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AMERICAN WOMEN FACE DISCRIMINATION IN SEEKING EMPLOYMENT WITH AND WORKING FOR JAPANESE COMPANIES OPERATING IN THE UNITED STATES

PERCY R. LUNEY, JR.*

Disparaging comments by Japanese political leaders about racial minorities, particularly black Americans, and the use by Japanese companies of "black sambo" images to market products, have drawn attention to the employment practices of Japanese companies operating in the United States.¹ Recent publicity about Japanese companies that have been charged with national origin, racial and sexual discrimination has only increased the sensitivity of Americans to all issues concerning Japan. The expanding role of Japanese companies in the United States and world economy compels careful analysis of Japanese racial and sexual attitudes.

Japanese acquisitions of American real estate and corporations have occurred at an increasing rate over the last three years. Japanese banks and life insurance companies dominate bond markets throughout the world. More important for the U.S. worker, Japanese companies are opening manufacturing facilities throughout the United States and employing increasing numbers of Americans. In 1988, Toyota Motor Corporation opened its first wholly owned United States automobile production plant in Georgetown, Kentucky. Toyota is the fourth Japanese automobile manufacturer to open its own facilities in the United States following Honda Motor Corporation (Ohio), Nissan Motor Company (Tennessee), and Mazda Motor Corporation (Michigan). Toyota and General Motors Corporation operate a joint venture manufacturing facility in Fremont, California; Mitsubishi and Chrysler have just opened a joint venture manufacturing facility in Illinois. These Japanese automobile companies or affiliated companies have built or bought United States manufacturing facilities in steel, electronics, and semiconductors.² In addition to manufacturing companies, the United States is now exper-

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1. *Prejudice and Black Sambo*, TIME Aug. 15, 1988 at 25.

2. Japanese companies have purchased substantial stakes in Calmat (Cement Division) and United States Gypsum. Lewis, *Japanese Takeout*, NEW REPUBLIC Oct. 3, 1988, at 19. Affiliated

encing a major influx of Japanese consumer product and service industry companies.³

More Japanese companies are moving their production facilities to the United States as the strong yen makes the price of products produced in Japan less competitive in the international marketplace. By producing their products in the United States, Japanese companies avoid an unfavorable yen-dollar exchange rate and United States import restrictions. Japanese companies recently opening operations in the United States include Kyowa America Corporation (plastic car parts and consumer electronics), Amano American Manufacturing Inc. (parking meters and time clocks); Recruit USA, Inc. (publishing and telecommunications); CST Communications Co. (investment company); Persona Inc. (temporary employment firm servicing Japanese businesses in the Los Angeles area); and Silver-Reed, Inc. (electric typewriters).⁴ In 1988, Kao Corporation acquired Andrew Jergens Company (hand lotion maker); Shiseido Company (Cosmetics) bought Zotos International, Inc. (hair wave products); Nichirei Corporation (frozen foods) purchased Sea Watch Company (seafood-processing); and Otsuka Pharmaceutical Company, acquired Pharmarite Corporation (health foods and health-care products).⁵ These Japanese companies are "exploiting the yen's strength and buying U.S. companies and building production facilities at prices that become cheaper each time the dollar weakens."⁶ Acquired U.S. companies provide instant name brand recognition and managerial expertise in the U.S. marketplace.⁷ Having a goal of expanding market share rather than

companies include other companies in a corporate group or conglomerate with mutual stock ownership.

3. See generally C. Prestowitz, *TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD*. (1988). "In 1987, five of Japan's largest U.S. acquisitions and investments were in service firms. They include: Westin Hotels and Resorts (\$1.5 billion); Shearson Lehman Hutton (\$538 million); Bank-America Corporation (\$350 million); Paine Webber Group, Inc. (\$300 million), and Joseph Home Co. (\$150 million)." Forsyth, *Japan's Invincible Invasion*, *JAPAN TIMES* Oct. 29, 1988, at 10. There is a strong tendency for Japanese manufacturing firms to buy goods and services from other Japanese companies whenever possible. When Marubeni moved employees from New York to Chicago, it used Nippon Express for the project. Prestowitz, at 182. When Bridgestone Tire Company (Yokohama, Japan) opened a plant in Tennessee, it purchased workers' compensation insurance from Yasuda Fire and Marine Insurance Company. *Id.*

4. Forsyth, *supra* note 3, at 10. Approximately 30 small Japanese companies opened offices and manufacturing facilities in Los Angeles in 1987. *Id.*

5. *Japan Brings Its Packaged Goods to the U.S.*, *Wall St. J.* (Jan. 17, 1989) B1, col. 3. For the last three years Kao Corporation has operated a California product testing facility where it is adapting its product line to American consumers. *Id.*

6. *Id.*

7. *Id.* Nissan Food Products Company (dry soup company) and Shiseido Corporation tried to enter the United States market place on their own initiative and each struggled for more than 10 years trying to establish product name recognition and to gain a market share. *Id.* The strength of the yen puts Japanese companies in a position where it is more effective and less expensive to buy name brand recognition and marketshare in the United States.

profit return to stockholders makes these companies formidable competitors.

With the growth of the Japanese presence in the United States manufacturing and service industries, Americans are concerned about whether these new Japanese companies plan to give Americans an equal opportunity to compete for jobs and contracts to supply goods and services.⁸ Are Japanese companies going to hire Americans for low-skilled, low-wage positions and continue to employ Japanese nationals for higher paid, more skilled positions? A growing fear exists among many Americans over mounting evidence that increased Japanese investment is accompanied by Japanese discriminatory employment and contracting practices.

This paper examines the employment relationship between American women and Japanese companies operating in the United States. Part I explores Japanese attitudes toward women. Part II describes Japanese attitudes towards non-Japanese. Part III outlines applicable laws prohibiting racial and sexual discriminatory employment practices by Japanese companies operating in the United States. Part IV discusses the past application of these fair employment and civil rights laws to Japanese companies. Finally, Part V speculates on future activities by Japanese companies operating in the United States and makes recommendations for future courses of action by these Japanese companies, American women, and Congress.

I. JAPANESE ATTITUDES TOWARD WOMEN

The recent death of the Japanese Emperor highlighted a long established practice of sexual discrimination in Japan. In most Imperial family formal ceremonies, women assume a secondary or subservient position.⁹ Professor Mikiyo Kano, a Japanese historian, describes this practice as "a performance of patriarch, or male supremacy, and it reinforced in the minds of ordinary people the notion that women should come second to men in the family and elsewhere in proper etiquette, even in ordinary society."¹⁰ Sexual discrimination in the Emperor system lim-

8. Japanese companies are building most of their United States facilities in areas with very low non-white populations. These companies give little or no business to black banks, insurance companies and real estate firms. Black businessmen accuse Japanese companies of a reluctance bordering on outright refusal to buy services and products from them. Japanese companies award very few dealerships and franchises to black Americans. They do not recruit executive employees from historically black college and university campuses. Lionel C. Barrow, Jr., *The Japanese, Crisis* (April 1988) pages 16-21.

9. Issobe, *Glorification of Emperor Draws Criticism From Women*, *The Japan Times Weekly*, (Dec. 10 1988) at 3, col. 1 (overseas ed.). Following Shinto tradition, only male members of the Imperial family can attend one of the Emperor succession ceremonies. *Id.*

10. *Id.*

its succession to the throne to the Imperial male lineage.¹¹ Male succession to the Imperial throne only became law approximately 100 years ago in the Meiji Era.¹² At the same time, the Japanese Government instituted the "ie" or family system which required that family head status and property passed from father to the first son. Women in a family were expected to follow orders from the male family head.¹³ "Although the 'ie' system was dissolved under the Civil Law reforms after World War II, the custom of male supremacy has remained"¹⁴ despite Article 14 of the 1947 Constitution which provides: "All the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status, or family origin."

The position of women in any society reflects the attitudes of men toward them.¹⁵ From birth in Japan, male children are trained to be "otokorashii" (manly; masculine) and female children are trained to be "onnarashii" (womanly, feminine).¹⁶ This training applies to demeanor, activities, education, interests and preferences.¹⁷ "[A]ny Japanese can predict with reasonable certainty that the speech forms used, seating arrangements, and style of interaction all will demonstrate the superiority of the male and the subordinate status of the female."¹⁸ There is a strong majority belief in Japan that sexual equality could destroy the family unit by inducing destructive competition between the sexes.¹⁹ There would be more single parent households, juvenile delinquency would increase, and accompanying social ills would emerge.²⁰ Women who cannot be categorized easily as either present or future wives or mothers may be some-

11. *Id.*

12. *Id.* Arguably, this current Imperial House Law violates the guarantee of equality between men and women found in the Constitution of Japan. Prior to the Meiji Era, eight women had sat on the Japanese throne, the last one being from 1762-71. *Id.*

Under the Civil Code of 1896, adopted in the Meiji Era, the wife occupied an inferior position. "Her legal capacity was restricted to almost the same degree as that of a 'feeble-minded' person or a 'spendthrift.'" Without her husband's consent, she could not borrow money, guarantee another person's obligations, sue, make or receive a gift, or enter an employment contract"; she could only make contracts for daily home matters as the agent of her husband. Hideo Tanaka, *Legal Equality Among Family Members in Japan - The Impact of the Japanese-Constitution of 1946 on the Traditional Family System*, 53 S. CAL. L. REV. 611, 624 (1980).

13. *Id.* "In the Confucian view it was both natural and virtuous that a woman throughout the course of her life obey three men in turn: her father in her youth, her husband in her maturity, and her son, as the head of her household in her old age." Smith, *Gender Inequity in Contemporary Japan*, 13 J. JAPANESE STUDIES 1, 6 (1987).

14. Issobe, *supra* note 9.

15. Smith, *supra* note 13 at 21-22.

16. *Id.* at 3.

17. *Id.*

18. *Id.* at 4.

19. *Id.* at 25.

20. *Id.*

thing of a threat to Japanese men.²¹

Using data gathered from government surveys, Professor Masako Kamiya from the Faculty of Law at Hokkaido University constructed the typical life pattern for a Japanese woman:

... A Japanese woman, after nine years of compulsory education and three years of high school, is likely to become employed. The chances of her attending a university or college are one in three, and her major would likely be in the humanities. As she is not expected to work for long, her job tends to be auxiliary or menial rather than managerial, and she has little chance of promotion. She earns considerably less than a man and contributes little to family income. By twenty-six, she is probably married and about to have her first child. She may have her second child within three years but plans for no more thereafter. She has given up her job either on marriage or on her first pregnancy.

Even at home, the woman remains in a supporting role. Housewives are given the tasks of daily and routine management but not the authority to make critical decisions within the household. Decisions on buying expensive items, like houses are made with the consent of, if not by, the husband, in spite of the prevailing myth that Japanese women rule in their homes.

By forty, she probably returned to the labor market, most likely as a part-time worker without any special skills. Her significance as a worker is overshadowed by her role as a wife and mother. She lives to be eighty years of age and spends the last eight years widowed.²²

When women enter the labor market they are usually on par with their male counterparts. Once women stop working for marriage or childbirth, they lose their seniority and status as "regular" or "permanent" employees.²³ "When they return to the labor force, they do so without seniority and as "temporary" or "part-time" workers, with lower wages and less employment security than regular employees and few, if any, fringe benefits."²⁴ The part-time or temporary employees may work full time with the same employer indefinitely.

In a recent book, Professor Frank Upham explains the economic justification for the "part time" or "temporary" worker in Japanese society. His conclusions are sobering:

It does not require sophisticated economic analysis to speculate on the

21. *Id.* at 20 citing an interview of Angela Carter in Ronald Bell, ed., *THE JAPANESE EXPERIENCE* 31 (1973).

22. Kamiya, *Women in Japan*, 20 U.B.C. L. Rev. 447, 452-453 (1986). "The 1970s and '80s have seen references in the media (Japanese) to the first women in various fields, which indicates both that women are actively improving their status, and also that these cases are exceptional enough to be newsworthy." *Id.* at 451.

23. F.R. Upham, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 126 (1987).

24. *Id.*

role these women are playing in Japan's economy. As the service sector continues to expand more rapidly than the rest of the Japanese economy, particularly the banking, insurance, and retailing sectors where women have traditionally been heavily represented, the demand for skilled and semi-skilled female clerical workers will remain substantial despite the effects of office automation. If Japanese companies can fill these positions with married women, costs can be minimized and efficiency enhanced. Because these women, despite doing the same work as their male colleagues, have a different employment status - temporary or part-time versus regular or permanent - and fewer years of service, they can be paid less without directly violating the principle of equal pay. Equally important, the managerial and supervisory positions, naturally reserved for full-time permanent employees, remain largely, if not totally, male. When we remember that female "part-time" workers in Japan often work the same hours as regular employees but receive only 45 percent of average male salaries, the picture becomes even clearer. By structuring its wage and promotion system to stress continuity as well as duration of tenure, the typical Japanese company can cut its costs tremendously while plausibly maintaining that it treats its similar situated male and female employees equally.²⁵

In general, Japanese women have fewer job opportunities, and receive lower pay, fewer promotions and unequal treatment on the job as compared to their male counterpart with the same educational background and experience.²⁶ Women are more often employed as part-time or temporary workers at lower wages. "[W]omen are used in the labor market as a shock absorber, according to the demands of the economy."²⁷

Although open discrimination against females in recruiting has disappeared and two decades of litigation have made it possible for female clerical and assembly-line workers to remain on the job as permanent

25. *Id.* at 126-127 (footnotes omitted).

26. Beer & Weeramentry, *Human Rights in Japan: Some Protections and Problems*, 1 *UNIVERSAL HUMAN RIGHTS* 1, 24 (1979). In the Japanese Government's *White Paper on Women*, January 1978, the following employment figures were reported for women in specialist, technical and executive occupations:

Occupation	Women	Men	% Women
Civil service administrators	1,100	118,900	0.9
Executives in private companies	98,800	1,029,800	8.8
Legal professionals	2,500	35,500	6.6
Research Scientists	3,900	72,700	5.1
Public accountants	1,000	31,500	3.1
Medical Technicians	672,700	336,500	66.7
Teachers	464,100	682,600	40.5

Id. at 25. "[T]here were only eight women in every 1000 managerial positions in 1983." Kamiya, *supra* note 22, at 450, n.20. See Brown, *Labor Law Issues Facing Multinational and Japanese Companies Operating in the United States and United States Companies Using Japanese - Style Labor Relations: Agenda Items Under the "New Labor Relations,"* 8 *U. HAW. L. REV.* 261, 273 (1986). See Nakanishi, *Equality or Protection? Protective Legislation for Women in Japan*, 122 *INT'L LAB. REV.* 609 (1983).

27. Kamiya, *supra* note 22, at 450-451.

employees after marriage and childbirth, employers have devised new methods for excluding women from management and supervisory positions.²⁸ "As of the mid-eighties, 70-80 percent of Japanese companies refused to hire female graduates of four-year universities."²⁹ Some Japanese companies now require women applicants to choose between management and clerical career paths. The management career path leads to promotion to executive supervisory positions but applicants must be willing to accept overseas assignments and to work until retirement age. Many potential female applicants find it impossible to make this commitment.³⁰ For the management career path, other companies only hire applicants from the law and economics departments of prestigious universities. This practice, in effect, discriminates against most females who major in literature and foreign languages.³¹ A 1981 Ministry of Labor survey reported that 45 percent of companies polled did not promote women to supervisory (kakaricho) positions, only 39 percent had employed a women as a supervisor or above, and 71 percent treated women differently.³² Professor Upham believes that these statistic understate the problem. He concludes that:

Statistics understate the degree of discrimination against Japanese women today, especially against those interested in pursuing managerial or professional careers and willing to make the necessary sacrifices to meet the requirements for permanent employment. It is in the area of recruitment and promotion of women for managerial positions that employment discrimination has been stark and uncompromising.

* * *

. . . Attacking discriminatory hiring, not only the refusal to hire uni-

28. Upham, *supra* note 23, at 127. "A common expectation of the young women hired by a firm is that they will provide tea for everyone (in addition to performing other duties) and maintain a demure and pleasant manner toward all. Preference in hiring is given to those who may be described as suitably ornamental. In a recently uncovered personnel department memorandum, a major Japanese firm was found to recommend against hiring several categories of female applicants. The long list, which speaks volumes for an attitude still very prevalent in the white-collar and service sectors, includes the following: Be wary of young women who wear glasses, are very short, speak in loud voices, have been divorced, or are daughters of college professors." Smith, *supra* note 13, at 17.

29. *Id.*

30. *Thwarting Women in the Work Place* (editorial), Japan Times Weekly, Dec. 6, 1986 at 12.

31. *Id.*

32. Upham, *supra* note 23 at 127-128. Employers offer five major defenses of their policies towards women employees:

1. Women have less physical strength, less intelligence, and less commitment to work.
2. Married women carry the burden of housework, and therefore have less energy to devote to their jobs.
3. Women's short working life makes it uneconomical for employers to invest in their training.
4. College graduates are the worst risk because they enter the firm at about twenty-two and leave it in three or four years to get married.
5. Since women are not trained, they cannot rise in the wage scale by taking on more demanding tasks.

Smith, *supra* note 11, at 16-17.

versity graduates but also the attempt to hire only women who indicate in interviews a willingness to retire upon marriage, presents even tougher doctrinal questions, as does discrimination in individual discretionary decisions such as promotions.³³

Article 14 of the Constitution of Japan prohibits discrimination between men and women.³⁴ Article 24 goes further and states that marriage shall be based on the mutual consent of husband and wife with equal rights.³⁵ "Under Article 24, matters such as the choice of a spouse, property rights, inheritance, choice of domicile, divorce and other matters relating to marriage and family are to be regulated from the standpoint of individual dignity and the essential equality of the sexes."³⁶ No other articles of the Japanese Constitution expressly make any distinction on the basis of sex.

In the same sex neutral language, most Japanese statutes are drafted so as not to distinguish between men and women.³⁷ Despite this seeming neutrality in language, the legal status of women is intertwined with Japanese societal perceptions of the role of women.³⁸ "It is a measure of the extent to which behavioral and attitudinal changes lag behind statute that one can say without any fear of responsible contradiction that women's position in Japanese society today is still very far from the equality long guaranteed them."³⁹ The institutions of marriage and family are often the basis for defining the legal status of women in any society. Therefore, the legal status of women in Japan must be explained first by reference to family law.

Recent amendments to the Civil Code have sought to enhance equality between men and women. On the surface, these measures have moved the Civil Code in the direction of equality but, for the most part, they have merely improved the status of women as housewives.⁴⁰ Japanese family and household registration systems automatically designate the father as head of the family and all other family members are defined by their relationship to the father.⁴¹ These registration systems govern qual-

33. Upham, *supra* note 23, at 127 and 138. (emphasis added).

34. Kenpo 1947 (Constitution of Japan).

The Japanese Constitution of 1946 was adopted to satisfy the terms of the Potsdam Declaration containing the conditions for Japan's World War II surrender. The concept of equality of the sexes was introduced by the Allied Powers General Headquarters Government Section in its draft constitution for the Japanese government. It appears in Articles 14, 24 and 44 of the Constitution of Japan. The current Civil Code, as amended in 1947, recognizes the principle of equality of the sexes and eliminates many sections affirming male dominance. See generally Tanaka, *supra* note 12.

35. *Id.*

36. Kamiya, *supra* note 22, at 453.

37. *Id.* at 463.

38. *Id.* at 453.

39. Smith, *supra* note 11 at 10-11.

40. Kamiya, *supra* note 22, at 457.

41. *Id.* at 456.

ification for election registration, education, national health scheme, national pension plan and other welfare benefits.⁴² "The title 'head of the household' is the basic qualification for important fringe benefits such as housing or lay-off priority."⁴³ Therefore, the registration systems maintain the patriarchal dominance in the institution of the family and "reinforce the concept of division of labor according to sex."⁴⁴

"Article 3 of the Rod Kyiun Ho⁴⁵ (Labor Standards Law) prohibits discrimination in the workplace on the grounds of nationality, creed or social status"⁴⁶ Under the law, sex is not mentioned as an illegal basis for discrimination. The absence of sex in the statutory language has, thus, been used as a justification for discrimination against women.⁴⁷ To comply with the International Convention on the Elimination of all Forms of Discrimination Against Women⁴⁸ of which Japan was a signatory, the Japanese Diet could simply have enacted legislation inserting "sex" in Article 3 as a prohibited ground for discrimination. This simple change was not made in the Koyo Kinto Ho⁴⁹ (The Equal Employment Opportunity Act) when it was passed in May 1985. "This law is nothing but a compromise between the pressure to comply with the convention and the unwillingness of the business community to concede anything which might affect industrial productivity and profit."⁵⁰ The Equal Employment Opportunity Act (EEOA) imposes no penalties for noncompliance and merely encourages employers to do their best not to discriminate. "The only remedies provided are administrative guidance and conciliation, neither of which can be enforced by the courts."⁵¹ EEOA approaches sexual equality as a bureaucratic responsibility of the Ministry of Labor and creates no new private rights or remedies.⁵²

At this point in time, it is too early to determine if the Ministry of Labor will use administrative guidance to put teeth in the enforcement of EEOA.⁵³ That the agency possesses such power cannot be disputed. Ar-

42. *Id.*

43. *Id.*

44. *Id.* Some laws continue to discriminate against women. The Horci (Law Concerning the Application of Laws, Law No. 1, 1898) is one example. Under the Horei, "the effect and validity of marriage, matrimonial property, divorce, legitimacy of a child and other matters regarding children are all determined by laws of the country where the husband or father is a citizen." *Id.* at 458.

45. Law No. 49, 1947.

46. Kamiya, *supra* note 22, at 460.

47. *Id.*

48. Adopted on December 18, 1979 at the 34th General Assembly of the United Nations and became effective on September 3, 1981.

49. Equal Employment Opportunity Act, Pub. L. No. 113 (1972) (codified as amended at Pub. L. No. 45 (1985)).

50. Kamiya, *Supra* note at 460. Provisions in the Labor Standards Law which discriminated in favor of women were eliminated in the name of equal opportunity by the new law. *Id.*

51. *Id.*

52. See Upham, *Supra* note 23 at 163.

53. Administrative guidance (*gyosei shido*) is an extralegal source of governmental power for

ticle 12 of the EEOA "legally empowers . . . the Ministry of Labor to draft guidelines (shishin) setting forth measures that 'should be taken by employers' (kozuru yo ni tsutomeru beki) to secure equal treatment and opportunity for women workers in hiring, promotion, recruitment and placement."⁵⁴ The state of the Japanese labor market, the course of sex discrimination litigation, and political strength of women's rights groups will determine the response of the Ministry of Labor in its guidelines and the ultimate impact of EEOA on Japanese society.

Litigation in response to the EEOA has not threatened the status quo and there is no indication that the Ministry of Labor is pursuing vigorous enforcement with strong administrative guidance. Two 1988 court cases suggest that some Japanese women are taking EEOA seriously. The Hiroshima High Court upheld a lower court ruling that forcing women to retire at an earlier age than men unreasonably discriminated against women employees and violated the prohibition against sexual discrimination in the Constitution of Japan.⁵⁵ The plaintiff female employee was dismissed at age 57, the employer's mandatory retirement age for women.⁵⁶ The employer's mandatory retirement age for men was 62.⁵⁷

In an ongoing case in Tokyo District Court, thirteen women workers of Shiba Shinyo Kinko, a banking services company, alleged that they were subjected to sexual discrimination in promotions and resulting sal-

the implementation of government regulation and supervision. It must be distinguished from the executive, legislative and administrative powers in the United States. Professor Dan F. Henderson has described "administrative guidance" as power

derived again from traditional concepts of inherent power of the administration, largely a carry-over from imperial theories, so that administrative guidance is more the mode of expressing these powers than their source By its very nature, guidance is not legally defined, nor are there rules or court precedents on such a subject. D. Henderson, *FOREIGN ENTERPRISE IN JAPAN* 200-202 (1973).

Administrative guidance refers to actions by governmental agencies that result in voluntary compliance with government policies or objectives. Actions may take the form of instructions (Shiji), requests (Yobo), warnings (Keikoku), suggestions (Kankoku), and encouragements (Kansho). The government agency's suggestions or recommendations are not enforceable in a court, and no legal sanctions against a noncomplying party are available. All forms of administrative guidance have no legal binding power or coercive authority. In Japan, failure to comply with administrative guidance does not result in official punishment or judicial order to perform. Failure to comply does result, however, in a loss of face by the governmental agencies, which subsequently may become extremely uncooperative in providing future services, advice, regulatory exceptions, licenses, and permits to the noncomplying party. See Narita, *Administrative Guidance*, 2 *LAW IN JAPAN* 45 (1968). Government agencies also may publicize noncompliance as a sanction or use the threat of such actions to encourage compliance. Complying parties may be rewarded through government subsidies.

54. *Id.* at 156.

55. *Earlier Retirement For Women Violates Japan's Constitution*, Japan Times Weekly, July 11, 1987 at 9. The case involved a suit by Sumie Ohigata, the employee, Against Radiation Effects Research Foundation, the employer. The Hiroshima High Court ordered the Foundation to pay Ms. Sumie 16 million yen in back wages and to revise its employee retirement regulations.

56. *Id.*

57. *Id.*

ary discrepancies within the company.⁵⁸ "In 1982, of the 210 men 38 years of age and over, 190 were in positions equivalent to deputy branch manager or higher. However, of women workers in the same age group who started work at the same time as their male counterparts, only 17 were in similar positions"⁵⁹ Despite bank regulations prohibiting sexual discrimination, the women workers were not promoted at an equal pace with their male counterparts and these discriminatory acts were held to violate the Constitution and the Labor Standards Law.⁶⁰

Despite the implementation of the Equal Employment Opportunity Law in 1986 and current court cases, a 1988 survey of Tokyo-based corporations found that "[d]iscriminatory treatment of women is still noticeable among Tokyo-based corporations."⁶¹ The Tokyo Metropolitan Government sent questionnaires to 2,500 Tokyo-based businesses with 30 or more employees; 1000 (40%) companies responded.⁶² Fifteen percent of the responding companies hire women on terms different from those applied to male applicants and pay women less than men in the same job.⁶³ Although discrimination against women in the workplace is illegal, equality of men and women in the areas of employment opportunities, and promotion are still far from realized. That sex discrimination is entrenched and has been largely unaffected by legislative prohibitions is obvious from the fact that some Japanese companies are openly willing to admit that they discriminate against women.

On November 30, 1988, the Tokyo Metropolitan Government reported on a survey of 1000 single 17 to 22 year olds living in Tokyo. The survey explored perceptions of the roles and abilities of men and women and the extent of sexual discrimination in the workplace.⁶⁴ In response to survey questions, "80 percent said there were differences in general character and abilities between men and women, and 60 percent said such differences were innate."⁶⁵ Sixty (60) percent said that the traditional role division that encourages men to concentrate on work and women to stay home need not be changed.⁶⁶ "Although more women than men wanted sexual discrimination at the workplace eliminated,"⁶⁷ Professor Masako Amano of Chiba University, who conducted the survey

58. *Women Call Foul Play in Job Advancements*, The Japan Times Weekly, July 11, 1987 at 9.

59. *Id.* The article did not mention how many women 38 years of age and over were employed in 1982 and how many women employees left the company before reaching the age of 38 by 1982.

60. *Id.*

61. *Tokyo-based Corporations Found Still Discriminating Against Women*, The Japan Times, June 30, 1988 at 3.

62. *Id.*

63. *Id.*

64. *Youths Hold Traditional Views of Sexual Equality*, Japan Times Weekly, Dec. 17, 1988 at 6. (overseas ed.).

65. *Id.*

66. *Id.*

67. *Id.*

and analyzed the results for the city, said "they had to give up the idea as they grow older and adapt to social norms."⁶⁸

Change of traditional roles for men and women in Japan is moving forward at a much slower pace than in the United States. Japanese women are disadvantaged at birth by conventional stereotypes of their accepted role in society. They learn these roles at home and in school and conform to them. Japanese companies neglect the training of female employees and do not promote them to supervisor positions because women are expected to leave work eventually to get married and to raise a family.⁶⁹ Corporate activities in Japan are based on long-range planning; employers seek individuals who can make long range commitments to the company. For the most part, such individuals are men. Given these institutionalized barriers to change, it is doubtful that the EEOA will bring about substantial change in the male-oriented Japanese workplace in the foreseeable future. Basic assumptions about human nature suggest that these same corporate attitudes favoring a male oriented workplace exist in Japanese companies operating in the United States.

II. JAPANESE ATTITUDES TOWARD NON-JAPANESE

Many Japanese, especially government and corporate leaders, attribute Japan's economic success to the "homogeneity" or "purity" of the Japanese race and culture.⁷⁰ One government official described the Japanese people as "a people that can manufacture a product of uniformity and superior quality because the Japanese are a race of completely pure blood, not a mongrelized race as in the United States."⁷¹ This Japanese

68. *Id.*

69. See Issobe, *Women Remain Stereotyped by Accepting Traditional Roles*, *The Japan Times*, August 26, 1986 at 2. The article discusses a book entitled *Onnatachi Wa Chikyujin* (Women Are Global People) by Mariko Mitsui, Satomi Nakajima, and Nanae Sakamoto. *Id.* This book recounts the activities of the Women's Action Group which formed in 1975 to protest sexual discriminatory practices in Japan. *Id.* Kurtenback, *Japan's Female Execs Are Slowly Finding Room at the Top*, *JAFE's Nakahara says*, *The Japan Times*, July 21, 1986 at 6.

70. Dower, *Japan, Racism and the West*, *Washington Post* Oct. 5, 1986 at C1. The same homogeneity which feeds nationalism in Japan also feeds negative sentiments among Americans towards the Japanese. This racial bias distorts and inhibits understanding between America and Japan, two complex and easily misunderstood societies.

71. *Id.* However, "for every Japanese quote about 'purity' or 'mongrelization' that aggrieved Americans may leap upon, the Japanese media in turn can and do produce an equally offensive remark by high placed westerners about "little yellow men" or simply, 'the Japs.'" *Id.* at C4. There is a long history of anti-oriental prejudice in America. In a speech, Mr. C. William Verity, Jr., Secretary of Commerce under President Ronald Reagan, referred to an innovative American idea as one "the Japs took and now we're going to take it back." *New U.S. Commerce Secretary Uses Term 'Japs'*, *Durham Morning Herald*, Oct. 17, 1987 at 14A. The University of Rochester's business school withdrew an offer of admission to a Japanese employee of Fuji Photo Film Company after Eastern Kodak Company, a big donor of funds and supplier of students, expressed concern that the student would take classes with Kodak employees. *U. of Rochester Cancels Admission of Employee of A Kodak Competitor*, *The Chronicle of Higher Education*, Volume XXXIV, No. 2, Sept. 9, 1987 at 1.

preoccupation with racial and cultural uniqueness does not result from Japan's long history as a secluded country. Rather, this Japanese attitude of "homogeneity" is a product of ideological and cultural manipulation by the Japanese government over the last 100 years.⁷² Professor John Dower⁷³ has concluded that the goal of this manipulation was "to dampen domestic tensions and provide a psychological bulwark against a threatening international environment."⁷⁴ The Japanese response to the racism of the west was an all out effort to master western technology and a manipulation of cultural values and symbols to forge a sense of national unity and purpose. Racial and cultural parity become fused in the exclusionist rhetoric of Japanese nationalism which permeated government policy and thought during the 1930s and early 1940s.⁷⁵

The current leaders of Japan were educated and grew up during the peak of this nationalistic movement. Consequently, it is not surprising to hear race biased or insensitive statements coming from these individuals. In 1986, former Prime Minister Nakasone made a statement interpreted by many to mean that U.S. intelligence was low because it was pulled down by the presence of large numbers of blacks, Hispanics and Puerto Ricans.⁷⁶ In 1988, Michio Watanabe, former finance minister and a senior official in the ruling Liberal Democratic Party, made derogatory statements about blacks in discussing debt in the United States. He said, "They use credit cards a lot. They have no savings, so they go bankrupt. . . But among those guys over there are so many blacks and so on, who would think nonchalantly: 'We're bankrupt, but from tomorrow on we don't have to pay anything back. We just can't use credit cards any more.'"⁷⁷

Japanese government officials plead that the Japanese are simply ignorant of what is offensive in foreign cultures. The Japanese seldom encounter anyone in their daily lives who is ethnically or culturally different. "With so few minority groups living in Japan, there is no one to pressure the Japanese into confronting their own prejudices or even recognizing them as such."⁷⁸ According to Nagayo Homma, an Ameri-

72. Dower, *supra* note 70.

73. Professor of Japanese Studies, University of California at San Diego.

74. Dower, *supra*, note 70.

75. *Id.* In 1942 and 1943, Japanese civilian bureaucrats prepared a secret 4,000 page study entitled "Global Policy with the Yamato Race as Nucleus." This report dwells at length on Japan's destiny as the 'leading race' in Asia, the country's natural role at the apex of a hierarchial Division of Labor, the 'unique' racial and cultural purity of the Japanese and psychological necessity of preserving this at all costs both at home and abroad, and the comparatively inferior national and racial characteristics of the other peoples of Asia. *Id.*

76. *Supra* note 1; Gilliam, *Japan: Ignorance or Racism?* Washington Post Aug. 1, 1988 at D3.

77. Chira, *Tokyo Again Astir Over Racial Slight*, N.Y. Times July 26, 1988 at A10, col. 2; *The Melting Pot is a Confounding Idea to the Japanese*, N.Y. Times July 31, 1988 at A10, col. 2; See Dower, *supra* note 69.

78. Chira, *supra* note 76.

can Studies Professor at the University of Tokyo, the Japanese "... have little social experience in dealing with different races. . . . They know about Martin Luther King and civil rights, but it's in an abstract context."⁷⁹

In rebuttal to those Japanese corporate and government officials who contend that the Japanese have little experience with minorities, one can argue that there are several minority groups in Japan. The Ainu, an indigenous Japanese people living mostly in Hokkaido, oppose the Japanese government's policy of treating the nation as racially homogeneous because they have a unique language and cultural heritage.⁸⁰ Koreans who are either permanent residents or citizens,⁸¹ and "Burakumin",⁸² Japanese descendants of tanners and butchers, considered unclean in Buddhist religion, complain of discrimination in housing, loans, marriage and employment opportunities.⁸³ Discrimination exists in spite of a Japanese constitutional provision to the contrary.⁸⁴ Discrimination against Burakumin and Koreans evidences a historical pattern of employment discrimination against minorities and non-Japanese nationals by Japanese companies.

The recent liberalization of the Japanese market has made it possible for Americans to work for Japanese companies in Japan. Seibu, Kobe Steel, Daiwa Securities, Yamaichi Securities, Fujitsu, Fuji Xerox, IBM

79. *Supra* note 1.

80. *Ainu Leader Accuses Japanese Government of Ethnic Blindness at International Gathering*, Japan Times Weekly, Aug. 29, 1987 at 4, (overseas ed.).

81. There are approximately 700,000 permanent Korean residents in Japan. Most have never seen Korea and are not fluent in the Korean language. Although most Koreans speak Japanese fluently, lead a Japanese lifestyle and resemble Japanese in physical appearance, so long as they are not ethnically Japanese, they will have serious difficulty being accepted socially in Japanese society. Y. Iwasawa, *LEGAL TREATMENT OF KOREANS IN JAPAN: THE IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW ON JAPANESE LAW*, 3, 212 (1986).

82. "Burakumin are Japanese, speak Japanese, and have the traditions of Japanese people. Burakumin are not racially different from other Japanese people. There is no historical difference in language, culture, or religion." S. Murakoshi, *A Note on the Law on Special Measures for Dowa Projects, Long-Suffering Brothers and Sisters Unite!* 27-38, 29, (1981).

83. Burakumin are intentionally excluded from the labor market through the circulation of burakumin family lists (Buraku chimes soku) by companies. Nine such lists distributed by private investigation agencies (Koshinsho) have been discovered since 1975. "As far as is known, they (the lists) were bought by over 200 firms, chiefly large enterprises and monopolies, in order to exclude Burakumin from employment from the very outset, . . . and to oust already employed Burakumin from their jobs." Kaneko, "Some Reconsiderations Concerning the History of Discrimination Against Burakumin and the Use of Discrimination Terms," *Long-Suffering Brothers and Sisters Unite!* 115-130, 120, (1981).

Private investigating organizations provide and companies use listings of people other than Burakumin to discriminate in employment. Such lists include communists, socialists, shokogakkai (religion), labor unions, Koreans, Okinawans, Ainu and mixed-blood people. Other companies simply limit their hiring to certain high schools and universities with which they have fixed ties. *Id.* at 49-61, 57.

84. Article 14 of the Japanese Constitution

"All Japanese are equal under the law, and they shall not be discriminated against in political, economic or social aspects by the difference of race, religion, sex or social status."

Japan, Nomura Securities, Toyota, Nissan, Honda, C. Itoh, Sumitomo Trading and Mitsubishi Trading are major companies which currently employ at least 20 foreigners in their head offices.⁸⁵ The experiences of the American employees at these companies provides some insight into Japanese corporate attitudes towards women. "Foreigners employed in Japanese companies complain of racial and sexual discrimination, the vagueness of Japanese-style contracts (employment) in comparison to more well-defined western ones, and the lack of connection between ability and compensation."⁸⁶

Women therefore may face sexual discrimination as well as racial and national origin discrimination in seeking jobs with and working for Japanese companies operating in the United States. In light of recent anti-black and hispanic comments by Japanese government officials and the preference of Japanese corporations to locate plants in rural areas of the United States where blacks and hispanics are not represented in the labor force, black and hispanic women arguably may be exposed to more discrimination than their white counterparts when seeking employment or working for Japanese companies.⁸⁷

III. LEGAL PROHIBITIONS AGAINST DISCRIMINATORY EMPLOYMENT PRACTICES BY JAPANESE COMPANIES OPERATING IN THE UNITED STATES

Title VII of the Civil Rights Act of 1964⁸⁸ (hereinafter referred to as Title VII) as amended by the Equal Employment Opportunity Act of 1972 prohibits discrimination by any employer against any employee with respect to any condition of employment on the grounds of race, color, religion, sex and national origin. Employers are broadly defined to include anyone affecting employment opportunities. Title VII provides the most comprehensive federal regulatory framework directed against employment discrimination. With the enactment of Title VII, Congress sought to assure equality of employment opportunities and to eliminate

85. Spivack, *Working For A Japanese Company*, 33 LOOK JAPAN 32 (June, 1987).

86. *Id.* "It's not against white, Jews or black or what not. It's a new kind of racial discrimination - the Japanese against others. A company, for example, reserves box seats for its Japanese employees but regular ones for its non-Japanese employees. American sales managers are even excluded from an out-of-town sales strategic planning trip. Baba, *Corporate Culture Clash in the Office*. Asahi Evening News, June 24, 1988 at 12.

87. See R. Cole and D. Deskins, Jr. *Racial Factors in Site Location and Employment Patterns of Japanese Auto Firms in America*, 31 CALIF. MGMT. REV. 9, 17 (Fall 1988) [Japanese plant sitings reflect a pattern in which avoidance of blacks is one factor in their site location decision." *Id.* The significance of race in the Japanese decisionmaking process is evidenced by one Japan External Trade Organization publication which "describes California as a good place to site plants because they have lots of Asians and they make 'high quality employees.'" *Id.* at 120.

88. Civil Rights Act of 1964, Pub. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e to 17 (1982)).

discriminatory employment practices.⁸⁹

Title VII's enforcement scheme requires the party charging discrimination to exhaust available administrative remedies at both the state and local level before the Equal Employment Opportunity Commission (hereinafter referred to as EEOC) investigates a complaint.⁹⁰ If the EEOC's investigation and conciliation attempt fails, the EEOC then decides whether to sue on behalf of the party charging discrimination.⁹¹ If a decision not to sue is made, the EEOC then issues a right-to-sue letter to the charging party.⁹² The charging party can then bring a private court action under Title VII against the alleged discriminating employer.

Other than Title VII, the principal statute providing a remedy for employment discrimination is 42 U.S.C. § 1981 which prohibits all forms of discrimination in making contracts.⁹³ This remedy is separate and distinct from Title VII.⁹⁴ Compliance with § 1981 is enforced by private law suits in United States District Courts and there is no need to comply with any prior administrative or procedural requirements.⁹⁵ A claim under Title VII can be joined with a claim under § 1981.⁹⁶ In contrast to Title VII's explicit prohibition against national origin discrimination, § 1981 protects "identifiable classes of persons" subjected to discrimination on the basis of their "ancestry or ethnic characteristics," but on its face this provision does not include place of birth or national origin discrimination.⁹⁷

The EEOC's Title VII enforcement authority over a foreign company doing business in the United States depends on the terms contained in any existing bilateral friendship, commerce and negotiation treaty between the United States and the foreign company's country of origin. The EEOC takes the position that most foreign companies doing business in the United States are within its jurisdiction unless the provisions of a bilateral friendship, commerce and negotiation treaty conflict with Title VII or offer the foreign company a choice of which country's law to follow.⁹⁸ Absent such a treaty limiting the EEOC's enforcement jurisdic-

89. *McDonald Douglas Corporation v. Green*, 411 U.S. 792, 800 (1973).

90. Civil Rights Act of 1964, Pub. L. No. 88-352, codified as amended at 42 U.S.C. § 2000e-5(c), (d) (1982); 29 C.F.R. § 1061.70 (1986).

91. 42 U.S.C. §§ (2000e-5)(g) (1982).

92. 42 U.S.C. § 2000e-5(b), (c), (g) (1982).

93. 42 U.S.C. 1981 (1982); Civil Rights Act of 1866, ch 31, § 1, 14 Stat. 27; Civil Rights Act of 1870, ch 114, § 18, 16 Stat. 144. *McDonald v. Sante Fe Trail Transportation Co.* 427 U.S. 273 (1976).

94. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

95. *Id.* at 459-60.

96. *Lincoln v. Board of Regents of the University of Georgia System*, 697 F.2d 928, 934 (11th Cir. 1983), *cert. denied*, 464 U.S. 826 (1983).

97. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

98. "EEOC Issues Policy Statement On Applying Title VII Internationally," Agency rulings, 57 LW 2177 (September 27, 1988). This article describes a September 2, 1988 EEOC field personnel

tion, the foreign company must comply with Title VII in its U.S. operations whether or not the foreign company is incorporated or simply doing business in the United States.

Contrary to the view held by some Japanese corporate executives and government officials, the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan⁹⁹ (hereinafter referred to as Friendship Treaty) does not exempt Japanese corporations or their wholly owned subsidiaries from compliance with Title VII. The United States has entered into similar bilateral treaties with other nations to promote commercial intercourse and investment by establishing mutual rights and privileges based on the most favored nation status. These treaties grant companies and citizens of either country (equal) "national treatment" without discrimination on the basis of their foreign status when conducting business within the other country.¹⁰⁰ "National treatment" includes the right to control and manage their enterprise.

Article VIII(1) of the Friendship Treaty permits a Japanese company

notice stating that the coverage of Title VII based on legislative history and court decisions is very 'road and includes foreign companies operating in the United States.

The EEOC also argues that American employees incorporated in the United States and doing business in the United States and overseas are liable for alleged discrimination taking place overseas. Consequently, an American corporation doing business in Japan would be liable for sexual discrimination practiced by its employees against American citizens in Japan. Recently, the Fifth Circuit Court of Appeals held that neither Title VII's language nor legislative history clearly express intent to provide for extraterritorial application to protect United States citizens employed by United States company employers; therefore, the presumption against extra territorial application is not overcome. *Boureslan v. Aramco*, 857 F.2d 1014 (5th Cir. 1988).

The majority's conclusion in *Boureslan* is contrary to a prior district court decision in *Bryant v. International School Serv.*, 502 F. Supp. 472 (D.N.J. 1980), which states that the alien exemption provision has no purpose if Title VII has no extraterritorial application to United States citizens. Congress considers the implications of applying Title VII extraterritorially when it adopted a provision explicitly exempting aliens employed abroad by U.S. corporations. Judge King makes this point quite clear in his dissent.

Since Title VII expressly exempts from coverage aliens employed abroad by U.S. corporations, the logical negative inference is that Title VII was intended to cover U.S. citizens employed abroad. Indeed, the alien exemption provision would be meaningless if Title VII did not apply extraterritorially: there is no need to exempt aliens employed abroad from coverage if no one is covered abroad. Construction of a statute to render a provision meaningless violates the established rule of statutory construction which obliges a court "to give effect, if possible, to every word congress used."

On December 23, 1988, the majority of judges on the Fifth Circuit Court of Appeals voted to rehear *Boureslan en. banc.* 863 F.2d 8 (5th Cir. 1988). This author believes that *Boureslan* should be overruled on rehearing.

99. Treaty of Friendship, Commerce and Navigation, April 2, 1953, United States - Japan, Art. X, 4 U.S.T. 2063, 2071, T.I.A.S. No. 2863.

100. Negotiated Friendship treaties when negotiated overcome nationalistic prejudices of host nations against foreign companies. Concepts such as "national treatment" and "most favored nation treatment" were created to supersede inconsistent regulations in the host nation. "National treatment" is "treatment accorded within the territories of a party upon terms no less favorable than the treatment accorded therein, in like situations, to national companies, products, vessels or other objects." "Most favored nation treatment" is defined as "treatment accorded within territories of a party upon terms no less favorable than the treatment accorded therein, in like situations, to national companies, products, vessels or other objects" *Id.*

operating in the United States to hire only Japanese citizens for executive or specialists positions.¹⁰¹ "Because ninety-nine percent of the population of Japan consists of people who are of Japanese national origin, a Japanese company that hires only Japanese citizens would in effect be hiring only people of Japanese national origin."¹⁰² Japanese corporate management believed that this provision gave them the right to hire personnel "of their choice" regardless of any civil rights or fair employment laws in existence. They also believed that a requirement of Japanese citizenship for a particular job did not violate Title VII's prohibition against discrimination based on national origin because discrimination on the basis of Japanese citizenship was not the same as discrimination on the basis of national origin.¹⁰³ No significant controversy arose under Article VIII(1) until after the passage of Title VII.

In *Sumitomo Shoji America, Inc. v. Avagliano*,¹⁰⁴ the Supreme Court attempted to address these issues and to reconcile Title VII and Article VIII(1) of the Treaty.¹⁰⁵ *Sumitomo Shoji America, Inc.* (hereinafter re-

101. "[C]ompanies of either party shall be permitted to engage, within the territories of the other party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." *Id.* at 2070.

102. Note, *Japanese Companies on United States Soil: Treaty Privileges vs. Title VII Restraints*, 9 HASTINGS INT'L & COMP. L. REV. 377, 378 (1986).

103. See generally *Id.*; Brown, *Labor Law Issues Facing Multinational and Japanese Companies Operating in the United States and United States Companies Using Japanese-Style Labor Relations: Agenda Items Under the New Labor Relations*, 8 OF HAW. L. REV. 261 (1986); Hiller, *Civil Rights Enforcement and Japanese Subsidiaries*, AM. BUS. L.J. 463 (1984); S. Sethi & C. Swanson, *Are Foreign Multinationals Violating U.S. Civil Rights Laws?* 4 EMPLOYEE RELATIONS L.J. 485 (1979); Duff, *Japanese and American Labor Law: Structural Similarities and Substantive Differences*, 9 EMPLOYEE RELATIONS L.J. 628 (1984); Note, *Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise*, 73, GEO. L. J. 1964 (1985). Note, *Treaties-Interpretation-U.S. Incorporated Subsidiaries of Japanese Companies May Not Invoke Provisions of FCN Treaty*, 7 SUFFOLK TRANSNAT'L L. J. 279 (1982); Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 STAN. L. REV. 947 (1979).

104. 457 U.S. 176 (1982).

105. *Id.* In the district court, Sumitomo moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court denied Sumitomo's motion to dismiss but agreed to certify the corporation's request for an interdictory appeal to the United States Court of Appeals for the Second Circuit. *Id.* at 179.

The Court of Appeals divided the question into two issues. First, under the terms of the Friendship Treaty, does a wholly owned subsidiary of a Japanese corporation incorporated in the United States have standing to invoke all substantive provisions of the Friendship Treaty which could be invoked by a branch of a Japanese corporation operating in the United States? Second, do the freedom of choice provisions exempt qualifying corporations from compliance with Title VII? On the first issue, the Court of Appeals concluded that the primary objective of the treaty was to encourage international trade and investment under a policy of equal protection under the laws. The Friendship Treaty extended this protection to foreign investments in general and did not distinguish foreign subsidiaries and foreign branches when referring to the substantive rights guaranteed by the treaty. Therefore, Sumitomo was entitled to invoke all the substantive provisions of the Friendship Treaty, including the "freedom of choice" provisions. On the second issue, the court concluded that foreign corporations should not be exempt from compliance with Title VII because the "bonafide occupational qualifications exception to Title VII would allow a corporation operating in the United States to discriminate in hiring on the basis of sex and national origin if such discrimination were, in the

ferred to as Sumitomo) was incorporated in New York and was a wholly owned subsidiary of a major Japanese corporation.¹⁰⁶ The Japanese corporation was an integrated trading company primarily engaged in the purchase and resale of goods in the international market.¹⁰⁷ Plaintiffs were 11 female New York secretarial employees who alleged that Sumitomo's practice of hiring male Japanese citizens to fill all executive, managerial and sales positions violated Title VII.¹⁰⁸ Sumitomo denied violating any provisions of Title VII and argued that the Friendship Treaty guaranteed Japanese corporations "freedom of choice" in hiring executive personnel and other specialists and exempted them and their subsidiaries operating in the United States from Title VII compliance in these hiring decisions.¹⁰⁹

The Supreme Court of the United States held that Sumitomo was incorporated in the State of New York and therefore subject to the civil rights and fair employment laws of the United States.¹¹⁰ As a United States company, Sumitomo was not entitled to the protection of the Friendship Treaty.¹¹¹ The Supreme Court, in effect, adopted a place of incorporation test for application of the Friendship Treaty.¹¹² The Supreme Court relied on the United States and Japan's expressed understanding in clear treaty language that a subsidiary of a domestic company

language of Title VII, "reasonably necessary to the normal operation of that particular business or enterprise." Therefore, Japanese corporations would have no immunity from the operation of Title VII and other United States civil rights statutes and must justify all hiring decisions under the "bonafide occupational qualifications" exception. *Id.* at 179-180; 638 F.2d 552 (2nd Cir. 1981).

The Second Circuit relied on the constitutional mandate that treaties are the "supreme law of the land." Under Article VI, clause 2, any federal legislation subsequent to a treaty must be construed to be consistent with the treaty if at all possible. If this can't be done without conflict, then the more recently enacted statute will control if there was a congressional intent to override the treaty. The Court of Appeals found that the application of Title VII did not conflict with the Friendship Treaty because the "bonafide occupational qualifications" exception permitted foreign companies to hire employees of their choice when necessary. The Second Circuit Court of Appeals then listed the factors to be considered in determining whether a foreign company had established "bonafide occupational qualifications." *Id.*

For further analysis, See generally, Lansing & Palmer, *Sumitomo Shoji v. Avogliano: Sayonara to Japanese Employment Practices in Conflict with Title VII*, 28 ST. LOUIS U.L.J. 153 (1984); Note, *Civil Rights-Friendship, Commerce and Navigation Treaty of 1953 Between the United States and Japan Immunizes Company Incorporated Under the Laws of the United States But Wholly Owned By a Japanese Corporation From United States Employment Antidiscrimination Laws*, 17 TEX. INT'L L.J. 517 (1982); Note, *supra* n. 101; Note, *International Law-Employment Discrimination*, 13 GA. J. INT'L & COMP. L. 159 (1983); STREET, *Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad*, 19 INT'L L. & POL. 357 (1987); Note, *Japanese Corporations and American Civil Rights Laws*, 12 DEN. J. INT'L L. & POLICY 93 (1982).

106. 457 U.S. at 178 (1982).

107. *Id.* at 178, n.1.

108. *Id.* at 178. Ten female employees are American citizens and one female employee is a Japanese citizen living in the United States.

109. *Id.* at 179.

110. *Id.* at 188-190.

111. *Id.*

112. *Id.*

incorporated in the other country would be a company of the place where incorporated.¹¹³ Therefore, a Japanese subsidiary incorporated in the United States is treated as any other American company and cannot employ persons of their own choosing under Article VIII(1) of the Friendship Treaty.¹¹⁴

If the Friendship Treaty does not apply, the Japanese companies must comply with Title VII and 42 U.S.C. 1981. Section 703(e)(1) of Title VII permits a domestically incorporated Japanese company to classify a job on the basis of religion, sex, or national origin in those certain instances where religion, sex or national origin is a bonafide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.¹¹⁵ This "BFOQ (bonafide occupational qualifications)

113. *Id.* at 183-185.

114. *Id.* at 189. *Sumitomo* therefore resolves the "corporate nationality" issue of foreign owned subsidiaries incorporated and based in the United States with respect to the Friendship Treaty. However, *Sumitomo* did not address the issues of the growing numbers of multi-national joint ventures. "A literal reading of *Sumitomo* would permit a joint venture to claim the rights and immunities of the Friendship Treaty, depending on its place of incorporation. Consequently, an American based joint venture incorporated in Japan might be able to successfully invoke its protections and be free of the application of certain American labor laws regarding management executives." Brown, *supra* note 102 at 283. *Sumitomo* never addressed the question of whether the parent can be liable as a "joint employer." Could *Sumitomo* America claim the Friendship Treaty rights of its parent corporation? The answer to this question was recently provided by a federal district court in *Spieß v. C. Itoh & Co. (America)* on retrial after the initial appellate decision was vacated by the Supreme Court in light of *Sumitomo*. Relying on the Supreme Court holding in *Sumitomo*, the district court held that C. Itoh & Co. (America) could not assert the substantive Friendship Treaty rights of its Japanese parent. In a class action under Title VII and 42 USC 1981, American male employees alleged nationality discrimination in managerial promotions and benefits. The company argued that many of its Japanese managerial employees were temporarily rotated from the parent and that they were in reality the employees of the parent. Therefore, C. Itoh & Co. claimed that the language of the Friendship Treaty in Article VIII(1) granted immunity from compliance with United States fair employment and civil rights laws in its executive personnel decisions. The district court rejected this argument because C. Itoh & Co. (America) was "merely attempting to accomplish indirectly what it (could not) accomplish directly." The district court denied C. Itoh's motion to dismiss and the subsequent appeals to the Fifth Circuit Court of Appeals and the Supreme Court were denied. *Spieß v. C. Itoh & Co. (America)*, 469 F. Supp. 1 (S.D. Tex 1979), reversed, 643 F.2d 353 (5th Cir. 1981), vacated (in light of *Sumitomo*) remanded to the district court. 687 F.2d 129 (5th Cir. 1982). The district court's order denying the company's motion to dismiss for failure to state a claim is unreported, but part of the opinion accompanying the order is reproduced in part in the Fifth Circuit's opinion dismissing the subsequent appeal for lack of jurisdiction. 725 F.2d 970, 973 (5th Cir. 1984), *cert. denied* 105 S. Ct. 115 (1984).

See generally Note, *Spieß v. C. Itoh & Co. (America), Inc.: Another Chapter in the Continuing Conflict Between FCN Treaties and Title VII*, 10 DEN. J. INT'L L. & POL. 585 (1981); Brown, *supra* note 102; Note, *supra* note 101, Street, *supra* note 102.

115. Civil Rights Act of 1964, Pub. L. No. 88-252 § 703(e)(1), 78 Stat. 241, 256 (1964); 42 USC § 2000e-2(E)(1976). However, a job classification based on race is not permitted. "The exclusion of racial discrimination from the BFOQ exception reflects a deliberate congressional decision to prohibit all racial classifications in employment. It also creates the anomaly that some classifications on the basis of national origin are permissible when similar classifications on the basis of race are not." Rutherglen, *Major Issues in the Federal Law of Employment Discrimination* p. 44 (1987). Unfortunately, it is difficult to distinguish between racial and national origin discrimination in the context of a Japanese company. *Id.*

exception provides a statutory basis for intentional discrimination which accommodates legitimate business needs that go to the 'essence' of the business."¹¹⁶ Whether the Japanese practice of rotating executive staff from the parent to the subsidiary is essential and necessary to the essence of the business must be decided. If the Friendship Treaty does apply and the Japanese company is exempted from compliance with United States fair employment and civil rights laws in appointment of executive personnel and specialists, the definitions of "executive" and "specialists" would become very important issues.

Executive employees rotate from the parent to the subsidiary because the companies have an integrated relationship and the employees gain a better understanding of the parent company and its needs.¹¹⁷ The rotating staff can range from 40 to 50% of all executive subsidiary managerial staff.¹¹⁸ Case law simply has not provided any definitive answers on how narrow, or broad, the BFOQ exception to Title VII might be interpreted. In *Sumitomo*, the court, in dictum, merely stated: "[t]here can be little doubt that some positions in a Japanese controlled company doing business in the United States call for great familiarity with not only the language of Japan, but also the culture, customs, and business practices of their country."¹¹⁹

Is it sufficient to say that Japanese nationals are more familiar with the language, customs business practices, management structure, company operations and interpersonal relations and therefore these cultural based attributes constitute "bonafide occupation qualifications"? What relationship do these cultural based attributes have to the job to be done by the executive? "It is debatable whether Japanese nationals possess all these attributes; whether some non-Japanese might possess more of them; and at what level-executive, managerial, technical, or sales - these attributes are significant."¹²⁰ Should Japanese companies operating in the United States be allowed to use Japanese cultural based attributes as a basis for hiring Japanese male employees to work in the United States? If a Japanese company employs only Japanese male nationals for certain positions based on a business necessity argument, is its intent in utilizing the BFOQ exception justification based on the legally permitted basis of national origin discrimination or is its intent based on illegal sexual discrimination? Can the Japanese company avoid hiring American women, particularly for managerial or executive positions, by claiming the BFOQ exception to justify the employment of Japanese nationals who are more likely to be men because of sexually discriminatory hiring practices in

116. Brown, *supra* note 102 at 299.

117. *Id.* at 300.

118. *Id.* at 300 n.196.

119. 457 U.S. at 189, n.19 (1982).

120. Brown, *supra* note 102 at 300.

Japan? These questions must be resolved by amending Title VII or in future Title VII litigation.

IV. APPLICATION OF U.S. CIVIL RIGHTS AND FAIR EMPLOYMENT LAWS TO JAPANESE COMPANIES OPERATING IN THE UNITED STATES

Evidence of discrimination by Japanese employers against women in the United States is not easy to identify. Various experts have studied Japanese company hiring practices in the United States, but few have addressed this issue. The most publicized case is *Sumitomo*. In that case, past and present female secretarial employees, one Japanese national and the others being United States citizens each filed complaints with the EEOC which issued "right to sue" letters to the secretaries. They then brought a class action suit claiming that Sumitomo's alleged practice of hiring only male Japanese citizens to fill executive, managerial and sales positions violated both 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964.¹²¹ As previously discussed, *Sumitomo* appealed the district courts denial of its motion to dismiss to the United States Supreme Court to determine if Article VIII(1) of the Friendship, Commerce and Navigation Treaty between the United States and Japan provided it with a defense to this litigation. Upon losing its appeal, Sumitomo settled this case with the female plaintiffs.

The Equal Employment Opportunity Commission (EEOC) charged Honda of America with racial and sexual discriminatory employment practices at its Maryville, Ohio plant.¹²² Honda rejected approximately 377 blacks and women for employment at its three Ohio plants between 1983 and 1986.¹²³ The EEOC alleged that Honda's hiring policies screened out blacks and women.¹²⁴ Honda negotiated a settlement on the discrimination charges with the EEOC after an extensive EEOC employment practice investigation that began in 1984.¹²⁵ Honda agreed to expand employee recruitment operations to include black communities, to promote more blacks and women and to explain anti-discrimination laws to its management.¹²⁶ Honda admitted no wrong doing in the settlement and simply stated that the settlement avoided a lengthy court fight.¹²⁷

121. 457 U.S. 176, 178 (1982).

122. Michael McQueen and Joseph B. White, *Blacks, Women at Honda Unit Win Back Pay*, Wall St. J., Mar. 24, 1988 at 2, col. 2.

123. *Honda to Pay \$6 Million in Rights Settlement*, N.Y. Times, Mar. 24, 1988 at 18, col. 1.

124. Schlesinger, *Shift of Auto Plants to Rural Area Cuts Hiring of Minorities*, Wall St. J. Apr. 12, 1988 at 1, col. 6.

125. *Id.*

126. *Id.* Ford (\$23 million) and General Motors (\$44.5 million) also reached settlements in EEOC cases against them for discrimination against women and minorities in the early 1980s. *Id.*

127. *Id.*

The reported cases on discrimination by Japanese corporations or their United States subsidiaries are few.¹²⁸ Most cases involve discrimination based on national origin against white male Americans.¹²⁹ Precise outcomes on the issues of alleged discrimination are normally never reached because the cases are settled after the courts determine that the plaintiffs cause of action can be maintained. EEOC investigations of Japanese companies have resulted in similar settlements, following which the case files are sealed and no public disclosure concerning evidence of discrimination uncovered by the EEOC's investigation can be made. Japanese companies litigate procedural issues as demonstrated by *Sumitomo* but

128. In *Porto v. Cannon, U.S.A. Inc.* 28 BNA FEP/Cas 1679 (1981, No. ND III) and *Mattison v. Cannon, U.S.A. Inc.* 28 BNA FEP Cas 1685 (1981, ND III) two white male American plaintiffs in two separate actions charged Cannon, a U.S. subsidiary of a Japanese corporation, with discrimination in its hiring, promotion and employment practices for non-Japanese national origin employees. The district courts agreed that a cause of action could be maintained under Title VII but disagreed on whether a cause of action was adequately alleged or established under 42 U.S.C. § 1981. One district court rejected the 42 U.S.C. § 1981 claim because the plaintiff alleged discrimination on the basis of race and did not plead facts to support this conclusion. The plaintiff did not plead that he was discriminated against because he was white or that he was treated differently from blacks, hispanics, American Indians or Asians. The other district court upheld the 42 U.S.C. § 1981 claim by concluding that whether the plaintiff could establish his claim was an issue of fact for the jury. These cases suggest that if national origin discrimination is motivated by or indistinguishable from racial discrimination, a claim may be actionable under 42 U.S.C. § 1981. See Sarno, *Annotation: Actionability, Under Federal and State Antidiscrimination Legislation, of Foreign Employer's Discriminating in Favor of Foreign Workers in Hiring and Other Employment Matters*, 84 ALR Fed. 114. In *Bullard v. Omni Georgia, Inc.* 640 F.2d 632 (5th Cir. 1981) black and white American employee plaintiffs alleged that they were discharged by defendant Omni Georgia, an American subsidiary of Omni Kenshi which is an affiliate of the Japanese trading company Nissho Iwai, because of their race, national origin and involvement in union organizing activities. *Id.* They pleaded that they were immediately replaced by new employees whose race was Asian and whose national origin was Korean and that the decision to replace them was made by someone whose race was also Asian and whose national origin was Japanese. *Id.* The Court of Appeals reversed a summary judgment in favor of Omni Georgia and held that the complaint adequately stated a 42 U.S.C. § 1981 claim and that a genuine issue of material fact existed as to whether the former employees were discharged because of racial discrimination or their national origin. *Id.* The Court of Appeals acknowledged that the line between discrimination on account of race and that on account of national origin may be so thin as to be indiscernible and held that the complaint adequately stated a 42 U.S.C. § 1981 claim. A cause of action for national origin discrimination is not available under 42 U.S.C. § 1981. The case was settled before trial in the district court and no decision on the issue of racial discrimination was forthcoming.

129. *Id.* In *Shiseido Cosmetics (America), Ltd. v. State Human Rights Appeal Board* 72 App. Div. 2d 711, 421 N.Y.S.2d 589, affirmed 52 N.Y. 2d 916, 437 N.Y.S.2d 668, 419 N.E.2d 346 (1979), the female plaintiff charged a wholly owned New York incorporated subsidiary of a Japanese company with discrimination on the basis of her American national origin in violation of the State Human Rights Law. The subsidiary's president terminated the plaintiff, Director of National Training, as part of a major reduction in United States operations. As part of the plan for dismissal of executive employees, the plaintiff was dismissed and her title was abolished. However, her duties were assumed by a Japanese national employed by the parent company for approximately 17 years. The court found inconsequential the fact that the dismissal of the plaintiff and other American employees was not accompanied by a comparable dismissal of Japanese nationals employed by the company or its parent in the New York offices. The court found that the State Civil Rights Act was not violated by the plaintiffs dismissal because most of the Japanese nationals were in fact employees of the parent company rotating through the New York office on temporary assignments. See Sarno, *supra* note 127, at 155-156.

settle out of court prior to litigating substantive issues relating directly to the claim of sexual discrimination. Consequently, no American court has held that a Japanese company operating in the United States has practiced sexual discrimination in violation of Title VII or 42 U.S.C. 1981.

There is a tendency for American subsidiaries of Japanese companies to give executive job preferences to Japanese male citizens employed by the parent companies. This employment practice and the general policy of "promoting from within the company" have an adverse impact on employment and promotion opportunities for women with Japanese companies operating in the United States.¹³⁰ Providing different economic and job security benefits to Japanese staff rotating through the American subsidiary from the Japanese parent and requiring Japanese language skills for certain jobs in the United States may constitute violations of Title VII.¹³¹ In other words, American subsidiaries of Japanese companies probably violate Title VII if their use of Japanese citizenship as an employment criterion is just a policy designed to exclude Americans from managerial and executive positions.¹³² "Nationality discrimination" can be a not-too-disguised form of national origin preference because it relies on 'stereotype assumptions' about who possesses or lacks job qualifications regarding the language, customs, and business practices of Japan.¹³³ Nationality discrimination by Japanese employers can arguably constitute sex discrimination because Japan has a self described "homogenous" population and Japanese employers have a distinct preference for hiring Japanese male citizens.¹³⁴

As previously mentioned in the discussion of employment practices in Japan, Japanese companies do not show significant preference for males over females in their initial hiring decisions. However, in promotions to managerial and supervisory executive positions, Japanese companies have a clear preference for Japanese male nationals and males in general. These employment practices are infrequently challenged in the United States because so few Americans are hired for executive positions and American executives have a tendency to simply seek another corporate job when they are dissatisfied with promotional opportunities in the current job. Litigation is expensive and working at the company which you are suing or seeking employment with a new company while suing your

130. Brown, *supra* note 102, at 295.

131. *Id.*

132. *Id.*

133. *Id.*

134. American courts have held that restriction of employee benefits to family, friends and persons of similar ancestry has an adverse impact on employees of other national origins and races and is a violation of title VII, *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984). But no American court has addressed this issue in the context of a Japanese employer operating in the United States.

previous employer can be difficult. Consequently, there are fewer incentives for American women executives to sue their Japanese employers.

V. CONCLUSION

As long as Japanese companies operating in the United States continue to use the BFOQ exception of section 703(e)(1) of Title VII and the Article VIII(1) exception for executive or specialist positions in the Friendship Treaty, they are permitted to discriminate against women indirectly by practicing sexual discrimination in Japan. The employment of Japanese males in executive positions through the BFOQ exception used by wholly owned domestically incorporated subsidiaries of Japanese companies must be rigorously scrutinized to ensure that their employment is required by a legitimate "business necessity." In *Sumitomo*, the Supreme Court did not define "business necessity." A legislatively imposed or a judicially determined standard for "business necessity" is needed. Such a standard could be enforced against all foreign companies operating in the United States.

When foreign companies, including wholly or partially owned subsidiaries incorporated in the United States, from nations, such as Japan, which have exhibited an historic pattern of discriminatory employment practices on the basis of sex, complaining parties should be permitted to introduce evidence of these practices in court. Such evidence would be admissible to demonstrate a *prima facie* case of sexual discrimination by showing that the challenged company selects or promotes women employees in a discriminatory pattern in its country of origin and that these discriminatory employment practices would violate Title VII if practiced in the United States. The complaining party should only be required to show that the company's employment pattern for women is "significantly different" from that of the female representation in the relevant labor pool in the country of origin. The employment pattern for women should also be examined throughout the company's worldwide operations.

Even more offensive to American women than discriminatory employment practices by Japanese companies is the fact that state governments have systematically subsidized and assisted in the location of many Japanese plants in the United States. Should states be subsidizing with the taxes of all its citizens the location of plants which discriminate against women as prospective employees? This is a very important policy question which is independent of the issue of the intent to discriminate by Japanese companies operating in the United States.