Commentary

Validity of Disciplinary Action Taken Following the Reporting of Racial Harassment

The *Morgan Stanley Japan Group Co., Ltd.* Case
Tokyo District Court (Jun. 27, 2024) 1326 *Rodo Hanrei* 14

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I. Facts[1]

On September 3, 2007, X (plaintiff), who is a South Korean national, concluded a labor contract with Company Y (defendant). On March 13, 2020, X reported to A, an HR representative at Y, that X had been subjected to harassment at the workplace (hereinafter, the "Report"). The facts alleged in the Report included that the remarks directed at X by his superior B (hereinafter, "B's remarks"), constituted verbal harassment on the basis of race or nationality (hereinafter, "racial harassment") and that X had been subjected to discriminatory treatment in promotion decisions. The content of B's remarks reflected B's critical views toward South Korea on various issues involved in the relationship between Japan and South Korea.

Following the Report, the corporate group to which Y belongs established an investigative committee and conducted a grievance investigation, including interviews with relevant parties. On April 30, 2020, C, who was responsible for investigation, and, D of Y's human resources department, notified X of the following: B's behavior was in nature partly unprofessional but was not deemed to constitute harassment; there is no evidence showing that X was subject to unfair treatment or influence based on nationality in terms of promotion; and the investigation on the Report would be closed accordingly.

Prior to the investigation, X had entered into a non-disclosure agreement with Y, agreeing not to disclose the details of the investigation. Nevertheless, over a four-month period From May 12, 2020, onwards, X repeatedly contacted individuals such as X's superiors, members of the investigative committee, other executives, and the group CEO a total of 19 times to protest the investigation results and criticize the company by sending emails or other means (X's conducts subject to disciplinary action).

X received a disciplinary action of reprimand dated September 7, 2020 (hereinafter, "Disciplinary Action").

II. Judgment

In the lawsuit filed by X against Y, the court rendered a judgment as summarized below.

1. The facts alleged in the Report include an allegation that X may have been subject to discrimination in terms of promotion on the basis of nationality. As discrimination against a worker in terms of promotion on the basis of nationality is a criminal act punishable under Article 3 and Article 119, item (i) of the Labor Standards Act (hereinafter referred to as "LSA"), this fact constitutes a reportable fact set forth in Article 2, paragraph (3) of the Whistleblower Protection Act (hereinafter referred to as "WPA"). The alleged facts also include an allegation that X's work environment was damaged due to experiencing verbal racial harassment by B. As the term "work environment" encompasses a broad range of factors and is not explicitly defined, and given the principle of legality of crime and punishment—which requires penal provisions to be clearly defined in order to safeguard individual freedom—a work environment is not included in the scope of "working conditions" prescribed in Article 3 of the LSA, a penal provision, and therefore, the alleged damage to the work environment would not constitute a reportable fact. Nevertheless, racial harassment on the basis of nationality, race, or country of origin is totally impermissible in Japan pursuant to the purport of Article 3 of the LSA, and when the work environment of a worker is damaged due to another worker's behavior that is based on superiority in their relationship with the former and exceeds the scope necessary and reasonable in the course of business, it is considered unlawful on the part of the employer to allow such a situation to persist (Article 30-2, paragraph (1) of the Act on Comprehensively Advancing Labor Measures, and Stabilizing the Employment of Workers, and Enriching Workers' Vocational Lives). In light of the foregoing, it may be necessary to regard damage caused by racial harassment in the workplace as a fact equivalent to a reportable fact under Article 2, paragraph (3) of the WPA (such facts and reportable facts are hereinafter collectively referred to as "reportable facts or equivalent") and examine it by applying the purpose of this Act.

2. If a worker's conduct constitutes grounds for disciplinary action but falls under any of the categories of whistleblowing set forth in the items of Article 3 of the WPA, i.e., whistleblowing to the recipient of services, such conduct is excluded from the scope of grounds for disciplinary action, as Article 5 of that Act prohibits disadvantageous treatment on the grounds of whistleblowing. Even where a worker's conduct constituting grounds for disciplinary action does not fall under any of the items of Article 3 of the said Act, in light of the purport of Article 3 of the LSA—which prohibits discriminatory treatment of workers regarding working conditions on the basis of nationality or race—as well as the purpose of the WPA that ensures compliance with laws and regulations through the protection of whistleblowing disclosure, provided that: (a) the reportable facts or equivalent that the worker communicated through the act in question is true or there are reasonable grounds to believe that they are true; (b) the conduct in question was not performed for any wrongful purpose; and (c) the means or methods used in carrying out the conduct in question are reasonable, the illegality of the act is negated. A disciplinary action imposed on the grounds of such conduct, lacks objectively reasonable grounds and is not found to be appropriate in general societal terms, and therefore, is treated as an abuse of rights and is deemed invalid (Article 15 of the Labor Contracts Act).

Since Article 5 of the WPA prohibits disadvantageous treatment on the grounds of the whistleblowing set forth in the items of Article 3 of the same Act, it is interpreted that disciplinary action may not be imposed against a worker on the grounds that their conduct constitutes whistleblowing. Among X's conducts subject to disciplinary action, the act of communicating his claim of discrimination in terms of promotion on the basis of nationality constitutes a disclosure of a reportable fact made by X to the recipient of his services, and hence, constitutes whistleblowing to the recipient of services in the case where a report is made with no wrongful purpose (the main clause of Article 2, paragraph (1) of WPA) and the whistleblower "considers" that "a reportable fact has occurred" (Article 3, item (i) of WPA), and therefore, imposing disciplinary action against X on the grounds of such conduct is impermissible (Article 5 of WPA). Similarly, with regard to X's conduct of communicating an allegation that their work environment had been damaged by B's remarks that X claims as constituting racial harassment, provided that such conduct was not carried out for any wrongful purpose, it is appropriate to consider that imposing disciplinary action against X on the grounds of such conduct is also impermissible by application of the purpose of Article 5 and Article 3, item (i) of the WPA (for the reasons explained in 1. above). In this case, it cannot be found that X acted for the purpose of obtaining money, attacking a former colleague and B, or having the former colleague transferred, and thus it cannot be said that X had any wrongful purpose. Therefore, it is appropriate to construe that it is impermissible to impose disciplinary action against X on the grounds of X's acts of communicating the above allegations.

As for the other acts subject to disciplinary action, although the reportable facts or equivalent that the worker communicated through the act in question were not found to have been communicated for a wrongful purpose, it was not established that the reportable facts or equivalent that the worker communicated through the act in question were true, nor could it be said that the means or methods used in carrying out the conduct in question were reasonable. Accordingly, the illegality of the act is not negated, and the disciplinary action is valid.

III. Commentary

1. A worker, as a natural consequence of concluding an employment contract, assumes a duty of confidentiality as an ancillary obligation; consequently, a breach of this duty may subject the worker to disciplinary action. Nonetheless, even where a worker's conduct falls under a breach of confidentiality, it may be recognized as legally justified provided that it serves the public interest, such as whistleblowing on corporate misconduct or legal violations. From this perspective, in Japan, a legal doctrine has developed to invalidate disciplinary action taken against a worker on the grounds of their act of internal/external whistleblowing,[2] under certain conditions (see section 3. below). Meanwhile, the WPA was enacted in 2004 (taking effect in 2006), which specifically provides for several types of whistleblowing disclosure that may be protected under the Act (see section 2. below).

In the lawsuit discussed in this article, a key issue in determining the validity of the disciplinary action against X was whether justification existed for X's report regarding B's remarks (which X claims constituted harassment) and the alleged promotion discrimination based on nationality. What uniquely characterizes this case is that the reported misconduct encompasses racial harassment. Apart from a past case in which a worker claimed the illegality of their employer's conduct in the workplace on the basis of nationality or race, such as distributing documents containing hate speech,[3] this lawsuit is probably the first case in which the validity of a disciplinary action imposed by an employer against a worker following the worker's report of such conduct was challenged.

2. A brief overview of the WPA discussed in this case is as follows.[4] The term "whistleblowing disclosure" protected under this Act means a report made by a worker with no wrongful purpose about a reportable fact to an entity predetermined to accept such reports (Article 2, paragraph (1)). Reportable facts are limited to cover only criminal acts and violations of laws that are punishable by criminal penalties (paragraph (3) of that Article), thus clearly defining the scope of whistleblowing disclosure to be protected under the WPA. Harassment that does not amount to a criminal act does not constitute a reportable fact, and is therefore not protected under the WPA.

Disadvantageous treatment of a worker on the grounds of their whistleblowing disclosure that is defined as above may be prohibited (Article 5). However, the requirements for protecting whistleblowing differ depending on where a report is to be made (Article 3). Specifically, when a worker makes an internal report (whistleblowing disclosure to the service recipient), it is sufficient if the worker (the whistleblower) considers that a reportable fact has occurred, or is about to occur (Article 3, item (i)), whereas, in the case of a disclosure to an administrative body or the like, there must be reasonable grounds for such belief, or alternatively the whistleblower must submit a document containing specified information (Article 3, item (ii)); disclosures to any other external entity are subject to even stricter requirements than the former (Article 3, item (iii)). Thus, there is a difference in terms of the requirements for protection because consideration should be given to the potential negative impact on the employer where a report is based on a false allegation.

Because of such extremely limited scope of application of the WPA, there have only been a few cases in which a court invalidated the disadvantageous treatment of a whistleblower by applying this Act.[5]

3. Meanwhile, before the WPA was enacted, a legal doctrine, or general doctrine, had developed based on court rulings to invalidate disciplinary action imposed on a worker for internal/external whistleblowing even when such report constitutes grounds for disciplinary action prescribed in the rules of employment if such act of the worker is justified. In assessing legitimacy in this context, the major criteria has been the truthfulness of the content of the report and the appropriateness or reasonableness of the purpose, means, and method of making the report.[6] Even after the WPA has come into effect, protection under this doctrine is applicable with regard to internal/external whistleblowing that falls outside the scope of protection under that Act. Articles 15 and 16 of the Labor Contract Act establish the framework for determining the validity of disciplinary actions and dismissals; however, their relationship with the WPA has remained somewhat ambiguous. This judgment is particularly noteworthy as it provides a clear framework for understanding this relationship.

4. The judgment of this case is understood as follows: [1] The court constructed a concept of "reportable facts or equivalent," which covers allegations of racial harassment that do not constitute but is equivalent to "reportable facts" defined in the WPA, and established a normative framework to the effect that it is necessary to examine such equivalence to a "reportable fact" by applying the purpose of that Act; [2] Among X's conducts subject to disciplinary action, the court held that the act of communicating a claim of discrimination against X to the service recipient in terms of promotion on the basis of nationality constitutes whistleblowing under Article 3, item (i) of the WPA where such disclosure was not made with any wrongful purpose, and therefore, imposing disciplinary action against X on the grounds of such conduct is impermissible; [3] Similarly, the court held that X's report of racial harassment, where not made for a wrongful purpose, falls within the purport of Article 5 and Article 3, item (i) of that Act and any disciplinary action against X on the grounds of making such report is also impermissible.

As for the holding in [1], the court developed the concept and normative framework mentioned above based on the value judgment that racial harassment in the workplace is impermissible in light of the provisions of Article 3 of the LSA and Article 30-2, paragraph (1) of the Act on Comprehensively Advancing Labor Measures, and Stabilizing the Employment of Workers, and Enriching Workers' Vocational Lives. The judgment of this lawsuit may be assessed as enhancing the effectiveness of protection for internal/external whistleblowing by expanding the scope of its concept of "reportable facts" prescribed under the WPA, while being fully mindful of the association with these legislative provisions.

Regarding holding [2], while it has been rare for courts to grant relief for disadvantageous treatment of a whistleblower by applying Article 3 or Article 5 of the WPA, this case is significant as the first precedent in which a court applied Article 3, item (i) of the Act to deny the validity of a disciplinary action.

With regard to X's report of racial harassment to the service recipient addressed in holding [3], the court held that imposing disciplinary action against X on the ground of making such report is likewise impermissible unless made for a wrongful purpose. This is based on holding [1] which establishes that it is necessary to examine a "reportable fact or equivalent" (including racial harassment) by extending the purport of the WPA; however, an examination of its substance—specifically how the court applied the purport of that Act—reveals that the court's reasoning is in effect equivalent to the direct application of that Act (Article 5 and Article 3, item (i)). In other words, it can be said that the court dealt with the issue not by applying the general doctrine, but by extending the applicable scope of protection under that Act.

Thus, the most notable point of this judgment is that it extended the concept of "reportable facts" under the WPA (holding [2]) and thereby extended the scope of protection under that Act as well (holding

[3]). Nevertheless, as mentioned above, the WPA limits "reportable facts" eligible for protection to cover only certain statutory violations, and it is not intended to provide comprehensive protection for whistleblowing of all facts that may be evaluated as unlawful. Considering that the prior legislative arguments had also adopted a cautious stance about expanding the scope of reportable facts from the standpoint of predictability,[7] the appropriateness of the methodology employed in this judgment from the perspective of protecting whistleblowers warrants further examination.

Furthermore, even assuming that the methodology adopted in this judgment is appropriate, Article 3 of the LSA that is referenced in this judgment is primarily intended to prohibit discriminatory treatment of workers in terms of working conditions on the basis of nationality, creed, or social status. This means that "race" is not strictly included in the causes of discrimination prohibited under that Article, nor does a working environment where workers are subject to harassment fall within the scope of "working conditions." It would also warrant examination whether it is appropriate to rely on that Article as the theoretical basis for establishing the concept of "reportable facts or equivalent" as was done in this judgment.

Notes

1. Beyond the facts discussed in the main text of this article, this case involves facts and issues that serve as preconditions for judging the validity of the disciplinary action in question: the validity of the non-disclosure agreement imposing the obligation of confidentiality on X with regard to the details of the in-house investigation implemented in response to the Report; the validity of the employer's work order requiring X not to disclose the facts alleged in the Report to anyone other than the investigation personnel and the human resources personnel, and the validity of its cautionary guidance requiring X to obey this work order; and the validity of the dismissal of X on the grounds that X did not stop sending emails even after the disciplinary action was taken (validity was recognized for all these matters). This article, however, does not address these facts but summarizes and reviews the judgment on this case with a focus on the issues relating to the facts discussed in the main text of the article.
2. In this article, a worker's act of reporting a company's misconduct or violation of law is in general referred to as a "internal/external whistleblowing," and it is referred to as an "internal report" if a worker's report is not brought outside the company.
3. *Fuji Housing* case, Osaka High Court (Nov. 18, 2021) 1281 *Rodo Hanrei* 58.
4. The English translation of the Whistleblower Protection Act is available on the website provided by the Ministry of Justice below:
https://www.japaneselawtranslation.go.jp/ja/laws/view/5109
Please note that the article numbers cited in this text are those applicable at the time of this case (prior to the amendment in 2025).
5. To the best of my knowledge, there were only two cases in which the disadvantageous treatment of a whistleblower was judged to be in violation of Article 3 or Article 5 of the WPA (both cases fall under Article 3, item (ii)). See also Yumiko Kuwamura, "Kaisei Koekitsuhosha Hogoho no Rodoho jo no Ronten" [Issues of the Amended WPA in the Context of Labor Law], 1552 *Jurist* (2020): 43.
6. *Osaka Izumi Co-operative Society (Whistleblowing)* case, Osaka District Court, Sakai Branch (Jun. 18, 2003) 1136 *Hanrei Times* 265. *Tonami Transportation* case, Toyama District Court (Feb. 23, 2005) 891 *Rodo Hanrei* 12.
7. Consumer Affairs Agency, "Report of the Expert Committee on the Whistleblower Protection System: Toward ensuring security and safety of people's lives by enhancing the effectiveness of the system" (2024), p. 33.

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