

SEXUAL HARASSMENT IN JAPAN

Hironobu Tsukamoto
Nagashima Ohno & Tsunematsu NY LLP

I. INTRODUCTION

In recent years, labor law-related compliance issues have become significantly important in Japanese companies. These labor law-related compliance issues include sexual harassment in the workplace. The “Me Too” movement, which originated in the United States, has probably been the catalyst for Japanese companies increasingly retaining outside counsel to investigate sexual harassment complaints.

The purpose of this article is to briefly explain the sexual harassment issues in the workplace in Japan, describe the matters to be addressed in the investigation of those issues, and explain how to treat the perpetrator when the sexual harassment has been found to have occurred.

II. SEXUAL HARASSMENT ISSUES

A. Basic Matters on Sexual Harassment in Japan

1. Regulations Regarding Sexual Harassment

Article 11, Paragraph 1 of the Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment (“Equal Opportunity Act”) provides that employers shall establish the necessary employment management measures to give advice to, and address the problems of, workers, and take any other necessary measures to ensure that their workers are neither disadvantaged in their working conditions because of their responses to sexual harassment in the workplace, nor harmed in the workplace because of the said sexual harassment. Furthermore, in accordance with Paragraph 2 of the said Article, the MHLW issued a guideline (the “MHLW Guideline”).

The MHLW Guideline divides sexual harassment into two categories: (i) the *quid pro quo* type, and (ii) the environment type. The *quid pro quo* type of sexual harassment is one by which an employee suffers a detrimental employment action such as a dismissal, demotion or reduction in salary. The environment type of sexual harassment is a situation in which an employee faces an obstacle to work to the extent that it cannot be ignored, such as when an employee’s exercise of his/her ability incurred a materially negative impact, due to the fact that the working conditions of such employee became unpleasant by a sexual statement or action made at the workplace against such employee’s will.

2. MHLW Guideline and Enforcement of the Equal Opportunity Act

Under the MHLW Guideline, an employer is required to do the following:

- (i) clearly articulate its policy regarding sexual harassment, and educate its employees;
- (ii) establish the necessary framework to provide consultation and to appropriately deal with the situation;
- (iii) quickly and appropriately deal with the sexual harassment in the workplace once the sexual harassment complaint is made; and
- (iv) take measures to protect the privacy of the relevant parties, and announce that an employee should not be disadvantageously treated because such employee consulted with an employer regarding the harassment in the workplace or cooperated with an employer in confirming the underlying facts.

An employer's failure to comply with these requirements can result in it being subject to administrative guidance or admonition,¹ and the name of such employer may be made public.²

B. Risks Associated with Sexual Harassment

1. Legal Risks

A person who is found to have committed sexual harassment will be held liable to the victim employee of such harassment in accordance with Article 709 of the Civil Code³ under general tort theory. In addition, such person may be subject to criminal sanction in accordance with Articles 176⁴ or 177⁵ of the Penal Code.

¹ Article 29 of the Equal Opportunity Act

(1) The Minister of Health, Labor and Welfare may, when he/she finds necessary with regard to the enforcement of this Act, request reports of employers and give employers advice, guidance, and admonitions.

² Article 30 of the Equal Opportunity Act. In the event that an employer is in violation of any of the provisions of Articles 5 to 7, Article 9, paragraphs 1 to 3, Article 11, paragraph 1, Article 12 and Article 13, paragraph 1, the Minister of Health, Labor and Welfare gave admonitions pursuant to the provisions of paragraph 1 of the preceding Article, but the employer has not complied with it, the Minister of Health, Labor and Welfare may make a public announcement of such violation.

³ Article 709 of the Civil Code. 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.

⁴ Article 176 of the Penal Code. A person who, through assault or intimidation, forcibly commits an indecent act upon a male or female of not less than thirteen years of age shall be punished by imprisonment with work for not less than 6 months but not more than 10 years. The same shall apply to a person who commits an indecent act upon a male or female under thirteen years of age.

⁵ Article 177 of the Penal Code. A person who, through assault or intimidation, forcibly commits sexual intercourse, anal sexual intercourse or oral sexual intercourse ("Sexual Intercourse, Etc.") with a person of not less than thirteen years of age commits the crime of Forcible Sexual Intercourse, Etc. and shall be punished by imprisonment

If an employee is found to have committed sexual harassment, an employer will be held vicariously liable for such sexual harassment in accordance with Article 715, Paragraph 1 of the Civil Code.⁶ In addition, an employer may be held liable for such sexual harassment as a breach of its obligation to give the necessary consideration to the victim employee's safety, such as his or her life safety, physical safety, among others.

2. Reputational Risks

In recent years, with the proliferation of the Internet, SNS, and other forms of social media, dissatisfaction or complaints regarding harassment in the workplace can be instantly and broadly disseminated outside of the company.

Society labels companies that allow severe harassment to take place as "black companies," and once such companies' reputations are tarnished or rumors are circulated, it might become difficult for such companies to recruit talented employees. Accordingly, today, a significant reputational risk may arise from sexual harassment in the workplace.

III. KEY MATTERS IN INVESTIGATION OF THE ISSUES

A. Primary Purposes of Investigation

Obviously, the primary purposes of a sexual harassment investigation are (i) to ascertain whether the alleged sexual harassment occurred, and if so, (ii) to determine the appropriate remedial action, and (iii) formulate measures to prevent recurrence of a similar incident.

B. Ascertaining Relevant Information

Under a sexual harassment investigation, the interviews of the victim and the alleged suspect are significantly important, because the sexual harassment is usually perpetrated behind closed doors with no eyewitnesses.

In interviewing the victim, the investigation team should be careful to neither make the victim feel uncomfortable nor cause the victim to suffer secondary emotional damage from the interview. Accordingly, the investigation team should consider

for a definite term of not less than 5 years. The same shall apply to a person who commits Sexual Intercourse, Etc. with a person under thirteen years of age.

⁶ Article 715 of the Civil Code

(1) 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 employee or in supervising the business, or if the damages could not have been avoided even if he/she had exercised reasonable care.

having the investigator who interviews the victim share the same gender as the victim, depending on the nature of the alleged sexual harassment. In addition, the investigation team should try to understand what the victim really wants, for example, whether the victim wants the perpetrator to apologize, wants the company to relocate the perpetrator, or wants the company to dismiss the perpetrator, and the like. Moreover, the investigation team should carefully conduct the investigation, giving strong consideration to privacy protection.

The interview of the alleged suspect should be conducted very carefully and with similarly strong privacy protection considerations as well, as the victim may have made a false accusation.

Occasionally, the alleged suspect may admit the accusation, but often, the suspect contests it. In such a case, the investigation team must carefully assess the accusation made by the victim and the rebuttal made by the alleged suspect, and oftentimes, the investigation team may wish to interview other employees, who may have information about the accusation and the relationship between the victim and the alleged suspect, among other information. Before interviewing the other employees, the investigation team should ascertain whether it is acceptable to the victim to do so, because the victim may not wish other employees to know his/her accusation. The investigation team should proceed with extreme caution in relation to the victim's and alleged suspect's privacy, in the course of conducting its investigation.

C. What an Employer Should be Mindful of

First, it is extremely important for an employer and the investigation team to promptly commence the investigation and proceed diligently once the victim makes a complaint. In some cases in which employers have not done so, they angered victims, which often further complicated the cases. Accordingly, a prompt initial response and reaction is required.

Second, as mentioned above, in view of the nature of the subject matter, the investigation team must be extremely cautious about how to treat the relevant information, particularly in the interests of privacy protection.

Third, after interviewing the relevant employees, including the victim and the alleged suspect, if it is found that the sexual harassment occurred, based on the findings of the investigation, an employer must decide what actions it should take against the perpetrator. For example, an employer may relocate the perpetrator to another department of the company in order to separate the perpetrator from the victim at the workplace.

In addition, the employer must decide what disciplinary action should be taken against the perpetrator. The level of the disciplinary action to be taken depends on the various factors, which will be further discussed in IV below.

The employer must be careful about what disciplinary action he/she will take

against the perpetrator, because if the disciplinary action is excessively light, the victim might file a lawsuit against the employer as well as the perpetrator claiming compensation for damages. Conversely, if the disciplinary action is unduly harsh, the perpetrator might file a lawsuit against the employer, for example, claiming that the disciplinary dismissal is unduly harsh and disproportionate to the perpetrator's actions, and thus, should be held invalid.

D. How to Prevent the Recurrence of a Similar Incident

Once the investigation has been completed and appropriate actions have been taken against the perpetrator, the employer should consider how to heighten awareness of its anti-sexual harassment policy among its employees company-wide. One of the possible ways to do so is to have its employees undergo anti-harassment seminar/training regularly.

E. Whether the Incident Should be Made Public

Since the nature of the incident is something that should be carefully handled by an employer with due care for the privacy of the victim and the perpetrator, an employer generally should not make the incident public.

IV. WHAT SANCTIONS CAN BE IMPOSED ON THE PERPETRATOR

A. Disciplinary Actions

1. General Rules

As mentioned in III (C) above, once the sexual harassment is found to have occurred, the employer must decide what disciplinary action should be taken against the perpetrator.

It should be noted that, in order for an employer to impose disciplinary actions on its employees, an employer must set forth in its Rules of Employment (i) the types of disciplinary actions, and (ii) the grounds for disciplinary actions. It should also be noted that an employer must show that there is a justifiable reason to impose disciplinary action, even if an employee's misconduct seems to fall under a ground for disciplinary actions described in the Rules of Employment on its face. A disciplinary action taken without justifiable reasons will be held invalid as an abuse of disciplinary rights, if challenged before the courts. In this connection, Article 15 of the Labor Contract Act provides as follows:

“[Even] in the event that an employer can impose a disciplinary action on an employee, a disciplinary action shall be treated as an abuse of that right and invalid, where the disciplinary action lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms in light of the nature and situation of the employee's behavior which is subject to the disciplinary action and other circumstances.”

2. Factors to be Considered

In determining whether there are justifiable reasons to impose a disciplinary action on an employee, Japanese courts consider various factors, including but not limited to the following:

- (i) content, degree, wrongfulness, etc. of the misconduct, such as:
 - (a) whether the misconduct was conducted willfully or negligently;
 - (b) how much tangible or intangible damage the victim or the employer suffered from the misconduct;
 - (c) whether or not the damage has been compensated;
- (ii) balance/proportion between the misconduct and the disciplinary action;
 - (a) whether or not the misconduct is significant enough to warrant a disciplinary action;
 - (b) whether or not the disciplinary action to be taken this time is consistent with or proportionate to the disciplinary actions imposed in the past for the misconduct of the similar nature;
- (iii) due process;
 - (a) whether or not the employee to be disciplined was granted an opportunity to be heard;
 - (b) whether or not the procedures for the disciplinary actions set forth by the Rules of Employment or other company policies were followed;
- (iv) other factors;
 - (a) whether or not the employee who committed the misconduct has sincere remorse for what he/she has done;
 - (b) whether or not the employee has any history of misconduct and disciplinary actions in the past; and
 - (c) whether or not the victim wants a harsh sanction.

Once the investigation is completed and the sexual harassment is found to have occurred, the employer should carefully analyze the relevant facts, considering the factors mentioned above, to determine what disciplinary action should be imposed on the perpetrator.

3. Typical Disciplinary Actions in Japan

Typical disciplinary actions in Japan include:

- (i) warning;
- (ii) wage reduction;
- (iii) suspension from work;

- (iv) demotion; and
- (v) disciplinary dismissal.

The disciplinary dismissal is the most severe disciplinary action, and because of that, if the employer disciplinarily dismisses the perpetrator, the perpetrator might challenge the validity of the disciplinary dismissal, by arguing that the disciplinary dismissal is disproportionately harsh.

B. Ordinary Dismissal

As an alternative to the disciplinary action, the employer may wish to choose ordinary dismissal. However, it should be noted that there is no at-will employment in Japan, therefore, an employer must show that there is a justifiable ground to ordinarily dismiss its employees.

An ordinary dismissal without justifiable reasons will be held invalid as an abuse of dismissal right, if challenged before the courts. In this regard, Article 16 of the Labor Contract Act provides as follows:

“If a dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, it is treated as an abuse of rights and is invalid.” Accordingly, in ordinarily dismissing the perpetrator, the employer must carefully analyze whether there is an objectively reasonable ground to do so.

C. Voluntary Resignation by the Perpetrator

Depending on the nature and severity of the harassment, it might be difficult for the employer to disciplinarily or ordinarily dismiss the perpetrator. In such a case, the employer can choose to impose a less harsh disciplinary action, such as a warning or wage reduction. However, the employer may think it is not practically feasible to allow the perpetrator to continue working in the workplace for some other reasons. In such a case, it may be a viable option to solicit the perpetrator to voluntarily resign from the employer.

V. CONCLUSION

As mentioned above, sexual harassment can present legal risks as well as reputational risks, and dissatisfaction or complaints regarding harassment in the workplace can be instantly and broadly disseminated outside of the company. If the companies are labeled as “black companies,” it might become difficult for such companies to recruit talented employees.

Companies operating in Japan should be mindful of such risks, and should establish robust policies regarding sexual harassment. If, unfortunately, a sexual harassment incident were to be reported, companies should immediately and carefully address such incident, to ensure that a similar incident will not occur and to protect the employees, which will ultimately result in protecting the companies themselves.

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