With respect to this matter, this decision avoided clearly stating a general opinion on whether or not Article 31 applies to administrative procedures, or, assuming that it does, what kind of administrative procedures it applies to. Even assuming that Article 31 applies, or applies with modifications, to administrative procedures, the court's decision goes no further than stating that advance procedures are not always necessary. It appears that this is because the diversity of administrative procedures means it is not realistic to uniformly demand advance procedures, thereby making it difficult to determine their necessity on a general basis.

There were also supplementary opinios: that of Justice Kaibe maintained that in principle, advance procedures should also be assured for administrative procedures, and that of Justice Sonobe, although recognizing the importance of advance procedures, stated that their need is a matter of legislative policy.

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2. Law of Property and Obligations

A case concerning the employer's duty to prohibit sexual harassment.

Decision by the Fukuoka District Court on April 15, 1992. Case No. (*wa*) 1872 of 1989. 1426 *Hanrei Jihō* 49.

[Reference: Civil Code, Articles 709 and 715]

[Facts]

X, a single famale worker was employed as a part-time worker in December 1985 by a publishing company. The next year she became a full-time worker and engaged in gathering information, editing, and so on. Because of the quality of her work she was steadily

given greater responsibility. Y, an editor of the company, was not as capable, and little by little his responsibilities were taken over by X, so he became jealous of her. Y talked about X's private behavior in an insulting manner, saying things like "X has frequent relationships with men," and "X is acting immorally with clients." This continued for two years. Therefore, the relation between X and Y deteriorated and X asked the managing director and other managers for assistance. They considered this problem to be personal dispute, and did not make a sufficient response. Furthermore, the managing director said that he would impose sanctions on both X and Y, if they could not settle their differences. Indeed, he recommended to X that she resign from the company, and so X reluctantly did so. On the other hand, Y was suspended from work for 3 days and his salary was reduced by 100,000 yen. X sued Y for damages based on tort by reason of sexual harassment, and her former employer for damages based on the doctorine of respondeat superior as prescribed in Article 715 of the Civil Code.

[Opinions of the Court]

Claim allowed.

Y circulated rumors concerning X's private sex life and damaged her social reputation in office and among clients. This is an injury to X's personal rights. Moreover, Y consequently caused a deterioration of her employment conditions and brought about her unavoidable resignation, an outcome he could have reasonably foreseen. Although X herself has some responsibility of the worsening of her employment conditions, in the light of the status of carrier women in modern society and the views concerning female workers held by management, which is almost exclusively comprised of men in this case, Y's actions are tortious.

Y acted as X's superior and his conduct was performed within the scope of his duties or in relation to them. Under the doctorine of respondeat superior as prescribed in Article 715 of the Civil Code, the publishing company, as Y's employer, is liable for acts of sexual harassment committed by Y.

Employers have a duty to provide conditions in the workplace

for avoiding circumstances in which the dignity of the employees as human beings is not respected or present a serious obstacle to the proper performance of responsibilities. The managing director and other managers of the publishing company did not properly understand the conflict between X and Y, and did not respond in an appropriate manner. This is a default of duty. Furthermore, although employers treat men and women equally in matters relating to employment under the Constitution and other related legislation, the management of the publishing company adjusted conditions in the workplace mainly at the expense of X. This constitutes a tort. Therefore, the company is liable under the doctorine of respondeat superior in relation to conduct of the managing director and other managers.

Accordingly, the publishing company and Y must pay 1.5 million yen in damages to X.

[Comment]

1. Since the 1980's, the term "sexual harassment" has been well known in Japan. In this case, X could have made a claim on the grounds of defamation, but instead, X used the argument of sexual harassment. As a result, much attention was paid to this case by the media.

2. There have been only a few cases concerning sexual harassment. One early sexual harassment case concerned improper dismissal (decision by the Nagano District Court on March 24, 1970). In that case, the driver of a sightseeing bus forced a female tour guide to have sexual relations with him and he was dismissed because of his immoral conduct. The court decided that this dismissal was proper, as the driver lowered the moral standards of the workplace and disgraced his company. This case, however, did not deal directly with sexual harassment. The conflict was between the bus driver and his company as to whether his conduct harmed the company. The first true sexual harassment case was decided on December 20, 1990 (decision by the Numazu Branch of Shizuoka District Court). In this case a male manager kissed a female subordinate without her consent and conducted other acts of sexual

harassment including attempting to take her to a hotel. This case is the first case that examined sexual harassment in detail and awarded damages.

3. According to arguments in the United States, sexual harassment cases can be classified into two types: "quid pro quo" and "hostile environment." This classification has also been adopted in Japan.

Quid pro quo harassment occurs when an employee is tempted with some tangible economic job benefit in exchange for acquiescence to a sexual request or is threatened with tangible economic damage for not acquiescing. Early sexual harassment cases were usually of this type. In Japan, cases prior to the present case were within this category.

Hostile environment harassment does not involve a direct economic effect on the employee's job. Instead, it is characterized by inappropriate sexual conduct that alters the victim's employment conditions and creates an offensive work environment. The present case falls within this category.

This classification, however, does not serve to bring about any practical effect. This is because both types of case are settled by the same legislative provision, i.e., Article 709 of the Civil Code. Nevertheless, this classification is useful to understanding sexual harassment more properly.

4. This is the first case concerning an "employer's duty" to prevent sexual harassment. In such cases the victim usually sues the wrongdoer, but sometimes also sues the employer. In Japan, such suits involve Article 715 of the Civil Code. By Article 715, an employer is liable for sexual harassment committed by an employee in cases where the employee acted in violation of his obligations in performing his work duties, but the employer is exempted from liability when it can be shown that the employer fulfilled its obligations in choosing and supervising the employee. Traditionally, the court has interpreted this requirement loosely, and has rarely allowed the emplyer's exemption. For the most part, an employer is automatically liable for sexual harassment committed by employees.

In this case, the court also states that the employer has a duty

to maintain proper conditions in the workplace. This means that the employer has the duty to prohibit sexual harassment. As a result, the employer may be liable for negligence if an employer in a management position commits sexual harassment in the workplace. This also means that the employer may have wide-ranging obligations to maintain conditions in the workplace. The extent of these obligations is uncertain, so there are fears that employers may bear liability for any unexpected, peculiar event. Some writers worry that such an uncertain obligation forces the employer to intervene in employees' personal relations. Others argue that the employer has this duty based on the employment contract. If so, this duty is equal to a duty to maintain a safe work environment, an implied duty of the employer.

5. According to one report, there were 373 cases of consultation concerining sexual harassment in 1990, and most of them resulted in the resignation of the person making the consultation (Labor Economic Bureau of Tokyo Metropolitan Government, 1990). In an other report, 58 percent of the women answering the survey had experienced some kind of sexual harassment at work. Surprisingly, 70 percent of the men witnessed some kind of sexual harassment. Among the women 14.6 percent eventually resignated from their companies (survey by "*Nikkei Women Magazine*," March 1990). On the other hand, 87 percent of wrongdoers were company supervisors and 5.7 percent were supervisors of affiliated companies (survey by the Association for Consideration of Sexual Harassment in the Workplace).

In Japan, legal mechanisms to settle disputes concerning sexual harassment are insufficient. Although there is an Equal Employment Opportunity Act, it provides only the duty to strive to maintain equal treatment of men and women. There is no sanction for breaches of this duty. The remedies available to victims of harassment are limited to those under the Civil Code, which allows protection of one's working position and tort liability.

Most sexual harassment cases in Japan involve tort liability. In Japan, most victims sue for tort liability rather than for protection of their working positions. Unlike in the United States, Japanese

supervisors usually do not have the right to dismiss their subordinates. Therefore, their harassment theoretically does not come within quid pro quo harassment, but rather, hostile environment. However, supervisors usually have considerable power to control their subordinates. Furthermore, there is often an atmosphere in Japanese companies that the people causing disputes are excluded and suffer disadvantage. In the end, the victim of harassment reluctantly leaves the company. Thus, victims of harassment usually do not sue for protection of their working positions. Instead, they sue for the tort liability of the wrongdoer and the company. This is a charactristic of Japanese sexual harassment cases.

The sexual harassment problem has two faces. One concerns sex discrimination, and the other concerns sexual freedom. In Japan, unlike the United States, sexual harassment has been discussed concerning sexual freedom rather than sex discrimination. In the United States, sex discrimination seems to be discussed under the influence of race discrimination. Essentially, sexual harassment is concerned more with freedom than equality. Equality for women has long been a topic of debate in Japan, and the growth of the female consciousness concering discrimination is related to the female consciousness concerning sexual freedom. Both are ultimately concerned with human dignity, and thus, sexual harassment also concerns human dignity, and is not limited to female victims. Sexual harassment works on gender, causes the victim severe physical effects, and disrupts the victim's life. It typically occurs in employment relations, but can occur elsewhere. It is effective to impose on employers the duty to maintain a safe work environment. This duty involves the obligation to prohibit sexual harassment. By fulfilling this duty, employers can protect those employees in subordinate positions.

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