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In the World, but Not of It: Japanese Companies Exploiting the U.S. Civil Rights Law

Keywords

Civil Rights, Corporations, Employment Discrimination, Labor, Workers' Compensation Law, International Trade, Investment, States

In the World, But Not of it: Japanese Companies Exploiting the U.S. Civil Rights Law

KIYOKO KAMIO KNAPP*

. . . Japan is a nation which has pursued commerce to the ends of the earth, yet cannot shed its age-old mistrust of what lies beyond its shores.

— Jared Taylor.¹

I. INTRODUCTION

A *kimono*-clad Oriental woman carries a torch of liberty on the front cover of the October 9, 1989, issue of *Newsweek* magazine. The illustration accompanies the headline *Japan Invades Hollywood*.² The magazine article depicts Japan's purchase of a "piece of America's soul,"³ referring to Sony's 3.4 billion-dollar takeover of Columbia Pictures Entertainment.⁴ To the majority of Americans surveyed in that article, Japan's economic power posed a greater threat than the military power of the then Soviet Union.⁵

Japan has built itself as one of the world's economic leaders. Between 1979 and 1990, annual Japanese investment in the U.S. skyrocketed nearly eighty-fold, from 257 million to 19.9 billion dollars.⁶ Major Japa-

* I was born in Japan and lived there for 24 years before moving to the United States. In this article, I base some of the general descriptions of the Japanese personnel management on my own experiences and observations while living in Japan.

Unless otherwise indicated, I am responsible for the accuracy of all Japanese translations. Japanese authors are cited as they appear on the publication. Some authors follow the traditional Japanese style of placing the author's surname first, followed by their first name; others follow the Western style. For authors in the former category, only surnames are used for subsequent references.

1. JARAD TAYLOR, *THE SHADOWS OF THE RISING SUN: A CRITICAL VIEW OF THE "JAPANESE MIRACLE"* 257 (1983).

2. In the translated version of the *Newsweek* magazine sold in Japan, the same headline read: Sony *Shingeki* [Sony *Advances* (against Hollywood)] (emphasis added). Hiroshi Ando, 57 NICHIBEI JYOHU MASATSU [JAPAN-U.S. INFORMATION FRICTION] (1991).

3. *Japan Goes Hollywood*, *NEWSWEEK*, October 9, 1989, at 62.

4. *Id.* See also *Japan Corporate Takeovers Abroad Hit 404 in 1989*, *L.A. TIMES*, January 11, 1990, at 3 (reporting that the number of mergers and acquisitions involving Japanese corporations at home and abroad in 1989 totaled 659, valued at \$212 billion).

5. *Japan Goes Hollywood*, *supra* note 3.

6. Eileen M. Mullen, *Rotating Japanese Managers in American Subsidiaries of Japanese Firms: A Challenge for American Employment Discrimination Law*, 45 *STAN. L. REV.* 687, 729 n.13 (1993), citing Bureau of Economic Analysis, U.S. Department of Commerce, *U.S. Business Enterprises Acquired or Established by Foreign Direct Investors in 1985*, 66

nese firms have achieved a significant portion of their investment in the United States by establishing branches and subsidiaries.⁷ Accordingly, in 1989, the number of Americans working for Japanese companies amounted to 500,000.⁸ This has triggered a rise in discrimination charges Americans have asserted against their Japanese employers.⁹ Plaintiffs

SURV. CURRENT BUS. at 50, tbl. 5 (May 1986) and Bureau of Economic Analysis, U.S. Department of Commerce, *U.S. Business Enterprises Acquired or Established by Foreign Direct Investors in 1991*, 72 SURV. CURRENT BUS. at 72, tbl. 4 (May 1992). Political economist Pat Choate reported that, as of 1990, the Japanese own \$285 billion of America's direct and portfolio assets, control more than \$329 billion of U.S. banking assets (a 14% share of the U.S. market), possess more real estate holdings in the U.S. than the members of the European Community (EC) combined, and trade up to 25% of the daily volume on the New York Stock Exchange. PAT CHOATE, *AGENTS OF INFLUENCE* at Introduction (1990). Furthermore, the Greenlining Coalition, a California organization composed of minority groups and consumers, provided the following information on Japanese direct investment in August, 1991: "Matsushita Electronic alone has an annual revenue of \$44 billion, more than 12 times that of Walt Disney Studios;" "Japanese companies control a quarter of all American motion picture production;" "[o]ver the last two years, the top 10 major Japanese investors have bought more than \$23 billion in American companies . . ." Lantos Hearings, *infra* note 30, at 329.

7. Robert Abraham, *Limitations on the Right of Japanese Employers to Select Employees of Their Choice under the Treaty of Friendship, Commerce and Navigation*, 6 AM. U. J. INT'L L. & POL'Y 475 (1991). For a historical background of Japanese foreign investment, see Tomoko Hamada, *Under the Silk Banner: The Japanese Company and Its Overseas Managers*, in JAPANESE SOCIAL ORGANIZATION 135, 136-139 (Takie Sugiyama Lebra, ed., 1992). For a discussion of Japan's foreign trade, see generally EDWIN O. REISCHAUER, *THE JAPANESE TODAY* 370-80 (1988); see also JON WORONOFF, *JAPAN AS ANYTHING-BUT-NUMBER ONE* 206 (1991) (noting that "[u]nlike Europe and America, where trade followed the flag, Japan's flag followed trade"). Ronald Morse, Executive Vice President of Economic Strategy Institute, explains that about 40% of total Japanese direct investments are located in the U.S., of which 35% are in real estate. Lantos Hearings, *infra* note 30, at 177-78. Many of the companies actively involved in foreign direct investment are classified as high-technology firms, automobile makers, chemical firms, and machinery manufacturers. Hamada, *supra*, at 138. Japanese firms also often enter foreign markets through mergers and acquisitions. *Id.* See also Gita Khadiri, *The Effect of the United States-Japan Treaty of Friendship, Commerce and Navigation on Japanese Investment in United States Real Estate*, 4 AM. U. J. INT'L L. & POL'Y, 591, 596-98 (discussing recent Japanese investment in United States real estate); Jeffrey M. Lavine, *Foreign Investment in Japan: Understanding the Japanese System and its Legal and Cultural Barriers to Entry*, 9 B. U. INT'L L.J. 149 (1991) (exploring the evolution of the Japanese legal system and its interplay in creating foreign investment barriers).

8. Delineated by geography, the figure represents 100,000 in California, 42,000 in New York, 38,000 in Illinois, 35,000 in Ohio, and 30,000 in Hawaii. PITFALLS FOR JAPANESE EMPLOYEES IN THE UNITED STATES at i (William J. Kilberg et. al., eds., 1993) [hereinafter PITFALLS].

9. For a detailed analysis of two landmark cases involving employment discrimination by Japanese multinational firms, see *infra* sections IV. A. (2) & (3) (discussing *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982) and *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991)). Other cases against Japanese employers include *Nghiem v. NEC Electronics, Inc.*, 25 F.3d 1437 (9th Cir. 1994) (involving a U.S. citizen of Vietnamese heritage claiming wrongful termination and race discrimination); *Papaila v. Uniden America Corp.*, 840 F.Supp. 440 (N.D. Tex. 1994) (involving a breach of employment contract as well as discrimination based on race, national origin, and age); *Fitzgibbon v. Sanyo Securities America, Inc.*, No. 92 Civ. 2818 (RPP), 1994 WL 281928 (S.D.N.Y. June 22, 1994) (involving

have mainly claimed violation of Title VII of the Civil Rights Act of 1964,¹⁰ which bans discrimination on the basis of race, color, religion, sex, or national origin.¹¹

claims of, among others, national origin and age discrimination, infliction of emotional distress, and breach of contract); *Bagnell v. Komatsu Dresser Co.*, 838 F.Supp. 1279 (1993) (N.D. Ill.) (involving a discharged employee asserting national origin discrimination); *Blaise-Williams v. Sumitomo Bank Ltd.*, 189 A.D.2d 584, 592 N.Y.S.2d 41 (1993) (involving a bank employee claiming that she was passed over for promotion based on her race, sex, color, or national origin); *Goyette v. DCA Advertising Inc.*, 828 F.Supp. 227 (S.D.N.Y. 1993) (involving claim of unlawful discharge based on their national origin); *EEOC v. Recruit U.S.A. Inc.*, 939 F.2d 746 (9th Cir. 1991) (involving a Japanese company's use of an internal coding system to screen out job applicants by race, gender, and age); *Yap v. Sumitomo Corp. of America*, No. 88 Civ. 700 (LBS), 1991 WL 29112 (S.D.N.Y., Feb. 22, 1991) (involving claim that defendant "discriminated in favor of Japanese nationals in staffing management positions"); *Walsh v. Eagle Wings Industries, Inc.*, No.89-2052, 1991 WL 90906 (C.D. Ill., Jan. 17, 1991) (involving claim arising over the company's refusal to give the American plaintiff the same relocation benefits as those given to Japanese employees and disallowing him to enter language classes comparable to those offered to Japanese employees); *Adames v. Mitsubishi Bank, Ltd.* 751 F.Supp. 1548 (E.D.N.Y. 1990) (challenging discrimination on the basis of race, descent, ancestry, and ethnic characteristics including a "dual staff system" which adversely affected non-Oriental employees); *Van Abrahams v. Pioneer Electronics U.S.A Inc.*, No. CV 88-7868-RSWL, 1989 WL 225579 (C.D.Cal. June 21, 1989) (involving national origin discrimination); *Kelly v. TYK Refractories Co.*, 860 F.2d 1188 (3rd Cir. 1988) (involving wrongful discharge, breach of contract, intentional infliction of emotional distress, etc.); *EEOC v. Japan Air Lines Co. Ltd.*, No.79 CIV. 1625 (MGC), 1986 WL 14290 (S.D.N.Y. Dec. 11, 1986) (involving age discrimination against management employees between the ages of 40 and 65 who were terminated); *Toshiba America Inc., v. Simmons*, 104 A.D.2d 649, 480 N.Y.S.2d 28 (1984) (involving an employee counterclaiming for damages for wrongful discharge against the employer filing an action for money had and received); *Spieß v. C. Itoh & Co. (America), Inc.* 643 F.2d 353 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1128 (1982), *cert. denied*, 469 U.S. 829 (1984) (involving an employees alleging discrimination in managerial promotions and other benefits); *Porto v. Canon, U.S.A., Inc.* 28 Fair Empl. Prac. Cas. 1679 (BNA) (N.D.Ill. 1981) (involving a challenge to the firm's establishment of an employment system which limited the opportunities of non-Japanese employees as well as his discharge based on national origin); *Fujita v. Sumitomo Bank of California*, 70 F.R.D. 406 (N.D. Cal. 1975) (involving female bank employees alleging gender discrimination). *See also* *McDuffie v. Nissei Sangyo America, Ltd.*, 989 F.2d 493 (4th Cir. 1993); *Birmingham v. Sony Corp. of America, Inc.*, 820 F.Supp. 834 (1992); *Blom v. N.G.K. Spark Plugs (U.S.A.), Inc.*, 3 Cal.App.4th 382, 4 Cal.Rptr.2d 139 (1992); *Ross v. Nikko Sec. Co. Int'l*, 133 F.R.D. 96 (S.D.N.Y. 1990); *Shiseido Cosmetics (America) Ltd. v. State Human Rights Appeal Board*, 72 A.D.2d 711, 421 N.Y.S.2d 589 (1979).

10. 42 U.S.C. §§ 2000e to 2000e-17 (1988). The Act provides:

It shall be an unlawful employment practice for an employer

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
- (2) to limit, segregate, or classify his employees or applicants in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Id. at § 2000e-2(a).

11. Other federal antidiscrimination laws include the following: §1981 of the Civil Rights Act of 1866, 42 U.S.C. §1981 (1988); §1983 of the Civil Rights Act of 1871, 42 U.S.C.

This body of litigation has sparked a debate among observers. Some critics view racism and sexism as byproducts of Japan's direct foreign investment.¹² On the other hand, some assert that anti-Japanese sentiment,¹³ fueled by bilateral trade friction, has painted an overly harsh picture of Japan's economic expansion.¹⁴

Notwithstanding the debate, Japanese multinational firms must strive to minimize the risk of discrimination suits by adopting defensive strategies.¹⁵ At the heart of the U.S. civil rights laws is the principle of fairness to individuals.¹⁶ Operating in the nation of immigrants, Japanese multinational firms must understand and appreciate America's commitment to individual dignity.¹⁷ Most importantly, employers should adopt a personnel policy which evaluates employees by their intrinsic merit.

Not only international criticism but also social changes in Japan have

§1983 (1988); Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34 (1988); Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12112-12213 (1988); Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206 (1988); Civil Rights Act of 1991, 42 U.S.C.A. §2000e-1(c)(2) (West Supp. 1991); Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C.A. §1324B (West Supp. 1991). These laws are supplemented by state and local fair employment laws. This article focuses on Title VII of the Civil Rights Act of 1964.

12. See generally William H. Lash III, *Unwelcome Imports: Racism, Sexism, and Foreign Investment*, MICH. J. INT'L L. 1 (1991). The same author also testified about discriminatory practices by Japanese multinational firms at a Congressional hearing, which will be discussed in later sections. See Lantos Hearings, *infra* note 30, at 394-406. Studies reveal mounting criticism against similar problems with Japanese firms in Great Britain, France, and Germany as well. Tomasz Mroczkowski & Richard G. Linowes, *Inside the Japanese Corporation Abroad: Views of American Professionals*, 23 MGMT. JAPAN 28 (1990).

13. See *infra* section III. B.

14. Individuals of this viewpoint argue that some American firms engage in similar discriminatory practices. Interview with Terry Morrison, Human Resources Consultant for Japanese corporations in Portland, Oregon (March 25, 1994). For a complete discussion of employment discrimination charges from the Japanese perspective, see *infra* section III. A.

15. Tsuyoshi Ohishi & Naoto Sasaki, *How to Operate a Business in International Communities*, 26 MGMT. JAPAN 3, 5 (1993) (observing that few Japanese companies have forged policies on international management).

16. See e.g. Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5-12 (1976) (discussing rationales for opposing discrimination); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (Title VII purports to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees"). As sociologist Robert Bellah wrote, "[i]ndividualism lies at the very core of American culture." Abraham, *supra* note 7, at 480 (citing ROBERT BELLAH, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 142 (1985)).

17. EEOC chairman Evan Kemp discussed how workforce equality should be enforced by foreign and domestic employers: "the single best way . . . is to make the people who make the personnel decisions aware that they must hire in compliance with our Federal, State, and local statutes that prohibit job discrimination." Lantos Hearings, *infra* note 30, at 71. Tatsuo Inoue emphasizes Japan's need to "seek a more balanced approach in accommodating the tension between communitarianism and individualism." Tatsuo Inoue, *The Poverty of Rights-Blind Communalism: Looking through the Window of Japan*, 1993 B.Y.U. L. REV. 517, 520 (1993).

bolstered the argument for such a merit system.¹⁸ The prolonged recession¹⁹ is now forcing many firms to depart from established norms such as lifetime employment and seniority-based wages.²⁰ The traditional values of Japanese corporate culture collide with the trends demanding a lasting change in the domestic labor market.²¹ Revitalization of the Japanese economy requires effective allocation of human resources to maximize individual strengths.²² Thus, creating a work environment based on respect of diversity represents a task that Japan must fulfill both at home and abroad.²³ Playing a vital role in the world economy, Japan must confront

18. Numerous writings have recently covered the subject on challenges facing Japanese corporate management. See generally ROCHELLE KOPP, *THE RICE-PAPER CEILING: BREAKING THROUGH JAPANESE CORPORATE CULTURE* 221-32 (1994); KOICHI HORI, *NIJYU-ISSEIKI NO KIGYO SYSTEM [THE CORPORATE STRUCTURE FOR THE 21ST CENTURY]* (1993); IWAO NAKATANI, *NIHON KIGYO FUKATTSU NO JYOKEN [WHAT IT TAKES TO REBUILD JAPANESE CORPORATIONS]* (1993); KAWARU NIHON GATA KOYO [JAPAN'S CHANGING EMPLOYMENT SYSTEM] (Akira Takanashi ed., 1994) [hereinafter *Kawaru Nihon*], RYO HATO, POSUTO SHUSHIN KOYO [POST-LIFETIME EMPLOYMENT] (1994); Takamitsu Sawa & Yoko Ishikura, *Okina Henka-ga Hajimaru: Ikinokoreru Hito-wa Dareda [Big Change Taking Place: Who will Survive?]*, *NIKKEI WOMAN*, Oct. 1994, at 68-69; Shintaro Hori, *Fixing Japan's White-Collar Economy: A Personal View*, *Nov.-Dec.*, *HARV. BUS. REV.* 157 (1991). Jiro Ushio, Chairman of Ushio Inc., a maker of industrial lamps and optical electronics, emphasizes that the three areas which need to be improved are "the excessively employee-oriented Japanese-style management system that guarantees lifetime employment and ties promotions and wages to the seniority system; industrial rules that overemphasize cooperation between government and business; and the system of cross-shareholdings between companies." Osamu Katayama, *Back to the Drawing Board*, 39 *LOOK JAPAN* 4, 11-12 (1993). Koichi Hori, President of the Boston Consulting Group, asserts that true globalization should begin within Japan. If only foreign branches and subsidiaries of Japanese firms force themselves to become "globalized" simply by hiring more locals, some cultural barriers will still remain between Japanese expatriates and local staff. This, Hori says, is a natural consequence of the vastly different values underlying Japanese and American-style management: the former based on seniority and the latter on individual qualifications. Thus, Japanese employers should adopt a merit system in order to create globally acceptable corporate culture. See HORI, *supra*, at 237-78. One scholar opines that Japanese society on the whole needs a "moral reorientation which places a greater emphasis on individual rights." Inoue, *supra* note 17, at 545.

19. For a discussion of the rise of the Japanese yen and its adverse effect on Japan's export-oriented economy, see *infra* section V. A. See also Paul Blustein, *Learning to Expect Trouble Instead of a Bubble; Long-Term Problems Slow Economic Recovery*, *WASH. POST*, Apr. 17, 1994, at H1.

20. See generally Yamamoto Harumi, *The Lifetime Employment System*, 40 *JAPAN Q.* (1993); Thomasz Mrozowski & Masao Hanaoka, *Continuity and Change in Japanese Management*, in *JAPANESE BUS.* 271-87 (Subhash Durlabhji & Norton E. Marks, eds., 1993). See also NAKATANI, *supra* note 18, at 12-23 (discussing the current recession in Japan and the challenges it presents to the Japanese employment system).

21. For a general description of Japanese business management, see *JAPAN: A COUNTRY STUDY* 115, 116-17, 216-18 (Ronald E. Dolan & Robert L. Worden, eds., 5th ed. 1992). For a comparative analysis of business management in Japan and the U.S., see, e.g., Mullen, *supra* note 6, at 744-58; Abraham, *supra* note 7, at 479-84; Marcia J. Cavens, *Japanese Labor Relations and Legal Implications of Their Possible Use in the United States*, 5 *N.W. J. INT'L L. & BUS.* 585 (1983).

22. See KOPP, *supra* note 18, at 51 (emphasizing globalization of human resources as "the only way for Japanese companies to insure their international competitiveness").

23. According to Ronald A. Morse, Japanese society will benefit from the pursuit of the

the challenge of building global companies that are not only "in the world," but also "of it."²⁴

This article analyzes employment discrimination by Japanese firms in the U.S. and recommends integration of diverse individuals into the core labor force as an essential element of global management. Numerous scholarly articles have explored issues related to the availability of affirmative defenses²⁵ for Japanese employers facing discrimination charges.²⁶

issues relating to discrimination by Japanese corporations in the U.S. Lantos Hearings, *infra* note 30, at 173.

24. Mroczkowski & Linowes, *supra* note 12, at 30 (1990). Jared Taylor also uses the expression "in the world, but not of it" to refer to Japanese people. TAYLOR, *supra* note 1, at 91. Edwin Reischauer assigns building meaningful relationships with other peoples as the greatest single obstacle the Japanese face today. REISCHAUER, *supra* note 7, at 408. He further explains that Japan must become a fully cooperative member of the international community by abandoning its sense of uniqueness. *Id.* at 410. See also HORI, *supra* note 18, at 24 (describing that the world is sending a message to Japan, urging to contribute to global society); Emma Louise Young, in JAPAN: A COUNTRY STUDY 55 (Frederica M. Bunge, ed., 1983) (explaining that the nation's economic success has motivated Japanese people to engage in "considerable soul searching" about its role in the world); Paul Lansing & Tamra Domeyer, *Japan's Attempt at Internationalization and its Lack of Sensitivity to Minority Status*, 22 CAL. W. INT'L L. J. 135, 137 (1991) (stating that Japan needs to cooperate with the rest of the world, proving its sincere effort to conform); Lantos Hearings, *infra* note 30, at 174 (containing the following statement by Ronald Morse: "Now that Japan is not isolated from the world, and if they are going to prove themselves as good citizens globally, the responsibility will be on the Japanese side, in Japan, to be able to really come up to the standard of international employment practices and other types of behavior").

25. An affirmative defense can be defined as "[a] response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." BLACK'S LAW DICTIONARY 60 (6th ed. 1990). For a discussion of the affirmative defenses applicable to Japanese corporations in employment discrimination cases, see *infra* section IV.

26. See e.g. Mark B. Schaffer, *The Implications of Japanese Culture on Employment Discrimination Laws in the United States*, 16 HOUSTON J. INT'L L. 343 (1993); Jeffrey J. Mayer, *A Critical Analysis of Judicial Attempts to Reconcile the United States-Japan Friendship, Commerce and Navigation Treaty with Title VII*, 13 NW. J. INT'L L. & BUS. 328 (1992); Michael S. Kimm, *Domestic Employees and Title VII Versus Foreign Employers and "FCN" Treaties: A 21st Century Perspective*, 9 B.U. INT'L L.J. 95 (1991); Madeline C. Amendola, *American Citizens as Second Class Employees: The Permissible Discrimination*, 5 CONN. J. INT'L L. 625 (1990); Dana Marie Crom, *Clash of the Cultures: U.S. Japan-Treaty of Friendship, Title VII, and Women in Management*, 3 TRANSNAT'L L. 337 (1990); Gary Singh, *Japanese Employment Practices under American Law*, 2 INT'L LEGAL PERSP. (1990); Matthew Orebic, *Japanese Companies on United States Soil: Treaty Privileges vs. Title VII Restraints*, 9 HASTINGS INT'L & COMP. L. REV. 377 (1986); Barbara A. Ritomsky & Robert M. Jarvis, *Doing Business in America: The Unfinished Work of Sumitomo Shoji America, Inc. v. Avagliano*, 27 HARV. INT'L L.J. (1986); Nobuhisa Ishizuka, *Subsidiary Assertion of Foreign Parent Corporation Rights under Commercial Treaties to Hire Employees "Of Their Choice"*, 86 COLUM. L. REV. 139 (1986); Paul Lansing & Laura Palmer, *Sumitomo Shoji v. Avagliano: Sayonara to Japanese Employment Practices in Conflict with Title VII*, 28 ST. LOIS U. L.J. 153 (1984); Francine McNulty, *Employment Rights of Japanese-America Joint Ventures in the United States under the U.S.-Japan Treaty of Friendship, Commerce and Navigation*, 16 LAW & POL'Y INT'L BUS. 1225 (1984); Note, *Yankees Out of North America: Foreign Employer Job Discrimination Against American Citizens*, 83 MICH. L. REV. 237 (1984); Stacey M. Rostner, *Beyond The FCN*

This article, however, focuses on limitations to those defenses and discusses what steps should be taken in order to keep problems from erupting.

II. PATTERNS OF EMPLOYMENT DISCRIMINATION BY JAPANESE FIRMS IN THE UNITED STATES

In today's global age, various forms of employment discrimination,²⁷ as well as cars and televisions, have transcended Japan's national border.²⁸ Through its economic activities in the U.S., Japanese multinational firms have introduced their employment practices to the American public. Some of these practices clash with U.S. civil rights laws and social norms.²⁹ Deep concerns over the Japanese corporate behavior finally forced Congress to confront the issue; in 1991, the Employment and Housing Subcommittee of the House Committee on Government Operations held three hearings entitled *Employment Discrimination by Japanese-Owned Companies in the United States* led by Rep. Tom Lantos (D-California).³⁰ The Subcommittee heard testimonies from aggrieved em-

Treaty: Japanese Multinationals under Title VII, 51 *FORDHAM L. REV.* 871 (1983); John Bruce Lewis & Bruce L. Ottley, *Title VII and Friendship, Commerce, and Navigation Treaties: Prognostications Based upon Sumitomo Shoji*, 44 *OHIO ST. L.J.* 45 (1983).

27. Japan has made little concerted effort to promote workforce equality. Various forms of job discrimination have prevailed, because "Japanese corporate society has traditionally been a society based on rank, class, and discrimination." Uchihashi Katsuto, *Downsizing, Japanese Style*, 21 *JAPAN ECHO* 47, 48 (comparing lack of attempt to combat discrimination in Japan with the U.S. approach to fair employment practices).

28. See Kenneth B. Noble, *A Clash of Styles: Japanese Companies in U.S. Under Fire for Cultural Bias*, *N.Y. TIMES*, Jan. 25, 1988 at A16 (discussing discrimination charges against Japanese firms in California, the nation's primary legal battleground, largely due to the concentration of American executives working for Asian-controlled electronics businesses in the San Francisco Bay area). The Equal Employment Opportunity Commission (EEOC) has expressed its growing concern for bias suits involving multinational firms in general. Lairold M. Street, who has worked with the International Trade Commission and is currently employed by the EEOC, suggests that this concern stems from expansion of economic activities by foreign-owned firms: statistics in 1989 indicated that 130 foreign firms chose the greater Washington D.C. area to conduct business in the U.S. This, Street says, is a five-fold increase from a decade ago. Lairold M. Street, *Helping Japanese Firms Cope with Employee Benefits and U.S. Labor and Employment Laws*, 35 *HOWARD L.J.* 381, 382 (1992). See also KOPP, *supra* note 18.

29. Most notably, the primacy of group harmony emphasized by Japanese firms conflicts with individualistic values held by Americans. Ohishi & Sasaki, *supra* note 15, at 4. See also James R. Lincoln, *Employee Work Attitudes and Management Practice in the U.S. and Japan: Evidence from a Large Comparative Survey*, *Cal. Mgmt. Rev.* 89 (Fall 1988) (discussing how work attitudes are different in Japan and in the U.S. based on a survey on 106 factories and their 8,302 employees in the U.S. (central Indiana) and Japan (Kanagawa Prefecture)); Abraham, *supra* note 7, at 479-484 (examining the differences between Japanese and American business practices).

30. These hearings were held on July 23, August 8, and September 24 of 1991. Alleged discriminatory practices ranged from disparaging comments to exclusion of Americans from the decision-making process. *Employment Discrimination by Japanese-Owned Companies in the United States: Hearings Before the Subcomm. on Employment and Housing of the House Comm. on Government Operations, House of Representatives, 102d Cong., 1st Sess.*

ployees, Japanese employers, the Equal Employment Opportunity Commission³¹ officials, and labor specialists. One witness characterized discrimination by her former Japanese employer as institutional as opposed to individualized discrimination.³² Chairman Lantos emphatically stated that U.S. citizens, who work for Japanese firms, are crying out in anguish as second-class citizens in their own nation.³³ The Lantos Hearings shed light on "what has been a significant undercurrent in much of the debate over Japanese investment:" "how American employees are faring at Japanese firms."³⁴

Some of the witnesses at the Lantos Hearings have also initiated lawsuits under Title VII. The U.S. took up the challenge of eradicating job discrimination when Congress enacted the Civil Rights Act in 1964. Title VII prohibits discrimination by employers, labor organizations, and employment agencies on the basis of race, color, religion, sex, or national origin.³⁵ It embodies the universally held principles of fairness and equality in American society. The Fifth Circuit has, for instance, construed Title VII as reflecting an "assumption that Congress sought a formula that would not only achieve the optimum use of our labor resources but

(1991) [hereinafter Lantos Hearings]. In his opening statement at the first hearing, Rep. Lantos stated as follows: "The Japanese have modernized some old plants, built new factories, and created many new jobs for American workers. As a Nation, we welcome Japanese investment, but we cannot and will not allow Japanese companies in the process to flout our values and principles or violate our labor, civil rights, and nondiscrimination laws." *Id.* at 1. Journalist Kishi Nagami documented critical part of these hearings in his book for a Japanese audience. He asserted that the hearings had captured little media attention in Japan. Thus, Nagami concludes, few Japanese recognize that the discrimination issues even exist. NAGAMI KISHI, *UTTAERARERU ZAIBEI NIHON KIGYO [EMPLOYMENT DISCRIMINATION CASES BY JAPANESE-OWNED COMPANIES IN THE UNITED STATES]* 1-3 (1992).

31. The Equal Employment Opportunity Commission [hereinafter EEOC] consists of five Presidentially-appointed members. This agency is in charge of processing employment discrimination charges under Title VII of the Civil Rights Act [hereinafter Title VII]. *See* 42 U.S.C. §2000e-4 (1988).

32. Lantos Hearings, *supra* note 30, at 46 (Susan Minshukin, former employee of Nikko Securities, basing this distinction on her own work experience at Merrill Lynch and Nikko. The former had a number of male sales assistants, whereas the latter filled such "helper" jobs with women). Judy Teller shares her observation as follows: ". . . in American corporations, it's at least conceded that [gender discrimination] is a no-no. Men may believe that women should be kept barefoot, pregnant and on the edge of town, but it's not acceptable, legally or in social terms, to behave that way. Within the context of Japanese corporation, it seems to me . . . there is a tradition of subordinate positions for women." *Id.* at 45.

33. Lantos further stated: "I think we are opening up an ugly chapter in United States-Japan relations." He added that this chapter will not be closed until Japanese firms end its discriminatory practices against Americans. *Id.* at 42. *See also* REISCHAUER, *supra* note 7, at 395-400 (describing racist attitudes among the Japanese as a reflection of a "we-they" dichotomy). Nagami Kishi presumes that some sanctions may be given in the future to Japanese corporations which violate the U.S. civil rights laws. They may include restrictions of the visas granted to Japanese managerial employees rotated from parent companies (currently 80,000 visas per year) and exclusion of the Japanese from the jobs with the U.S. government. KISHI, *supra* note 30, at 235.

34. KOPF, *supra* note 18, at 20.

35. For the relevant provisions, *see supra* note 10.

. . . would enable individuals to develop as individuals.”³⁶ Title VII has given litigants a useful tool in regulating employers’ outward behavior influenced by arbitrary generalizations of particular groups.³⁷

By violating the letter and the spirit of Title VII, “the cornerstone, as well as touchstone of employment discrimination law,”³⁸ Japanese employers have failed to honor America’s commitment to workforce equality. This section analyzes the general patterns of employment discrimination by Japanese firms in the United States based on the testimonies at the Lantos Hearings as well as case law.

A. *Discrimination in Recruitment and Hiring*

Recruitment and hiring have posed a major challenge to Japanese multinational firms.³⁹ A recent Japan Society poll reveals that nearly one third of the surveyed U.S. affiliates of Japanese firms have received complaints of discrimination in their hiring and promotion practices.⁴⁰

In general, Japanese employers abroad hire a disproportionately low percentage of Americans for upper-level management.⁴¹ They systemati-

36. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386-387 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971) (emphasis added).

37. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (emphasizing Congressional intent to combat overt discrimination, “the most obvious evil”).

38. *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS* 15 (Mack A. Player et al., eds., 1990).

39. WILLIAM C. BYHAM, *SHOGUN MANAGEMENT* 151 (1993). “Just consider the sheer number of differences in education, skill levels, culture, and expectations between the Japanese and North Americans.” *Id.*

40. KOPP, *supra* note 18, at 22 (citing DANIEL BOB AND SRI INTERNATIONAL, *JAPANESE COMPANIES IN AMERICAN COMMUNITIES* 41 (1990)).

41. In their 1990 article, Mroczkowski and Linowes, both Professors of Business Administration at American University, wrote that more than one million non-Japanese employees work for Japanese companies worldwide. Nonetheless, a study by Japan’s Ministry of International Trade and Industry revealed that these companies typically fill staff management positions with Japanese expatriates: “Of the top officials at Japanese owned subsidiaries abroad, 45.4% had been transferred from the home office against 17.3% for foreign-owned subsidiaries in Japan.” Mroczkowski & Linowes, *supra* note 12, at 28. Associate Professor Schon Beechler of Columbia Business School explains: “Japanese companies are still using more than double the percentage of expatriates in their foreign affiliates than is typical of Western multinationals.” Anne G. Perkins, *Japanese Multinationals: The Hiring of Expatriates Persists*, *HARV. BUS. REV.* 72 (Sept./Oct. 1994). Lewis Steel, a civil rights attorney who has handled a series of discrimination cases against Japanese employers, observes that some Japanese parent companies send over employees even for the lowest level of management. Among these firms, Japanese nationals occupy 30-40% of the entire workforce. Lantos Hearings, *supra* note 30, at 159. Judy Teller concluded, through her own experiences and observations at DCA Advertising (a wholly owned subsidiary of a Japanese advertisement company), that national origin and gender, rather than merit and dedication, constitute determining factors in an employee’s future. Lantos Hearings, *supra* note 30, at 25 (explaining that American law, belief, and custom have been trampled). See also HORI, *supra* note 18, at 228-29 (1993) (discussing the low percentage of local employees assigned to managerial or executive positions at Japanese multinational firms); NAKATANI, *supra* note 18, at 42 (stating that virtually no Japanese firms in the U.S. would even consider the possi-

cally reserve managerial or executive positions for Japanese nationals rotated from parent companies.⁴² Due to the sheer number of Japanese expatriates,⁴³ their values dominate corporate culture.⁴⁴ These values

bility of promoting American managers to presidents or chief executive officers); Lansing & Palmer, *supra* note 26, at 165-66 (explaining that Japanese firms intend to facilitate a better understanding of the overall business operation through rotation of executives from one subsidiary to another). Few Japanese companies, both at home and abroad, hire foreigners as regular employees. John Shook, the first foreign employee of Toyota Motor Corporation in Japan made the following statement: "The whole company infrastructure is set up for the Japanese . . . we don't fit. If the company gets serious about hiring more foreigners, things will have to change." ROBERT M. MARCH, WORKING FOR A JAPANESE COMPANY: MANAGING RELATIONSHIPS IN A MULTICULTURAL ORGANIZATION 16 (1992). Typically, local staff play an extremely limited role in the business operation, isolated from the firm's decision-making process. Lantos Hearings, *supra* note 30, at 156-71 (containing a written statement by Lewis Steel, a civil rights attorney who has dealt with Japanese firms). Japanese employers often hire foreigners simply for their linguistic skills. A 1988 survey shows that three out of four foreign employees of Japanese firms are hired for international activities, and one in five for language skills. MARCH, *supra* note 41, at 113. "Foreigners working for Japanese companies in Japan often feel frustrated by their limited duties, such as checking English texts for grammar or entertaining foreign visitors." This manifests the common perception among Japanese employers that foreigners will stay with the company only temporarily. At the same time, the employees' lack of Japanese-speaking skills may be another contributing factor. *Id.* at 114. They often hire locals merely as temporary contract workers. *Id.* at 115. Robert March refers to these foreign employees as second-class, "disposable" citizens. He also introduces the case of Denis Pawley, who was the top-ranking manager at Mazda USA in Flat Rock, Michigan. Pawley resigned in three years, convinced that he would never be given meaningful authority. March points out that Pawley erroneously expected to become a top executive in Mazda, because Japanese auto companies consider it essential for their global strategies to keep Japanese nationals in control. *Id.* at 164-65.

42. These companies value frequent rotation of managers, including overseas assignments, as a way to develop and maintain organizational flexibility. One American manager criticizes temporal overseas assignments of Japanese managers. He calls this common practice a "revolving door of executives," which makes it difficult for local staff to keep up with business operations. BYHAM, *supra* note 39, at 17. Likewise, another observer discusses rotation of managers as a source of discontinuity and a lack of direction among the local staff. Mullen, *supra* note 6, at 778. Virtually all rotating managers are men. Lantos Hearings, *supra* note 30, at 160.

43. Tomoko Hamada observes a steady increase of Japanese businessmen accepting transfers to overseas assignments. In 1986 alone, for instance, 58,951 Japanese transferred to foreign branches or subsidiaries. Hamada further notes: "[A]lready about two million Japanese businessmen and their families have been transplanted into foreign countries by Japanese companies. About a quarter million come to the United States." Hamada, *supra* note 7, at 136. The Japanese Ministry of International Trade and Industry (MITI) explained: "[T]he ability of Japanese investors to dispatch executive employees from Japan to manage and control their overseas subsidiaries is of the greatest importance and indeed is a basic prerequisite for the successful management of their overseas business activities." Amicus Brief of MITI at 5, *Sumitomo Shoji America Inc. v. Avagliano*, 457 U.S. 176 (1982). See also KAORU KOBAYASHI, THE MOST MISUNDERSTOOD COUNTRY 99 (1984) (discussing job rotation as a common method for Japanese firms to train managers to become generalists rather than specialists).

44. Mroczkowski & Linowes, *supra* note 12, at 29. One author discusses his observation of the staffing pattern at Mitsubishi International Corporation, a New York subsidiary of Mitsubishi Shoji, a major Japanese trading company. Although Americans comprise 75% of its employees, most of them engage in menial tasks as assistants for Japanese expatriates.

include "strong control from headquarters and a mentality that makes a clear distinction between insiders and outsiders — between Japanese at the core of the firm and foreigners at the periphery."⁴⁵

For example, *Yap v. Sumitomo Corp. of America*⁴⁶ arose over such a rotation system. Defendant (SCOA) is the wholly-owned American subsidiary of a major Japanese trading company, Sumitomo Shoji Kaisha, Ltd.⁴⁷ SCOA systematically assigned Japanese males rotated from the parent company to managerial positions.⁴⁸ Non-Japanese plaintiffs

He further notes a similar practice at Toyota in the U.S.: while Americans occupy the majority of executive positions, they only maintain inflated titles. As in the previous example, expatriates retain the real decision-making power. HORI, *supra* note 18, at 228-29. One observer describes a "dual administrative structure" typical in manufacturing and trading companies: "Japanese at the top, coordinating with Tokyo head office and making decisions, and local staff below responsible for operations." MARCH, *supra* note 41, at 115. "Japanese companies like to control overseas operations closely, and many Japanese managers admit that Tokyo gives them little freedom to act autonomously . . . [M]ajor and minor policy decisions often are made at headquarters." BYHAM, *supra* note 39, at 91. Statistical surveys in the U.S., Europe, and the Asia-Pacific region have affirmed ethnic homogeneity of Japanese management from a comparative perspective as well. "[C]lose to 70% of middle/senior managers in Japanese firms abroad are Japanese, a marked contrast to American and European multinationals abroad, where only 10% of the same group come from the home country. As for the CEOs of overseas subsidiaries, virtually 100% are home country (i.e., Japanese) nationals in the Japanese case, contrasted to 75% being home country nationals with European subsidiaries, and 50% with U.S. subsidiaries abroad." MARCH, *supra* note 41, at 163.

45. This observation is based on a report by the Japan Economic Institute, funded by the Japanese Foreign Ministry. MARCH, *supra* note 41, at 118-19. The Japanese refer to subsidiaries as *ko-gaisha* (child company) in relation to *oya-gaisha* (parent company). These terms suggest "the existence of a familial relationship of control and dependency." *Bulova Watch Co. v. K. Hattori & Co.*, 508 F.Supp. 1322, 1339 (E.D.N.Y. 1981) (citing K. HATTANI, *THE JAPANESE ECONOMIC SYSTEM: AN INSTITUTIONAL OVERVIEW* 126 (1976)). John Horton, Manager of Administration at Toyota Technical Center U.S.A., Inc. explains the dual management structure he has observed at the company: non-Japanese employees with allegedly management responsibilities must report to a parallel Japanese national manager. Lantos Hearings, *supra* note 30, at 191. Likewise, Judy Teller and Russel Goyette point to the practice of operating with a double standard by their former employer, DCA Advertising: one for the Japanese and the other for Americans. *Id.* at 24 & 31. Teller explained: "It was actually the stated policy of Japanese management that they could not treat the two groups alike." *Id.* at 24. Attorney Lewis Steel has observed a three-tiered structure in Japanese multinational firms: rotating staff from parent companies dominating the managerial positions, local male employees in the middle, and women at the bottom. *Id.* at 159. "With some notable exceptions such as Sony and Nissan, centralized control from Tokyo and reliance on Japanese managers to enforce it is still the pattern among many Japanese corporations." Mroczkowski & Linowes, *supra* note 12, at 28 (1990). Tomoko Hamada agrees with this view and asserts that "the Japanese firms" approach to multinationalization derives from and is an extension of the interorganizational alliance between relational dynamics of the parent firm and its subsidiaries in Japan." Hamada, *supra* note 7, at 139. See also Perkins, *supra* note 41 (observing heavy reliance by Japanese firms on expatriates who can communicate with headquarters "through a common language, culture, and way of thinking").

46. *Yap v. Sumitomo Corp. of America*, No. 88 Civ. 700 (LBS), 1991 WL 29112 (S.D.N.Y. Feb. 22, 1991).

47. *Id.* at *1.

48. *Id.*

claimed discrimination on the basis of national origin in hiring, promotion, and compensation policies.⁴⁹ The U.S. District Court for the Southern District of New York approved a proposed consent decree which aimed at the greater use of the local staff in the senior management group. The decree committed SCOA, among others, to provide a variety of programs such as on-the-job training, career counseling, and management training sessions.⁵⁰

A practice revealed in *EEOC v. Recruit U.S.A., Inc.*⁵¹ provides a vivid and well-documented example of discriminatory hiring. In this case, Recruit, a Japanese job placement agency in California, used a code system to maintain a job candidate pool accommodating its clients' ages, as well as their racial, ethnic, and gender preferences.⁵² Recruit used common names to denote race and gender;⁵³ for instance, the phrase Talk to Adam when coding a request by an employer seeking male applicants and Talk to Eve for female applicants.⁵⁴ IBM Japan, one of Recruit's clients,

49. *Id.*

50. *Id.* at *3.

51. *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746 (9th Cir. 1991).

52. *Id.* at 748 n.1; Lantos Hearings, *supra* note 30, at 43 (a statement by Paul Schmidtberger that anywhere from 5 to 10 per 100 applications would be of "incorrect race" while more than that would be of "incorrect gender").

53. *Recruit U.S.A., Inc.*, 939 F.2d., at 748 n.1; Lantos Hearings, *supra* note 30, at 7. Former Recruit employee Paul Schmidtberger stated that the firm's screening process would have forced him to screen out his own application despite his qualifications, including degrees from Yale University and Stanford Law School and fluency in Japanese. Lantos Hearings, *supra* note 30, at 42. Fumihiko Sasaki, Sub-Chief of the Legal Department at Recruit U.S.A., Inc. (hereinafter Recruit) views the firm's settlement with the EEOC as a mere compromise. Most of all, Recruit was concerned for publicized charges of its alleged discriminatory practices. KISHI, *supra* note 30, at 130-36. On April 26, 1989, and May 2, 1989, the San Francisco Chronicle published two articles, one on the company's coding system and the other on the internal memorandum indicating IBM Japan's request for excluding non-Oriental applicants. These articles were based on information provided by former employees, including Paul Schmidtberger, who testified at a Lantos Hearing. By the time of his resignation, Schmidtberger had obtained corporate documents regarding Recruit's charges. He refused to return them despite the company's plea and submitted them to the EEOC. Lantos Hearings, *supra* note 30, at 42. On May 26, 1989, shortly after the San Francisco Chronicle published the articles, R. Gaul Silberman of the EEOC charged Recruit with violation of Title VII and the Age Discrimination in Employment Act. The EEOC then obtained preliminary injunction prohibiting the company from destroying or removing the records beyond territorial discriminatory practices. At the appellate level, Recruit challenged this injunctive relief; it claimed that the EEOC violated Title VII's confidentiality provisions by issuing a press release and lifting the seal on the complaint and appended charges. The Ninth Circuit however, justified the EEOC's act, considering substantial public interest involved. See *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746 (9th Cir. 1991). In an interview with a Japanese journalist, Fumihiko Sasaki of Recruit expressed his discontent with the outcome of the case. Sasaki explained: "Because Schmidtberger was unsatisfied with his salary, he left the job, stealing a substantial amount of internal documents, and revealed them at the Lantos Hearing. We found it difficult to defend ourselves, because the court focused on the discrimination issues instead of violation of confidentiality provisions." KISHI, *supra* note 30, at 131.

54. Similarly, Recruit used "Talk to Haruo" for Japanese men; "Talk to Mariko" for

explicitly stated its preferences for job candidates: "Foreigners are no good"; "White people, black people, no; but second generation Japanese or others of Asian descent, OK."⁵⁵ For Meiko Securities, another client, Recruit ordered a candidate pool with a male to female ratio of four to one.⁵⁶ The settlement with the EEOC required the company to establish a \$100,000 fund to be distributed among victims of discrimination and to provide training seminars which educate Japanese managers coming to the U.S. about American antidiscrimination laws.⁵⁷

To take another example, the Daiichi Kangyo Bank in California, which possesses the world's largest banking assets,⁵⁸ allegedly conducted racially-motivated hiring. Karl Joachim Biniarz, former president and manager of the Bank's San Diego branch, testified about an instruction he had received from a Japanese senior executive: to have a "proper profile," meaning "no women or blacks," for a loan officer position.⁵⁹

Moreover, Robert Cole and Donald Deskins researched site selection patterns by Japanese auto manufacturers in the U.S.⁶⁰ Questions arose over hiring practices by Honda of America Manufacturing Inc. at its manufacturing facilities in Marysville, Ohio. In 1977, Honda established its original hiring radius as twenty miles.⁶¹ Consequently, merely 2.8% of Honda's workforce consisted of blacks although blacks accounted for 10.5% of the population at the Marysville site.⁶² In 1984, then EEOC

Japanese women; "Maria" for Hispanic women; and "Maryanne" for black women. The code was further used to accommodate employers' age preferences. For instance, "Suite 20 through 35" meant age twenty to thirty-five. Recruit U.S.A., Inc., 939 F.2d at 748, n.1; Lantos Hearings, *supra* note 30, at 7.

55. This memorandum written in Japanese, "IBM Project Confirmation," was submitted to the Lantos Committee along with Paul Schmidtberger's statement. Paul Schmidtberger testified that the memo was taped to the wall of the Recruit office. Lantos Hearings, *supra* note 30, at 8.

56. *Id.* at 9.

57. *Id.* at 2.

58. The Greenlining Coalition notes that among the world's 20 largest banks listed in the American Banker, the top six are Japanese, and seven of the top 10 are Japanese. The top six banks and their asset size from the previous year are as follows: (1) Dai-ichi Kangyo Bank (\$428.2 billion); (2) Sumitomo Bank Ltd. (\$409.2 billion); (3) Mitsui Taiyo Kobe Bank Ltd. (\$408.8 billion); (4) Sanwa Bank Ltd. (\$402.7 billion); (5) Fuji Bank Ltd. (\$399.5 billion); and (6) Mitsubishi Bank Ltd. (\$391.5 billion). Lantos Hearings, *supra* note 30, at 328.

59. According to Biniarz, after the Bank fired two Filipino-American employees, a Japanese official said that Filipinos tend to be lazy. Biniarz claims that he himself was involuntarily terminated. *Id.* at 201-203.

60. Robert E. Cole & Donald R. Deskins, Jr., *Racial Factors in Site Location and Employment Patterns of Japanese Auto Firms in America*, 31 CAL. MGMT. REV. 9 (1988).

61. For its decision to choose the Marysville site, Honda of America pointed to several reasons, such as active encouragement from the state of Ohio and superior access to the interstate highway system. Lantos Hearings, *supra* note 30, at 127-28. The company enlarged its hiring radius to 30 miles in 1986 and even further in 1987. *Id.* at 128.

62. Cole & Deskins, *supra* note 60, at 15. EEOC Chairman Evan Kemp discussed a geographical factor that may have affected hiring practices by Japanese employers. Japanese multinational firms would be expected to locate where tax and wage rates remain relatively low; many of minority groups are, however, located where tax and wage rates are high.

Chairman Clarence Thomas filed a charge against Honda for discrimination against women and blacks in hiring and promotion and against non-Japanese in engineering positions.⁶³ Refusing to accept the charges, Honda officials had repeated talks with the EEOC for four years.⁶⁴ At last, on March 24, 1988, Honda agreed to give 370 blacks and women a total of six million dollars in back pay.⁶⁵ In response to the EEOC charge, Honda evaluated its hiring patterns and began what it calls "corrective hiring."⁶⁶

Cole and Deskins also published an article which analyzed the more general tendency of Japanese manufacturers to select areas with a low black population.⁶⁷ For this purpose, they cited an interview with Dennis

Lantos Hearings, *supra* note 30, at 64.

63. *Id.* at 128 & 134.

64. Kunio Iwamoto, former Vice President of Honda who dealt with this case, insists that the firm's choice of the hiring radius was not intended to exclude certain applicants. Iwamoto speaks with confidence of Honda's equal employment opportunity policy which he says the company adopted long before the EEOC's charge was filed. He explains that the firm was hoping to help reduce a high unemployment rate within that radius by hiring as many locals as possible. In fact, Iwamoto says, Honda received about 30,000 applications constantly. KISHI, *supra* note 30, at 138-142.

65. Cole & Deskins, *supra* note 60, at 9 (citing Micel McQueen & Joseph White, *Blacks, Women at Honda Unit Win Back Pay*, WALL ST. J., March 24, 1988).

66. Lantos Hearings, *supra* note 30, at 134. Instead of simply expanding the hiring radius, Honda adopted a new policy of recruiting from a larger area including the neighboring counties. In addition, the company implemented and carried out five new policies: (1) to place newspaper advertisements stating that Honda does not discriminate; (2) to ask minority organizations to recommend prospective employees; (3) to conduct career guidance at colleges for blacks throughout the U.S.; (4) to educate Honda managers on the U.S. antidiscrimination laws and civil rights issues; and (5) to emphasize the importance of equal employment opportunity to all workers through President's speeches and so forth. KISHI, *supra* note 30, at 140. Iwamoto sees the company's settlement as a mere compromise. Iwamoto made the following statement in his interview with Nagami Kishi, a management specialist who surveyed employment discrimination cases against Japanese firms in the U.S.: "Since we expanded to the U.S. in 1959, we have operated our business, based on our attorneys' advice. In fact, we were confident that our company had taken root in American society . . . [h]owever, the EEOC expected greater social responsibility from us because of our rapid growth and prominence." *Id.* at 142. At a Lantos Hearing, Honda emphasized its effort to promote women and blacks by reporting an increase of women and blacks in what they call "production associates:" "From March 1984 to March 1988 employment of female production associates rose from 12.5% to 25.8%; and black production associates from 1.2% to 2.8%." Nonetheless, Lantos questioned the company's definition of "associates," which proved to be production line workers or assembly line workers. In fact, in Honda's upper-level management, 7% were women and there was only one black (out of about 150). Lantos Hearings, *supra* note 30, at 135. Based on his interview, Robert March introduces the following information on the "ostensible" behavior of Japanese managers at Honda in Marysville:

"[t]he Japanese in Marysville put more emphasis on communal living Japanese-style and reinforcing their common links with one another, than on adjusting to the new environment . . . [w]ouldn't it be nice to be back home? They would say to each other when relaxing. Having farewell parties (*sobetsukai*) and singing karaoke together seemed to be the things they talked about most, or had written about." MARCH, *supra* note 41, at 201.

67. Cole & Deskins, *supra* note 60, at 13.

Des Rosiers, who had performed several site studies for Japanese auto companies.⁶⁸ These employers, Des Rosiers says, scrutinize profiles of the community extensively "by ethnic background, by religious background, [and] by professional makeup."⁶⁹

Likewise, it has been discovered that Japanese investors in the U.S. receive detailed census tract information from the Japan External Trade Organization (JETRO).⁷⁰ One JETRO publication was found to recommend California to site plants because of its higher Asian population, a potential source of "high quality" human resources.⁷¹

B. *Discrimination in Assignment and Promotion*

At Japanese multinational firms, local employees often find themselves trapped in job duties with minimal delegated authority.⁷² The Greenlining Coalition, a California organization composed of minority groups and consumers, criticized the hiring pattern at the Mitsui Taiyo Kobe Bank, a bank with an asset base of \$408.8 billion.⁷³ In its 1990 Annual Report, all 103 members of Board of Directors are Japanese males.⁷⁴ The twenty-two Advisory Board members and fourteen key or "Senior Managing Directors" are all Japanese males who are at least fifty-eight years old. Moreover, the top ninety-seven management persons are all Japanese males. The Coalition discussed the adverse impact of such homogeneous workforce in California, a state of diverse individuals including 13.5 million people of color and 8.35 million white women.⁷⁵

68. *Id.* at 17 (citing Doug Williamson, *Japanese Bias Comes to Light in Hiring Plans*, WINDSOR STAR SPECIAL RPT.: JOBS 2000, October 29, 1987, at 14).

69. Japanese employers try to find out, for instance, a ratio of accountants to farmers in the area. Also, the employers prefer a high German content, due to their positive stereotypes about Germans, such as having a good work ethic. *Id.* at 17-18.

70. *Id.* at 18. Established in 1958 by the Japanese Ministry of International Trade and Industry, JETRO performs a broad array of activities, such as import promotion and liaison between small businesses in Japan and their foreign counterparts. Dick K. Nanto, in *JAPAN: A COUNTRY STUDY* 203 (Frederica M. Bunge, ed., 1981).

71. Cole & Deskins, *supra* note 60, at 18.

72. Lantos Hearings, *supra* note 30, at 158-62. At Nissan America, Japanese managers "assist in the planning and checking of department activities, with the American staff carrying out and adjusting day-to-day operations." MARCH, *supra* note 41, at 17-18 (citing *The International Herald Tribune*, May 24, 1990). Lawyer Lewis Steel describes a three-tiered structure he has observed within those firms: Japanese nationals rotated from parent companies dominating the managerial positions, "even down to the lowest level of management;" locally-hired men at the middle level with limited chance for promotion; and women at the bottom, providing support services. Lantos Hearings, *supra* note 30, at 158-62. Chet Mackentire, former employee of Ricoh, explains that Japanese nationals occupied virtually all the firm's division heads throughout the U.S. Company representatives pointed to two reasons: "One, each division has profit and loss responsibility to the mother company in Japan; and two, they need division heads who they can rely on." *Id.* at 209.

73. *Id.* at 331.

74. *Id.* at 328.

75. *Id.* at 329. "As a result [of its discriminatory practices], Mitsui's all Japanese male control from Tokyo is unable to understand the marketing, lending and service needs of

In *Adames v. Mitsubishi Bank*,⁷⁶ four women sued their former employer, Mitsubishi Bank's New York Office (Mitsubishi), alleging discrimination based on their non-Oriental status. Plaintiffs asserted that they were hired as analysts but were actually confined in positions as administrative assistants.⁷⁷ Mitsubishi maintained a "dual staff system," including rotating staff (executive and managerial employees from the head office in Japan on assignments of limited duration) and local staff (individuals who were hired locally). Plaintiffs described the gap between these two as one which "significantly impeded the ability of local staff at all levels to achieve promotions or salary increases."⁷⁸ Only twenty officer positions were allocated to local staff, as compared to fifty-five officer positions to rotating staff; of the twenty officers among local staff, only one involved a position higher than the first level of assistant manager; moreover, of the top nineteen positions, eighteen were held by Japanese rotating staff.⁷⁹ The court denied Mitsubishi's motion for summary judgment.

Some employers give inflated job titles to local employees while forcing them to report to a Japanese "shadow manager" who retains the decision-making power.⁸⁰ The Daiichi-Kangyo Bank, for instance, gave "no authority whatsoever" to a former vice president and manager of its San Diego office without receiving approval from a Japanese expatriate through the head office in Los Angeles.⁸¹

Furthermore, at Toyota Technical Center (TTC), John Horton, a middle management employee of ten and a half years, alleged a discriminatory barrier at the firm.⁸² TTC's top management denied Horton's promotion twice in 1990 despite the exemplary performance appraisals he

America's most diverse business culture and California's 700 billion-dollar economy." *Id.* at 331. The Coalition compares Mitsui's discriminatory hiring pattern with fair employment practice at the Bank of Tokyo's Union Bank, another Japanese bank located in California. Union Bank has successfully promoted its comprehensive equal employment opportunity policy since 1988. The Coalition commends the Bank's effort in achieving its goal that women and people of color will occupy 60% of the new senior management appointments. *Id.* at 330.

76. *Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1548 (E.D.N.Y. 1990).

77. *Id.* at 1551-51.

78. *Id.* at 1552.

79. The Bank did not contest these figures. However, it denied that any specific positions were allocated to the rotating staff. *Id.*

80. MARCH, *supra* note 41, at 165. See also Lantos Hearings, *supra* note 30, at 161 (noting that business transactions by local staff are often subject to approval by Japanese employees even if they possess limited knowledge or skills in that particular field); *id.* at 168 (observing that some Japanese firms refer to clerical employees as officials and managers to make it appear that they ensure fair employment).

81. Lantos Hearings, *supra* note 30, at 201-2.

82. Horton's job title is manager of administration. Horton is in charge of purchasing, import and export, and facilities. He calls himself "one of only very few Americans at the management level although none of [them] has advanced beyond middle management." Approximately 20 employees above middle management are all Japanese citizens although, in Horton's view, some of them are less qualified than the U.S. citizens in middle management positions. *Id.* at 188-89.

had received on a constant basis.⁸³ On both occasions, he observed that the positions went to Japanese nationals while no consideration was given to Americans.⁸⁴ Horton calls TTC a rotating training ground for Japanese expatriates which prevents qualified Americans from advancing.⁸⁵

C. *Discrimination in Salary and Compensation*

Some have questioned a disparity in salary and compensation between Japanese and American employees. Judy Teller, former employee of DCA Advertising (DCA), a wholly owned subsidiary of Dentsu Inc., a Tokyo-based advertising and communications company, alleged that DCA provided material benefits exclusively for its Japanese employees.⁸⁶ These included "cars, generous housing allowances, tuition for their children, [and] a double bonus system by which they were rewarded for the same work efforts."⁸⁷ Moreover, Teller said, for Japanese expatriates, the firm incurred expenses for a university English immersion program of several months.⁸⁸ In contrast, for American employees studying Japanese, DCA only paid up to half tuition for once-a-week language classes, the actual amount depending on the grade received.⁸⁹ Notwithstanding lack of educational opportunities, the company massively dismissed Americans, claiming their positions required fluency in Japanese.⁹⁰

The Sanwa Bank, the world's fifth largest bank and the twelfth largest corporation in the world ranked by assets, allegedly reimbursed part of tuition for employees attending graduate school when they maintained a rating of two or better.⁹¹ John L. Piechota, an American worker with the highest rating, was expressly denied this benefit. Yukio Harada, his manager, told him it was because "the Japanese have a job for life and Americans don't."⁹² Harada even canceled Piechota's technical seminars that had been approved and paid for; in contrast, Harada had constantly allowed the Japanese in similar positions to take such seminars.⁹³

83. *Id.* at 189-190.

84. *Id.* at 189.

85. *Id.* at 190 (noting TTC's periodical implementation of "new levels of authority to insert between Horton's position and that of upper management so as to exclude [him and other Americans] from competitive promotions and advancements").

86. *Id.* at 24.

87. *Id.* at 24. Typically, salaries for Japanese employees include benefits such as housing, commuting, family, pension, health plan, and the like. MARCH, *supra* note 41, at 112.

88. Lantos Hearings, *supra* note 30, at 24.

89. *Id.*

90. *Id.* Teller further testified about the existence of double standards at DCA: one for Japanese and the other for Americans. She added, "It was actually the stated policy of Japanese management that they could not treat the two groups alike, and the difference was patent in the way the two groups were treated." *Id.*

91. *Id.* at 213.

92. Under this policy, the company entirely reimbursed Kimisuke Fujimoto's education at Stanford University. *Id.*

93. *Id.* at 218.

D. *Exclusion from the Decision-Making Process*

Some American employees have allegedly been excluded from their companies' communications and decision-making network.⁹⁴ John Horton, a manager fluent in Japanese, asserted that his employer, TTC, ordered him not to speak Japanese in the workplace.⁹⁵ The firm also prohibited Japanese employees from speaking their language in his presence. Horton argues that these rules were intended to exclude him from "contact with all but a select group of company officials."⁹⁶

Similarly, some Japanese managers prevent American workers from participating in after-work and weekend gatherings, where they exchange vital business information.⁹⁷ Both Nikko Securities and DCA Advertising held those meetings exclusively for Japanese employees.⁹⁸ At DCA, when an American employee suggested including local staff in those functions, he was expressly told that they were reserved for the Japanese.⁹⁹ Piechota, former employee of Sanwa Bank, criticized weekly gatherings at a California branch, which whites, blacks, or Hispanics were prohibited from attending.¹⁰⁰ The participants, exclusively Japanese nationals, often made important decisions at these meetings.¹⁰¹

E. *Discrimination in Dismissal*

*Goyette v. DCA Advertising Inc.*¹⁰² arose over the discharge of twenty-three employees in September, 1990. At DCA Advertising,¹⁰³ twenty-two of the discharged employees were Americans; one of them was a Japanese woman who had expressed her intent to retire.¹⁰⁴ Plaintiffs alleged discrimination based on national origin discrimination. The court granted plaintiffs' motion for summary judgment with respect to the Title VII intentional discrimination claim.¹⁰⁵ DCA's president, Toshio Naito,

94. A study affirms that Japanese managers are rarely active in improving communications between Japanese and American employees; they often fail to encourage language study or to organize social activities including both Japanese and Americans. MARCH, *supra* note 41, at 97.

95. Lantos Hearings, *supra* note 30, at 196.

96. *Id.*

97. See BUHAM, *supra* note 39, at 17; Lincoln, *supra* note 29, at 94, 96 (introducing a result of a comparative survey that Japanese employees are far more likely than Americans to socialize after work).

98. Lantos Hearings, *supra* note 30, at 19 & 25.

99. *Id.* at 25.

100. *Id.* at 213.

101. *Id.* (noting that whites, blacks, or Hispanics were prohibited to attend these meetings).

102. *Goyette v. DCA Advertising, Inc.* 828 F. Supp. 227 (S.D.N.Y. 1993).

103. DCA Advertising is a wholly-owned subsidiary of a Japanese advertising agency. *Id.*

104. *Id.* at 229.

105. "Retention by Japanese employer's executives indicating intent to discriminate against American employees of subsidiary of Japanese corporation, reassignment of duties to Japanese employees, and additional benefits provided to Japanese expatriates and Japa-

had told Russell Goyette, former Vice President and one of the Americans fired: "We have to treat Americans and Japanese differently. We have to favor the Japanese."¹⁰⁶ Another plaintiff, Judith Teller, asserted that the firm dismissed many qualified and productive Americans while guaranteeing the jobs of the Japanese, some of whom were "clearly unqualified."¹⁰⁷

Examples of age discrimination are also plentiful. In July 1990, Sanwa Bank California fired white, black, and Hispanic workers over the age of forty; in contrast, it fired neither Japanese nationals nor Orientals. Piechota claims that he was "physically removed from the property under escort."¹⁰⁸ Evidence clearly indicated that the discharge was not due to economic reasons.¹⁰⁹ Similarly, in *Kelly v. TYK Refractories Co.*,¹¹⁰ the Third Circuit discussed, among other claims, wrongful discharge and reversed an award of summary judgment for TYK. Plaintiff served as the Chief Operating Officer and Executive Vice-President of TYK, a wholly owned subsidiary of a Tokyo-based trading company. TYK allegedly gave Kelly a discriminatory instruction: to discharge older employees and to replace them with younger Japanese males.¹¹¹

Lastly, Ricoh Corp., under its employee reduction plan of one hundred people, exclusively laid off Americans in February, 1990.¹¹² Nancy Cosgrove, one of the employees laid off, summarized her observation of Ricoh as follows: the firm had provided the "perfect environment for covert, insidious discrimination," which was "fraught with double standards

nese-Americans created factual issues precluding reason for discharges-reduction in force to cut losses-was pretext for discrimination on basis of national origin and whether legitimate motives played role in discharges." *Id.* at 228.

106. This quote derives from Naito's response to Goyette, who complained about discharge to Naito and asked him for alternative employment with the company's affiliate. *Id.* at 230.

107. In March of 1990, Teller received a performance review by Kiyoshi Eguchi, DCA's general manager. Her overall work was rated four or "exceeds standards" on a scale of one to five. *Id.* at 231. DCA retained Japanese employees in Teller's department although they were arguably less qualified than Teller. For instance, it retained Hiroaki Yamada, a Japanese expatriate, who was considered incompetent. *Id.* Also, evidence suggests that Goyette was qualified for his position. *Id.* at 233. See also Lantos Hearings, *supra* note 30, at 25 (Judith Teller discussing an example of a Japanese employee who spent a year in his private New York office "reading the newspaper and that was his activity, at full pay, approximately \$100,000 per year . . .").

108. Lantos Hearings, *supra* note 30, at 214. Piechota had received the highest rating possible in his performance review. He also claims that he put in 938 hours of authorized but uncompensated overtime in two years. *Id.* at 212.

109. According to a 1990 annual report, the Bank's profits more than doubled from the previous year, which was a record high since the Bank was formed in 1972. The same report also shows an increase of stockholder equity by 19%. Furthermore, its parent company, Sanwa Bank Ltd., had the highest profits in its history as well as the second highest profits of any other bank in Japan. Lantos Hearings, *supra* note 30, at 214.

110. *Kelly v. TYK Refractories Co.*, 860 F.2d 1188 (3rd Cir. 1988).

111. *Id.* at 1190.

112. Lantos Hearings, *supra* note 30, at 41.

for Japanese personnel, Americans, men and women."¹¹³

F. *Sex Discrimination*

Japanese firms typically assign their female employees to clerical or administrative positions with little chance for promotion.¹¹⁴ As civil rights attorney Lewis Steel has observed, college-educated women may find themselves trapped in what he calls a glorified secretarial role, although performing vital aspects of business transactions, they are generally referred to as secretaries and paid accordingly.¹¹⁵

In *Avagliano v. Sumitomo Shoji America, Inc.*,¹¹⁶ a landmark case which will be analyzed in a later section of this article, female secretaries of a wholly owned Japanese subsidiary challenged the firm's practice of reserving managerial posts for male Japanese nationals.

Also, at Nikko Securities, only one thirty-fourth of the managerial posts was held by a woman.¹¹⁷ Susan Minshkin, former employee of Nikko, testified about various forms, both overt and subtle, of gender discrimination.¹¹⁸ Minshkin was hired as an administrative assistant, the entry level professional position for college graduates; those positions were entirely composed of women.¹¹⁹ On the other hand, a man whose qualifications were nearly identical to Minshkin's was hired as a sales trainee, a higher level position.¹²⁰ The company also required seven years of work before promoting women to the level of assistant vice president, the lowest officer level; it required less than two years for men.¹²¹ The company

113. Nancy Cosgrove, one of the employees laid off, points to the following as the reasons for her discharge: her filing complaint with the Division of Civil Rights; her litigation against Ricoh; and her decreased workload due to her pregnancy. *Id.*

114. *Id.* at 158. Today 37% of managers in the U.S. are women; the comparable figure in Japan is 2%. ВУНАМ, *supra* note 39, at 176-78. For a discussion of gender discrimination in Japan and the limited effect of the Equal Employment Opportunity Law, see generally Kiyoko Kamio Knapp, *Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law*, 18 HARV. WOMEN'S L.J. (forthcoming May 1995).

115. Steel further notes a recent increase of Asian-born (mainly from Japan, Korea, and the Philippines) female employees hired by Japanese firms. In his view, this practice reflects employers' belief that Asian women are much less likely to protest unfair treatment than Caucasian women. Lantos Hearings, *supra* note 30, at 162.

116. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982).

117. Lantos Hearings, *supra* note 30, at 140. See also *Ross v. Nikko Sec.*, 53 Fair Empl. Prac. Cas. (BNA) 1121 (S.D.N.Y. 1990). However, Nikko Securities (hereinafter "Nikko") justified this disproportionate figure as simply the results of the hiring. Evan Steward, General Counsel of Nikko, emphasized the firm's effort in active hiring and promoting women. Tom Lantos nevertheless expressed his skepticism about this statement, pointing to the statistical disparity between men and women at the managerial level. Lantos Hearings, *supra* note 30, at 140.

118. Lantos Hearing, *supra* note 30, at 18-20.

119. *Id.* at 18.

120. He also received a higher rate of pay than any of the other women who had already been promoted two levels above him and others with equal qualifications, including women who were employed as administrative assistants and secretaries. *Id.*

121. *Id.* at 19.

required all women, including professionals, to fill in for the receptionist during the lunch break; no men were required to do the same.¹²² Minshkin further alleged that “[s]ingle women were frequently asked about their future marriage plan, on one hand as encouragement to marriage, on the other to assess when the women would be leaving the company.”¹²³

III. DISCRIMINATION CHARGES FROM THE JAPANESE PERSPECTIVE

A. *Claims of Bias Suits*

Some observers, both Japanese and Americans, have equated mounting criticism against Japanese employment practices with racism. For instance, some challenge what they call an anti-Japan policy advocated by the Clinton administration; according to their view, this policy has forced the EEOC to scrutinize and focus public attention on hiring practices by Japanese firms.¹²⁴ One Japanese scholar expresses a similar view in his observation of the Lantos Hearings; Professor Yoshihiro Tsurumi of Baruch College, City University of New York, called the hearings “a witch-hunt inquisition” which was “one-sided and isolated tales of woe” from “disgruntled individuals.”¹²⁵

Testifying before the Lantos Committee, the EEOC Chairman Evan Kemp refused to declare Japanese employers more discriminatory than their U.S. counterparts.¹²⁶ In 1990, the EEOC received nearly 60,000 discrimination charges;¹²⁷ among this figure, the Commission identified 115 charges against 35 Japanese firms in the U.S.¹²⁸ Kemp described the number of charges and lawsuits against Japanese employers as an “extremely small universe,” cautioning the risk of drawing a specific conclu-

122. *Id.* at 18.

123. *Id.* at 19.

124. *Zaibei Nikkei Kigyo Ijime ga Hajimaru? [Japanese-Firm Bashing Has Begun in the U.S.?]*, SANDEI MAINICHI, June 12, 1994, at 120-21. Kilbert, Tallent, and Agawa, lawyers and co-editors of the book entitled *Pitfalls for Japanese Employers in the United States*, expressly stated that so-called Japan bashing was the true motive behind the Lantos Hearings. *PITFALLS*, *supra* note 8, at iii.

125. KOPP, *supra* note 18, at 19 (citing Yoshihiro Tsurumi, *The Ghost of McCarthyism Haunts Japanese Firms*, *PACIFIC BASIN Q.* 15 (Summer/Fall 1991)).

126. In response to the Committee's request, Kemp presented some statistical evidence regarding employment practice by Japanese companies in the U.S. At the beginning of his testimony, however, Kemp explained the EEOC's reluctance to review particular employers for closer scrutiny based on national origin. Doing so, he said, conflicts the EEOC's mission “to enforce the laws against job discrimination fairly and even handedly without regard to the factors that we tell employers to ignore, including national origin.” Lantos Hearings, *supra* note 30, at 63-71. See also KISHI, *supra* note 30, at 107-14 (providing general information on the EEOC's functions).

127. There were precisely 59,426 charges. Lantos Hearings, *supra* note 30, at 65.

128. Among the charges against Japanese employers, 37% alleged race discrimination, 34% sex discrimination, 29% age discrimination, and 14% national origin discrimination. *Id.*

sion.¹²⁹ Furthermore, referring to Recruit's illegal use of codes to screen out minorities,¹³⁰ Kemp pointed to about three hundred charges currently filed against American companies, which have also used codes on job order forms.¹³¹

In their study on minority hiring by Honda Motor Company,¹³² Cole and Deskins noted that Japanese auto manufacturers are not more discriminatory than the U.S. counterparts. According to them, the practices by Japanese employers are more visible because they are inexperienced in disguising such practices and have no reservations talking about race.¹³³

Rochelle Kopp, Principal of Japan Intercultural Consulting, agrees that lawsuits involving Japanese multinational firms often invite more media coverage than they deserve, "simply because they involve Japanese firms."¹³⁴ Kopp points out that some plaintiffs may see their Japanese employers as "deep-pocketed and vulnerable" and thus bring frivolous lawsuits.¹³⁵ She further introduces a comment made by some defense lawyers for Japanese firms: "many of [our] courtroom opponents are extortionists who threaten to whip the jury into a Japan-bashing frenzy if they aren't offered a handsome settlement."¹³⁶

In fact, some courts have flatly rejected plaintiffs' discrimination claims and granted summary judgments for Japanese corporate defendants. *Walsh v. Eagle Wings Industries, Inc.*¹³⁷ provides one example in which the court found each of the allegations wholly unsupported. The defendant (hereinafter "EWI") is a wholly-owned subsidiary of a Japanese corporation. Walsh's allegations against EWI included the firm's refusal to give him the same relocation benefits as those given to Japanese employees, refusal to allow him to take language classes comparable to those offered to Japanese employees, and providing company-sponsored outings solely to Japanese employees.¹³⁸ The U.S. District Court for Central District of Illinois found none of these claims factually supported and granted a summary judgment accordingly. For instance, written docu-

129. Nevertheless, Kemp discussed some general observations on Japanese companies. For instance, he testified that Japanese companies tend to hire a higher percentage of Asian or Pacific Islanders than other companies. The EEOC found that Asians and Pacific Islanders accounted for 13% of the workforce at Japanese firms, compared to 2.6% of all other companies surveyed. *Id.* at 64. Other authors cited Kemp's testimony, stating: "This testimony must have disappointed the Lantos Committee which originally aimed at Japan basing." PITFALLS, *supra* note 8, at iii.

130. For a summary of this case, see *supra* notes 51-57 and accompanying text.

131. Kemp added that litigation is pending against some American employers in North Carolina and New York. Lantos Hearings, *supra* note 30, at 71.

132. See *supra* note 60.

133. Lansing & Domeyer, *supra* note 24, at 153 (citing Cole & Deskins, *supra* note 60, at 18).

134. KOPP, *supra* note 18, at 21.

135. *Id.* at 241.

136. *Id.* (citing Mark Thompson, *Japan Inc. on Trial*, Cal. Lawyer 44 (May 1989)).

137. *Walsh v. Eagle Wings Industries, Inc.*, No.89-2052, 1991 WL 90906 (C.D.Ill. 1991).

138. *Id.* at *1.

ments revealed that the relocation policy for Japanese employees was indeed more restrictive than the one given to Walsh.¹³⁹ Likewise, Walsh was "unable to adduce even the slightest proof" that company had sponsored recreation and excursion trips exclusively for its Japanese employees.¹⁴⁰ The court found it undisputed that EWI had offered such activities for all employees and Walsh had never been refused admission.¹⁴¹ Walsh, however, assumed that he had been excluded, simply because he had seen only Japanese participants or because he had seen a sign advertising the trips in Japanese.¹⁴²

Similarly, in *Bagnell v. Komatsu Dresser Co.*,¹⁴³ the U.S. District Court for the Northern District of Illinois condemned the terminated American employee's attempt to "portray a well-orchestrated conspiracy to remove him because of his U.S. origin and to replace him with a Japanese person."¹⁴⁴ Confronted with the discrimination charge, Komatsu Dresser (KD) based its reason for firing Bagnell on his expense account falsifications on numerous occasions.¹⁴⁵ Bagnell's job as a sales manager had constantly kept him on the road and required him to keep records of the expenses incurred so that he could be reimbursed by KD.¹⁴⁶ The questionable practices ranged from "padded expenses (such as a receipt altered to reflect an amount more than six times the actual charge)" to "double submission of the same receipt, as though two separate charges were involved."¹⁴⁷ The court agreed that these repeated inaccuracies qualified as a legitimate good faith reason for the termination.¹⁴⁸ Bagnell further failed to establish that the same degree of deception would have been tolerated in non-American employees.¹⁴⁹ The court was not reluctant to express its frustration when it stated: "[i]t would take pages to address each of the gossamer strands from which Bagnell seeks to weave his imaginary conspirational web. In candor, the trip is simply not worth it."¹⁵⁰ Accordingly, the court granted summary judgment for KD.¹⁵¹

139. *Id.* at *3.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Bagnell v. Komatsu Dresser Co.*, 838 F.Supp. 1279 (N.D.Ill. 1993).

144. *Id.* at 1288-89.

145. *Id.* at 1284.

146. *Id.* at 1281.

147. *Id.* at 1284. In one instance, Bagnell reported an expense of \$95.00 from the Marriott Windows, Columbus, Ohio. The hotel, however, faxed a copy of a receipt for two breakfast buffets at a cost of \$14.70. The company was also concerned about other instances "where service establishment identification had been torn off, dates had been altered and a \$91.59 charge had been reported for drinks at a golf outing that Grzelak (who was in attendance) did not recollect Bagnell purchasing." *Id.* at 1281-82.

148. *Id.* at 1284.

149. *Id.* at 1288-89.

150. *Id.* at 1289. The court further stated: "[n]othing indicates that anything was at work other than a desire to rid the company of an employee . . . who had . . . proved in his boss' judgment to be cheating regularly on his expense account." *Id.* at 1290. Moreover, the court rejected Bagnell's allegation that KD had breached his employment contract in dis-

These two cases cannot be the sole depiction of bias suits against Japanese corporations. Nonetheless, they do suggest the possibility that some Americans may attempt to fabricate a race or national origin discrimination theory against their Japanese employers.

B. *Anti-Japanese Sentiment in the U.S.*

Among the American public, feelings of resentment against the Japanese have grown stronger as the trade deficit mounts.¹⁵² Consequently, some Americans may hold an overly hostile view of vigorous economic activities by Japanese investors.¹⁵³ The following tragedy highlighted growing tensions between Japan and the United States: in 1982, two laid-off auto workers (a father and his stepson) in Detroit, Michigan, expressed their frustration toward the Japanese when they brutally murdered Vincent Chen, a Chinese American.¹⁵⁴ Ronald Ebens, the father, yelled at Chin, "It's because of you . . . that we're out of work." As one author noted, the killers "transferred blame not only from the Japanese government to the Japanese people, not only from the Japanese people to United States citizens of Japanese descent, but finally from Japanese Americans to anyone unlucky enough to bear Asian features."¹⁵⁵

The hostility, often known as Japan-bashing, further intensified during the late 1980s.¹⁵⁶ In 1987, the Harvard Business Review published an article entitled *Only Retaliation Will Open Up Japan* in an "almost war-like tone."¹⁵⁷ "To hit the deficit where it hurts us most, we need a target rifle, not a shotgun."¹⁵⁸ In the same year, Japan faced a "political

charging him. The company's employee handbook cautions that it does not constitute a contract. Also, the handbook clearly articulates its policy that "falsification of company records subjects an employee to termination without notice." *Id.* at 1291.

151. *Id.* at 1291.

152. Katayama, *supra* note 18, at 8 (noting that Japan's trade surplus with the rest of the world exceeded \$100 billion in 1992); Ronald C. Brown, *The Faces of Japanese Labor Relations in Japan and the U.S. and the Emerging Legal Issues under U.S. Labor Laws*, 15 SYR. J. INT'L & COMP. L. 231, 232 (1989) (discussing political, economical, social, and legal effects of Japan's high trade deficit, which amounted to \$60 billion in 1987). See also Mullen, *supra* note 6, at 756-57 (providing various examples of how Americans have harbored negative views of the Japanese).

153. In 1992, the U.S. bilateral trade deficit with Japan amounted to \$49 billion. In the same year, Japan's trade surplus with other nations exceeded \$100 billion. Katayama, *supra* note 18, at 8. One observer commented: "Americans tend to ignore the fact that Britain has more money invested in the United States and Canada controls 26 percent of all foreign owned real estate compared to 15 percent control rate for Japan. However, when these countries are investing in the United States, we do not say too much; it is only when Japan enters the picture that Americans start to get riled up." Lansing & Domeyer, *supra* note 24, at 154.

154. *U.S. v. Ebens*, 800 F.2d 1422 (6th Cir. 1986).

155. Note, *Racial Violence against Asian Americans*, 106 HARV. L. REV. 1926, 1928 (1993).

156. TOKOMO HAMADA, *AMERICAN ENTERPRISE IN JAPAN* 2 (1991).

157. *Id.*

158. *Id.* (citing Robert T. Green & Trina L. Larsen, *Only Retaliation Will Open Up*

firestorm" in the U.S: Japan's breach of an international agreement was revealed.¹⁵⁹ Japan's Toshiba Machine Company had sold prohibited military technology to the then Soviet Union; this had enabled the Soviets to build submarines with quiet propellers, undetectable by acoustic devices the U.S. had strategically placed on the ocean floor.¹⁶⁰ The estimated cost of damages done to the U.S. exceeded thirty billion dollars.¹⁶¹ An anti-Japan movement spread in various forms, ranging from banning the sale of Toshiba products to smashing a Toshiba cassette player with sledgehammers on the grounds of the Capitol.¹⁶²

As these incidents suggest, the current anti-Japanese atmosphere gives Japanese firms even more compelling reasons to prevent discrimination charges.¹⁶³ Experts predict a continued rise in Title VII litigation against Japanese firms.¹⁶⁴ In general, explosion of litigation has plagued both domestic and foreign employers across the United States; the number of discrimination suits has skyrocketed by more than twenty-two times over the past two decades.¹⁶⁵ In addition, a survey by the Japanese Ministry of Labor reveals that fifty-seven percent of 331 Japanese firms operating in the U.S. possibly face discrimination suits.¹⁶⁶ Over seventy percent of the surveyed firms have urged the Ministry for advice on "how to avoid 'unnecessary' trouble."¹⁶⁷ In other words, these employers themselves are now acutely aware of the need to implement defensive strategies to insulate themselves against discrimination charges. Also importantly, American jurors in transnational litigation may be culturally inclined to distrust Japanese corporate defendants. For all these reasons,

Japan, HARV. BUS. REV. 6:22-28 (Nov./Dec. 1987)).

159. Along with Toshiba, Norway's Kongsberg Vaapernfabrikk as well sold the same kind of technology to Soviet. CHOATE, *supra* note 6, at 7.

160. "These Soviet submarines, loaded with multiple-warhead missiles, can now creep undetected so close to the U.S. coast that they could destroy most of America's strategic arsenal before it could be launched." *Id.*

161. *Id.*

162. *Id.*

163. Street, *supra* note 28, at 387 & 401.

164. The factors behind the expected rise include the following: a greater number of Americans working for Japanese companies; deterioration of economy; increase of layoffs and discharge by Japanese companies; strained Japan-U.S. relationship; increase of labor disputes in American society as a whole; media attention focused on business operations by large Japanese corporations in the U.S. PITFALLS, *supra* note 8, at iii.

165. Jay Finegan's article explores employment litigation as an epidemic in American society. Finegan notes that the number of current discrimination suits account for an estimated one-fifth of all civil suits filed in U.S. courts. Jay Finegan, *Law and Disorder*, INC. 64 (Apr. 1994). The Newsweek magazine reports a sudden increase of sexual harassment complaints filed with the Equal Employment Opportunity Commission: from 6,883 in fiscal year 1991 to more than 12,000 in 1993. "Money doled out to settle EEOC claims nearly doubled as well, from \$12.7 million in 1992 to \$25.2 million last year." Seena Nayyar & Susan Miller, *Making It Easier to Strike Back*, NEWSWEEK, Sept. 12, 1994, at 50.

166. MARCH, *supra* note 41, at 118 (citing *Trouble Ahead*, WALL ST. J., Aug. 29, 1989, at 1).

167. *Id.*

the employers should direct their efforts toward implementing preventive strategies.

IV. TITLE VII DEFENSES FOR JAPANESE FIRMS

This section explores two primary defenses that Japanese firms have asserted against discrimination charges, points out the limited scope of these defenses and further emphasizes the necessity of adopting a new employment policy intended to prevent disputes.

A. *Friendship, Commerce, and Navigation Treaty*

1. Conflict between the FCN Treaty and Title VII

Some Japanese firms have invoked their Title VII immunity under the Treaty of Friendship, Commerce, and Navigation.¹⁶⁸ The U.S. and Japan signed this commercial agreement in 1953 with an aim to "give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms."¹⁶⁹ Article VIII(1) of the FCN Treaty provides: "Nationals and companies 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."¹⁷⁰ This provision gives employers of both nations hiring discretion to facilitate the staffing of overseas business operations.¹⁷¹ Some Japanese firms have asserted that the Treaty gives them hiring preference for Japanese nationals within the managerial ranks. However, such a hiring pattern inevitably results in discrimination on the basis of national origin, which is expressly prohibited by Title VII.¹⁷² This apparent conflict between the Treaty provision and Title VII has sparked

168. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, 4 U.S.T. 2063 [hereinafter FCN Treaty]. Since World War II, the U.S. signed friendship treaties with more than two dozen nations. Abraham, *supra* note 7, at 485.

169. *Sumitomo Shoji America, Inc. v. Avigliano v.* 457 U.S. 176, 185-86 (1982). The Supreme Court further described the purpose of the FCN Treaty as "not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage." *Id.* at 187-88.

170. FCN Treaty, *supra* note 168, at art. VIII(1), at 2070.

171. *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d. 552, 554-55 (2nd Cir. 1981), *vacated on other grounds*, 457 U.S. 176 (1982).

172. Title VII distinguishes citizenship from national origin and bans only discrimination based on the latter. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (distinguishing national origin discrimination from citizenship discrimination). In Japan, however, citizenship is virtually synonymous with national origin; those of Japanese origin make up ninety-nine per cent of the nation's population. David T. Wilson, *Foreign Owned Subsidiaries and National Origin Discrimination: Can Federal Employment Discrimination Law and Employer Choice Provisions be Reconciled?* 10 ARIZ. J. INT'L & COMP. L. 507, 526 (1993) (citing JAPAN: A COUNTRY STUDY 90 (Ronald E. Dolan & Robert L. Worden, eds., 5th ed. 1992)). See also Cary B. Samowitz, *Title VII, United States Citizenship, and American National Origin*, 60 N.Y.U. L. REV. 245 (1985).

a debate among numerous legal scholars.¹⁷³ Difficulty in resolving this conflict partly stems from the historical fact that the Treaty was ratified in 1953, before the enactment of Title VII. Title VII neither refers to the FCN Treaty nor expressly indicates whether it encompasses foreign employers in the U.S. The existing U.S. civil rights laws fail to provide a stable framework for reconciling two competing interests: promoting foreign investment by allowing investors certain hiring discretion, as opposed to adhering to America's uncompromising commitment to civil rights.¹⁷⁴ In other words, the U.S. legislation has yet to confront the challenge posed by globalization of the workforce.¹⁷⁵ In her recently published book, Rochelle Kopp, Principal of Japan Intercultural Consulting, explains the ambiguity surrounding the applicability of U.S. discrimination laws in the international arena:

Future cases will undoubtedly explore arcane legal issues raised by the conflict between this international treaty and domestic civil rights laws Clearly American (and international) law hasn't caught up with the challenges posed by international personnel policies that extend across borders and affect employers of more than one nationality.¹⁷⁶

2. Sumitomo Shoji America, Inc. v. Avagliano

In *Sumitomo Shoji America Inc. v. Avagliano*,¹⁷⁷ the Supreme Court considered whether the Treaty privilege extended to the Sumitomo America, a wholly owned subsidiary of a Japanese trading company. Here female secretarial employees brought a class action against Sumitomo America, alleging sex and national origin discrimination.¹⁷⁸ They claimed that the firm had reserved its upper-level managerial positions mainly for Japanese men.¹⁷⁹ The Second Circuit agreed to provide Sumitomo America with the Treaty defense in hiring Japanese nationals for the key

173. Many articles have explored the availability of Article VIII(1) defense to Japanese multinational firms. See *supra* note 26.

174. Mullen, *supra* note 6, at 780-82. See also Orebic, *supra* note 26, at 406 (concluding that the resolution of the conflict between the Treaty provision and Title VII depends on a balancing of the two policies).

175. Mullen, *supra* note 6, at 782 (suggesting one possible approach of negotiating bilateral or multi-lateral Equal Employment Opportunity agreements).

176. KOPP, *supra* note 18, at 243. See also Mullen, *supra* note 6, at 782 (concluding that "American antidiscrimination law must be adapted to address the multidimensional nature of the EEO charges involving foreign-owned corporations"); Rosner, *supra* note 26, at 894 (stating that "[t]he employment practices of Japanese subsidiaries present a case of first impression in the employment discrimination field).

177. *Sumitomo*, 457 U.S. 176. *Sumitomo* is called *sogo shysha* in Japanese, meaning a general trading company. *Sogo shyosha* represents one of the most typical forms of Japanese multinational firms vigorously conducting overseas business activities. Lansing & Palmer, *supra* note 26 (stating that these firms may distribute 20,000 individual items and maintain resident offices in as many as 100 foreign nations).

178. Avigliano, 638 F.2d. 552.

179. *Id.* at 553.

positions.¹⁸⁰ The Supreme Court reversed the decision;¹⁸¹ in its analysis, the Court viewed Sumitomo America, a subsidiary incorporated under the New York laws, as a U.S. company subject to Title VII.¹⁸² It further distinguished a locally incorporated subsidiary from a branch of a foreign corporation. However, the Court did not address whether an American subsidiary may properly invoke the Treaty defense when the parent company dictates the subsidiary's alleged discriminatory conduct.¹⁸³

3. Fortino v. Quasar Co.

The *Fortino*¹⁸⁴ case addressed the availability of the Treaty defense to an American subsidiary of a Japanese firm, as opposed to a wholly owned Japanese subsidiary incorporated in the U.S. as in the *Sumitomo* case. This case arose over dismissal of three American managerial employees by Quasar, an un-incorporated division of Matsushita Electric Corporation of America. Under Title VII, plaintiffs alleged discrimination on basis of their non-Oriental origin.¹⁸⁵ In 1990, the U.S. District Court rendered verdict for plaintiffs and awarded them 2.5 million dollars in damages. In reversing this decision, the Seventh Circuit explored what it viewed as the most essential question: whether the employer, an American subsidiary of a Japanese firm, may assert its parent's privilege under the FCN Treaty as a Title VII defense.¹⁸⁶ The court expressly chose to consider the applicability of the FCN Treaty although Quasar did not raise the issue in the district court.¹⁸⁷ The Seventh Circuit justified its decision to do so "for the sake of international comity, amity, and commerce."¹⁸⁸ It then held that the parent's Treaty-based immunity does

180. *Id.* at 558.

181. *Sumitomo*, 457 U.S. at 182.

182. *Id.* at 182-83 (stating that "[b]oth the Ministry of Foreign Affairs of Japan and the United States Department of State agree that a United States corporation, even when wholly owned by a Japanese company, is not a company of Japan under the Treaty and is therefore not covered by Article VIII(1)"). Ronald Brown summarizes the ultimate result of the *Sumitomo* case as follows:

Some five years later, a settlement in this case was announced where the employer agreed to allocate nearly \$3 million over three years to train, promote, and pay its female workers in the United States. The settlement agreement also requires that women be placed in 23-25 percent of the management and sales positions. The company attorney is quoted as saying there is no admission of liability and the agreement reflects a decision to 'Americanize' its U.S. offices as part of a 'world-wide localization' of its subsidiaries.

Brown, *supra* note 152, at 250 (citing 10 D.L.R.(BNA) A-7, A-8 (Jan. 15, 1987)).

183. *Sumitomo*, 457 U.S. at 189-90 n.19.

184. *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991).

185. *Fortino*, 950 F.2d at 399.

186. FCN Treaty, *supra* note 168.

187. *Fortino*, 950 F.2d at 391.

188. Plaintiffs requested the appellate court not to consider the treaty issue, because the defendant had failed to raise it to the district judge. The Seventh Circuit rejected this requested and explained as follows: "Ordinarily we will not consider a point that was not raised in the district court, but we can do so, . . . and, for the sake of international comity,

reach Fortino, and discrimination in favor of Japanese nationals by the latter is not actionable.¹⁸⁹ In so deciding, the court emphasized significant control the parent had asserted over Fortino's business operations.¹⁹⁰ Some American scholars have criticized this decision as unfairly exempting Japanese multinational firms from Title VII liability.¹⁹¹

4. Lessons for Employers

Prudent Japanese employers should not rely on the FCN Treaty defense for the following reasons.¹⁹² First, since the Fortino decision was not

amity, and commerce, we should do so when we are asked to consider the bearing of a major treaty with a major power and principal ally of the United States." *Id.*

189. In its amicus brief, the EEOC expressed its view that Quasar is a division of an American corporation, and, therefore, they have no right to ignore U.S. discrimination laws. Lantos Hearings, *supra* note 30, at 71.

190. In 1994, the U.S. District Court for the Northern District of Texas expressly adopted the Fortino rationale in upholding the validity of the FCN Treaty defense asserted by Uniden America (hereinafter "Uniden"), an American subsidiary of a Japanese corporation in an employment discrimination case. Uniden asserted that it had a right, under the FCN Treaty, to discriminate against the American plaintiff on the basis of his race and national origin. *Papaila v. Uniden America Corp.*, 840 F.Supp. 440, 443 (N.D. Tex. 1994). Uniden is a subsidiary of Uniden Japan, a Japanese corporation headquartered in Tokyo which manufactures and sells electronic equipment. *Id.* at 444. The court found the Fortino reasoning persuasive and allowed Uniden to assert the Treaty right of its parent corporation in Tokyo. *Id.* at 446.

191. See generally Donald D. Jackson, *Titling the Playing Field: Japan's Unwarranted Advantage under the Civil Rights Act of 1991 and Fortino v. Quasar Co.*, 28 *TEX. INT'L. L.J.* 391 (1993); Steven J. Lewengrub, *Seventh Circuit Allows American Subsidiary to Avoid Title VII Liability by Asserting FCN Treaty Rights of Japanese Parent — American Employees Treated as Second Class Citizens — Court Cites Reciprocal Benefits for American Firms Operating Abroad—Fortino v. Quasar Co.*, 950 *F.2d* 389 (7th Cir. 1991), 22 *GA. J. INT'L. & COMP. L.* 527 (1992); Wilson, *supra* note 172, at 535-542. Imura, then Chief Executive Officer of Quasar, disagrees with the view that the Treaty provision gave the firm an unfair advantage. Instead, he stresses that the source of ultimate victory was Quasar's genuine attempt to resolve cross-cultural misunderstandings at trial. Imura points out, for instance, that the firm successfully denied the trial court's finding that Quasar substantially increased salaries of Japanese executives while discharging American executives. Plaintiffs' allegation derived from Quasar's adjustment of a salary structure for its Japanese employees in accordance with factors such as: "1) whether the employee lives in an apartment or owns a home; 2) the size of the employee's family; and 3) whether the employee's children attend public or private schools." At the appellate level, Quasar explained the general rule: foreign subsidiaries of Japanese companies often pay housing and education allowances to meet the needs of their expatriates. The company further proved that the American subsidiaries in Japan as well, including IBM Japan, observe the same practice for their employees sent from parent companies in the U.S. Likewise, Quasar asserted that it had discharged some Japanese employees as well, contrary to the district court's finding. These explanations, Imura says, helped resolve some misunderstanding. Also, Imura describes in detail how he decided to appeal the case despite the corporate attorney's strong objection and how he prepared for the appeal by carefully examining relevant documents and interviewing employees. This investigation convinced him that no discrimination had occurred. Kishi, *supra* note 30, at 160.

192. See, e.g., Abraham, *supra* note 7, at 478 (stating that ". . . it is nonetheless more prudent for the Japanese employer to forego the protection of the Treaty, and make em-

appealed,¹⁹³ the Supreme Court has left open the question of whether an American subsidiary may invoke the Treaty rights of its Japanese parent company.¹⁹⁴ Additionally, other courts may refuse to broadly construe the parent's Treaty immunity. The EEOC has taken the position that it disagrees with the Fortino holding: "because Quasar is a division of an American corporation, . . . [the company should have] no right to ignore [U.S.] discrimination laws."¹⁹⁵

Second, the Treaty exemption is restrictive in its scope; it applies only to upper-level positions limited to "accountants, other technical experts, executive personnel, attorneys, agents and other specialists."¹⁹⁶

Third, even if the court does agree to grant the Treaty-based immunity, companies may still incur substantial legal defense costs.¹⁹⁷ Even at the preliminary stage, where the discrimination claims are filed with the EEOC or a state agency, the estimated defense costs already range from five thousand to twenty thousand dollars.¹⁹⁸ Entire proceedings may also force companies to consume a large number of hours and to lose productive use of staff.¹⁹⁹ The administrative costs of implementing preventive strategies may far outweigh the potential legal defense costs.²⁰⁰

Finally, any charges of discrimination, irrespective of their merits, could impair the company's public image.²⁰¹ Given the fear of Japan's economic power, allegations against Japanese investors may capture more public attention.²⁰² Thus, to minimize the risk of litigation, companies should install comprehensive strategies in creating a working environment which stresses fairness and openness.²⁰³

U.S. courts have articulated Title VII's goal as combating employment discrimination, which is "one of the most deplorable forms of discrimination" in American society because "it deals not with just an indi-

ployment decisions on the unassailable criterion of employee qualifications").

193. Mullen, *supra* note 6, at 761 (citing Stephen G. Hirsch, *Meet the New Boss*, LEGAL TIMES, May 11, 1992, at 25, 27 (special supplement: The Pacific Rim)).

194. The Supreme Court expressly stated: "[W]e also express no view as to whether Sumitomo may assert any Article VIII(1) rights of its parent." Sumitomo, 457 U.S. at 189-90 n.19.

195. Lantos Hearings, *supra* note 30, at 71.

196. FCN Treaty, *supra* note 168, at art. VIII(1).

197. Finegan, *supra* note 165, at 68.

198. *Id.*

199. *Id.*

200. See, e.g., CALLAGHAN & COMPANY, EQUAL EMPLOYMENT COMPENSATION MANUAL, Pt. II, §2.03 (1983).

201. *Id.* at 68.

202. See *supra* section III. A.

203. Finegan, *supra* note 165, at 71-72 (citing human-resources expert Marlene Porter, who has successfully prevented her employer, the Community Bank of Homestead in Miami, from being sued by its employees. During her twelve-year tenure, the Bank terminated about 200 employees; yet, none has filed a suit). The article stresses the importance of reducing the likelihood of potential litigation by introducing actual defensive policies adopted by the Bank.

vidual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family with a job or profession for which he qualifies or chooses."²⁰⁴ Japanese multinational firms should honor moral and legal beliefs prevailing in their host nation. Their failure to harmonize with U.S. culture confines Japanese investors into their standing as foreign outsiders in the U.S.²⁰⁵ Thus, they should make sincere effort to integrate more local talent into the core labor force. The expanded role of local employees will not only satisfy the firms' duty to comply with the U.S. civil rights laws; it will also contribute to promoting direct foreign investment.²⁰⁶ Additionally, by providing local communities with more career opportunities, the company can create a positive impression and gain social acceptance for its economic expansion.

B. *Bona Fide Occupational Qualification*

1. Scope of the BFOQ Exemption

Title VII permits intentional discrimination on the basis of religion, sex, or national origin when those practices are reasonably necessary for the proper operation of the business.²⁰⁷ In other words, defendants must

204. *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369 (11th Cir. 1982) (quoting *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970)). See also *Rowe v. Gen. Motors Corp.*, 457 F.2d 348, 354 (5th Cir. 1972); *Torres v. Wisconsin Dept. of Health and Social Services*, 859 F.2d 1523, 1526-27 (7th Cir. 1986). One scholar describes the essential role of work in both individual and social life as follows:

"The individual person is dignified by work; the community is enriched by work. Society stands condemned by failure to provide meaningful work . . . work helps us become more fully human . . . Productive work will remain incomprehensible, or, at most, an ineffable and unattainable dream for the majority of the earth's population."

David L. Gregory, *Catholic Labor Theory and The Transformation of Work*, 45 WASH. & LEE L. REV. 119, 129-30 (1988).

205. KOPP, *supra* note 18, at 48.

206. One observer considers it "costly and politically risky" for multinational firms to depend entirely on their home-country nationals. KOPP, *supra* note 18, at 49.

207. 42 U.S.C. §2000(e)-2(e). This section reads:

"[I]t shall not be an unlawful employment practice for an employer to hire and employ . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ."

Id. The statutory BFOQ defense is distinguished from a judicially created "business necessity" defense. A BFOQ is a defense to intentional discrimination ("disparate treatment"). On the other hand, the business necessity defense is asserted in cases attacking employment practices which are neutral on its face but adversely impact protected groups under Title VII ("disparate impact"). Under this theory, discriminatory motive is unnecessary to establish a prima facie case of discrimination. To defend against a disparate impact charge, the employer must prove that the practice in question "[bears] a demonstrable relationship to successful performance of the jobs for which it was used." *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding against the use of testing and educational requirements, which operated to disqualify black applicants at a substantially higher rate than white applicants). In essence, both the BFOQ and business necessity require that employers articu-

provide a reasonable justification for their discriminatory conduct. To satisfy that burden, employers must prove that "the essence of [their] business operation would be undermined" without challenged conduct.²⁰⁸ Also, they must prove a reasonable basis for their belief that "all or substantially all" members of the excluded class cannot perform the essential job duties safely and efficiently.²⁰⁹ The BFOQ defense is asserted most often in the context of gender discrimination.²¹⁰

Traditionally, the BFOQ defense is construed narrowly. *Dothard v. Rawlinson*²¹¹ exemplifies one of the rare circumstances where the defendant survived the heightened judicial scrutiny typical in a BFOQ analysis. The Supreme Court upheld the employer's refusal to hire women as correctional counselors in an all-male, maximum security prison. Being a male qualified as a BFOQ, because the job required close physical proximity to inmates, and the environment of violence and disorganization would pose a serious risk of threat not only to women but also to other guards and inmates.²¹² Other circumstances where the BFOQ defense may prevail include "the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman to that religion"²¹³

Notwithstanding the general rule, however, the Second Circuit has agreed to expand the scope of the BFOQ analysis in cases involving Japanese firms. "[A]s applied to a Japanese company enjoying rights under Article VIII of the [FCN] Treaty, [the BFOQ] must be construed in a manner that will give due weight to the Treaty rights"²¹⁴ To justify national origin discrimination under this analysis, employers bear the burden of showing the requirement of any of the following skills:

1. Japanese linguistic and cultural skills;

late a legitimate business purpose for challenged conduct. One scholar considers the BFOQ defense more stringent than business necessity, which "encompasses considerations beyond a narrow focus on job performance, such as workplace safety, societal concerns for environmental protection" Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 5, 11 (1991) (citing *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 1552 (11th Cir. 1984) and *Wright v. Olin Corp.*, 697 F.2d 1172, 190 n.26 (4th Cir. 1982)). This article discusses the BFOQ defense exclusively.

208. *Diaz v. Pan American World Airways Inc.*, 442 F.2d 385 (5th Cir. 1971), cert. denied, 404 U.S. 950 (1971).

209. *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

210. See, e.g., *International Union, UAW v. Johnson Controls Inc.*, 499 U.S. 187 (1991); *Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982); *Fesel v. Masonic Home of Del., Inc.*, 447 F.Supp. 1346 (D.Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

211. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

212. *Id.* at 335.

213. *Wilson v. Southwest Airlines Co.*, 517 F.Supp. 292, 297 (N.D. Tex. 1981) (citing the Interpretative Memorandum of Title VII submitted by the Senate Floor Managers of the Civil Rights Bill 1110 Cong. Rec. 7212 (1964)).

214. *Sumitomo*, 638 F.2d at 559.

2. knowledge of Japanese products, markets, customs, and business practices;
3. familiarity with . . . the parent enterprise in Japan; and
4. acceptability to those with whom the company . . . does business.²¹⁵

*Adames v. Mitsubishi Bank*²¹⁶ provides one example in which a Japanese firm argued that understanding of the Japanese language and culture was reasonably necessary to their business practices. In this case, which was summarized earlier,²¹⁷ the defendant claimed a legitimate business purpose for reserving most senior management positions for rotating Japanese staff.²¹⁸ The Bank's chief manager explained: "[K]nowledge of Japanese business practices and management style . . . and the ability to read, write, and speak the language, are all essential skills for many positions."²¹⁹ Nevertheless, the manager later acknowledged his uncertainty as to whether knowledge of Japanese business practices is an absolute prerequisite to joining the rotating staff.²²⁰ Patricia Gaiton, former manager responsible for personnel affairs, stated that the Bank had made little effort, if any, to create promotional opportunities for local staff.²²¹ Plaintiffs also claimed that the requirement of the Japanese language and skills requirements operated as a pretext. For this argument, they explained that the Bank's services mainly involved providing primary lending for American-based and other non-Japanese corporations.²²² They then asserted that the nature of the business required familiarity with U.S. banking practices and laws, rather than Japanese custom and language.²²³ The court held that the Bank failed to articulate a legitimate business reason for its allegedly discriminatory act.²²⁴

2. Lessons for Employers

The *Sumitomo* court's expansion of the BFOQ analysis²²⁵ should not be read as an automatic assurance that Japanese firms may oversee the substantive fairness of their job qualifications. Undoubtedly, courts will refuse to give an unwarranted advantage to foreign companies which require linguistic or cultural skills as a pretext to exclude Americans. In contrast to immutable characteristics, such as gender, knowledge of the Japanese language and culture can be possessed or acquired by people of

215. *Id.*

216. This case arose over alleged discrimination based on race, descent, ancestry, and ethnic characteristics. *Adames v. Mitsubishi Bank*, 751 F. Supp. 1548 (E.D.N.Y. 1990).

217. See *supra* section II. B.

218. *Adames*, 751 F.Supp. at 1553.

219. *Id.*

220. *Id.*

221. *Id.* at 1553.

222. *Id.* at 1554.

223. *Id.*

224. *Id.* at 1561.

225. See *supra* note 216 and accompanying text.

non-Japanese origin.²²⁶

Thus, to establish a legitimate justification, employers must articulate the validity of the qualifications through the use of concrete job descriptions.²²⁷ For instance, certain positions may dictate that the job applicants possess a complete command of the language, because the essential job duties involve intricate bilingual transactions. In preparing job classifications, it remains insufficient for the employers to simply throw in phrases such as "fluency in Japanese;" it can be read as merely the perceived need for the language skill. Instead, the description should specify the expected degree of proficiency. One example would be: "ability to speak Japanese sufficiently to conduct complex business negotiations with native speakers." Likewise, if the position only requires basic conversational skills, it may suffice to say: "at least two years of college-level study with a minimum 3.0 grade-point average."

Equally important, employers should clarify the content of the job duties which require the linguistic skills. For instance, what is the frequency of communications between the American subsidiary and its Japanese parent company? Are those communications done orally or in writing? Alternatively, does the job require serving Japanese clients, who do not speak English?

Moreover, employers should provide a language program or tuition reimbursement to help American employees acquire the requisite language skills.²²⁸ Such effort will bolster the argument that the language requirement derives from genuine business concerns.²²⁹

While preparing job descriptions, companies should also delete any subjective employment criteria such as loyalty and team spirit. In general, Japanese employers place greater emphasis on employees' attitude,²³⁰

226. Abraham, *supra* note 7, at 506.

227. S. Prakash Sethi & Carl Swanson, *Are Foreign Multinationals Violating U.S. Civil Rights Laws?* 4 EMP. REL. L.J. 485, 518-19 (1979).

228. MASATU NO NAKA NO AMERICA SHINSHUTSU: NUHON KIGYO NO RISUKU KANRI TO SHAKAI KOKEN [Official English title: TRANSCENDING TRADE FRICTIONS, JAPANESE-OWNED BUSINESSES IN THE U.S., RISKS, SOCIAL CONTRIBUTIONS], 66-67 (Tokyo Marine and Fire Insurance Co., Ltd., ed. 1992) [hereinafter MASATU].

229. See KOPP, *supra* note 18, at 69. In a survey on over 400 large Japanese firms, Professor Hideki Yoshihara of Kobe University noted that 81% of the respondents pointed to personality (trustworthiness, etc.) as a desirable characteristic for locally hired managers for international business operations. *Id.* at 76.

230. One researcher found a "good attitude" the most important quality Japanese managers want in administrative or junior executive staff members. MARCH, *supra* note 41, at 120. See also TAYLOR, *supra* note 1, at 125-26 (noting the important role of attitude in Japanese society). Yoshitaka Sajima, general manager of corporate planning for Mitui & Company, suggested the essential role of interpersonal skills in Japanese corporations when he commented that "[e]ven the top M.B.A. from Harvard or Stanford, a very capable, aggressive person, might not be a good employee for us. He might destroy the harmony of our system." Mullen, *supra* note 6, at 746-47 (citing Tamar Lewin, *Sex Bias or Clash of Cultures*, N.Y. TIMES, Apr. 8, 1982, at D1, D6).

rather than their concrete skills.²³¹ Some of them may perceive that the personal skills would qualify under the cultural skills in the BFOQ analysis. However, because measurement of these "skills" dictates wholly subjective value judgment, they will probably be subject to more rigid scrutiny than the language requirement. The court will not sustain arguments which only reinforce common stereotypes: "Japanese nationals are more likely to exhibit corporate loyalty than Americans" or "raised in society based on collectivism, Japanese nationals can work better in a group than Americans." Employers should set forth more objective criteria which accurately reflect job-related skills.

Finally, the concept underlying the BFOQ defense can help Japanese employers implement a merit system. As noted above, the BFOQ is an affirmative defense, which employers assert against allegations of discrimination. Nonetheless, at a preventive stage, employers can use a BFOQ analysis effectively as a means of self-assessment; in hiring and promotion, employers should critically evaluate the validity of their practices in terms of whether they could qualify, if challenged, under the scope of the BFOQ exemption. For that purpose, the two-step BFOQ analysis, which was discussed earlier, will prove helpful.²³² This process should remind employers to focus on job-related factors in their decision-making process. It is a process of evaluating a job candidate on the basis of his or her actual capabilities; the individual's gender or national origin, for instance, should play no role unless such traits are necessary to fulfill the job duties. Thus, the BFOQ analysis can serve as a foundation upon which Japan builds a merit system, one vital element of an egalitarian workplace.

231. Due to emphasis on personal skills rather than technical skills, the recruitment and hiring process by Japanese firms tend to be highly subjective in nature. See Mullen, *supra* note 6, at 750. Some critics have observed the same kind of subjective hiring among Japanese employers overseas. An exercise in the "Access to Success" Overseas Manager Program, run by the Management Services Center in Japan, made clear that Japanese managers prioritize superficial qualities in job interviews. In this exercise, videotaping of three simulated interviews revealed that Japanese managers, as compared to American managers, place less emphasis on candidates' abilities to perform the job, past work experience, or motivation; instead, they are influenced by candidates' physical appearance or conversational skills. BYHAM, *supra* note 39, at 167. The subjective screening process also becomes apparent as it pertains to the questions generally asked during job interviews. For example: "Do you consider yourself a cooperative person;" "have you had any problems in interpersonal relationships;" "what do you think about dating;" "what do you usually talk about with your friends;" "do you consider yourself organized?" KOBUNSHA, *MENSETSU SHIKEN: 100-MON, 300-TO [JOB INTERVIEWS: 100 QUESTIONS AND 300 ANSWERS]* (1994). Another book, written specifically for female job seekers, contains a section entitled Typical interview questions for women, including the following examples: "Do you have a boyfriend? If so, do you plan to marry him;" "how often do you take the time to talk with your parents? Do you get along better with your mother, or your father?" The book further explains that recruiters' main concern is to evaluate candidates' personalities; particularly for non-managerial positions, recruiters tend to ask more subjective questions than those directly related to work. JOSHI-GAKUSEI NO TAME NO SHUSHOKU BESTO RESSUN [JOB HUNTING INFORMATION FOR FEMALE STUDENTS] 130-31 ((Norio Yoshida, ed., 1994).

232. See *supra* notes 208-209 and accompanying text for the two-step BFOQ analysis.

V. MOVING TOWARD A MERIT SYSTEM

A. *Japan's Economic Crisis and its Effect on Management*

Pursuit of workforce equality will necessitate a fundamental change at the core of Japanese corporate culture.²³³ In her article on Japan's Equal Employment Opportunity Law, Loraine Parkinson argues that full attainment of equality in Japan would be impossible unless it results from an institutional change — from a group to an individual orientation.²³⁴ Nevertheless, Parkinson cautions that “[d]ecades could pass before the new structure is functioning at an efficiency level equivalent to that of the old.”²³⁵ Because of this, she adds, the economic loss in the meantime would be great enough to hurt the Japanese economy.²³⁶ One should note, however, that Parkinson's article was published in 1989, before the economic crisis Japan is now facing. Contrary to Parkinson's assertion, today's economic condition is more likely to compel employers to adopt a new approach to management. Most importantly, they should pursue hiring and promotion based on job-related qualifications of individuals.²³⁷

Japanese-style management remained unchallenged, at least domestically, while Japan still prided itself as an economic superpower.²³⁸ The people praised their own employment system as the source of the nation's prosperity.²³⁹ Indeed, the postwar years observed a boost of the Gross National Product per person by sixty times.²⁴⁰

Today, however, Japan is suffering the longest and severest economic slump since World War II.²⁴¹ Since February, 1993, the sharp rise of the

233. See, e.g., Loraine Parkinson, *Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change*, 89 COLUM. L. REV. 604, 629 (1989) (noting that a switch to the merit system is widely believed to be necessary for attainment of gender equality in Japan).

234. *Id.* at 630.

235. *Id.*

236. *Id.*

237. Abraham, *supra* note 7, at 500-502 (discussing that this policy would allow Japanese employers to retain those with necessary skills while avoiding the citizenship requirement as a pretextual reason for intentional discrimination).

238. “In the past, Japanese-style management was the corporate tool for survival. It was at its finest when it pulled the country through the oil crises of the 1970s and the high-yen slump of the late 1980s.” Katayama, *supra* note 18, at 6.

239. *Id.* (noting that “no one saw the need to change a system that was clearly working” during the high growth period). See also Louise do Rosario, *Out with the Oldies: Japan's Recession Takes Toll on “Lifetime” Employment*, FAR EAST. ECON. REV., Apr. 22, 1993, at 74 (stating that Japanese white-collar workers had “little to complain about . . . before the current economic crisis. . . they were rewarded with promotions and salaries for their long working hours”).

240. Before the war, Japan's Gross National Product was one-twentieth of its U.S. counterpart. Today it exceeds the latter by 120%. Hato, *supra* note 18, at 33.

241. “The growth rate has repeatedly fallen short of the government's forecasts; consumer spending, which accounts for 65% of gross national product, has been sluggish; and capital spending, which accounts for another 20%, has also been slow.” Takeuchi Yasuo,

Japanese yen has gravely impaired the nation's export-oriented economy.²⁴³ It has become apparent that Japan can no longer "stay drunk on the wine of postwar success."²⁴³ Public anxiety has mounted as to whether the nation's economy can regain its vigor.²⁴⁴

The collapse of the bubble economy has forced Japanese firms to critically evaluate their employment system. As one observer described, Japanese employers have "suddenly awoken to the fact that many aspects of their time-honored personnel management methods . . . have become handicaps rather than assets."²⁴⁵ Recently, numerous observers have stressed the need to reassess the value system at the core of traditional labor practices.²⁴⁶ They have argued that purely monetary strategies alone remain insufficient to overcome the economic crisis.

In February, 1992, Sony chairperson Akio Morita cautioned that "Japanese-style management [was] reaching the end of its usefulness."²⁴⁷ Jiro Ushio, chairperson of Ushio Inc., a manufacturer of industrial lamps and optical electronic, predicts that individualism, low growth, and globalization will destroy Japanese-style management within ten years.²⁴⁸ On August 6, 1994, *Asahi Shimbun*, a major newspaper in Japan, reported the following survey results on the Japanese labor practices: among 354 companies, sixty-two percent agreed that lifetime employment must be re-examined; ninety-seven percent said the same for the seniority system.²⁴⁹

The Troubled Economy, 21 JAPAN ECHO 2 (1994).

242. Yamamoto, *supra* note 20, at 386. In January 1994, Eijiro Hata, Japan's minister of international trade and industry, explained the adverse impact of the strong yen as follows: "[F]or each one yen increment of the Japanese yen against the dollar, Japan's auto industry suffers a fifteen percent loss in pretax profits; electronics companies lose nearly nine percent." Jathon Sapsford, *Japan Inc.'s Earnings Slump Continues for the Fourth Consecutive Fiscal Year*, WALL ST. J., May 11, 1994, at A11. See generally *Re-Engineering the New U.S. Export to Japan*, JAPAN-AM. DIG. 33 (May/June 1994). Osamu Katayama notes Japan's inability to pull itself out of the recession as it did in the 1970s and 1980s by "increasing productivity and quality to make its products more competitive internationally." Katayama, *supra* note 18, at 11. Harumi Yamamoto express the similar view. For a significant impact of Japan's weak economy on traditional Japanese-style management, see Yamamoto, *supra* note 20 at 386.

243. Katayama, *supra* note 18, at 13.

244. *Id.* See also Inoki Takenori, *Prescribing Medicine for a Global Recession*, 21 JAPAN ECHO 6, 9 (1994).

245. "[L]ifetime employment, seniority-based promotion and compensation, and avoidance of layoffs" exemplify these aspects. KOPF, *supra* note 18, at 224.

246. See *supra* note 18. See generally Yoichiro Hamabe, *Inadvertent Support of Traditional Employment Practices: Impediments to the Internationalization of Japanese Employment Law*, 12 U.C.L.A. PAC. BASIN L.J. 306 (1994).

247. Katayama, *supra* note 18, at 4.

248. *Id.* at 13.

249. *Minaosu-beki Nihon Koyo Shisutemu-wa [The Japanese Employment System that Must Be Re-examined]*, ASAHI SHIMBUN [ASAHI NEWS], Aug. 6, 1994, at 10. 58% responded that lifetime employment may be maintained as long as it is modified to some extent. As desirable modification, 88.3% intended to implement a hybrid system tailored to accommodate both long-term and mobile employees. *Id.*

In sum, international criticism does not serve as the sole motivating factor for Japanese companies in adopting a new personnel policy. This section explores changes in the current Japanese labor market and demonstrates how creation of a merit system can provide the fuel of revitalizing economy.²⁵⁰

B. *Collapse of Lifetime Employment and Seniority System*

Lifetime employment and seniority-based wages have long constituted the core of Japanese business management. Under the traditional system, employers make hiring decisions based on personnel requirements rather than the need to fill a certain job or function.²⁵¹ They hire fresh graduates annually and retain them until mandatory retirement of sixty. Using a broad array of motivational tools such as pep talks, boot camps, calisthenics, and company slogans, employers take every step possible to instill values such as duty and group loyalty into their workers.²⁵² Seniority-based wage structures exemplify another motivational tool of heightening a team spirit.²⁵³ Firms determine salaries in accordance with the length of employee's service so that they may eliminate a sense of competition among workers.²⁵⁴

Given the current state of economy, these time-honored practices are losing their appeal.²⁵⁵ Excess labor,²⁵⁶ which includes loyal but incompetent workers on the payroll, may cut into efficiently.²⁵⁷ Companies tend to view their mid-level managers as "overpaid, unproductive and nonessential."²⁵⁸ As a result, more firms are now attempting to trim costs by im-

250. Sawa & Ishikura, *supra* note 18, at 69.

251. NIPPON STEEL HUMAN RESOURCES DEVELOPMENT, NIPPON: THE LAND AND ITS PEOPLE 137 (1988).

252. BYHAM, *supra* note 39, at 47 (1993); Lincoln, *supra* note 29, at 99.

253. By coupling permanent employment with seniority compensation, the seniority system encourages loyalty and identification with the company's goals. Lincoln, *supra* note 29, at 93.

254. This established custom aims to eliminate a sense of competition among workers and to foster corporate loyalty. *Id.*

255. One observer cautions, however, that most people are concerned only with temporary solutions to the current management deficiency; he stresses the importance of changing the entire labor structure from a long-term perspective. HATO, *supra* note 18, at 61. Another observer notes that it is too unrealistic to believe that lifetime employment will completely disappear. KAWARU NIHON, *supra* note 18, at 202.

256. One expert estimates that Japan has at least 5 to 6 million redundant workers. He also discusses cancellation of outstanding job offers by 114 firms to new university graduates in the winter of 1992 to 1993. HORI, *supra* note 18, at 163.

257. Brown, *supra* note 152, at 239; Katayama, *supra* note 18, at 11-12; Sawa & Ishikura, *supra* note 18. The traditional lifetime employment system would "act as an ameliorating counterforce" against unemployment: "If a company no longer needs workers for some particular line of activity, it will always seek to train those displaced for some other form of work in the company, and even when it faces an overall surplus of labor, it may seek to keep workers occupied in make-work activities until natural attrition has eliminated the surplus." REISCHAUER, *supra* note 7, at 325.

258. Rosario, *supra* note 239.

plementing early retirement. For the same reason, demotion and layoffs have become more common.²⁵⁹ Furthermore, some companies have pushed redundant employees aside to a so-called window desk, "where they practically are an outcast and do nothing."²⁶⁰

Honda Motors adopted a policy of automatically discharging employees around age fifty-five.²⁶¹ As of 1991, about forty percent of large Japanese companies, especially financial or insurance firms, have adopted similar policies.²⁶² In August 1992, President Hiroshi Sato of TDK, the world's largest manufacturer of magnetic tapes, directed fifty of his senior managers to "stand by at home;" TDK agreed to pay ninety percent of their salaries until retirement age as compensation for not working.²⁶³ Also, in January 1993, Pioneer Electric Corp., a leading manufacturer of audio and video equipment, forced its thirty-five managers in their fifties to choose either early retirement or dismissal.²⁶⁴ Capturing national attention, the news profoundly disturbed the public mind.²⁶⁵

A Ministry of Labor survey indicates the age applicable for early retirement plans as follows: 49 or younger (20.9 percent); early fifties (40.3 percent); late fifties (28.7 percent).²⁶⁶ The survey goes on to suggest that companies with 5,000 or more employees tend to target younger employees: 49 or younger (30.5 percent); early fifties (47.5 percent); late fifties (21.2 percent).²⁶⁷ In July, 1993, journalist Osamu Katayama reported the following statistical survey by Nikko Research Center: the current recession has subjected 1.1 million workers to "in-house unemployment," as described above.²⁶⁸ This created dismay among middle-managers who

259. NEC Corp., for instance, chose to maintain its redundant human resources by revising the job descriptions of some 1,300 of its 6,000 managers and rotating them from supervisory positions to so-called in-house specialists working with subordinates. Yamamoto, *supra* note 20, at 384; *Is Future Bleak for Middle Managers?*, JAPAN-AM. DIG. 31 (May/June 1994) [hereinafter *Is Future Bleak*]. See also Hamada, *supra* note 7, at 135 & 141 (discussing a gap between a myth and reality: for many, lifetime employment is "more of a dream than a reasonable expectation" for many Japanese today); HORI, *supra* note 18, at 163 (observing a steady increase of layoffs since 1992 and estimating that the unemployment rate will rise to over 10% from the current level of under 2.5%).

260. *Is Future Bleak*, *supra* note 259. See also Uchihashi, *supra* note 27, at 47 (explaining how Japanese companies in general have coped with the current economic slump by "thinning out the ranks of middle management, whether by outright dismissals or, more frequently, by such indirect methods as demoting employees, pressuring them to take early retirement, or making life unbearable for them in the workplace").

261. *Is Future Bleak*, *supra* note 259.

262. KAWARU NIHON, *supra* note 18, at 55-56.

263. HORI, *supra* note 18, at 157.

264. Yamamoto, *supra* note 20, at 382; HORI, *supra* note 18, at 163-64 (also discussing examples of voluntary retirement programs implemented by two companies: Yamaha and ALPS Electric).

265. Yamamoto, *supra* note 20, at 382.

266. KAWARU NIHON, *supra* note 18, at 55-56.

267. *Id.*

268. Katayama, *supra* note 18, at 12.

have devoted their lives to the companies.²⁶⁹ In the emerging skill-based work environment,²⁷⁰ the majority of middle managers, who are generalists rather than specialists, inevitably face the toughest challenge.²⁷¹

An organization of Japanese labor lawyers protested serious human rights violations facing discharged or demoted employees.²⁷² In February, 1993, the organization launched a two-day "employment restructuring hotline" in three cities.²⁷³ The attorneys consulted employees who needed legal advice regarding layoffs, demotion, internal transfers, early retirement, and various other tactics the companies had adopted to cope with the recession. For two days, the telephone kept ringing non-stop. The lawyers accepted a total of 502 cases but predicted that twice as many people had actually called in. Many calls came from managerial employees in their forties and fifties; the majority of them worked for large corporations.

One case involved alleged practice by a fifty-one year-old manager of a large musical instrument manufacturer; the company forced him to retire after having him spend seven months in a dark basement room with no work assignment.²⁷⁴ In another case, a forty-four year-old manager of a computer software company was transferred to a subsidiary in the countryside.²⁷⁵ This subsidiary was designed for employees whom the company expected to retire soon. Once transferred, he and other managerial employees were taken to a forest, where they were assigned the task of cutting trees, totally unrelated to the companies' software business. They were forced to retire after much humiliation. This company forced more than 3,000 employees to retire in several months.

In April, 1993, the lawyers' organization made a special request to the Ministry of Labor to enforce fair treatment of senior employees.²⁷⁶ Disgruntled middle managers have launched the Tokyo Managers' Union

269. *Is Future Bleak*, *supra* note 259, at 31. Kunio Miyazato, Koyo Chyosei Hottolaine Kara [From the Employment Restructuring Hotline], No. 1308 RODO HORITSU JYUNPO [LABOR LAW NEWS] 4 (1993) [hereinafter Restructuring Hotline].

270. For a discussion of the growing need for employees with technical skills or knowledge, *see infra* V. D.

271. KAWARU NIHON, *supra* note 18, at 145. *See also* Rosario, *supra* note 239, at 74 (explaining that companies tend to view mid-level managers as "overpaid, unproductive and nonessential").

272. Many employers have justified their unreasonable treatment of workers as a strategy to cope with the recession. They have often ignored their duty imposed by the Labor Standards Law. The Labor Standards Law provides general guidelines regarding labor contracts, wages, work hours, etc. Rodo Kijun Ho [Labor Standards Law], Law No. 49 (1947). One critic describes this situation by using the expression: "[Japanese] labor law stands still at the entrance gate." Restructuring Hotline, *supra* note 269, at 4-5.

273. *Id.*; *Is Future Bleak*, *supra* note 259, at 31.

274. *Id.*

275. *Id.*

276. Nihon Rodo Bengodan [Japan Labor Law Attorneys Association], Koyo Chyosei ni Kansuru Yobosyo [Prevention of Employment Restructuring], No. 1310, RODO HORITSU JYUNPO [LABOR LAW NEWS] 21-23 (1993).

(TMU).²⁷⁷ TMU's request to the Ministry of Labor to be acknowledged as a legitimate labor union has been jeopardized; employers have tried hard to "stop the movement before it becomes a menace."²⁷⁸

As well as lifetime employment, the seniority system is gradually disappearing; more companies are now willing to pay individually negotiated salaries.²⁷⁹ As noted above, Japanese firms originally valued the seniority system as an effective way to eliminate a sense of competition among workers and to heighten company loyalty.²⁸⁰ This custom, long advocated by labor unions, is now giving way to the merit system.²⁸¹ As of spring, 1993, 10.4 percent of the surveyed employers have implemented the new salary structure based on individual salary negotiation; thirty percent intended to adopt it in the future.²⁸² A well-publicized policy launched by Honda Motor Co., Ltd. in 1992 allows managerial employees to negotiate annual salary with the company based on the individual's qualifications and performance.²⁸³ In 1993, Fujitsu Ltd. adopted a similar arrangement.²⁸⁴ Honda and Fujitsu are considered the first to adopt the practice of individually negotiated salaries throughout the managerial hierarchy.²⁸⁵

C. Increase in Job Mobility

The gradual decline of lifetime employment derives from changing labor consciousness as well. The increase in job mobility reflects the rise of individualism among younger generations in Japan.²⁸⁶ A survey result

277. *Is Future Bleak*, *supra* note 259, at 31.

278. *Id.*

279. See generally Rodo-Sho [Ministry of Labor], Rodo Hakusho Hakusho [White Paper on Labor] 246-52 (1994); Katayama, *supra* note 18, at 12. According to a study at the Institute of Business Research at Daito Bunka University in Japan, the majority of the personnel managers from the surveyed companies agreed that the seniority system needs gradual but substantial modifications. Mroczkowski & Hanaoka, *supra* note 20, at 280.

280. JAPAN TRAVEL BUREAU, SALARYMAN IN JAPAN 42-43 (1986).

281. *Id.*

282. KAWARU NIHON, *supra* note 18, at 107.

283. *Id.* at 106-107; HORI, *supra* note 18, at 164 (noting that Honda's program initially included about 4,500 middle managers, nearly 15% of its total workforce).

284. Yamamoto, *supra* note 20, at 386.

285. In the past, only a small number of employers, such as Sony Corp., some department stores, and general merchandisers, based annual compensation on systems other than solely on the length of service. Nonetheless, Honda and Fujitsu are "the first to apply the practice of American-style individual salary negotiation systematically throughout the managerial hierarchy." *Id.* Shintaro Hori introduces some other examples of recent personnel actions by major Japanese firms: (1) Japan Air Lines plans to reduce its staff through voluntary retirement, hiring freezes, and one-year paid-absence programs; (2) IBM Japan initiated a voluntary-retirement program for employees over the age 50 by offering a 50% increase in the lump sum received at retirement (average, approximately 15 million yen on average) and outplacement until age 65 at one of IBM's affiliated companies; (3) Mitui Mining and Smelting plans to eliminate 300 employees (6% of its total work force) through transfers to affiliated companies and cut management salaries by an undisclosed amount. HORI, *supra* note 18, at 167 (1993).

286. See HORI, *supra* note 18, at 39-42 (noting that senior managers should learn the value of individualism from their subordinates). See also Lincoln, *supra* note 29, at 89.

affirms their tendency to share "American-style values of leisure, consumption, and affluence."²⁸⁷ Consequently, younger people tend to perceive work as a means of self-expression.²⁸⁸ Their primary goal is to realize their individual potential, not to devote their life to one company.²⁸⁹ This shift in labor consciousness emerged around 1984, when the Gross National Product per person exceeded 10,000 dollars. No longer viewed as an act of betrayal, switching jobs has gained greater social acceptance.²⁹⁰

A Ministry of Labor survey reveals a substantial increase in the number of people who have switched jobs during the last several years: in 1985, 2,245,000 workers have changed their jobs, whereas 3,248,000 workers have done so in 1991.²⁹¹ As of 1993, 22.2 percent of university graduates and 44.2 percent of high school graduates have switched jobs.²⁹² Job mobility has increased particularly in large corporations, where lifetime employment was once the norm.²⁹³

In another notable development, employers as well have changed their attitude toward lifetime employment. In 1991, only thirty percent of the surveyed companies intended to hire mainly from among new graduates; twenty percent to hire from among those with previous work experience; and fifty percent to hire from a mixed pool.²⁹⁴ In five years since 1985, Sumitomo Trust Bank has hired 159 persons with a wide array of previous work experience, such as finance (thirty-six persons), manufacturing (thirty persons), construction/real estate (thirty persons), software computers (twenty-two persons), trade (nine persons), and the mass media (six persons).²⁹⁵ This diversity in backgrounds is noteworthy, in light of the conservative attitudes prevailing among Japanese banks.²⁹⁶ The greater emphasis on personal autonomy will increase the need to create a flexible work environment.

D. *Demand for Professionals*

Japanese firms have long valued generalists who live up to the essential part of their managerial philosophy: to develop flexibility by ac-

287. Lincoln, *supra* note 29, at 93.

288. HATO, *supra* note 18, at 46-48.

289. REISCHAUER, *supra* note 7, at 326 (discussing less loyalty and commitment among younger workers, who reject the paternalistic nature of traditional management and "crave more freedom in their personal lives"). Not only young people but also senior-level employees are now more interested in switching jobs in order to maximize their potential. Among the managers and professionals surveyed by Nippon Manpower, a Japanese human resource development company, 75% of the respondents declared their interest in entertaining a lucrative offer from a headhunter. Mroczkowski & Hanaoka, *supra* note 20, at 284.

290. Changing Jobs Becoming More Popular, 36 JAPAN REPT. 5 (1990).

291. KAWARU NIHON, *supra* note 18, at 55-56.

292. *Id.* at 55-75.

293. *Id.*

294. *Id.* at 55-69.

295. HATO, *supra* note 18, at 135-38.

296. *Id.*

cepting a wide range of tasks in order to understand various aspects of the organization.²⁹⁷ Nonetheless, current trends in Japanese management clearly suggest employers' need to seek individuals with concrete skills.²⁹⁸ In general, the growth of service and high-tech industries has significantly increased the need for trained professionals, while rendering company-specific, wide-ranging skills less useful.²⁹⁹ Japanese firms are now facing the challenge of shifting their focus on manufacturing to more creative activities, including planning, design, and development of products.³⁰⁰

In the course of postwar economic development, Japan simply aimed at overcoming poverty by relying on its manufacturing industries.³⁰¹ In those days, diligence of blue-collar workers, measured by long hours worked, served as the core of Japanese economy. Today, however, more emphasis is placed on so-called process management, "the process of decision-making and product-development itself."³⁰² In this context, sole reliance on workers whose only virtues are diligence or loyalty can hamper the corporate development.³⁰³

Critics have asserted that the weakness of Japanese service-sector jobs partly stems from disrespect of individuality.³⁰⁴ Japan's traditional labor pool composed of its homogeneous population³⁰⁵ may only suppress

297. Coral Snodgrass, who studied many Japanese corporations, assert that this individual flexibility arises "because the Japanese organization itself is so inflexible." BYHAM, *supra* note 39, at 14 (citing Coral Snodgrass and J. Grant, *Cultural Influences on Strategic Planning and Control Systems*, 4 *ADVANCES IN STRATEGIC MGMT.* 205-28 (1986)). See also NAKATANI, *supra* note 18, at 4 (observing that many specialists, who had failed to exhibit sufficient flexibility to perform a wide variety of tasks, were forced to leave companies).

298. HORI, *supra* note 18, at 205-207.

299. HAMADA, *supra* note 156 at 58; HORI, *supra* note 18, at 100; NAKATANI, *supra* note 18, at 87-91 and 216-22.

300. Among companies surveyed by the Ministry of Labor in 1992, 52.9% responded that they expected an increase of positions requiring high-level technical knowledge or skills. Rodo-Sho [Ministry of Labor], Rodo Hakusho [White Paper on Labor] 155-56, 192-201 (1993). Shintaro Hori, who has consulted to numerous Japanese firms on business strategies, explains that Japanese corporations must reconsider their functional priorities: "[Japanese companies] must focus on improving the productivity and innovativeness of white-collar workers with the same level of commitment and vigor they directed at becoming highly productive quality and customer-oriented manufacturers." HORI, *supra* note 18, at 158. See also Ushio Jiro & Noguchi Yukio, *Reforming Japan's "War-Footing" Economic System*, 21 *JAPAN ECHO* 13, 18 (1994) (explaining the need to "shift from a production-oriented to a consumption-oriented economy").

301. See Katayama, *supra* note 18, at 13. For a discussion of Japan's postwar economic development, see generally REISCHAUER, *supra* note 7, at 309-19.

302. Katayama, *supra* note 18, at 13. See also Yamamoto, *supra* note 20, at 386 (foreseeing companies' need to rely more heavily on "creative activities, such as planning, design, and development to survive").

303. Yamamoto, *supra* note 20, at 386.

304. Sawa & Ishikura, *supra* note 18. Japanese firms, while emphasizing individuals as components of a team, pay little attention to specialized skills. WILLIAM OUCHI, *THEORY Z* 76 (1981) (discussing a lower degree of professionalism in Japanese corporations).

305. See KOPP, *supra* note 18, at 223-24 (explaining that Japanese traditional management, which encourages passivity, conformity, and conservatism, can no longer help the na-

creativity needed to boost the business.³⁰⁶ Therefore, companies should strive to build a workforce composed of diverse values and skills,³⁰⁷ which challenges talented employees to contribute innovative ideas.³⁰⁸ The seniority system, which creates a "false equality that overemphasizes harmony," is less likely to motivate employees to maximize their individual potential.³⁰⁹

Other trends as well bolster the argument for the merit system. The rising number of temporary and contract employees suggests a greater demand for professionals for immediate use.³¹⁰ The number of temporary workers has increased by about 4.5 times, from 145,000 in 1986 to 654,000 in 1992.³¹¹ Similarly, contract employees have increased from 7.9% in 1987 to 18.9 percent in 1993.³¹² Also, more firms are beginning to use Western-style headhunters to fill their managerial and technical staff.³¹³ In January, 1994, Toyota Motor Corp. announced its plan to hire automobile designers under one-year contracts and with merit-based annual salaries.³¹⁴ Explaining its decision to turn away from lifetime employment, Toyota's statement read: "[a]s the business conditions surrounding Japanese corporations underwent radical change, however, it was inevitable that the rigid organizational structure of the past would impose limits on corporate growth."³¹⁵ As the Wall Street Journal reported, this decision by Toyota, one of the most conservative firms in Japan, will profoundly affect on Japanese labor practices.³¹⁶ Major corporations are now opting for midcareer recruitment, which enables them to hire talented employees for narrowly defined roles.³¹⁷

tion's economy as Japanese business shifts its focus from "cost leadership to innovation and high value-added products").

306. Sawa & Ishikura, *supra* note 18.

307. See, e.g., Yamamoto, *supra* note 20, at 386; HORI, *supra* note 18, at 42-43 & 211-12; Sawa & Ishikura, *supra* note 18, at 69 (noting that individuals, as well as corporations, should change their attitude toward jobs; in choosing jobs, they should focus more on what they truly want to do).

308. Katayama, *supra* note 18, at 13.

309. *Id.*

310. KAWARU NIHON, *supra* note 18, at 55-69. Mroczkowski and Hanaoka introduce some examples of new hiring practices among Japanese firms. Nikko Securities, for instance, hire foreign exchange traders at high salaries on a contract basis. The career path for these contract employees is entirely separate from the traditional lifetime employment track; their salaries and career prospects are based on their performance. Mroczkowski & Hanaoka, *supra* note 20, at 283-84.

311. *Id.*

312. *Id.*

313. Mroczkowski & Hanaoka, *supra* note 20, at 286; HATO, *supra* note 18, at 58.

314. Michael Williams, *Toyota Creates Work Contracts Challenging Lifetime-Job System*, WALL ST. J., Jan. 24, 1994, at A8.

315. *Id.*

316. *Id.*

317. HATO, *supra* note 18, at 133-34. Sumitomo Gomu Kogyo Company's "job request system," which was adopted in 1990, exemplifies such a trend: the firm allows its newly hired employees, after three months of orientational training, to select three sections they hope to work for. The rate of a person being assigned to the position of his or her first

E. Anticipation of Labor Shortages

The rapidly aging population of Japan, coupled with a declining birth rate, will also profoundly affect the nation's labor market.³¹⁸ Presently, the Japanese population's aging rate is highest in the world.³¹⁹ In 1992, the Ministry of Labor reported that people over the age of sixty-five accounted for 12.6 percent of the entire population.³²⁰ Among this group, the number of people over the age of seventy-five has sharply increased.³²¹ Furthermore, the Ministry of Welfare estimates that the number of the elderly will reach 6,000,000³²² by the year 2,000.³²³ This means that Japan will have the highest percentage of the elderly in the world.³²⁴ Furthermore, according to the Institute of Population Problems, Japan's birth rate, which was 1.57 children per woman in 1989, is expected to decrease to 1.32 children per woman by 1996.³²⁵

The shrinking labor force will necessitate the greater use of older, experienced workers as additional labor resources.³²⁶ Older workers themselves are hoping to remain in the workforce longer, as shown in the following survey by the Prime Minister's Office. Among the surveyed workers, 23.2 percent and 57.1 percent expressed their desire to work until age sixty and sixty-five respectively.³²⁷ Among males in their fifties, nearing their mandatory retirement age of sixty, as high as 68.8 percent hoped to work until age sixty-five. This figure rose to 91.2 percent among males between age sixty and sixty-four.

Currently, some employers may see demotion and layoffs, which automatically eliminate older workers, as an inevitable strategy to cope with the economic crisis. However, one major advantage of hiring older employees lies in cutting down costs on training young and inexperienced

choice amounts to 80%. The rate equals 100% if the persons assigned to the positions of their third choice are included. This type of personnel policy is still considered extremely rare in Japan. *Id.* Hato discusses other examples of "revolutionary hiring" recently adopted by some major companies including Sony and Japan Air Lines. *Id.* at 128-34.

318. The Japanese population is aging at the world's highest rate. Rodo-Sho [Ministry of Labor], Fujin Rodo Hakushyo [White Paper on Women's Labor] 40 (1992). In June 1990, the Ministry of Labor raised the minimum retirement age for 55 to 60. After the age of 60, employers may rehire workers on a commissioned basis. Akwi Seo, *Work Keeps Them Healthy*, 37 LOOK JAPAN (1991).

319. Fujin Rodo Hakushyo, *supra* note 318, at 40.

320. *Id.*

321. *Id.* at 41.

322. Japan has a population of 120.75 million.

323. Fujin Rodo Hakushyo, *supra* note 318, at 41.

324. Sodei Takao, *Family in an Age of Working Women*, 9 JAPAN ECHO 95, 102 (1982) (concluding that women's role in the labor force should increase in the aging society).

325. Japan Information Center, *Experts Think Japan's Low Birthrate Could Decline Further*, 37 JAPAN REP. 2 (1991).

326. See Uchihashi, *supra* note 23, at 49 (stating Japan's need to pass a law against age discrimination, because "it is wrong to deny [elderly workers] their seniority rights on the grounds that their present abilities are unequal to their past contribution").

327. KAWARU NIHON, *supra* note 18, at 211-12.

workers.³²⁸ From a long-term perspective, the Japanese employment system should be restructured to meet the needs of the anticipated labor shortage.

VI. PROTECTIVE MEASURES AGAINST DISCRIMINATION CHARGES

The rise of employment disputes involving Japanese firms in the U.S. should alert the employers to formulate human resource policies as a vital part of global management.³²⁹ This section offers suggestions on what steps companies should take in order to avoid conflict.³³⁰

First, the Japanese firm should retain a lawyer capable of offering practical legal advice based on his or her solid understanding of the U.S. and Japan cultures and business practices.³³¹ Legal knowledge alone will remain inadequate to deal with possible clash of two fundamentally different cultures.³³² The attorney should assist the company in implementing various strategies to minimize the risk of litigation. For instance, he or she should be able to help prepare written documents on various aspects of employment such as work regulations, fringe benefits, and sexual harassment policies.³³³

Second, the attorney should provide an educational program to acquaint Japanese managers with U.S. antidiscrimination laws. This program should cover both theoretical aspects of the laws and case studies based on suits against Japanese or other multinational firms in the U.S. In addition, interviewing skills workshops can help recruiters learn what constitute impermissible questions at job interviews.³³⁴ Managers rotating from Japan should be required to undergo such training prior to departure. The company should create methods to evaluate their level of understanding after participation.³³⁵ This helps ensure that the managers arrive in the U.S., truly informed. Likewise, the employer should offer seminars for both Japanese and American employees, designed to enhance their cross-cultural understanding and to develop interpersonal

328. *Id.* at 166.

329. One observer emphasizes human resources management as playing the most critical role in the success of a Japanese corporation. Japanese businesses heavily relied on production in the 1960s and 70s and on marketing in 1980s. Japanese economy today, however, should shift its focus from goods to people. HATO, *supra* note 18, at 110-14.

330. See generally MARY GREENWOOD, *HIRING, SUPERVISING AND FIRING EMPLOYEES: AN EMPLOYER'S GUIDE TO DISCRIMINATION LAWS* (1987); PITFALLS, *supra* note 8.

331. PITFALLS, *supra* note 8, at 6-7.

332. Schaffer, *supra* note 26, at 399 (suggesting the appropriate role for American attorneys advising Japanese multinational corporations).

333. PITFALLS, *supra* note 8, at 6-7.

334. Finegan, *supra* note 165, at 69.

335. Equally important, the company should carefully evaluate candidates for overseas assignment in terms of their fluency in English, cross-cultural experience, communication skills, the ability to work through conflicts, and so on. The company should also consider assigning Japanese employees to foreign branches and subsidiaries, preferably for longer than five years.

skills in the multinational workplace.³³⁶ Such training can build itself on interactive sessions, which include activities such as role plays, exercises, and group discussions.³³⁷ Nonetheless, gaining intercultural understanding has to be a long, ongoing process.³³⁸ Thus, the company should encourage their employees to work through conflicts and misunderstanding, bridging cultural gaps through learning-by-doing.³³⁹ On a more informal basis, the company should sponsor social activities encouraging participation from all workers. To cultivate harmonious work relations based on trust, it is vital to make Americans feel part of the company.³⁴⁰

Third, the company should provide a well-defined job description for each position.³⁴¹ The description should be both accurate and detailed, including job duties, requisite skills, knowledge, education, and experience. Publishing such information enables the company to articulate objective standards in hiring and promotion. At the same time, it gives the employer the opportunity to evaluate its own employment criteria.

Fourth, supervisors should be required to document all important actions. Written records can be of great value in case any dispute arises. For newly hired employees, the company should provide a handbook on personnel policies, including a list of conduct that may lead to termination.³⁴² Equally important, the company should adopt a procedure to review and update documents systematically. This gives the employer the opportunity to assure that the corporate policies are proper in light of

336. More than one-third of the 578 companies surveyed by the Olsten Corporation reported the increasing need for employees with multicultural communication skills. Robert Hayles, Vice President of Cultural Diversity for Grand Metropolitan Food Sector, explained that companies must get an "everyday understanding of whom diversity involves, what diversity is, and why diversity is necessary." WARREN GORHAM LAMONT, *WHAT YOU NEED TO KNOW ABOUT MANAGING DIVERSITY* 10 (1992). Shelly Lieberman, Multicultural and Cross-Cultural Consultant and Director of Educational Outreach and Marketing, discusses potential benefits from a diversity training program, intended to nurture sensitivity and understanding of cultural differences: (1) growth in previously unexplored marketplaces; (2) redevelopment of markets that were not sensitively managed due to a lack of understanding of communities served; (3) improved employee relations; (4) wider range of problem-solving skills; (5) better allocation and utilization of human resources; (6) better vendor relationship; and (7) increased productivity. *Id.* at 26.

337. *Id.* at 34-36.

338. *Id.* at 31.

339. *See, e.g.*, KOPP, *supra* note 18, at 25 (stating that "[s]mall matters frequently escalate into major misunderstandings that pit Japanese and locally hired employees against each other").

340. As one way to achieving this goal, the company as a whole should actively participate in the local community affairs through philanthropic activities. This tactic will also help enhance the corporate image in the community. MASATU, *supra* note 228 (emphasizing the importance of social contributions by corporations and introducing examples from various multinational corporations).

341. Typically, Japanese companies prepare job descriptions for department managers, but not for individual employees. *Id.* at 75-77. *See also* HORI, *supra* note 18, at 184 (stressing the need for clarification of individual responsibility).

342. Finegan, *supra* note 165, at 70.

furthering the goal of equal employment opportunity.³⁴³

Fifth, the company should make every effort to facilitate effective communication between management and employees. For instance, Japanese supervisors should straightforwardly communicate to the employees the result of performance appraisals.³⁴⁴ Avoidance of open confrontation constitutes a common element of Japanese culture. Bosses often remain reluctant to inform their subordinates, in a direct and forthright way, of any problems that need to be corrected. To preserve congenial working relationships, they may use inference³⁴⁵ or give their feedback informally by "[surrounding] employees in an atmosphere of daily advice and admonitions."³⁴⁶ Lack of direct communication may, however, cause some misunderstanding on the part of American employees.³⁴⁷ Therefore, the company should also create opportunities to receive employees' comments on work conditions. Such opportunities may take various forms ranging from individual conferences to opinion surveys.

Sixth, all forms of internal communications should be carried out in English, when possible. This rule should apply to written materials, such as personnel policies, company memos, and notices on the bulletin board. Documents in Japanese, even if accompanied by English translations, may cause mistrust among American employees.³⁴⁸ For the same reason, all company meetings should be conducted in English. Akihiko Maruyama, who was in charge of human resources management at Tokyo Marine and Fire Insurance Company in New York, stresses this point from his own experiences and observations.³⁴⁹ Maruyama explains that some Americans feel being excluded from decision-making when Japanese managers speak Japanese to each other, even in informal discussions.³⁵⁰

343. PITFALLS, *supra* note 8, at 32-35.

344. HORI, *supra* note 18, at 187-88. The company should also articulate the method and standards of evaluation.

345. To avoid sharp conflict of views, the Japanese often rely on nonverbal communication. REISCHAUER, *supra* note 7, at 136.

346. BYHAM, *supra* note 39, at 12.

347. Also, at the job interview, Japanese employers should refrain from making comments out of courtesy such as, "We hope you will be able to stay with us as long as possible." Such an ambiguous statement may create a false impression that the company guarantees lifetime employment. KISHI, *supra* note 30. In *Fitzgibbon v. Sanyo Securities America, Inc.*, a discharged American employee asserted his receipt of the Japanese employer's oral and written assurances of lifetime employment. For instance, plaintiff submitted a handwritten statement on a loan application that "employment will be a sort of lifetime employment." The court rejected this argument, because a reasonable person would not recognize this statement as an express limitation upon the employer's right to terminate at will. *Fitzgibbon v. Sanyo Securities America, Inc.*, No. 92 Civ. 2818 (RPP), 1994 WL 281928, at *6 (S.D.N.Y. June 22, 1994).

348. Finegan, *supra* note 165.

349. KISHI, *supra* note 30, at 184-85.

350. *Id.* The following discrimination suit against a Japanese company provides one example. In this case, an American plaintiff claimed, among other things, that his employer had sponsored recreational activities exclusively for its Japanese employees. The court found that the company, in fact, provided the activities for all employees. Partly because he

Seventh, the company should establish an internal procedure, which responds to complaints, conducts a thorough investigation to determine whether any discrimination has occurred, and if it has, to take corrective action.³⁵¹ The officers involved in this process should consist of both Japanese and Americans.

Finally, the company should carefully evaluate the racial and ethnic composition of its work force, ensuring adequate representation of the local population. The amount of autonomy given to local staff can largely determine the degree of the firm's globalization.³⁵² From a more practical viewpoint, heavy reliance on expatriates deprives Japanese companies of the opportunity to use valuable human resources; aided by their knowledge of the local conditions, American managers can greatly enhance business operations.³⁵³

VII. CREATION OF A THIRD-CULTURE BUSINESS ENVIRONMENT

To fulfill their duty to comply with the U.S. civil rights laws, Japanese firms must curtail various aspects of their traditional employment practices. Nonetheless, this curtailment does not mean that the companies must replace their entire management structure with its U.S. counterpart. Americans may, in fact, find certain aspects of Japanese-style management admirable.³⁵⁴

Ronald A. Morse, Executive Vice President of the Economic Strategy Institute, discusses underlying values supporting Japan's economic performance, such as loyalty and teamwork; he then concludes that there is no reason to condemn these values as long as they do not manifest themselves in unfair employment practices.³⁵⁵ Professor Brown at the University of Hawaii School of Law points out that joint employer-employee consultation committees, flexible job descriptions, and attempts at cooperation rather than conflict to resolve disputes find greater use in the American workplace.³⁵⁶ He further introduces an effort by the G.M-

had seen a sign advertising excursion trips in Japanese, the plaintiff assumed that the company had excluded him. *Walsh v. Eagle Wings Industries, Inc.*, No.89-2052, 1991 WL 90906 (C.D.Ill. 1991), at *3.

351. *EQ. EMPL. COMPL. MAN.*, Pt.II section 2.03-2.09 (1983).

352. Mroczkowski & Linowes, *supra* note 12, at 28.

353. BYHAM, *supra* note 39, at 214.

354. Brown, *supra* note 152, at 239-40.

355. Lantos Hearings, *supra* note 30, at 180-81 (observing that "the Japanese educational system and the corporate training programs prepare an excellent and effective workforce for Japanese business").

356. Brown, *supra* note 152, at 239-40. Some U.S. manufacturers of Japanese origin have successfully adopted certain aspects of Japanese-style management. For instance, Kyocera in San Diego has implemented a "Honor Employee System", which offers privileges to employees who have reported to work on time and have not been absent for six months in a row. Other examples include: "the self-disciplined, small, autonomous group method; 30-minute morning communication meetings; pep talks; bottom-up suggestion system meetings, and group competition bonus systems." KOBAYASHI, *supra* note 43, at 94-95. Based on a comparative survey, James Lincoln discusses what specific aspects of Japanese-style man-

Toyota joint venture in California, and the G.M. Saturn project, as well as numerous projects in the steel and manufacturing industries to learn from Japan's success; they have "taken great strides in devising management and labor relations approaches and contract provisions which seek to replace confrontation with cooperation."³⁵⁷

In his book on Japanese management, *Theory Z*, William Ouchi questions a potentially destructive aspect of excessive individualism at the core of competitive American workplaces.³⁵⁸ Predominance of self-assertion over group conformity creates a society where "each person is at war with the other."³⁵⁹ Characterized by a high degree of specialization, American-style management tends to promote a hierarchical culture; professionals are glorified while those without high-level skills remain unappreciated. In contrast, Japanese companies have used a variety of methods of building team spirit by eliminating a sense of competition among all workers.³⁶⁰ Ouchi compares individualism asserted by Americans with collectivism emphasized by the Japanese.³⁶¹ He then advocates the latter as better suited to modern industrial production and industrial life.³⁶²

William Byham, who wrote a book entitled *Shogun Management* based on experiences of more than two hundred U.S. and Canadian managers working for Japanese companies, suggests that the shared challenge facing Japan and the U.S. is to create a third-culture business environment that integrates the strengths of both management-styles.³⁶³

agement practices produce company commitment and job satisfaction in Japan and in the U.S. The following is an excerpt from the survey results: (1) long-term employment and/age seniority grading (positive in both countries); (2) cohesive work groups (positive in both countries); (3) dense supervision; close supervisor-subordinate contact (positive in Japan; negative in U.S.); (4) "tall," finely-layered hierarchies (negative in both countries; but contributes to management-labor consensus in Japan); (5) formal centralization/de facto decentralization of decision-making (positive in both countries); (6) quality circle participation (positive in both countries); (7) unions (enterprise-specific in Japan; industry-occupation specific in the U.S.) (weak negative to null in Japan; strongly negative in U.S.) Lincoln, *supra* note 29, at 103.

357. Brown, *supra* note 152, at 239-40.

358. OUCHI, *supra* note 304.

359. Western philosophers and sociologists, including Plato, Hobbes, and B.F. Skinner, have asserted that "individual freedom exists only when people willingly subordinate their self-interests to the social interest." OUCHI, *supra* note 304, at 65.

360. Partly for the purpose of eliminating a sense of competition among workers, Japanese firms have deliberately avoided drawing a clear line between white and blue-collar positions. Edwin Reischauer explains the company's paternalistic interest in both groups: "They usually wear the same work jackets and hats in the plant and eat in the same company restaurants. Cheap company housing may be provided to both groups, and a great deal of company indoctrination is included in the initial in-service training for both." REISCHAUER, *supra* note 7, at 324.

361. OUCHI, *supra* note 304, at 66.

362. *Id.*

363. For this purpose, the author presented experiences of more than 200 U.S. and Canadian managers working for Japanese companies and a small number of Japanese managers. BYHAM, *supra* note 39, at vii.

Thus, Japanese multinational firms assume dual responsibilities: first, to implement human resource strategies, based on the American model, in order to build a work environment that integrates voices and experiences of diverse individuals; and second, to help American workers see themselves as part of a team working together in the pursuit of the common goal.³⁶⁴ An illustration of an integrated organization by Robert Wallace of Wallace III & Associates, a management consulting firm, suggests a goal that Japanese multinational firms should aim for:

"[An integrated organization] looks at people as a mosaic in a stained glass window. The uniqueness of each individual piece is clear, and this uniqueness creates the beauty of the mosaic when the sun shines through. Individuals feel included and welcome to an organization if their uniqueness is valued and honored at the workplace. These workers are also more productive."³⁶⁵

It is time for Japanese companies to learn and appreciate the beauty of the mosaic. Playing a vital role in the international business community, Japanese employers assume the responsibility to develop respect of the individual in the workplace while maintaining a sense of collective responsibility.³⁶⁶

VIII. CONCLUSION

Japanese multinational firms have long endeavored to triumph in the world marketplace. Nonetheless, they have yet to gain standing as good corporate citizens in the global community. Their employment practices often clash with America's commitment to redress job inequalities through Title VII. The rise of discrimination suits should alert Japanese employers to confront and reject the forced homogeneity of their workforce. They should recognize the ultimate source of victory in litigation: a workplace that fully integrates³⁶⁷ the strengths of diverse individuals.³⁶⁸ Adoption of a merit system would serve as a catalyst for attainment

364. For a discussion on how to make teamwork effective in the corporate setting, see generally Jon R. Katzenbach & Douglas K. Smith, *The Discipline of Teams*, HARV. BUS. REV. 111-20 (1993).

365. LAMONT, *supra* note 336, at 23 (discussing integration, as opposed to assimilation).

366. One scholar explains the inevitable link between individualism and communality as follows: "It is our sense of our own individual dignity that leads us to appreciate the same worth of the individuality of other persons." Inoue, *supra* note 17, at 548.

367. One should distinguish integration, meaning "to bring together as parts, into a whole" from assimilation, meaning "to make alike." LAMONT, *supra* note 336, at 23 (relying on the definition in Webster's Dictionary). American society has traditionally linked the concept of assimilation with the melting pot metaphor, "where ethnic and racial differences were standardized into a kind of American puree." This notion contradicts the goal of managing diversity: to enable every member of the group to retain and maximize his or her individual potential. R. Roosevelt Thomas, Jr., *From Affirmative Action to Affirmative Diversity*, HARV. BUS. REV. 107, 112 (Mar./Apr. 1990).

368. Creating a multicultural work environment has posed a new challenge for U.S. domestic corporations as well. The visible increase in the number of women and minorities in the U.S. labor force has bolstered the need to promote diversity management as a corpo-

of that goal.

The transition is inevitable even without the legally imposed duty under Title VII. In Japan as well, the decline of lifetime employment and the seniority system has necessitated a qualifications-based personnel policy. Japanese firms must strive to create a work environment reflecting a broad array of backgrounds and perspectives. Lasting changes must take place from within. Only with such changes will Japan have embarked on the journey to true globalization.

rate policy. An America That Works, a policy statement issued by the Committee for Economic Development (an independent research and educational organization for over 225 business executives and educators) contains the following information: blacks, Hispanics, and Asians will comprise more than half of the net labor force growth between 1988 and 2000; 81.4 percent of women between the ages of 25 and 54 will be participating in the workforce in 2000. LAMONT, *supra* note 336, at 7-8. R. Roosevelt Thomas, Jr., Assistant Professor at the Harvard Business School and Executive Director of the American Institute for Managing Diversity, Inc., at Atlanta's Morehouse College, also emphasizes the growing need for employers to take advantage of a multicultural workforce. Thomas introduces examples of diversity management by Avon, Corning, Digital, Procter & Gable. Thomas, *supra* note 367.