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渋谷区
Shibuya City

ROBERT WALTERS

The Current Legal Environment for Transgender people in Japan (at Work)

November 14, 2020

Lawyers for LGBT and Allies Network
Director Naosuke Fujita

Overview of Today's Session

While there is current no specific legislation in Japan that address the rights of a transgender people (other than Gender Recognition Act);

Over the past two decades and more specifically in recent years, there have been positive legal developments in Japan that has produced an environment for transgender people to have constructive dialogue with employers and more generally in society; .

We will look at some of such developments and will hear from our guest speaker Mai of her experience and advice in engaging in such constructive dialogue.

The Labor Contracts Act

Employer must, in connection with a labor contract, provide necessary consideration so that the employee may provide his/her services in an environment where his/her living, physical and other safety may be secured. (Article 5, Labor Contracts Act)

使用者は、労働契約に伴い、労働者がその生命、身体等の安全を確保しつつ労働することができるよう、必要な配慮をするものとする。（労働契約者法第5条）

“Safety” includes “psychological safety”

Tokyo District Court – June 2002

The Situation:

- An MtF employee, after working as a male for 10 years, sought to work in her true identity at work and asked her company to work as a female employee.
- The company did not engage with her and denied her request.

Court's View:

- The employee was under significant pain and suffering if forced to conduct herself as a male or restricted from conducting herself as female.
- The employee's request to work as a female and be provided appropriate accommodation was with good reason.
- There was no effort on the part of the company (a) to understand; nor (b) to make appropriate accommodation.
- Company's concerns with respect to reaction of other employees or customers is something that can be addressed over time and is not material enough to warrant the action taken by the company.

Supreme Court of Japan – January 2019

Supplemental Opinion of Supreme Court
Justices Onimaru and Miura



January 23, 2019

“Gender is an attribute of an individual in leading social life and in establishing relationships and is an inseparable element of one’s personal dignity”

“The pain and suffering of transgender people regarding their gender identity is an issue society needs to address”

“We wish society understand the issues faced by transgender people and appropriate steps are taken by those concerned from the perspective of individual and personal dignity”

Tokyo District Court – December 2019

The Situation:

- An MtF employee sought to work in her true identity at work including the right to use the restroom of her gender.
- The employer restricted her restroom use to one that is at least two floors apart.

Court's View:

- “Gender is an individual attribute that is inseparable from a person’s individual dignity. The right of a person to socially live in one’s own gender identity is an important legal right. Restriction on such essential facilities as a restroom is a restriction of such important legal right.”
- “The employer must consider all circumstances including the employee’s individual circumstances as well as change in social norm and may not categorically deny such request.”

Other Developments

January 15, 2020 “Steps to be Taken by Employers with respect to Verbal and Physical Conduct Issues abusing Superior Position (Power Harassment Guidelines)”
Ministry of Health, Labor and Welfare

- Specifically sets out SOGI related verbal and physical action as “harassment”
- Company Action
 - Create Policies and Procedures
 - Establish Consultation System
 - Prompt Investigation and Remedial Action
 - Protect Privacy

September 23, 2020 “Towards the Protection of Sexual Minority Rights (Part II) – Enacting Legislation to Guarantee the Dignity of Transgender People”
Science Council of Japan

Resources

- Tokyo District Court Judgment of June 20, 2002
- Supreme Court Judgment of January 23, 2019 <https://bit.ly/36kjkjA> (Japanese)
- Tokyo District Court Judgment of December 12, 2019 <https://bit.ly/3p2HUOy> (Japanese)
- Science Council of Japan Report “Towards the Protection of Sexual Minority Rights (Part II) – Enacting Legislation to Guarantee the Dignity of Transgender People” September 23, 2020 <https://bit.ly/32qmOQr> (Japanese)
- Japan Sport Association “Guidelines on Optimal Sexual Diversity in Physical Education and Sport : Deepening Understanding of Sexual Orientation and Gender Identity” September 30, 2020 <https://bit.ly/3n3TbMJ> (in Japanese and in English)
- Ministry of Education, Culture, Sports, Science and Technology “Attentive Care for Children/Students with respect to Sexual Orientation and Gender Identity” April 1, 2016 <https://bit.ly/2JGsRda> (Japanese)
- Ministry of Labor, Health and Welfare “Steps to be Taken by Employers with respect to Sexual Verbal and Physical Conduct Issues at the Workplace (Sexual Harassment Guidelines)” Last Amended August 2, 2016 (<http://bit.ly/2Ap9LAe> (Japanese)
- Ministry of Labor, Health and Welfare “Steps to be Taken by Employers with respect to Verbal and Physical Conduct Issues abusing Superior Position (Power Harassment Guidelines)” January 15, 2020 <https://bit.ly/3fil7cW> (Japanese)

Note on Japan's Legal Gender Recognition Law

Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (Ministry of Justice Translation)

<https://bit.ly/3mZjjbu>

Diagnosis by at least two doctors	
1. Must be at least 20 years old	
2. Must not be married	
3. Must not have a child who is a minor	Supreme Court Judgment October 19, 2007
4. Must not have reproductive organs	Supreme Court Judgment January 23, 2019
5. Must have surgical intervention	