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CONTENTS

New Minister of Labour

Prime Minister Ryutaro Hashimoto reshuffled his Cabinet on September 11 with the inauguration of the second Hashimoto Cabinet, Bunmei Ibuki, a member of the LDP, was appointed as the new Minister of Labour, replacing former Labour Minister Yutaka Okano.

Ibuki was born in Kyoto city in 1938. After graduating from the Kyoto University, he joined the Ministry of Finance and was attached to the Budget Bureau and the International Finance Bureau. Before entering politics in 1983, Ibuki also served as a Private Secretary to the Minister of Finance. With his experience as the vice minister for Ministry of Health and Welfare, he is well-versed in policy matters, especially social welfare.

General Survey

Preliminary Release of the 1997 White Paper on Labour

On June 27, the Ministry of Labour released its 1997 White Paper on Labour. This year's white paper analyzes trends in the labor economy for 1996 (in Part I), and Part II discusses employment and wages in terms of the structural changes in economy and society, and the aging of the population. The emphasis in Part II was on the need to promote the continuous employment of individuals until age 65 through mechanisms which would allow for labor mobility into emerging fields and careers. The White Paper proposes that a new employment system needs to be built in response to the structural transformation now occurring in Japanese society and to the graying of society.

Part I of the White Paper analyzes the nation's economy and its implications for labor. With the economy recovering at a moderate pace, the employment outlook continued to look bleak. However, the ratio of active job openings to job applicants was up from figures for the previous year for the first time in six years, and the unemployment rate dropped slightly in the latter half of 1996. Meanwhile, real wages continued to grow moderately and working hours increased slightly from the preceding year.

Part II provided on analysis of changes occurring in employment and the wage system. While the structural changes in the economy, deregulation, and the advancement of information technology have benefitted consumers as a result of various kinds of rationalization and the appearance of higher value-added products and services, the effect on

the demand for labor and on wages has been great. Moreover, the impact has been uneven, varying according to industry, occupation and employment status. One result of those changes has been a wider gap in wages among some workers. In order to avoid becoming a high unemployment society with larger wages disparity and the sense of inequality which such disparities foster, part II argues that measures should be taken to promote the smooth flow of labor into Japan's industries which are experiencing growth. For an unemployment-free labor market to emerge it called for provisions to develop the abilities of workers, including the implementation of an objective system for assessing those abilities.

As for the rapidly aging population, the White Paper sees the enhancement of employment opportunities for the elderly as an important task in building an invigorated society. Compared to their counterparts in other countries, Japan's elderly have a strong willingness to work. However, the job opportunities for older persons need to be improved both in quantitative and qualitative terms. With a decrease of the number of young persons coming into the labor market in the future, Japan's corporations need to explore ways to keep their employees gainfully engaged until 65 and find ways to develop further career of each worker by better utilizing his or her skills. For that to occur the wage system and the work evaluation system will need to change. To assist firms in doing that, policies are needed to provide guidance and support both for firms and employees who have a range of needs, including specific requirements for vocational training.

Working Conditions and the Labor Market

Outcome of a Special Survey of the Labor Force Survey in 1997

On June 7, the Management and Coordination Agency (MCA) announced the results of a special survey which was administered as part of the Labor Force Survey in 1997. The special survey is disseminated each year in February and covers 100 thousand males and females aged 15 or older. The aim is to assess how long certain employees were jobless and the number of employed persons by employment status.

As for the composition of the labor force by employment status, Japan's 49.63 million employees (executives excluded) consisted of 38.12 million regular employees, 6.38 million part-time employees, 3.07 million *arubaito* (temporary workers), and 2.07 million employees with other statuses. The percentage of regular employees declined and the percentage fell below 90 percent for male employees and 60 percent for female employees for the first time since 1984 (when the questionnaire started). At the same time the percentage of employees who worked part-time or on other temporary arrangements rose.

Those who left jobs in the past year numbered 6.74 million. Among those just over half (50.7%) of men were re-employed. For women, the figure was 55 percent. For the second straight year the percentage of unemployed males and females who resumed work increased.

This year's survey results focused attention on the "period of joblessness." Of the 2.3 million unemployed persons surveyed, 41.7 percent were out of work for less than three months; 17 percent, for three to six months; 20 percent, for six months to a year; and 20.9 percent, for more than a year. The ratio of those who were jobless for more than a year received wide media coverage as it surpassed the previous high of 20.2 percent registered in 1987 (when industry affected by the high yen slump). Incidentally, the percentage of those who were jobless for less than three months was the highest figure recorded for both men (35.6%) and women (50%). As for those who were unemployed for more than a year; men (27.4%) outnumbered women (11.7%).

Human Resources Management

Fifty Five Percent of Big Companies Have an Early-Retirement Preferential Program: Preliminary Results from the 1997 Employment Management Survey

On June 24, the Ministry of Labour released preliminary results from a survey on employment management. The survey is conducted to assess how corporations are managing their employees. This year's survey focused on arrangements for retirement at about 6,000 companies with 30 or more employees (of which, 81.1 percent responded).

The survey asked about actual practice on January 1, 1997, and revealed that 94.5 percent of companies had a system with a mandatory retirement age. The age was 60 or over in 90.2 percent of the companies. Seventy percent of firms with a uniform retirement age, had a system of extending employment and/or re-employing retirees.

As for other aspects involving retirement administration, 4.5 percent of firms had adopted a system of *tenseki shukko* (transfers, usually temporary, with a change in the official employer) to related firms and subsidiaries. Seven percent had an early-retirement system in place. A system of helping retirees find new jobs was found at 1.1 percent of employers, and 1.3 percent offered retirees assistance to go establish their own businesses. The percentage of large companies (with 5,000 or more employees) having such provisions was usually higher than the average. For example, 55.7 percent of large firms had introduced an early-retirement scheme. Furthermore, the survey also questioned companies about their

employment practices for different occupational groups. The largest number of firms replied that they would keep both those in management posts and those in general jobs employed until the mandatory retirement age. As for future changes in their practices, many firms replied that they had no plans for change. The indications are that most firms still prefer an arrangement which offers stable employment within the framework of the compulsory retirement age system.

Labor-Management Relations

Tekko Roren Shifting to Multiple-Year Agreements

Tekko Roren (the Japan Federation of Steel Workers' Unions), one of the country's leading industrial labor organizations, plans to switch to a agreements which will hold for several years, thereby replacing its annual negotiations. It is certain that the federation will adopt the new system in its 1998 wage talks. The current pattern of the spring offensive (which began in 1956 and became a Japanese institution) revolves around the wage negotiations of individual labor unions in each spring. They would make their wage-hike requests in the spring of each year and determine the overall average wage increase for the coming year. However, with lower rates of growth and smaller wage hikes in recent years, Tekko Roren is reviewing the spring offensive and is studying ways to formulate multiple-year agreements. The aim is to develop a more efficient approach to looking after its members' working conditions.

In the first year of a two-year round its member unions would negotiate about basic working conditions such as wages, severance pay, various allowances and working hours. In the second year, Tekko Roren would then shift its emphasis to rectifying the gap in working conditions between the large and smaller companies. Tekko Roren is now thinking of continuing to negotiate the size of bonuses (which most directly reflect company performance) each year. It is believed that more effective negotiating will allow Tekko Roren to put more energy into efforts to reform the nation's welfare and social-security systems. The federation will formally decide on the details of its new approach at its annual convention in September.

Virtually, all of other industrial labor federations seem to have responded negatively to the multiple-year agreements for a variety of reasons. First, many unions feel that a move from holding wage talks every year will further widen the gap in wage increases between large and smaller companies. Second, the annual wage talks every spring have been the main feature of Japan's labor movement, and many fear that the ability of members to identify with the union will be weakened.

Nikkeiren (the Japan Federation of Employers' Associations) has also taken a negative stance on the new approach. Its view is that a two-year wage agreement will make it difficult to cope adequately with sudden large changes in the economic environment. In the latter half of 1996 the price for semiconductor memories began to fall. As a result, the electrical machinery industry, (which acted as the pacesetter for the spring offensive in the 1996 wage talks) gave way to the auto industry which served as the pacesetter in this spring's round of negotiations. Management, which is concerned with maintaining its flexibility for responding quickly to changes in the economy, must feel uncertain over Tekko Roren's initiatives. It is thus unlikely that labor and management in many other industries will follow Tekko Roren's move in the near future.

Tekko Roren's new move toward two-year agreements in part reflects the fact that the steel industry cannot easily shift its production base offshore owing to the nature of the equipment. As a result, steel companies are better positioned to engage in long-term planning and must be better prepared to ride the future through good times and bad.

1997 *Shunto* Wage Talks Settled with Greater Emphasis on Bonuses

According to the final results of a survey conducted by the Ministry of Labour on the outcome of 1997 spring wage talks, labor and management reached agreement at 289 major private companies with 5,000 or more employees. The average wage hike was ¥8,927, representing a 2.9 percent increase. That amount was ¥215 above the increase won in 1996. After registering a record low of only 2.83 percent in the 1995, unions were able to obtain an increased percentage increase for two years in a row. However, the increase in the consumption tax rate and the end of three years of special tax cuts will stretch the family budget of most workers. Rengo estimates that a family with an annual income of seven million yen will have to bear an increased burden of over ¥10,000 a month, an amount considerably above the ¥8,927 increase mentioned above.

Labor planned to put its demands first to firms in the auto industry. The auto workers were chosen as the pacesetters because their firms had recorded an increase of over 60 percent in corporate profits over the preceding year owing to the decline in the value of the yen. Management, however, argued that such a wage hike would make it difficult to maintain the industry's international competitiveness. Toyota led the industry in setting the top rate. Labor and management at Toyota agreed on a monthly wage raise equal to the previous year's increase plus ¥700. With the top pacesetter determining the upper limit, wage hike were

contained despite the good profits registered by the industry.

Instead of wage increases, individual auto makers offered to distribute their profits as bonuses. Toyota, for instance, offered to pay employees bonuses for the year which would be equivalent to 6.1 months' basic wages, a record-high amount of about two million yen or more. Once raised, wages are difficult to lower. However, bonuses can easily be adjusted to the firm's performance. Accordingly, Nikkeiren has argued that the proportion the annual wage bill paid as bonuses should be raised from the current 30 percent to 40 percent. Following the lead of the auto industry, firms in other industries notably trended to place emphasis on bonuses rather than on the increase of wages per se.

In addition, Nikkeiren maintained that public utility industries should constrain their wage hikes in order to minimize the gap between internal and external cost structures. Accordingly, labor and management in the public utility industries such as the private railways and the electric power were made to feel sensitive to the criticism that they were not being publically spirited. Reflecting on moves to deregulate the economy, in the end they felt compelled to show restraint in their negotiations as one characteristic of this year's spring wage offensive.

Public Policy

First Female Administrative Vice Minister for Labor

When Tokio Nanase retired as Vice Minister from the Ministry of Labour, Nobuko Matsubara (Head of the Labour Relations Bureau) was promoted to replace him on July 1. At a Cabinet meeting held on June 30, Labor Minister Yutaka Okano won approval for her appointment and officially announced the decision. As an executive official of central government ministries and agencies, Ms. Matsubara became the first woman to be the Administrative Vice Minister. So far women have held a similar post in the Agency for Cultural Affairs and in the Social Insurance Agency.

Ten women, including Ms. Matsubara, have held appointments at the level of vice minister or director general in the government's 22 central ministries and agencies. Women who hold the post of the division chief or higher number are 90. According to the Office for Gender Equality of the Prime Minister's Office, which promotes the participation of women in the decision-making process at the national level, the number of women entering the public service has been growing slowly but steadily since 1975 (the United Nation's Year for Women). Women who hold appointed posts have increased ten-fold from 1975 when there was only one.

Furthermore, the ratio of women recruited to be executives in Category I of the central government's national bureaucracy rose from 6.4 percent in 1985 to 14.8 percent in 1994.

Ms. Matsubara has served head of the Labor Standards the Labor Relations and the Women's Bureau. She also had a period as Councilor, before that she had been in charge of International Labour Affairs Division and the Women's Policy Planning Division. As Head of the Policy Planning Division of the Women's Bureau, she reviewed the Equal Employment Opportunity Law, and as Head of the Labour Standards Bureau, she led an overhaul of the criteria for recognizing death from overwork.

Deregulation is currently in high gear in areas affecting labor and working conditions. Hoping to maintain provisions for fair play in the labor market and safety networks which protect labor, Ms. Matsubara seems ready to restructure the way labor policy is administered as Japan moves into the 21st century.

Special Topic

"Personal Rights" in the Workplace: The Emerging Law Concerning Sexual Harassment in Japan

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I. Introduction

Sexual harassment in the workplace has been an issue in Japan for several years. Along with scholarly and journalistic writings, case law has developed during that period. A series of judicial decisions have been made in cases involving sexual harassment, many finding the defendant liable. These decisions have a distinctive feature in that they focus on the infringement of "personal rights" rather than the employment discrimination. This article examines how the law concerning sexual harassment has evolved in Japan.

Apart from the above developments in case law, sexual harassment has been a central issue in discussions of the equal employment opportunity legislation. More and more people have commented on the problem and have called for new legislation. As a result, the Equal Employment Opportunity Law was recently amended in the Diet, and a new provision was inserted to prevent sexual harassment. This article also comments on that development and

notes several remaining legal issues.

II. The Legal Basis of Liability for Sexual Harassment

1. Sexual harassment under the present labor and employment law

In the United States, where the law of sexual harassment in the workplace first developed, harassment is usually considered in the context of employment discrimination. Although the victims of sexual harassment are entitled, depending on the facts of each case, to the right to tort remedies under state law, the focus of discussion is on whether sexual harassment constitutes a form of employment discrimination under Title VII of the Civil Rights Act of 1964. Case law is now established that sexual harassment violates Title VII so long as the victim's working conditions are adversely affected. This is the case regardless of whether the harassment is a quid pro quo type or a hostile working environment type. As a basis of this case law, it is to be noted that Title VII comprehensively prohibits discrimination with respect to conditions of employment.

In contrast, there has been no provision in Japanese statutory labor and employment law that makes sexual harassment illegal. The Labour Standards Law, one of the most fundamental statutes regulating employment relations, prohibits sex discrimination only with respect to wages. Unlike Title VII, the Equal Employment Opportunity Law has no comprehensive provision on employment discrimination. Instead, it stipulates how employers should act with regard to recruitment, hiring, assignment, promotion, training, fringe benefits, and the termination of employment. Moreover, provisions regarding recruitment, hiring, assignment and promotions do not strictly prohibit discrimination. They only require that employers make a good faith effort to provide equal employment opportunities ("moral duty provision"). Although the recent amendment to the Equal Employment Opportunity Law has a provision on sexual harassment, it will not be effective until April 1, 1999.

2. Sexual harassment under tort law

Under the Civil Code of Japan sexual harassment can be illegal. With respect to quid pro quo cases, employer's legal acts such as discharge and transfer can be illegal and void when they constitute sexual harassment as a violation of the public order under Article 90 of the Civil Code. The public order in this provision has been interpreted to include equality between the sexes. More importantly, sexual harassment based on hostile working environment can constitute tort. Article 709 of the Civil Code provides that a person who unlawfully infringes upon another person's right is liable for damages. According to established case law, the "right" in this provision need not be a statutory one. It can be a "legally protected interest."[1] In cases where sexual harassment amounts to defamation, invasion of privacy, assault or battery, it infringes upon legally protected interests and

constitutes a tort.

Furthermore, lower court decisions have held that sexual harassment can constitute a tort when it violates the victim's "personality right," "personal right" or "personal interest."(2) In 1992 the Fukuoka district court stated in a leading case that harassment by spreading rumors about the plaintiff's sex life infringed on her privacy and legally protected "interest in working in an environment conducive to working."(3) The court appears to regard the "interest in working in an environment conducive to working" as one of personal interests which are as such protected by tort law. This notion is significant because it can be a basis for liability even in cases where there is no element of defamation, invasion of privacy, or sexual assault.

Although the notion of "personal interest" or "personal right" may not be familiar in common law countries, it has been derived from German law. The term "personal right" (*Jinkaku-ken*) is a translation of a German legal term "Persönlichkeitsrecht," which may be translated as "the right to the dignity of one's personality." The Supreme Court has held that the infringement of personal interest constitutes a tort under the Civil Code. For example, the Court once held that the distribution of handbills that criticized the job performance of teachers constituted a tort because such conduct infringed on the teachers' "interest in having a measure of serenity in their private lives."(4) The handbills had encouraged the parents of pupils to harass the teachers. Relying on legal theory with regard to this tort courts created the new notion of the "interest in working in an environment conducive to working" in sexual harassment cases.

3. Evaluation of the Japanese approach

While sexual harassment in the United States is discussed in the context of employment discrimination, Japanese law focuses on the tort liability incurred when personal interests are infringed.(5) Although this is due to the lack of a statutory provision to regulate employment discrimination in general, the Japanese approach has its own significance, because it can be applied to other sexual harassment cases outside of the employment context (e.g., sexual harassment in education).(6) However, the expression of the "interest in working in an environment conducive to working" is too inclusive. It may cover a situation irrelevant to sexual or other types of harassment.

Although the approach of Japanese case law that rests on the victim's personal interest is to be supported, the author suggests that the definition of the personal interest should be more narrowly delineated so that it can fit sexual harassment cases. Instead of elusive notions such as the "interest in an environment conducive to working," the interest to be protected under tort law in workplace sexual harassment cases should be formulated to be the

"interest in working environment free from sexual discomfort."(7) In cases involving sexual harassment in education, "working environment" in this definition should be replaced by "educational environment."

It must be noted that, even under the Civil Code, the element of discrimination can be influential in the determination of tort liability. Although sexual harassment is not in itself a violation of the Equal Employment Opportunity Law, it often occurs with discrimination. The motive of harassers can be taken into consideration in deciding seriousness of the conduct as explained in the next section.

4. What constitutes illegal sexual harassment?

Under the prevailing tort theory in Japan, the liability of the tortfeasor is determined (i) by a consideration of the nature of the infringed legal interest on the one hand, and (ii) by seriousness of the conduct which infringed on such interests on the other. If plaintiff's interest is not so established as to be a statutory right, then the defendant's misconduct needs to be serious. Since the interest in working in an environment conducive to working (or free from sexual discomfort) is not an established right, the content of the defendant's misconduct is important in hostile working environment cases.

Last year the Kanazawa branch of the Nagoya High Court provided some general criteria for evaluating the contents. The court first accepted the view that it is not always illegal for a male supervisor to take advantages of his position and engage in sexual behavior against the will of his female subordinate.(8) According to the court, however, such conduct becomes illegal as an infringement of her personal right to sexual freedom or to the determination of her own sexual matters, "when the conduct is inappropriate from a social point of view in light of the totality of the circumstances which include the nature of the conduct, the position of the supervisor, the age of the supervisor and the subordinate, the marital history of the subordinate, the relationship between the two, the place where the conduct occurred, the frequency and continuity of the conduct, the response of the subordinate, etc."

Although the factors listed by the court are quite comprehensive, some factors appear to be more important than others. Among the most important is the nature of the offender's conduct and its frequency or continuity, because they are most likely to affect the seriousness of the conduct, which is, as described before, an important element to determine tort liability. The Ministry of Labour has already focused on these factors in a pamphlet published to assist employers in the evaluation of their personnel management practices. In this pamphlet, the Ministry of Labour defines the hostile working environment sexual harassment to be "sexual conduct against the woman's will ... which, by being repeated, leads to a serious deterioration

of her working environment."[9] Although this definition is subject to criticism in that it appears to consider both repetition and seriousness of sexual conduct to be indispensable elements to consider when assessing the impact of sexual harassment,[10] it indicates two important factors regarding illegal sexual harassment.

The importance of these two factors has been acknowledged in the United States. In Meritor Savings Bank v. Vinson [11], the U.S. Supreme Court held that sexual harassment in a hostile working environment violates Title VII if the harassment is sufficiently severe or pervasive to alter the working conditions of victims and create a hostile working environment. Although this criterion is formulated for determining liability for employment discrimination under Title VII, it also provides a helpful bench mark for determining tort liability under the Civil Code in Japan. As stated before, the personal right or the interest in personality has not yet been established as a statutory right, and tort liability is to be found only when such interests are seriously infringed. It should be noted, however, that this framework serves only to determine tort liability in court. When employers establish their own internal policy to prevent sexual or other types of harassment, the definition of prohibited harassment may no longer be limited to conduct that is serious or repetitive.

III. Sexual Harassment and the Employer's Liability

1. Employer's liability through an employee's conduct

When is an employer liable for its employee's sexual harassment? In quid pro quo cases, the employer is usually liable for the supervisory employees' conduct such as dismissal and demotion, since the supervisors decide and implement such actions in personnel management on behalf of the employer. On the other hand, in hostile working environment cases, where harassment in itself is not carried out on behalf of the employer, the liability of the employer is more ambiguous and often becomes the point of some contention. Article 715 of the Civil Code of Japan 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. The notion of "in the course of implementing duties" is liberally interpreted to mean "in relation to implementing duties." Thus, it is similar to the notion of "within the scope of employment." Several lower court decisions have ruled that an employer is liable under Article 715 for sexual harassment by one of its supervisors.

For example, in the Fukuoka case mentioned earlier the court decided that the employer was liable when one of its supervisors harassed a female subordinate by spreading rumors about her sex life.[12] In this case, the court held that the sexual harassment was carried out while the supervisor was doing his duties, because he spread the rumors mostly within working hours and at the workplace, to his boss and to other subordinates as well as to the

company's clients, thereby taking advantage of his position as one of the company's supervisors. Also, one rumor alleged that the plaintiff had an affair with an employee of one of the company's clients.

The Fukuoka decision gave weight to the time and the place where the harassment occurred, to the relationship between the offender and the victim, and to the contents of the rumor, and the specifics of when the rumor was disseminated. Of course, all these factors need not to be present in all cases. The Tokyo District Court recently held that the employer is liable for its supervisor's physical contact with his female subordinates even though the conduct occurred in a hospital when the female employee was on sick leave.(13) The court reasoned that the supervisor carried out the harassment by taking advantage of his position as supervisor and in the course of having a conversation on the company's business within his working time.

2. The duty to adjust the working environment

The Fukuoka case raised another basis for establishing the employer's liability to compensate when sexual harassment occurs: the "duty to adjust the working environment." Although it was long time after the problem started, the managing director of the defendant corporation became aware of the trouble between the supervisor and the plaintiff and tried to resolve it. However, after failing to reconcile the matter, he persuaded the plaintiff to resign from the company, while ordering the supervisor only to take three days off work. The court stated that the employer is obliged (i) to take care to prevent employment relations from developing in ways that infringe upon the employee's human dignity and diminish his or her ability to perform their job, or (ii) to cope with such an incident in an appropriate manner which will ensure that the workplace is conducive to working.(14) The court decided that the managing director had a duty to improve the work environment, but failed to do so. The court stressed that the attitude of the managing director was discriminatory in that from the beginning he had in mind that the female subordinate should resign if case was not resolved.

Thus, under Japanese case law, the employer is responsible to adjust a hostile working environment caused by sexual harassment. This duty to adjust the working environment is quite important, because, it allows a court to hold the employer liable even in cases where it is difficult to identify the offender (e.g., when someone anonymously posts pin-ups of naked models) or it is impossible to hold the employer liable under Article 715 of the Civil Code through an employee's conduct (e.g., when a sales person is sexually harassed by a customer). Although it may not always be clear how employers should carry out this duty, the judicial creation of this duty is based on the pointed concern for instances in which a hostile working environment results from sexual harassment.

IV. New Provision Under the Amendment of Equal Employment Opportunity Law

A bill revising the Equal Employment Opportunity Law passed the Diet on June 11, 1997. The amendment, which takes effect on April 1, 1999, calls for considerable changes to be made for equal employment opportunity in Japan.(15) For example, the amendment abolishes the good-faith effort provisions with regard to discrimination in recruitment, hiring, assignment and promotion. Under the amended law, such discrimination is prohibited under mandatory provisions. Quid pro quo harassment may violate these provisions when it involves one of those areas.

Also, there is a new provision on sexual harassment. Paragraph 1 of Article 21 provides that the employer shall take necessary care so that female workers will not be subject to adverse treatment by the company or hostile working environment because of sexual harassment in the workplace. Paragraph 2 of this Article also provides that the Minister of Labour shall issue guidelines for the measures of care that employers should take.

Under the amended law, the employer has a responsibility to prevent sexual harassment in the workplace, whether it be of the quid pro quo type or the hostile working environment type. Although it is not entirely clear how employers should demonstrate that they have fulfilled their duty to prevent sexual harassment, administrative guidelines will be developed to indicate what they are supposed to do. The Ministry of Labour has already convened a tripartite meeting to discuss the guidelines.

Theoretically, however, a few problems remain. First, it might be argued by some that employers now have a contractual duty to prevent sexual harassment. In other words, the employer's liability for sexual harassment can now be seen as flowing from a contractual relationship and not from a tort. On the other hand, there is a counter argument that the new provision merely subjects employers to administrative regulation and does not affect the employment contract. Second, it is not certain whether the new provision sets the criteria necessary to determine which specific incidences of sexual harassment amount to illegal conduct. The provision merely refers to adverse treatment and to the related disturbance of the working environment because of certain sex-related behavior. The resolution of these issues will be left to case law. In other words, it is not certain whether or to what extent the new provision will affect the existing case law as explained before.

V. Conclusion

The law of sexual harassment in Japan has developed as case law based on the 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. The employer liability when one of its employees engages in sexual harassment is predicated on the employee's conduct within the scope of employment as well as on the failure of the employer to take appropriate steps to adjust the working environment. In addition to the remedy under the Civil Code, the recent amendment to the Equal Employment Opportunity Law has a new provision that obligates employers to prevent sexual harassment in the workplace. Although this provision, coupled with administrative guidelines, will affect employers' personnel management, there still remain a few important issues which require further clarity. These concern the nature of the remedy and the scope of liability.

[notes]

(1) Daigakuyu case, 4 Minshu 670 (Gr.Ct.Cass. 28 Nov. 1925).

(2) For example, consult the Fukuoka Sekuhara case, 607 Rodo Hanrei 6 (Fukuoka District Courts 16 Dist. Ct. Apr. 16, 1992); the Osaka Sekuhara case, 893 Hanrei Taimuzu 203 (Osaka Dist. Ct. Aug. 29, 1995). For the analysis of these and other recent cases, see Ryuichi Yamakawa, "Wagakuni ni okeru Sekushuaru Harasumento no Shihoteki Kyusai" (Remedies for Sexual Harassment Under Japanese Private Law), 1097 Jurisuto 69 (1996).

(3) 607 Rodo Hanrei at 21.

(4) 43 Minshu 2252 (Sup. Ct. Dec. 21, 1989)

(5) In a very recent case, the Kyoto District Court held that an employer has a contractual duty to adjust the working environment so that employees should not be pressured to resign as a result of its deterioration. Kyoto Sekuhara case, 716 Rodo Hanrei 49 (Kyoto Dist. Ct. Apr. 17, 1997). Under this holding, victims of sexual harassment can claim a contractual remedy.

(6) See Alison Wetherfield, "Amerikajin Bengoshi no Mita Nihon no Sekushuaru Harasumento (2)" (Sexual Harassment in Japan - the Views of an American Lawyer) 1080 Jurisuto 78 (1995). Wetherfield comments that the notion of the right to work in a working environment conducive to working is advanced compared to the criteria given under Title VII.

(7) Ryuichi Yamakawa, "Sekushuaru Harasumento to Fuhô Kôi (Sexual Harassment and Tort), 1005 Jurisuto 48 (1992).

(8) Kanazawa Sekuhara case, 707 Rodo Hanrei 37 (Kanazawa Branch of Nagoya High Ct., Oct. 30, 1996).

(9) Ministry of Labour, "Josei no Nôryoku Hakki no Tameni" (Giving Full Scope to Women's Ability).

(10) There is another criticism that the element of seriousness and repetition is not necessary, since the purpose of this pamphlet is the improvement of employment management, not the determination of legal liability.

(11) 477 U.S. 57 (1986).

(12) 607 Rodo Hanrei at 22.

(13) Tokyo Sekuhara case, 707 Rodo Hanrei 20 (Tokyo Dist. Ct. Dec. 25, 1996).

(14) 607 Rodo Hanrei at 23.

(15) See generally Ryuichi Yamakawa, "Into a New Phase: Equal Employment Opportunity Law," 36 Japan Labour Issues Quarterly 2 (1997).

Statistical Aspects

Recent Labor Economy Indices

	June 1997	May 1997	Change from previous year
Labor force	6,908(10thousand)	6,876 (10thousand)	92(10thousand)
Employed	6,679	6,632	89
Employees	5,435	5,399	68
Unemployed	299	244	3
Unemployment rate	3.3%	3.5%	0.0
Active opening rate	0.74	0.73	0.01
Total hours worked	164.8 (hours)	156.2 (hours)	1.1*
Total wages of regular employees	(¥thousand) 290.9	(¥thousand) 288.2	1.9*

Notes: 1.*denotes annual percent change.
2.From February 1991 the data for "total hours worked" and "total wages of regular employees" are for firms with 5 to 30 employees.
Source: Management and Coordination Agency, Ministry of Labour.

Trends in the Percentage of Those Who were Became Unemployed in the Last Year by Current Employment Status