 of the Civil Code). The provisions on sexual harassment under the Equal Employment Opportunity Act should be understood as aiming to eliminate such a situation and create a working environment where women can work free from anxiety. Accordingly, employers are supposed to have the obligation to create a working environment that respects the personal interest of (women) workers (e.g. the obligation to give consideration to and improve the working environment), as an incidental obligation under the employment contracts.

At any rate, it is at least worth noting that the provisions on the obligation to give consideration to women workers on sexual issues were incorporated into the Equal Employment Opportunity Act, which prohibits discrimination based on gender roles.

The third key point in revision is that the 1997 Act introduced the concept of positive action (measures to eliminate discrimination that is actually taking place between men and women) for the purpose of rectifying a long period of accumulated discrimination against women, and as a result, consultation and other support programs financed by the national government were established. In view of the fact that it is substantially difficult for women workers to bring their complaints about discrimination to court, positive action is indispensable as a mechanism that encourages employers to eliminate discrimination voluntarily.

As reviewed thus far, the 1997 Act expanded the scope of rights of women workers as compared to the 1985 Act, but it maintained its nature as a law to provide protection from discrimination only for women workers. For this reason, the scope of workers eligible for protection under employers' obligation to give consideration to sexual harassment introduced under the 1997 Act was limited to women workers.

3. The 2006 Act

The currently effective revision to the Equal Employment Opportunity Act was enacted in 2006 and put into effect in April 2007.

The biggest change under the 2006 Act was the transformation from a law to prohibit discrimination against women into a law to prohibit gender discrimination, covering discrimination against men as well. What should have been discussed in the revision process

was the essence of “equality”—*What is equality?*—, an issue that is related to the nature of the Act. Historically, the Act had existed as a law to prohibit discrimination against women, and the targeted level of equality was clear, that is, bringing the situation of women up to the same level as men. On the other hand, if the lawmakers intended to design a law to prohibit gender discrimination, they ought to have questioned, in the first place, where they should place the basis for gender equality or which direction the ideal of gender equality should aim at, or more specifically, they should have necessarily considered how to incorporate the concept of work-life balance into the Act.

Despite that, the relation between gender equality and work-life balance was regarded as an issue to be left under the jurisdiction of the Child Care and Family Care Leave, and even the concept of harmony between work and private life, provided in Article 3 of the Labor Contract Act, was not introduced to the Equal Employment Opportunity Act. However, considering that achieving an appropriate work-life balance is an inevitable task in the course of realizing gender equality (the issue of work-life balance is often discussed in the context of child care and family care but it also concerns workers who live alone), the Equal Employment Opportunity Act must also incorporate measures as necessary, including the measures to prevent men from working long hours.

Along with the transformation from the law to prohibit discrimination against women to the law to prohibit gender discrimination, employers’ obligation to give consideration to sexual harassment against women in the course of employment management was replaced with their obligation to take employment management measures to protect both men and women from sexual harassment at the workplace, as might be expected.

The overwhelming majority of sexual harassment cases involve women as victims and men as harassers (or alleged harassers). So far, there is only one exception to this, the Japan Post (Kinki Postal Administration Bureau) Case (the judgment of the Osaka High Court, June 7, 2005, 908 *Rodo Hanrei* 58). In this case, a female superior was alleged to have conducted sexual harassment against her male subordinate by taking a leave of absence for a few hours, entering the public bath situated at the workplace, and staring at the subordinate’s naked upper body. While the court of first instance found sexual harassment (the judgment of the Osaka District Court, September 3, 2004, 884 *Rodo Hanrei* 56), the court of second instance denied it. As it is shown in this case, whether the same criteria should be applied to men and women for finding sexual harassment remains to be further discussed as an important issue relating to corporate employment management.

The second most important change under the 2006 Act is the introduction of the prohibition of indirect discrimination (Article 7; taking measures which are based on conditions other than sex but could virtually result in discrimination by reason of sex), in addition to direct discrimination by reason of sex (being female or male). This change is a welcome advance to overcome the difficulty in submitting proof of direct discrimination.

According to the report of the Equal Employment Opportunity Policy Meeting, released in June 2004, the following measures may constitute indirect discrimination: (i) re-

quiring a standard height, weight and physical strength as a condition for recruitment; (ii) requiring the availability for nationwide transfer as a condition for recruitment for the main career track; (iii) requiring a standard academic level (including the major subject) as a condition for recruitment; (iv) requiring the experience of a transfer that required relocation of residence as a condition for promotion; (v) requiring the status of the head of a household recorded in the residence certificate (e.g. being the primary breadwinner or having dependents) as a condition for receiving fringe benefits or family allowances, etc.; (vi) treating full-time workers more favorably than part-time workers; and (vii) excluding part-time workers from the scope of workers eligible to receive fringe benefits or family allowances, etc. However, the 2006 Act only designated three measures as measures to be prohibited as indirect discrimination, namely, (i) the condition for recruitment relating to a worker's height, weight and physical strength, (ii) the condition for recruitment for the main career track requiring a worker's availability for nationwide transfer, and (iii) the condition for promotion requiring the worker to have the experience of a transfer (Article 2 of the Ordinance for Enforcement of the Equal Employment Opportunity Act).

Providing a limited list of measures prohibited as indirect discrimination in this manner cannot be seen in legislation anywhere else in the world. Also in consideration of the fact that the essential concept of indirect discrimination is an attempt to review and reform the conventional, male-centered practices at the workplace, such legislative methodology of limiting the prohibited measures does not match the concept of indirect discrimination itself. Some of the abovementioned measures that are likely to result in indirect discrimination, for example, the requirement of the status of the head of a household, may not be regarded as violation of the Equal Employment Opportunity Act but need to be examined from the perspective of whether they are against public policy.

The third key point in revision is that the 2006 Act has expanded the scope of prohibition of discrimination against women workers by reason of pregnancy, childbirth, etc. In particular, while the provisions prior to revision only prohibited employers from dismissing women workers who have become pregnant, delivered a child or taken a maternity leave before or after childbirth, the revised Act also prohibits employers from giving other disadvantageous treatment to such women workers (Article 9, paragraph [3]).

There is no doubt that this new provision is the legislation of the judgment framework employed in the Toho Gakuen Case (the judgment of the First Petty Bench of the Supreme Court, December 4, 2003, 862 *Rodo Hanrei* 14), in which the court found breach of public policy in respect of the regulations for bonus payment that required employees to attend work for 90% or more of the period subject to assessment in order to receive a bonus, and treated those who have taken a maternity leave after childbirth, child care leave, and menstrual leave as having been absent from work.

In this case, the Supreme Court explained that a measure that gives disadvantageous treatment to women workers by reason of their exercise of the rights guaranteed under laws such as the Labor Standard Act and the Child Care Leave Act does not immediately consti-

tute a breach of public policy but it is regarded as such and declared void only where such measure restrains women workers from exercising the rights guaranteed by law, namely, the right to take a maternity leave after childbirth under Article 65, paragraph (2) of the Labor Standards Act, and seems likely to substantially deprive them of these legally guaranteed rights. At the same time, the Supreme Court also mentioned that even if said regulations for bonus payment are void, it is permissible for the employer to treat the female employee who took a maternity leave after childbirth, etc. as having been absent from work for the period of such leave in the process of calculating the amount of bonus, and acknowledged the legality of the payment of bonus according to the actual rate of attendance at work. According to the Supreme Court's logic, the principle of no work, no pay, is applicable to the period of a maternity leave after childbirth, etc., and hence such leave may be treated in the same manner as an ordinary absence from work.

This logic is incorporated into the Gender Discrimination Guidelines, which exemplify the following as "dismissal or other disadvantageous treatment" prescribed in Article 9, paragraph (3) of the Equal Employment Opportunity Act: (i) dismissal; (ii) refusal to renew the fixed-term contract; (iii) reduction of the number of contract renewals; (iv) compulsion of an amendment to the terms of the labor contract; (v) demotion; (vi) violation of the working environment; (vii) disadvantageous order to stand by at home; (viii) wage reduction and disadvantageous calculation of bonus; (ix) disadvantageous performance evaluation; (x) disadvantageous job reassignment; and (xi) the client company's refusal to receive services of a dispatched worker. Among these items, a question arises as to (viii), the case where a reduction of bonus, etc. constitutes disadvantageous treatment. According to the guidelines, such case is found only in the following situation: "where the employer calculates the amount of bonus or retirement allowance to be paid while taking into account the period of absence from work or decline in labor efficiency, and in the calculation process, the employer gives disadvantageous treatment to employees who were absent from work or whose labor efficiency declined due to pregnancy or childbirth, compared to those who were absent from work for the same period or whose labor efficiency declined to the same level due to sickness"; and "where the employer calculates the amount of bonus or retirement allowance to be paid while taking into account the period of absence from work or decline in labor efficiency, and in the calculation process, the employer treats employees as having been absent from work or having shown a decline in labor efficiency beyond the actual period of absence from work or actual rate of decline in labor efficiency due to pregnancy or childbirth." Thus, there is no doubt that the Gender Discrimination Guidelines were established as a confirmation of the abovementioned Supreme Court judgment in the Toho Gakuen Case.

Then, how should we construe the legal effect of such measures that give disadvantageous treatment by reason of the exercise of rights guaranteed by laws, such as the right to take a maternity leave before or after childbirth? The Supreme Court held that such disadvantageous treatment would be judged to be against public policy and declared void only if

it restricts the exercise of rights and substantially nullifies the legally guaranteed rights. However, when it comes to the right to take a leave upon pregnancy or childbirth or for childrearing, women workers have to take a leave immediately when the necessity arises (men may also have to take a leave for childrearing). With respect to a maternity leave after childbirth, which was treated as an absence from work in the abovementioned Toho Gakuen Case, it must not be forgotten that the employer is prohibited from having women work and women are also prohibited from attending work within six weeks after childbirth under any circumstances (see Article 65, paragraph [2] of the Labor Standards Act). From this standpoint, it is inappropriate to simply apply the no work, no pay theory to workers' taking leave by exercising the rights guaranteed by the Labor Standards Act or the Equal Employment Opportunity Act, but it is instead necessary to re-examine the nature of the rights embodied in a child care leave, etc.

The last noteworthy point of the 2006 Act is the introduction of the provisions that dismissal of women workers who are pregnant or in the first year after childbirth shall be void (Article 9, paragraph [4]). In ordinary cases of dismissal of women workers by reason of marriage, pregnancy, childbirth, etc., which is prohibited under the Act, the women workers concerned must prove that they have been dismissed by the employer and that their dismissal has been done by reason that they have become pregnant, delivered a child or requested or taken a maternity leave before or after childbirth (see Article 9, paragraph [3]). On the other hand, in the case of dismissal of women workers who are pregnant or in the first year after childbirth, such dismissal is "void" in operation of law unless the employer successfully proves any justifiable grounds for dismissal other than pregnancy, childbirth, etc. Such provisions cannot be found in any labor laws other than the Equal Employment Opportunity Act, and deserve attention as the first legislation achieved for mitigating the burden of proof of women workers who have been dismissed during said period.

III. Issues That Remain to Be Addressed

The above is the overview of the history of the Equal Employment Opportunity Act that has passed the quarter-century milestone. The section below presents the issues with this Act that remain to be addressed in the future.

1. Re-consideration of the Concept of Discrimination

While the laws to prohibit gender discrimination in common-law jurisdictions generally include "discrimination by reason of the marital status" in the concept of gender discrimination, Japan's Equal Employment Opportunity Act only prohibits employers from requiring women workers to leave their jobs by reason of marriage (Article 9, paragraph [1]) and from dismissing women workers by reason of marriage (paragraph [2] of said Article), and does not incorporate the concept of "discrimination by reason of the marital status" from the beginning. It should be recalled that this is one of the obstacles to the prevention of

discrimination against women by reason that they have duties at home.

Discrimination against married women was brought to court in the Sumitomo Life Insurance Company Case (the judgment of the Osaka District Court, June 27, 2001, 809 *Rodo Hanrei* 5) and the Maruko Keihoki Case (the judgment of the Ueda Branch of the Nagano District Court, March 15, 1996, 690 *Rodo Hanrei* 32). In the former case, the company was alleged to have given low evaluation to all married women without exception and barred their promotion on the grounds that married women's labor would decrease in quality and quantity as most of them take a maternity leave before or after childbirth, child care leave, annual paid leave, etc., and that their duties at home constrain their engagement in work. The court found such uniform treatment of married women to be illegal and determined that it is impermissible to treat women workers in general as having failed to improve their capabilities only on the basis of their absence from work through the exercise of their rights under the Labor Standards Act. In the latter case, the court judged that the company's recruitment policy of assigning all unmarried women to full-time and regular position and all married women to full-time but non-regular position does not constitute discrimination against married women.

Thus, Japan's anti-discrimination law does not recognize the marital status as the subject of gender discrimination, and as mentioned above, the Equal Employment Opportunity Act, currently effective, prohibits "dismissal by reason of marriage" but does not prohibit discrimination by reason of the marital status. Seeing that there is still a view in Japan that the husband is the primary breadwinner of the family and the wife is supposed to work only to make up for a shortage in the family income, the marital status must also be incorporated into the Act as the subject of prohibition of discrimination.

2. Use of Positive Action

In order to eliminate gender discrimination in the employment field, the legal provisions to prohibit discrimination alone are not enough, but it may be vital to use positive action (positive measures to be taken by employers to eliminate discrimination) as well, because this can be an essential means to eliminate gender discrimination when it is difficult for the victim to bring the issue to court due to time and financial constraints, and it is also a necessary scheme to compensate for the discriminatory state that has existed for a long time.

The Equal Employment Opportunity Act leaves it to employers to implement positive action measures at their discretion ("shall not preclude employees from taking measures"). In 2010, when the aforementioned survey was conducted, the percentage of firms (with 30 or more employees; hereinafter the same) that implemented positive action measures was only 28.1%, showing that the overwhelming majority did not implement such measures. Among the latter category, 0.9% had previously implemented but discontinued positive action measures and 60.4% did not plan to implement such measures at the present time,

while only 10.6% were planning to implement the measures in the future.⁸ This data indicates that the incorporation of the concept of positive action into the Act has had little effect so far.

The positive action measures that were frequently implemented are as follows (multiple answers allowed): (i) clarifying the criteria for employees' performance evaluation (67.3%); (ii) providing education/training for part-time employees or promoting them to regular employment (56.9%); (iii) improving the environment and culture at the workplace (46.2%); (iv) introducing a personnel management system or performance evaluation system under which taking a leave for childbirth or childrearing will not be a handicap for women workers (44.4%); (v) proactively recruiting motivated and talented women for a workplace where there is no or only a few women workers (41.5%); and (vi) developing a pleasant working environment (40.2%). On the other hand, the following measures were not frequently implemented: (i) working out a plan for enabling women to exert their abilities (17.3%); (ii) proactively providing women workers with education/training so they may be appointed for the positions and titles where there is no or only a few women workers (22.0%); (iii) conducting research and analysis on how women workers exert their abilities and problems they are facing when exerting their abilities (23.4%); and (iv) reviewing the criteria for recruitment, assignment and promotion that are difficult for women workers to comply with (28.9%).⁹

The realities shown above clearly indicate the necessity to further promote positive action measures, and also in light of the fact that essential measures for positive action were not implemented, which measures are actually needed to ensure effective positive action should be presented more clearly.

3. Private Law Remedies for Discrimination in Recruitment

In the context of interpretation of the current Equal Employment Opportunity Act, a question arises as to how private law sanctions against contravention of this Act should be considered, and this question is especially important in relation to discrimination in recruitment and promotion.

As for discrimination in recruitment, the recruitment criteria adopted by most Japanese firms are non-transparent and their details cannot be identified from outside. Therefore, it is extremely difficult for rejected job applicants to prove that the rejection was derived from discrimination by reason of sex, and even if they successfully prove this, it is generally considered that the remedies to be awarded to them by the court according to the principle of employer's freedom in recruiting employees would be compensation for damage only as a token, and it would be difficult to compel recruitment of those rejected.¹⁰

⁸ 21st Century Job Foundation, *supra* note 1, 205.

⁹ 21st Century Job Foundation, *supra* note 1, 206.

¹⁰ There is an argument that gender discrimination in recruitment should rather be dealt with as an issue of positive action. See Mutsuko Asakura, *Rodoho to Jenda* [Labor law and gender] (Yuhikaku, 2000), 148.

The judgment of the Grand Bench of the Supreme Court in the Mitsubishi Plastics Case (December 12, 1973, 27 *Saikosai Minji Saibanreishu* 1536) is a famous precedent judgment that emphasized the concept of freedom of recruitment. In this case, the absence of any law or regulation to govern recruitment practice at that time was mentioned as one of the grounds for upholding the company's claim of freedom of recruitment. However, although there was no law or regulation to govern recruitment practice when this judgment was rendered in 1973, it should be called to mind that we now have laws and regulations to restrict freedom of recruitment against discrimination by reason of sex (Article 5 of the Equal Employment Opportunity Act), age (Article 10 of the Employment Countermeasures Act) or disabilities (Article 44 of the Act on Employment Promotion etc. of Persons with Disabilities). In this respect, freedom of recruitment may no longer be perfectly inviolable.

4. Sexual Harassment and Employers' Obligation to Give Consideration

As remedies for sexual harassment, a theory of obligating employers to give consideration to the working environment has come on the scene. In the sexual harassment case in Fukuoka (the judgment of the Fukuoka District Court, April 16, 1992, 607 *Rodo Hanrei* 6), the court stated that an employer has the obligation to give consideration to the working environment "so as not to violate employees' personal dignity in relation to provision of labor or seriously interfere with their engagement in providing labor." In the sexual harassment case in Sendai (the judgment of the Sendai District Court, March 26, 2001, 808 *Rodo Hanrei* 13), the court acknowledged that the employer (an automobile dealership in this case) has the obligation to improve the working environment, or more specifically, the "obligation to improve the facilities so that employees can engage in work in a favorable working environment," and also has the obligation to give consideration to the working environment, that is, the "obligation to give consideration to maintaining and securing a favorable working environment for employees' engagement in providing labor," and that these obligations are covered by an employment contract.

A question arises in respect of the relationship between employees' obligation to take measures to prevent sexual harassment prescribed in the Equal Employment Opportunity Act (Article 11), and their obligation to give consideration to the working environment mentioned in the court rulings. Specifically, the Sexual Harassment Guidelines, established under the Act, designate (i) clarification of policy, (ii) development of a consultation system, and (iii) implementation of appropriate measures *ex post facto*, as employers' obligations. Then, if employers fulfill these obligations, are they deemed to fulfill the obligation to give consideration to the working environment as well?

There is an argument that employers may be exempt from liability for tort or default as long as they fulfill the obligations prescribed in the Sexual Harassment Guidelines. However, the list of obligations under these guidelines provides for the minimum standards that employers must meet, which means that employers may not always be exempted from liability for default even when they fulfill those obligations.