

# The Corporate Counselor

- Insights into Japanese Corporate Law -

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## THE DEVIL WEARS PRADA WITH DISCRIMINATING FASHION – AN OVERVIEW OF SEXUAL HARASSMENT CLAIMS IN JAPAN

On May 17, 2013, the UN Office of the High Commissioner for Human Rights urged Japan to adopt legislation that would make sexual harassment and discrimination in the workplace illegal. This recommendation came in response to Ms. Rina Bovrisse's nearly four-year battle with Prada Japan. According to media sources, Ms. Bovrisse sued the company after Prada Japan's CEO David Sesia allegedly demoted or dismissed female staff members whom he deemed visually unappealing. Ms. Bovrisse reportedly objected to this conduct, and was subsequently criticized for her own appearance, offered a demotion to an entry-level sales staff position, and then urged to resign. Instead, Ms. Bovrisse leaked her story to the press and sued Prada Japan.

In October 2012, the Tokyo District Court ruled in favor of Prada Japan, holding that while the company did engage in discriminatory conduct and had removed more than 10 store managers because they were "old, fat, ugly, disgusting or did not have the Prada look," disclosing the company's actions to the local media constituted sufficient reason for punitive dismissal as provided in the company's work rules. Prada Japan subsequently initiated litigation against Ms. Bovrisse for allegedly damaging its image, and Ms. Bovrisse took her case to the United Nations.

The UN Office of the High Commissioner for Human Rights supported Ms. Bovrisse. The United Nations issued a ruling in which it urged Japan to "introduce in its legislation an offence of sexual harassment, in particular in the workplace, which carries sanctions proportionate to the severity of the offence ... [and] ... ensure that victims can lodge complaints without fear of retaliation."

The spotlight is now on Japan for action.

With international pressure focusing on Japan to reexamine its laws and regulations concerning sexual harassment, companies conducting business in Japan should anticipate the possibility of more stringent sexual harassment laws being enacted and current Japanese laws being more aggressively interpreted by the judiciary. Should such changes come to fruition, then companies in Japan may need to undergo a thorough review of their sexual harassment compliance programs. To help cope with these potential changes and the need for further compliance initiatives, it is imperative for companies operating in Japan (or companies that plan to enter the Japanese market) to understand the current regulatory framework in Japan that prohibits sexual harassment in the workplace and the weaknesses of the current regulatory regime.

## Mounting a Sexual Harassment Claim in Japan

There are two fundamental considerations applicable to any sexual harassment claim – whether the subject conduct is recognized as sexually harassing conduct, and whether a remedy exists against such wrongful conduct.

Not all improper sexual conduct equates to sexual harassment in Japan. Notification No. 615 of 2006 issued by Japan's Ministry of Health, Labor and Welfare (the "Equal Employment Guidelines") recognizes two types of sexually harassing conduct: (i) "retaliation-type" sexual harassment, which is conduct that results in unfavorable treatment or retaliation towards the victim (e.g., if a manager demands a sexual relationship with a co-worker and subsequently terminates the co-worker because the worker rejects such relationship), and (ii) "environment-type" sexual harassment, which is conduct that occurs when the work environment of an employee deteriorates because of a colleague's sexual statements or conduct (e.g., if a manager touches a co-worker's body and as a result, the employee's motivation to work decreases).

Despite the recognition of sexually harassing conduct, there are no specific Japanese statutes that provide a private plaintiff with a remedy for sexual harassment. Instead, Japanese law has vested a government agency with the authority to enforce Japanese legislation prohibiting sexual harassment, and private plaintiffs are left to seek redress in Japanese courts by alleging violations of tort law (which is disadvantageous to private plaintiffs in several ways, as discussed below).

**Japanese Legislation.** Article 11 of Japan's Equal Employment Opportunity Law prohibits discrimination based on gender and requires employers in Japan to "establish necessary measures in terms of management to give advice to workers and cope with problems of working, and take other necessary measures so that workers they employ do not suffer any disadvantage in their working conditions by reason of said workers' responses to sexual speech or behavior ... ." In other words, Article 11 imposes an affirmative obligation on an employer in Japan to prevent sexual harassment in the workplace.

The Equal Employment Guidelines prescribes the following steps an employer can take to help meet its obligation to provide a sexual harassment-free workplace: (i) announce the company's policy against sexual harassment (e.g., by detailing such policies in the company's work rules), and inform and educate employees about such policies (e.g., through a company newsletter and/or seminars); (ii) establish internal systems to respond to grievances of sexual harassment (e.g., activate a hotline or retain an outside consultant on an as-needed basis); and (iii) initiate immediate action upon learning of an occurrence of sexual harassment in the workplace.



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Employers who fail to take proactive measures to prevent sexual harassment face the risk of administrative action for non-compliance, such as receiving a corrective order or facing a public announcement of non-compliance by Japan's Ministry of Health, Labor and Welfare.

While Article 11 and the Equal Employment Guidelines provide noteworthy restrictions against sexual harassment, Article 11 has no utility for a private plaintiff. Article 11 was promulgated under a Japanese public law that does not provide a private plaintiff with a cause of action (i.e., enforcement of Article 11 is reserved to the Ministry of Health, Labor and Welfare), and monetary damages are not available for breaches of Article 11. Accordingly, the lofty goals established under Article 11 are left to a Japanese government agency to monitor and enforce, and not to the class of persons whom the legislation was designed to protect.

**Japanese Tort Law.** In the absence of a Japanese statute that directly prohibits sexual harassment and provides a private plaintiff with the right to enforce its provisions by suing for damages, private plaintiffs in Japan frequently frame their sexual harassment claims in terms of Japanese tort law violations and seek compensation under (i) Article 709 of Japan's Civil Code for claims against individuals and employers, and (ii) Articles 415 and 715 of Japan's Civil Code for claims against employers.

The following is a publicly available translation of the foregoing Articles, accompanied by a discussion of the inherent difficulties in successfully pursuing a sexual harassment claim based on Japanese tort law:

- Article 709 provides that a "person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence."
- Article 415 provides that "if an obligor fails to perform consistent with the purpose of its obligation, the obligee shall be entitled to demand damages arising from such failure." In such cases, private plaintiffs often allege that employers breached their obligation to provide safe workplaces to their employees (and Article 11 of Japan's Equal Employment Opportunity Law and the Equal Employment Guidelines are often referenced in such allegations as an example of the employer's failure to provide a safe workplace, but direct reliance on Article 11 is not permissible, as stated above).
- Article 715 provides that a "person who employs others for a certain business shall be liable for damages inflicted on a third party by his/her employees with respect to the execution of that business; provided, however, that this shall not apply if the employer exercised reasonable care in appointing the employees or in supervising the business, or if the damages could not have been avoided even if he/she had exercised reasonable care."

A plaintiff could face an immediate uphill battle winning a sexual harassment claim using Japanese tort law because the

plaintiff would have the burden to prove the occurrence of wrongful acts in contravention of abstract statutory concepts. For example, Civil Code Articles 415 and 709 require a plaintiff to demonstrate that the tortfeasor infringed a "legally protected interest" or obligation; however, Japanese law does not provide a private plaintiff with a direct right to seek relief for sexual harassment. Plaintiffs relying on Articles 415 and 709, therefore, ordinarily allege that the subject conduct violated elusive notions protected under Japanese tort law, such as "the right to the dignity of one's personality" or "an interest in an environment conducive to working," which broad rights render an analysis to a particular sexual harassment claim difficult to predict. On the other hand, while Article 715 is sufficiently broad to include wrongful conduct inflicted during the course of employment, it has a built-in reasonable care and damage avoidance defense that ultimately results in limiting broad reliance on Article 715 since the statute's application will be highly fact specific.

**Japanese Caselaw.** Due to a perceived Japanese cultural preference that parties should settle grievances through informal mechanisms as opposed to formal litigation and a dearth of Japanese licensed lawyers (in comparison to the United States and Europe), there are relatively few reported Japanese sexual harassment cases in comparison to cases reported in the West. This lack of a deep bench of precedents, combined with the perceived reluctance of judges in Japan to issue opinions strongly frowning upon sexual harassment or to render large damage awards, makes it difficult for plaintiffs to assess upfront a sexual harassment claim's likelihood of success or even ascertain whether pursuing a judicial action would be cost effective in the first place.

The Prada decision is a case on point, but not the sole example of a Japanese court's reluctance to strike down sexual harassment in the workplace. In the so-called Kanazawa sexual harassment case (Nagoya High Court, 1996), the court accepted the view that it is not always illegal for a male supervisor to take advantage of his position and engage in sexual behavior against the will of his female subordinates. According to the court, such conduct becomes illegal depending on a number of factors, such as the age of the supervisor and the subordinate, and the marital history of the subordinate.

Japanese courts have rendered verdicts in favor of plaintiffs alleging sexual harassment. However, the damage awards are low and the decisions tightly drawn to the facts. For example, in the so-called Fukuoka sexual harassment case (Fukuoka District Court, 1992), a male editor was accused of spreading rumors about the sexual promiscuity of a female writer. The court ruled in favor of the plaintiff, but the damage award was JPY1,650,000 (far less than the likely legal fees incurred by the plaintiff to pursue the court case). In the so-called Bank of Japan sexual harassment case (Kyoto District Court, 2001), approximately JPY7,000,000 was awarded in damages for mental distress when a female employee was forced to leave the Bank after her boss kissed her, touched her private parts, and relentlessly asked her to go out with him.

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Having an understanding of the prohibitions on sexual

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harassment in the Japanese workplace is not only important for companies conducting business in Japan, it is also helpful for companies outside of Japan who employ or interact with Japanese executives. By understanding the regulatory regime and enforcement process in a Japanese executive's home market, the overseas employer/host can better understand the differences in how the two regimes deal with sexual harassment. This knowledge should help overseas employers/hosts anticipate misunderstandings with Japanese executives so they can proactively provide tailored training and requisite information at the commencement of the work relationship, which should help clear up misunderstandings about what constitutes appropriate conduct in the workplace and avoid costly litigation with disgruntled colleagues.