

The Law to Prevent “Power Harassment” in Japan

OBATA Fumiko

The provisions pertaining to workplace bullying (known as “power harassment” in Japan) were established in the Comprehensive Labor Policy Promotion Act (CLPPA).¹ They are, however, not prohibitive provisions that can serve as grounds for civil claims for damages. Instead, they are provisions that establish the responsibilities of the national government, employers, and workers while imposing obligations for employers to develop systems and take other such measures to prevent power harassment. The obligations to take measures are actualized through the employment of administrative measures to ensure effectiveness, such as administrative guidance, on employers who violate the obligations. The provision of obligations to take measures has the advantage of enforcing administrative guidance, etc., possible, even before the occurrence of power harassment if an employer does not implement measures prescribed by the Act. Moreover, the execution of obligations to take measures can be taken into consideration when making judgments about breaches of Civil Code obligations. As a result of the imposition of obligations to take measures, employers are required to develop work rules that include the disciplinary action against wrongdoers; develop understanding of what constitutes workplace power harassment to ensure that supervisors or workers in leadership positions do not make the mistake of thinking that actions taken to instruct problematic workers are not regarded as power harassment; accept victim’s requests for consultation by setting up a consultation desk; encourage other workers to work to prevent the spread of damage caused by power harassment; and improve work environments to prevent the manifestation of workers who engage in power harassment to relieve stress resulting from long working hours, etc. Urgent tasks for the national government include the formulation of guidelines providing a specific definition of “power harassment,” study of the need to establish “prohibitive provisions concerning power harassment behaviors that can serve as the grounds for claims for damages” in law, the study of the Convention Concerning the Elimination of Violence and Harassment in the World of Work, and study of measures to prevent power harassment by customers and other outsiders.

- I. Problem presentation
- II. The necessity of laws and regulations
- III. Prohibitive provisions that can serve as grounds for civil claims for damages
- IV. Liability provisions and obligations to develop systems for the prevention and other measures
- V. Future challenges

I. Problem presentation

There has been no end to lawsuits in which workers who experience mental suffering because of bullying, mobbing, or abuse of power in the workplace (hereinafter referred to collectively as “power harassment”) claim damages against the wrongdoer or their employer. The same is true of lawsuits in which abused workers who experienced the development or exacerbation of a psychiatric illness or the families of abused workers who commit suicide as a consequence claim damages against the wrongdoer or employer.² The number of consultations concerning workplace bullying and harassment made to the general labor consultation counters of Prefectural Labor Bureaus continues to increase. Such consultations make up a considerable share of all individual civil labor dispute-related consultations.³

Under current law, victims and their families can claim damages for such behaviors as torts or defaults. Moreover, wrongdoers can be held criminally liable if their behaviors are deemed to be defamation or assault.⁴

Additionally, on March 15, 2012, “Recommendations for Prevention and Resolution of Workplace Power Harassment” were issued by the Ministry of Health, Labour and Welfare (MHLW).⁵ The Recommendations defined the “workplace power harassment” as “any act harming physical or mental health of the victim beyond the appropriate scope of business by exploiting one’s superior position or human relationship with co-workers, or leading to a deterioration of the working environment.” Further, messages from top management, the formulation of internal rules, identifying situations likely to lead to bullying and harassment, education to prevent power harassment, and dissemination of guidelines and initiatives have been recommended as corporate actions toward preventing workplace power harassment. On the other hand, the establishment of places for consultation and resolution and the prevention of a recurrence (e.g., through training, etc.) have been recommended as means for resolving it. MHLW has made the importance of preventing power harassment broadly known through its *Akarui Shokuba Oendan* (“Supporters of human-centered workplace”) website.⁶

In March 2018, a report was released by MHLW’s Investigative Commission on Measures to Prevent Power Harassment in the Workplace.⁷ The report clarified the advantages and disadvantages of proposed responses—namely,

- (i) establishing the criminal liability or civil liability of wrongdoers (criminal penalties or unlawful acts),
- (ii) establishing provisions providing the grounds for claiming damages against employers (private-law effects),
- (iii) placing obligations to take measures on employers,
- (iv) countermeasures to be taken by employers in guidelines that explicitly indicates how they do, and
- (v) raising awareness

At the same time, the report organized the concept of power harassment that was constituted by three elements: “the behavior is committed by a person in a superior position (or based on superiority) at the workplace,” “the behavior exceeds the scope of necessary and reasonable elements of business operations,” and “the behavior caused mental anguish, physical pain, or a degradation of the working environment.”

Deliberations on this topic subsequently began in the Labor Policy Council and were compiled into a report at the end of 2019.⁸ Employer members found proposals (v) and (iv) useful, while worker members recommended proposals (i) and (ii). In the end, however, it was a proposal (iii) that was prepared as a bill. The bill was enacted with a supplementary resolution by both Houses of the Diet in May of this year.⁹

In this paper, I will evaluate whether or not adopting proposals (iv) and (v) was appropriate in Part II. Then, in Part III, I will study whether or not adopting proposals (i) and (ii) was appropriate while also considering the reasons power harassment has not been eradicated. Given that incorporated into the supplementary resolution of both Houses of the Diet¹⁰ is an item calling for consideration of the necessity of establishing “provisions prohibiting power harassment behaviors that can become grounds for claims for damages” in law, it could be argued that such prohibitive provisions should have been established during the current Diet session. In Part IV, I will explore what significance the new provisions based on (iii) would have while giving attention to the

reasons that power harassment has not been eradicated, and then consider future challenges in Part V.

II. The necessity of laws and regulations

When the Labor Policy Council discussed how best to eradicate power harassment, employer members asserted that proposals (v) and (iv) were appropriate.¹¹ The main concern was that the establishment of provisions prohibiting power harassment with a lack of clear distinction between work-related guidance/instruction and power harassment would make supervisors think twice about giving guidance or instructions to their subordinates, and operations would become hampered as a result. Undoubtedly, if supervisors hesitated to guide or instruct their subordinates out of fear, they would be accused of power harassment, operations could become hampered, and expectations for subordinates' growth would be diminished. Given this concern, would it not better to go as far as the measures of (v) and (iv) and not beyond them?

However, cases in judicial precedents¹² reveal the cruelty of bullying and power harassment, and they occur in Japan. It must, therefore, be admitted that stopping at (iv) and (v) is not possible.

For example, there was a case in which a worker who, having suffered a foot injury when a ball with a needle used in surveying was thrown at him and been forced to do overtime work all night without being permitted to even take a noontime break, caused a car accident with possible suicidal intent.¹³ There was also a case in which a worker claimed for damages for mental suffering after being forced to drink alcohol despite having a low tolerance for it and being forced to drive when not feeling well.¹⁴ Moreover, there was a case in which a supervisor slapped subordinates' face and head more than ten times or shot them with BBs with an air gun when in a bad mood or frustrated with work, which led to a subordinate's suicide.¹⁵ No one would doubt that the bullying shown in these cases is unpardonable.¹⁶

In light of the fact that judicial precedents concerning suicides following the onset of poor mental health due to workplace bullying, mobbing, or power harassment continue to occur even after the release of the Recommendation,¹⁷ it is difficult to say that raising awareness, formulating guidelines, and other such measures are enough. A legal system to prevent such cases must be immediately established.

III. Prohibitive provisions that can serve as grounds for civil claims for damages

Should the proposals (i) and (ii) that were pushed by the worker members be adopted?

1. The time required for establishing the scope of remedy and conceptual development

The proposals (i) and (ii) that were recommended by worker members were also prominent in the Labor Policy Council's discussions.¹⁸ Under these proposals, it is thought that the reasons power harassment occurs are lack of understanding among those concerned and the weak deterrence posed by current laws. Through (i) and (ii), both wrongdoers and employers would realize that power harassment is unlawful, and the threat of significant disadvantage, if power harassment occurs, would be applied. Their aim would be to make wrongdoers (and potential wrongdoers) refrain from engaging in behaviors considered to be power harassment and make it easier for victims to sue.

Even under current laws, it is possible to make claims for damages and press charges of criminal responsibility if a behavior is deemed to constitute defamation or assault. If the proposals (i) and (ii) establish provisions bearing the name "power harassment" while still envisioning exactly the same kind of remedy provided in current laws, some may think it sufficient to promote broader awareness of current laws. Admittedly, the argument that expanding public awareness by establishing provisions that can be simplified in easy-to-understand slogans—such as "power harassment can result in imprisonment or fines" and "power harassment can bring about claims for damages against you"—would be better and able to effectively suppress power harassment would be persuasive to some extent. However, if this will be the path taken, it will

become necessary to develop the relationship between proposals (i) and (ii) and the remedial system provided by current laws.

If these (i) and (ii) proposals' intent is to target a narrower scope than the scope of the remedy under current laws and to prepare legal remedies with greater "threat effectiveness" within that scope, then it becomes necessary to define that scope and to provide justification for implementing legal remedies with greater threat effectiveness within it.

If the proposals are to target a broader scope of remedy than that under current laws, then it becomes necessary to define why the expanded behaviors will now be seen as a breach of obligation or unlawful even though they are not currently considered so and also to define the extent of the expanded scope.

Moreover, regardless of which of the above describes the proposals' intent, it is necessary to define what "power harassment" is in order to prohibit it. Prohibiting power harassment without first defining it will, as was pointed out by employer members, result in managers' and supervisors' refraining from instructing or scolding their subordinates out of excessive fear of being accused of power harassment, which could lead to a situation whereby the number of workers who engage in problematic behaviors does not decline, and business stagnates. Vague definitions are impermissible, specifically if criminal penalties are to be imposed, and therefore it becomes necessary to narrow down requirements into something that can be called criminally unlawful.

However, the definition of power harassment has been inconsistent when reviewing judicial precedents.¹⁹ Moreover, if there are judicial precedents whereby behavior that is deemed power harassment is judged as unlawful and which legal liability is found, there are also judicial precedents that do not always find legal liability because, even though a behavior is deemed power harassment, it contains elements that are not judged to be unlawful.²⁰ Under such circumstances, realizing the aforementioned proposals will require the time needed to define what "power harassment" is more precisely, develop the relationship between proposals (i) and (ii) and the remedial system provided by current laws and make other preparations.

2. The difficulty of undoing wrongdoers' misconceptions

One reason why power harassment cannot be eradicated despite the remedial system and the posting of the aforementioned Recommendation and other materials on MHLW's website is that wrongdoers do not believe their behaviors are illegal.

(1) Wrongdoers' misinterpretations

Analyzing judicial precedents involving power harassment-related claims for damages reveals many cases in which people who are identified as wrongdoers see themselves as (A) "relieving the tension by making jokes for a change," (B) "strictly reprimanding people with problematic behaviors to make them reflect on their actions and prevent a recurrence," or (C) "giving strict instruction to shape new or inexperienced people into fully qualified workers" and thereby contributing to the company and serving the role of supervisor, manager, or mentor.²¹

(A) Relieving the tension by making jokes for a change

For example, in the instance of (A), in a case in which a worker of a client company said to a dispatched worker, "I'm going to make your hair burning" "with a lighter," the court ruled that looking at the interaction before and after that, it is considered that the above-mentioned statement was fended off as a joke and therefore it cannot be said to be extremely inappropriate." However, concerning the wrongdoer's saying regarding a vehicle (a Daihatsu Copen) owned by the dispatched worker that "I hate your Copen; I think I'll smash it up," and the wrongdoer's suspecting that the dispatched worker was actually playing pachinko when absent from work for feeling ill, the judge stated that "these are remarks that seem to be made frivolously as part of instruction" but also added that "it must be stated that if they are repeated even when the dispatched worker shows bewilderment or discomfort, then, the communication could be abuse and occasionally insults

and therefore lead to illegality.” Thus, the court determined that the behavior could be judged as power harassment, affirmed the employer’s liability of the client company, and ruled that it had the obligation to pay compensation for pain and suffering (company-specific tort liability was denied).²² It is possible in this case that the wrongdoer was surprised at being ordered to pay damages, as he thought that all of his actions were “just teasing.”

In another case, an experienced worker told a younger worker who had obtained a construction project order for trivial mistakes, saying, “Don’t think you’ll stay here in the company when the construction starts.” The experienced worker asked the younger worker “Do you want to stay in the project?” asking if the younger worker want to continue to be involved in the project he had obtained the order for, and, when the younger worker did not respond immediately to this question, said with a laugh, “You’re no good because you can’t answer right away.” And the experienced worker made statements that gave the supervisor the impression that the worker was pilfering change. In its decision, the court recognized the (existence of) torts considered power harassment behavior that “includes inappropriate expressions and responses that can only be described as diverging from the scope of normal instruction and education” and ordered the payment of damages for associated with the onset of depression by the victimized worker.²³ In this case, as well, it is possible that the wrongdoer was surprised at being ordered to pay damages despite “only teasing” and “simply pulling practical jokes.”

(B) Reprimanding workers with problematic behavior

Looking next at an example in the instance of (B), a court ruled that asking a worker who committed problematic acts (which included spreading degrading gossip about other employees without grounds and making groundless remarks slandering people in the workplace directly to executives) to affix his personal seal on a memorandum pledging not to engage in such behavior again and ordering him to carefully read the company’s regulations are appropriate measures in light of social norms and therefore not torts.²⁴ On the other hand, in the same judgment, regarding an interview set up so that the personnel officer could provide warning and instruction to the worker (which was secretly recorded by the worker), at which time the officer became fed up with the worker’s sulky attitude and shouted, “What do you mean you’re going to sue! Don’t act stupid. I’ll never forgive this!” the court ruled that this behavior went beyond the boundary of warning and instruction permitted by social norms, even if the purpose was justified, and was constituted a tort, and thus affirmed the employer’s liability of the company for this portion of the complaint. It is possible that the personnel officer found this ruling unacceptable, believing that the person who should be criticized was not him but the worker.

Moreover, a court ruled in a case involving a consumer electronics retailer that issuing a written warning to a worker who improperly processed sales is an act whose necessity and appropriateness is admissible in the course of work, that a shift change conducted by the company cannot be judged to be part of power harassment, and that scolding for problematic behavior was neither groundless nor done repeatedly or continuously to make an example of the worker. Therefore such acts cannot be judged to be part of power harassment. However, concerning a transfer order made without concrete explanation and causing a mistaken understanding about workload, the court judged that the order was an act of making the worker engage in an excessively heavy workload that went beyond an appropriate scope of work and caused severe psychological distress and therefore was a tort.²⁵ Here, too, it is possible that the worker’s supervisor found being judged to have committed a tort, even if only partially, to be unreasonable, as he was only acting to ensure that business was not hindered in consultation with headquarters and company managers.

(C) Instruction of new and inexperienced workers

Furthermore, looking at (C), a court recognized that saying things like, “Do you have any intention of learning this?” “How long do you intend to be a new employee?” “It’s a waste of time dealing with you,” “Do you think the company needs someone who lies so easily?” “Why don’t you just die?” and “I hope you quit” are “typical examples of power harassment if it is considered that they were said to an employee who had not yet been with the company for a year.” Liability for damages associated with the victim’s suicide was affirmed

based on a tort in the case of the wrongdoer and employer's liability in the case of the company.²⁶ As with the other cases, it is possible that the supervisor wondered why he received this judgment when he was only scolding a new employee with a bad attitude.

Additionally, there is a case in which a supervisor said things like, "Give me break. Can't you take care of even processing single subrogation properly? Just quit. Stop slowing everyone down," and "You can't do it even when you try hard. See, it's because you're not paying attention. You do the same thing, over and over" to a worker who was slow, made frequent mistakes, and had only just returned to work following medical treatment, and, further, in which, after the worker returned to the workplace, the supervisor made no effort to understand or consider the worker's medical condition and believed that the worker could physically handle a normal workload. Here, the court ruled that "When it is considered that the work, which was mentally demanding even for a healthy person, was even more mentally difficult for the plaintiff, who had just returned to work following treatment for syringomyelia and who continues to suffer from the aftereffects of the disease, and that the defendant Y2 gave no consideration to this whatsoever, and even when based on the aforementioned problems experienced by the plaintiff, it can be said that the acts of the defendant Y2 fall under power harassment." The court ruled that obligation exists on the part of the supervisor to pay 1 million yen in compensation for pain and suffering based on a tort, and that obligation to pay the same amount exists on the part of the employing bank based on employer's liability.²⁷ Here, too, it is possible that the supervisor thought the judgment of power harassment was unreasonable, as scolding a subordinate whose work is inadequate is a natural part of a supervisor's duties.

Additionally, in a case involving a restaurant operated by one employer and one worker,²⁸ where the employer, after severely scolding the worker, who made the same mistakes even after being admonished repeatedly and who, immediately after being warned not to turn on the gas with a rice cooker on top of a burner, turned on the gas with a rice cooker on the burner, was sued for liability for damages relating to the worker's suicide by the worker's family. The court mitigated the amount of damages the family sought by 50%, ruling that "there is an aspect whereby simple admonishment was not enough, and severe scolding was unavoidable on occasion." However, the court also noted that it is not hard to imagine that, for the worker, who, by nature, made the same mistake dozens of times even when admonished frequently, repeated strong warnings and scolding would cause an excessive psychological burden and feeling of self-denial. Considering this together with the employer's slapping the worker on two occasions, the court ordered the payment of damages, as the employer's acts "deviated from the scope of instruction and response to a worker and neglected the aforementioned duty of care." It is possible that the employer felt it was impossible not to lose his temper when the worker made the same mistake dozens of times even after being admonished each time, and thus he felt that being made to pay damages, even if only 50% of the damages sought, for the worker's suicide was unreasonable.

Thus, learning is necessary to change the perception of people who may think their own acts "are natural," "unavoidable," or "not of a kind that would bring liability" so that they realize that, depending on the circumstances, their actions could be deemed torts or power harassment.

(2) Judgments differ depending on specific circumstances

As I mentioned in Part I, some claims for damages brought by a victim or the victim's family involve claims made for pain and suffering due to mental anguish. A fair number involve claims for damages relating to the loss of health or life when a victim suffers a mental disorder and ends up committing suicide. In the latter case, particularly when a worker already has a disorder or is a new employee, that worker could suffer greatly from behavior that would not affect a worker who does not have a disorder or is not new employee. Given this, attention must be given to the fact that employers and supervisors are deemed to have the obligation of giving a higher level of consideration to such workers. However, there are also fairly numerous judicial precedents that considered the circumstance that the worker already had a disorder by reducing the amount of damages.²⁹

If a wrongdoer engages in a particular behavior with knowledge that a worker is easily affected but does not take this into account and, as a result, the worker's condition worsens, or the worker subsequently commits suicide, that behavior is considered to be a breach of the wrongdoer's obligation. In a case in which a worker's illness was severe, and the worker had difficulty withstanding a behavior that would not cause suffering to another worker, it is possible that the fact that the wrongdoer/employer neglected to give consideration to this would be judged a breach of obligation and that payment of damages would be ordered. However, whether such a case should be treated as power harassment or not depends on the definition of power harassment.

Additionally, if the same strict instruction is given at a workplace where workers in a team handle operations that could put others' lives in danger and it is deemed that strict instruction of less experienced members and subordinates by the team leader is necessary because mistakes that could harm life must never happen, and at a workplace where no such worries exist, the judgment of whether the instruction is unlawful or not can vary.³⁰

Because it cannot be judged whether a behavior is unlawful or not without taking such detailed and concrete circumstances into account, there is a need to study and learn what constitutes illegal behavior based on the specific circumstances of each workplace. If this is left to a self-initiated study by individuals, it can be anticipated that some people will take no action, and it becomes possible that others will be unable to make correct judgments due to a lack of information. Under such circumstances, even if provisions for civil liability and criminal liability are established, and it is demonstrated to wrongdoers who believe their behaviors are correct that engaging in power harassment can bring legal liability, this will probably not spur them to correct their behavior.

3. The difficulty for victims to demand remedial procedures

Another reason for the difficulty in eradicating power harassment could be that workers subjected to power harassment cannot utilize remedial procedures despite the existence of remedial system and the posting of the aforementioned Recommendation and other materials on MHLW's website.

Wrongdoers who intentionally engage in abuse of power harassment or bullying are unlikely to choose and target workers who would not hesitate to fight back determinedly and take the matter to court if subjected to power harassment or bullying. Even if legal provisions are established, and it is demonstrated that civil liability or criminal liability can be pursued to wrongdoers who repeatedly engage in power harassment or bullying with certainty that the person will not sue and that others will not intervene, getting those wrongdoers to change their behavior will not be easy if the risk of being sued is too small.

Assuming that it is difficult for victims to take wrongdoers to court on their own, the national government must implement separate means for taking action, such as establishing places where victims can seek consultation nearby, etc.

IV. Liability provisions and obligations to develop systems for the prevention and other measures

1. Content of new provisions

As I mentioned in Part II, there are questions concerning how effective the proposals involving raising awareness and guidelines would be. The proposals establishing provisions concerning the civil liability and criminal liability of wrongdoers and claims for damages against employers have the problems discussed in Part III.

Recently established Article 30-2 of the CLPPA states that an employer shall "ensure that the working environments of workers they employ are not harmed by behaviors in the workplace that take place against the backdrop of a relationship in which one party has some form of superiority over the other and that exceed a scope that is necessary and appropriate for the conduct of business" and will bear obligations to develop

systems and implement other measures (hereinafter referred to as “obligations to take measures”).

At the same time that this provision was established, the prohibition of less favorable treatment for the reason of engaging in consultation, etc., pertaining to power harassment was also set forth in the CLPPA Article 32 Para.2 (on this occasion, similar provisions concerning harassment for the reason of sexual harassment, etc., were also set forth [Equal Employment Opportunity Act (EEOA)³¹ Article 11 Para.2; EEOA Article 11-3 Para 2; and of the Child Care and Family Care Leave Act (CCFCLA)³² Article 25 Para 2]). Additionally, provisions on the liability of the national government, employers, and workers concerning power harassment were set forth in the CLPPA Article 30-3; on this occasion, similar provisions concerning harassment for the reason of sexual harassment, etc., were also set forth (EEOA Article 11 Para 2; EEOA Article 11 Para 4; CCFCLA Article 25-2).

The following points should be made concerning these new provisions.

2. Significance of obligations to take measures

Obligations to take measures are not provisions under private law but rather administrative provisions. They are targeted at employers. Provisions for obligations to take measures do not take a form that establishes a civil relationship of rights and obligations, such as the existence or non-existence of liability for damages. It must be remembered that they establish standards of behavior for employers in the form of implementing preventative measures, and do not establish standards that provide grounds for claims in civil suits, etc.³³

In other words, obligations to take measures are actualized in the form of taking administrative measures to ensure the administrative effectiveness of administrative guidance, etc., against employers who violate those obligations. If an employer does not implement a legally prescribed measure, a breach of obligation to take measures are affirmed (even if harassment has not actually occurred) and the administrative guidance, etc., against the employer could be carried out.³⁴

The preparation of provisions for support for labor dispute resolution by the directors of Prefectural Labor Bureaus and mediation by Dispute Adjustment Committees (*Funso Chosei Innkai*) as well as to ensure the fulfillment of obligations to take measures, etc., (e.g., advice, guidance, recommendation, etc.) for labor disputes relating to power harassment is scheduled based on the new provisions.³⁵ Less favorable treatment for the reason of going to the consultation process, etc., was also prohibited in the new provisions (CLPPA Article 30-2).

It is hoped that the national government will utilize the advantages of the means of actualizing labor policy known as “obligations to take measures” and strive to achieve “prevention,” which is the essential aspect of harassment.

With the establishment of provisions for employers’ obligations to take measures concerning power harassment, it is thought that developed guidelines would lead to the clarification of employers’ guidelines, etc., as well as dissemination and education concerning them, the development of systems necessary for appropriate responses to the consultation, and quick and appropriate responses to workplace harassment after it occurs resembling those established in the guidelines on measures concerning sexual harassment that employers should implement in employment management.³⁶

It can be expected that if, as a result of the new provisions, “power harassment” is defined, provisions on the liability of those concerned are set forth, the obligations to take measures for prevention borne by employers are clarified, awareness among concerned persons in workplaces rises, systems for prevention function, the hurdles victims face in demanding remedial procedures are lowered, and administrative guidance is effectively implemented even when harassment does not occur, instances of power harassment will decrease in comparison with the present time.

3. Employers' breaches of obligations to take measures and lawsuits involving claims for damages

It is interpreted that like Article 11 of the EEOA concerning sexual harassment and Article 11-3 of the same law concerning so-called "maternity harassment," Article 30-2 of the CLPPA and other provisions do not have civil effect. Nonetheless, employers' taking of measures for prevention can be taken into consideration when judgments are made about whether or not breaches of Civil Code obligations have occurred. It can also be taken into account when making judgments concerning the employer liability with respect to whether or not reasonable care was exercised in the appointment and supervision of a worker who becomes a wrongdoer. In other words, provisions on obligations to take measures can have an indirect effect on civil claims for damages.³⁷

Already, many employers are implementing such measures as establishing guidelines for severely dealing with wrongdoers in internal rules and providing training for dissemination and education based on the recommendations included in the "Recommendations for Prevention and Resolution of Workplace Power Harassment"³⁸ of March 15, 2012.

In cases in which the employer took those steps, and those steps were effective, it has been considered that there were no breaches in terms of the employer's obligation to adjust (consider) job environments, duty of care, and obligation to care for employee safety and health in a civil lawsuit for damages.³⁹

4. The role of employers

The new provisions obligate employers to spearhead to eliminate power harassment from the workplace by taking specific measures. It is important and quite significant in relation with the reason power harassment has not been eradicated.

First, as I discussed in Part III, it is unlikely that victims will take wrongdoers to court, considering that wrongdoers who intentionally engage in power harassment and bullying typically target weak workers who cannot do so. Therefore, it is more effective to enable victims to consult with services that are more accessible than a court of law, encourage co-workers to support workers who suffer from power harassment, and create ethical workplaces where wrongdoers give up engaging in power harassment or bullying. If employers lead with solid guidelines for eradicating power harassment, encourage workers to contribute to the fulfillment of those guidelines, implement preventative measures that include specifying that disciplinary action will be imposed on wrongdoers, and indicate explicitly that neither wrongdoers themselves nor those who facilitate harassment will be tolerated, the result will be a higher likelihood that wrongdoers will be called out and the possibility that they will correct their behaviors to avoid being subjected to disciplinary action or another disadvantage.

Secondly, as I described in Part III-2, there are cases when people who are identified as wrongdoers see themselves as (A) "relieving the tension by making jokes for a change," (B) "strictly reprimanding people with problematic behaviors to make them reflect on their actions and prevent a recurrence," or (C) "giving strict instruction to shape new or inexperienced people into fully qualified workers" and thereby contributing to the workplace and serving the role of supervisor, manager, or mentor.

Employers must change the cognition of such wrongdoers by pointing out to them the possibility that their actions could be considered torts or power harassment. However, given that it cannot be judged whether an act is illegal or not without taking such detailed and concrete circumstances into account, there is a need to study and learn what constitutes unlawful acts based on the specific circumstances of each workplace when doing so. An effective way of approaching this is for employers to share information throughout the workplace and perform an active role in helping employees deepen their understanding of power harassment, rather than leaving the matter to individuals' self-initiative.

Thirdly, there is the possibility that employers simply highly regard workers who claim (A), (B), or (C),

without looking at their behaviors objectively, and leave them to be. The provisions for obligations to take measures will likely be effective in encouraging employers to rethink this posture.

In other words, employers hire many workers and build an organization for the purpose of business, and demand that people at the lower ranks follow the instructions of those at the top (by going so far as to establish disciplinary actions). They ask new employees and transferred workers who are beginning a job in a new department to strive to become capable of wholly taking their responsibility by receiving instructions and training from workers in leadership positions, managers, supervisors, and mentors. If a worker engages in problematic behavior, they urge the worker to reflect on that behavior by having a supervisor or manager severely reprimand him or her to prevent a recurrence. Supervisors, managers, and workers in leadership positions who serve to provide instruction, training, and reprimands by grasping the employer's intentions have an important presence in terms of maintaining company order and contributing to the company. In addition, it is not unusual to see cases where workers take the initiative to relieve workplace tension with humor demonstrate leadership that brings coworkers together. In fact, there are times when such workers relieve workplace stress with harmless jokes. Moreover, it may be more advantageous for employers to take a relaxed approach than fussing over tiny details.

However, employers must acknowledge that the people who caution, instruct, train, and reprimand are performing the role of a supervisor, manager, or instructor, and employers must also ensure that the behaviors of those people do not go beyond what is appropriate for business and do not cause suffering to victims. Furthermore, while accepting workers who relieve tension with light humor, employers must severely rebuke those who engage in abuse, bullying, or power harassment that goes far beyond light humor. The new provisions demand that employers take measures to create workplaces where all workers can work without experiencing unreasonable suffering.

Fourthly, there is the point that when employers are overly concerned about business success or work efficiency, this can place long working hours and excessive workloads on workers and unbalance them physically and mentally. While indirect, this situation can create a breeding ground for bullying and power harassment. Employers must ensure that workers who become exhausted in a workplace disrupted by long working hours or other factors do not turn to bullying to take out their frustration with others or release stress.⁴⁰ As was stated in the Labor Policy Council's report,⁴¹ improving workplace environments eliminates the factors behind power harassment and is a desirable action for employers to take. The ideal path forward is to effectively reduce mental disorders among workers and resulting suicides by implementing measures to decrease long working hours and excessive stress and, simultaneously, measures to prevent power harassment.

V. Future challenges

1. Specific definition

A pressing challenge for the national government is the establishment of guidelines that provide a specific definition of power harassment; a point that was included in the supplementary resolution of both Houses of the Diet.⁴²

To perform the role identified in Part IV-4, employers who encourage onsite study and learning must personally gain an accurate understanding of power harassment's specific definition and then take thorough steps to convey this definition to workers and prevent power harassment. Their guidelines could present descriptions of criteria drawing a line for determining whether a behavior is (a) "a behavior committed by a person in a superior position at the workplace," is (b) "a behavior that exceeds the scope of necessary and reasonable elements of business operations," and resulted in (c) "deterioration of the working environment of the worker." They could also provide examples of what constitutes a typical case.

From last year's discussions by the Labor Policy Council, it is expected to be confirmed that, as was demanded by employer members, scolding workers who engage in problematic behavior and cautioning

new or clumsy employees who repeatedly make mistakes are, in themselves, actions that supervisors must naturally take in their capacity, and that issuing a severe warning or reprimand when a problematic behavior or mistake causes a serious situation is not illegal so long as a situation lacks balance. What instances will be considered “lacking balance” and what will be considered “behavior that exceeds the scope of necessary and reasonable elements of business operations” will likely be points that attract attention.

It should be noted that within the supplementary resolution⁴³ the “feelings of an average worker” would be the standard when making judgments about power harassment and that consideration would also be given to the “subjective view of the worker.” However, how these points will be reflected in guidelines will also draw attention.

2. Other matters

The following issues must also be urgently addressed in addition to those presented in V-1 above.

The supplementary resolution of both Houses of the Diet⁴⁴ stated that the study to legislate the aforementioned “provisions prohibiting power harassment behaviors that can become grounds for claims for damages” must be considered, including its necessity as well and that, following the adoption of the Convention Concerning the Elimination of Violence and Harassment in the World of Work by the 108th Session of the ILO, the consideration toward the convention’s ratification would be given. In light of this, it is necessary to begin the study of the aforementioned prohibitive provisions in a manner that includes their establishment in law, while at the same time promoting labor-management understanding of power harassment in the workplace by applying the obligations to take measures, confirming how effective this approach is and ascertaining the urgency for implementing further measures, and reconciling these steps with the time required to complete the conceptual development mentioned in Part III-1.

Additionally, measures for preventing business partners’ and customers’ power harassment, malicious complaints, and other behaviors, mentioned in the supplementary resolution must be explored.⁴⁵ Theoretically, power harassment by one’s own employed worker against a business partner, or a student or other person engaged in job-hunting is something that employers can control. However, when it comes to the behaviors of business partners, customers, and other outside person, those behaviors are difficult for employers who employ workers who encounter them to directly control. This is a remaining issue.

This paper is based on an article commissioned by the editorial committee of *The Japanese Journal of Labour Studies* for inclusion in the special feature “Harassment” in its November 2019 issue (vol.61, no.712) with additions and amendments in line with the gist of Japan Labor Issues.

Notes

1. CLPPA is an abbreviation for the Act on Comprehensive Promotion of Labor Policies, Stability of Employment of Workers and Enhancement of Occupational Life.

2. There are instances when a worker who suffers a mental disorder or other condition as a result of power harassment and committed suicide, or the worker’s family, makes a claim for damages based on a tort against the wrongdoer and, simultaneously, makes a claim for damages against the wrongdoer’s employer (company) based on employer’s liability. Among such instances, there are also instances when the worker or worker’s family makes a claim for damages based on a breach of obligation to care for employee safety and health or torts, claiming that there was a breach of obligation to protect workers as an employer (company) of the worker who suffered damage (Fumiko Obata, “Pawa harasumento to rosai hoshō” [Power harassment and workers’ accident compensation], *Horitsu Jiho* 89, no.1 (2017): 72). There are also instances when a worker who experiences mental anguish as a result of power harassment makes a claim for compensation for pain and suffering against the wrongdoer and, simultaneously, makes a claim for damages against the employer (company) of the wrongdoer based on employer’s liability. Among such instances there are also instances when the worker also makes a claim for damages based on breach of obligation to consider (adjust) job environments or torts, claiming that there was a breach of obligation to protect workers on the part of the employer (company) of the worker who suffered damage. For details on the obligation to consider (adjust) job environments and on the relationship between it and the obligation to care for employee safety and health, see Fumiko Obata, “Saitama-shi Kankyo Senta jiken hyoshaku” [Commentary on the *Saitama City Environmental Center* case], *Monthly Jurist*, no.1534 (July 2019): 120. See also, Yuichiro Mizumachi, *Shokai rodo ho* [Labor and employment law], (Tokyo: University of Tokyo Press, 2019), 275–284.

3. “Akarui shokuba oendan,” Ministry of Health, Labour and Welfare, <https://www.no-harassment.mhlw.go.jp/foundation/statistics/> (in Japanese).
4. For categorization of judicial precedents, see the website of “Akarui Shokuba Oendan,” run by MHLW, *supra* note 3, <https://www.no-harassment.mhlw.go.jp/foundation/judicail-precedent/> (in Japanese).
See also Mizumachi, *supra* note 2, 276–284; Yuichiro Mizumachi, *Rodo ho* [Labor Law], 7th ed. (Tokyo: Yuhikaku, 2018), 228–233; Kazuo Sugeno, *Rodo ho* [Labor Law], 11th corrected ed. (Tokyo: Kobundo, 2017), 242–243; Takashi Araki, *Rodo ho* [Labor Law], 3rd ed. (Tokyo: Yuhikaku, 2016), 274–277; Michio Tsuchida, *Rodo keiyaku ho* [Labor Contracts Act], 2nd ed. (Tokyo: Yuhikaku, 2016), 128–131; Fumiko Obata, “Rodo kankei ni okeru jinkaku-ken” [Personal rights in labor relations], in *Rodoho no soten* [Issues in labor law], ed. Michio Tsuchida and Ryuichi Yamakawa, special issue, *Jurist: Issues in jurisprudence series no.7* (March 2014): 18–19; Shinobu Naito, “Pawa harasumento” [Power harassment], ed. Michio Tsuchida and Ryuichi Yamakawa, special issue, *Jurist: Issues in jurisprudence series no.7* (March 2014): 32–33; Yukio Takanaka, “Pawa harasumento” [Power harassment], ed. Masahiko Iwamura, et. al, special issue, *Jurist: Labor precedents for practical procedures selected*, 2nd ed. (October 2018): 224–233; Masato Hara “Pawa harasumento” [What is power harassment? from the perspective of labor law], *Monthly Jurist*, no.1530 (April 2019): 34–39, and Susumu Noda, “Kigyo chitsujo hoji gimu ihan toshiteno harasumento” [Power harassment as a breach of obligation to maintain corporate order], *Horitsu Jiho* 89, no.1 (2017): 66–71.
5. <https://www.mhlw.go.jp/stf/houdou/2r98520000025370.html> (in Japanese).
6. Ministry of Health, Labour and Welfare, *supra* note 3.
7. <https://www.mhlw.go.jp/stf/houdou/0000201255.html> (in Japanese).
8. https://www.mhlw.go.jp/stf/newpage_03620.html (in Japanese).
9. “Supplementary resolutions of the 198th Diet session at a glance,” House of Councillors, The National Diet of Japan, https://www.sangiin.go.jp/japanese/gianjoho/ketsugi/198/futai_ind.html (in Japanese). “Supplementary resolution concerning a bill to revise a part of the Act on the Promotion of Female Participation and Career Advancement in the Workplace,” The House of Representatives, Japan, http://www.shugiin.go.jp/internet/itdb_rhome.nsf/html/rhome/Futai/kourouF4A4EEE1E4CE9333492583E800014D3F.htm (in Japanese).
10. *Supra* note 9, supplementary resolution.
11. Agenda, minutes, materials, etc. of the Employment Environment and Equal Opportunity Subcommittee of Labour Policy Council, https://www.mhlw.go.jp/stf/shingi/shingi-rousei_126989.html (in Japanese).
12. Other examples of cruel bullying include the *Kawasaki City Waterworks Bureau* case in which a worker who was subjected to collective violence that included such expletives as “What the hell is that dirtbag doing here?” and having a cheese knife brandished in front of him during drinking on a company trip later committed suicide (Tokyo High Court (Mar. 25, 2003) 849 *Rohan* 87); the *Seishokai Kitamoto Kyosai Hospital* case in which a worker who was told to “die” during work, made to massage the wrongdoer’s shoulders and clean the wrongdoer’s residence, forced to buy a can of oolong tea (costs almost 100 yen) for 3,000 yen, and subjected to other acts committed suicide (Saitama District Court (Sept. 24, 2004) 883 *Rohan* 38) ; and the *Meiko Advance* case in which a worker who was shouted at with such insults as “What are the hell are you doing, stupid,” “How will you make up for this,” and “You idiot” when he made mistakes and was sometimes hit in the head committed suicide (Nagoya District Court (Jan. 15, 2014) 1096 *Rohan* 76).
13. The *Nippon Doken* case (Tsu District Court (Feb. 19, 2009) 982 *Rohan* 66).
14. The *Windsor Hotels International* case (Tokyo High Court (Feb. 27, 2013) 1072 *Rohan* 5).
15. The *Maritime Self-Defense Force* case (Tokyo High Court (Apr. 23, 2014) 1096 *Rohan* 19).
16. *Supra* note 12: In the *Kawasaki City Waterworks Bureau* case, liability for damages was affirmed in accordance with the State Redress Act based on breach of the city’s obligation to care for employee safety and health. *Supra* note 12: In the *Seishokai Kitamoto Kyosai Hospital* case, it was judged that the wrongdoer bore liability for damages for the victim’s death based on a tort, and that the employer bore liability for damages based on a breach of obligation to care for employee safety and health (however, the amount of damages to be paid by the employer was reduced to half of the wrongdoer’s amount because the death could not be foreseen). *Supra* note 13: In the *Nippon Doken* case, only the employer was the defendant, and liability for damages was affirmed based on breach of obligation to care for employee safety and health as a breach of obligation to prevent power harassment and torts, as the responsible person not only took no action but did not even have awareness of the problem. *Supra* note 14: In the *Windsor Hotels International* case, liability for damages for mental anguish was judged to exist for the supervisors based on torts and for the employer based on employer’s liability. However, some of the supervisors made an apology, and this was taken into account in the amount of compensation for pain and suffering. *Supra* note 15: In the *Maritime Self-Defense Force* case, the Self-Defense Force’s liability for damages was affirmed, as it was judged that there was a violation of the State Redress Act and also a breach of obligation for guidance and supervision for violent acts conducted as instruction. Additionally, it should be noted that, in the *Meiko Advance* case at *supra* note 12, liability for damages was affirmed based on Article 350 of the Companies Act.
17. *Supra* note 5, at the Recommendation.
18. https://www.mhlw.go.jp/stf/shingi/shingi-rousei_126989.html (in Japanese).
19. For consideration and details of judicial precedents, see Fumiko Obata, “Saitama-shi Kankyo Senta jiken hyoshaku” [Commentary on the *Saitama City Environmental Center* case], *Monthly Jurist*, no. 1534 (July 2019):120, and Takanaka, *supra* note 4, 228. For discussion that includes theory, see Naito, *supra* note 4, 32–33.
20. Judicial precedents that fall under the former include the *Reform Business YI Company* case, (Nagoya District Court (Dec. 5,

2017) 2371 *Hanrei Jiho* 121) and the *Tomato Bank* case, (Okayama District Court (Apr. 19, 2012) 1051 *Rohan* 28). Judicial precedents pertaining to the latter include the *Meiko Advance* case, *supra* note 12, the *Nihon Aspect Core* case, (Tokyo High Court (Aug. 13, 2014) 2237 *Rokeisoku* 24), and *Kofu City, Yamanashi Prefecture (Municipal Junior High School Teacher* case, (Kofu District Court (Nov. 13, 2018) 1202 *Rohan* 95).

21. Whether or not an act falls under (A) “relieving the tension by making jokes for a change” can be problematic. Examples in which torts were recognized include the *Arkray Factory* case, (Osaka High Court (Oct. 9, 2013) 1083 *Rohan* 24) and the *Reform Business YI Company* case, *supra* note 20.

Judicial precedents in which the question of whether or not (B) “strictly reprimanding people with problematic behaviors to make them reflect on their actions and prevent recurrence” was excessive was examined include the *Maeda Road Construction* case (Takamatsu High Court (Apr. 23, 2009) 990 *Rohan* 134) and the *Hospital A* case (Fukui District Court (Apr. 22, 2009) 985 *Rohan* 23) as examples in which a supervisor’s behavior was judged to not be a tort or default.

Judicial precedents in which the question of whether or not (C) “giving strict instruction to shape new or inexperienced people into fully qualified workers” was excessive was examined include the *Suntory Holdings* case (Tokyo District Court (Jul. 31, 2014) 1107 *Rohan* 55) and the *Kano Seika* case (Nagoya High Court (Nov. 30, 2017) 1175 *Rohan* 46) as examples in which such behavior was judged to be a breach of obligation to care for employee safety and health and a tort.

22. *Supra* note 21, at the *Arkray Factory* case.

23. *Supra* note 20, at the *Reform Business YI Company* case.

24. The *Sanyo Consumer Electronics* case (Hiroshima High Court, Matsue Branch (May 22, 2009) 987 *Rohan* 29).

25. The *Kansai K’s Denki* case (Ōtsu District Court (May 24, 2018) 2354 *Rokeisoku* 18).

26. The *Akatsuki Sangyo and Others* case (Fukui District Court (Nov. 28, 2014) 1110 *Rohan* 34).

27. *Supra* note 20, at the *Tomato Bank* case.

28. The *A-an* case (Fukuoka High Court (Jan. 18, 2017) 1156 *Rohan* 71). See also the commentary by Fumiko Obata, *Monthly Jurist*, no.1526 (December 2018): 134–137.

29. The *Suntory Holdings* case at *supra* note 21 and the *A-an* case at *supra* note 28.

30. In the *Kenwakai* case (Tokyo District Court (Oct. 15, 2009) 999 *Rohan* 54), it was judged the work instructions of managers in workplaces that are entrusted with life and health should stay within the scope that is required in a medical setting. Takanaka, *supra* 4, 232.

31. EEOA is an abbreviation for the Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment.

32. CCFCLA is an abbreviation for the Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members.

33. Ryuichi Yamakawa discusses sexual harassment in this manner in “Shokuba ni okeru harasumento mondai no tenkai to hoteki kiritsu no doko” [development of workplace harassment problem and legal and regulatory trends], 89-1 *Horitsu Jiho* 64. Mizumachi, *supra* 2, 277; Sugeno, *supra* 4, 262; Mizumachi, *supra* 4, 229; Araki, *supra* 4, 109; Tsuchida, *supra* 4, 755.

34. See Yamakawa, *supra* note 33, 64.

35. Article 30-5 and Article 30-6 of CLPPA. Material 3 of the 16th Employment Environment and Equal Opportunity Subcommittee session of the Labor Policy Council (August 27, 2019), https://www.mhlw.go.jp/stf/newpage_06377.html (in Japanese).

36. See MHLW Notice No. 615 of October 11, 2006, and MHLW Notice 312 of August 2, 2016.

37. The *Reform Business YI Company* case, *supra* note 20, is an example of a case in which it was judged that, although the company had implemented certain measures, it had not paid sufficient attention to appointment and supervision as it ultimately could not prevent power harassment. The same point applies to sexual harassment (Mizumachi, *supra* note 2, 278; Sugeno, *supra* note 4, 262; Mizumachi, *supra* note 4, 229; Tsuchida, *supra* note 4, 755–756).

38. *Supra* note 5, at the Recommendations.

39. Looking at the *Kansai K’s Denki* case, *supra* note 25, as a substantial cause-and-effect relationship between the relevant behavior and the worker’s suicide was not recognized, the wrongdoers and the company were ordered to together pay 1 million yen in compensation for pain and suffering, and a breach of the company’s obligation to consider workplace environments was denied because the company conducted training on preventing power harassment for store managers and others, the company set up a consultation service, and the service was actually being used. The *Saitama City Environmental Center* case (Tokyo High Court (Oct. 26, 2017) 1172 *Rohan* 26) is an example in which the obligation to adjust workplace environments and obligation to care for employee safety and health were judged to have been breached because the employer did nothing to change the situation and did not investigate the facts. See the *Nippon Doken* case, *supra* note 13, for an example in which it was deemed that the obligation to prevent power harassment and obligation to care for employee safety and health had been breached because the employer not only did not address the situation but was not even aware a problem existed. In the *Suntory Holdings* case, *supra* note 21, the employer’s liability was affirmed, but it was deemed that there was insufficient evidence to recognize a breach of obligation to maintain workplace environments or a tort against the plaintiff by the defendant company itself because the defendant company had conducted interviews and urged the wrongdoer to reflect on his behavior.

40. The *Yoka Municipal Hospital Union and Others* case (Hiroshima High Court, Matsue Branch (Mar. 18, 2015) 1118 *Rohan* 25). A relationship in which employers and workers can mutually identify behaviors is important (the same point is made in Masato Hara, et

al, “Zadankai: Genba kara pawahara o kangaeru” [Roundtable discussion: Considering power harassment as seen from where it occurs], *Monthly Jurist*, no.1530 (April 2019):14).

41. *Supra* note 8, at the report.

42. *Supra* note 9, at supplementary resolution.

43. *Supra* note 9, at supplementary resolution.

44. *Supra* note 9, at supplementary resolution.

45. *Supra* note 9, at supplementary resolution.

OBATA Fumiko

Professor, Graduate School of Human and
Environmental Studies, Kyoto University.

