

October 7, 2021

In this issue, we provide a summary of a recent court decision on a case involving a transgender person and some insights into the handling of harassment against LGBT employees. Currently, there is no specific legislation in Japan that addresses issues related to LGBT in the workplace, but there is increased attention on the topic.

Lawsuit Involving Transgender's Right in the Workplace

On May 27, 2021, the Tokyo High Court rendered a decision in a lawsuit brought by a transgender employee working at the Ministry of Economy, Trade and Industry (METI).

The plaintiff's biological gender was male, but the plaintiff's self-acknowledged gender was female, and the plaintiff had been diagnosed with gender identity disorder by a medical specialist. As the plaintiff had not received gender reassignment surgery, the plaintiff's gender recorded in the family register (where personal information and family relationships of all Japanese nationals are registered) had not been changed from male to female.

The plaintiff had submitted a written request to the employer stating that in order to work as a woman, the plaintiff wished to be treated as follows.

- Allowed to work with women's clothes and hairstyle.
- Allowed to use women's resting areas and bathrooms.
- The name and gender used by the employer for internal purposes to be changed to female.

The plaintiff's request also stated that, under guidelines formulated by medical experts, the experience of living with the desired gender was required for undergoing gender reassignment surgery, and that the plaintiff was planning to undergo gender reassignment surgery in the near future.

The employer allowed the employee to work with women's clothes and hairstyle, and to

use women's bathrooms that were two or more stories away from the floor where the employee's office was located. The employer did not initially allow the use of a female's name, but allowed its use after the plaintiff's name on the family register was officially changed.

The plaintiff subsequently suffered depression and took leave of absence for nearly one year.

In the lawsuit brought before the Tokyo District Court, the plaintiff argued that restrictions on the use of bathrooms inevitably cause a transgender person to feel that their self-acknowledged gender is denied. For this reason, the plaintiff contended, in the situation where an individual's gender has been changed to the self-acknowledged gender in a social context, in principle, the individual should be allowed to use the bathroom that is appropriate for the self-acknowledged gender. It was therefore illegal for METI to restrict the plaintiff's use of women's bathrooms four years after the plaintiff began working as a woman, the plaintiff maintained.

METI defended its position as follows. The plaintiff's colleagues were uncomfortable with the situation where the plaintiff was using women's bathrooms. In order to reduce the risk of trouble with other employees, it was reasonable and lawful to instruct the plaintiff to use bathrooms that were two stories away.

The case also involved a dispute over whether a superior's comments constituted harassment and whether damages for pain and suffering should be awarded.

In Japan, there are no specific laws stipulating the treatment (including the use of bathrooms) of transgender persons. While the government has taken some action to promote understanding of diversity of sexual orientations and gender identities, legislation relating to these issues has not been enacted.

In addition to considering these circumstances in Japan, the Tokyo District Court took into consideration laws and guidelines of other countries concerning this issue, and determined that METI's restriction on the use of women's bathrooms was illegal.

The Tokyo District Court also found that it was illegal for the superior to tell the plaintiff that the plaintiff should "go back to being a man" if it takes some time to undergo surgery.

As a result, the Tokyo District Court ordered the employer to pay 1.2 million JPY in total as compensation for mental suffering for the restriction on the use of bathrooms and the superior's statement.

On appeal, the Tokyo High Court did not find that the restriction of use of bathrooms was illegal, but determined that the superior's statement was illegal and awarded reduced damages for pain and suffering.

Recent Trends Regarding Sexual Minorities

In Japan, there is some increased awareness in creating a work environment that is comfortable for all employees, including those who are sexual minorities such as the plaintiff in the above case.

In March 2020, the Ministry of Health, Labour and Welfare published a report on the results of a survey of corporate initiatives regarding LGBT employees. The report mentioned some companies were taking steps, such as prohibiting discrimination based on sexual orientation in the work rules, conducting training on LGBT issues, and setting up a consulting system for LGBT employees, as they consider their treatment of LGBT employees.

In addition, in the guidelines on power harassment that came into effect on June 1, 2020, the Ministry of Health, Labour and Welfare clearly stated that abusive words or conduct against another employee related to the person's sexual orientation or gender identity are examples of power harassment if made in the context of a dominant relationship in the workplace.

Measures Addressing Harassment

The appropriate handling of various types of harassment that disrupt the working environment is very important. Companies are required to take steps to prevent sexual harassment, power harassment, and so-called maternity harassment (harassment related to pregnancy, childcare leave, family care leave, etc.) such as by adopting rules prohibiting harassment and establishing consulting systems for employees to use.

While there are currently no direct requirements for companies to take similar action

regarding harassment against sexual minorities, businesses should be alert to the issue. It would be desirable to have a system that also addresses such harassment so that appropriate action can be taken in case a specific incident arises.

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