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THE FIRST STEP FORWARD—THE AIDS DISMISSAL CASE AND THE PROTECTION AGAINST AIDS-BASED EMPLOYMENT DISCRIMINATION IN JAPAN

Marc Lim

Abstract: The fight against AIDS in Japan, a journey that has encountered much resistance from a Japanese public and corporate sector ill-educated on the disease, may have taken a new turn. Before 1995, employees infected with HIV or suffering from AIDS had little recourse in fighting against the discrimination they faced in their private lives and in the Japanese corporate sector. With the AIDS Dismissal Case, the Japanese judiciary, in a show of judicial activism, found the dismissal of an HIV-infected worker based upon his HIV status illegal and an infringement upon the worker’s human rights. In addition, the court found the disclosure of the worker’s HIV status by his employer to third parties to be an infringement upon his right to privacy. This Comment examines this case and show its ambiguities and potential precedential value. Many predict that the case will be seen as a viable base for civil rights protections against AIDS-based employment discrimination in Japan.

It is more important to prevent the spread of AIDS than to protect the privacy of high-risk groups. If we respect the human rights of one person, we are depriving ninety-nine people of their right to life. Comment by Hoei Ohama, spokesperson for the Liberal Democratic Party’s AIDS Committee.

I. INTRODUCTION

In 1995, in a decision by the Tokyo District Court, Japan spoke out against the dismissal of employees based on their contraction of Human Immunodeficiency Virus (“HIV”), the virus which causes Acquired Immune Deficiency Syndrome (“AIDS”). The case, which will be referred to in this Comment as the AIDS Dismissal Case, marked the first time the Japanese

2 Judgment of Mar. 30, 1995 (Tokyo Dist. Cl.), 876 HANREI TAIMUZU 122. [hereinafter AIDS Dismissal Case] Many cases in Japan involve anonymous parties and are therefore cited to by means of the date they were issued rather than by party names. However, academics analyzing the cases will attach general names to them for ease of reference. Unless otherwise indicated, all translations from Japanese are by the author.
judiciary considered the question of AIDS in the workplace. The AIDS Dismissal Case may also be the beginning of a judicially created body of civil protections for employees with AIDS or HIV. As a case of first impression, the AIDS Dismissal Case has come under detailed scrutiny from the Japanese academic community, which has debated the case’s impact on the future of AIDS in Japan and especially on the future of HIV-positive employees in Japan’s group-oriented employment system.

As a potential cornerstone for protection against AIDS-based employment discrimination in Japan, the AIDS Dismissal Case and the background in which it occurred deserve dissection and analysis. Part II of this Comment describes the advance of AIDS into Japanese society and looks at the societal, governmental, and corporate reaction to that advance. Part III details the background of the AIDS Dismissal Case. Part IV examines its holding in three areas: (1) the legality of the defendants’ disclosure to the plaintiff of his HIV status; (2) the legality of terminating the plaintiff based solely upon his HIV status; and (3) the legality of the defendants’ disclosure of the plaintiff’s HIV status to other company employees. Part V analyzes the case’s potential impact on Japanese labor law from four angles: (1) the case’s failure to touch upon the constitutional rights of the plaintiff; (2) the case’s omission of any reference to the 1989 AIDS Prevention Law; (3) the case’s impact as a vehicle of judicial activism; and (4) the case’s implications for privacy law in Japan. The Comment concludes by affirming the AIDS Dismissal Case’s potential to establish protection for HIV-positive employees in the Japanese workplace.

II. AIDS’ ENTRANCE INTO JAPAN

AIDS in Japan has followed a course unlike its progress in Western industrialized nations. Whereas the disease in Western countries has long been linked to homosexuality and intravenous drug use, the disease in Japan has spread mostly through untreated blood transfusions and

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3 Kotensei men’ekifuzen shokogun no yobôni kansuru hôritsu [Law Concerning the Prevention of Acquired Immunodeficiency Syndrome], Law No. 2 of 1989, commonly referred to as Eizu Yobô Hô [AIDS Prevention Law] [hereinafter AIDS Prevention Law].


heterosexual contact. This difference in infection methods has profoundly influenced the Japanese public perception and response to the AIDS phenomenon.

During the early and mid-1980s, as international AIDS awareness was just beginning, an economically prosperous Japan largely dismissed AIDS as a foreigner’s disease. Ironically, by 1990, Japan had the most reported cases among all Asian nations, with 290 full-blown cases of AIDS. The first publicly confirmed case of AIDS in Japan occurred in 1985. After that year, AIDS spread rapidly into Japanese society, from a reported six cases in 1985 to 446 cases in 1995. The rate of HIV carriers increased correspondingly, from 1,420 confirmed cases in 1990 to 4,175 cases in the beginning of 1996. Particularly hard hit was Japan’s hemophiliac population. While these numbers pale in comparison to the HIV infections in the United States, Europe, and Africa, Japan’s HIV infection rate has disturbingly outpaced all

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8 Eric A. Feldman & Shohei Yonemoto, Japan: AIDS as a “Non-issue,” in AIDS IN THE INDUSTRIALIZED DEMOCRACIES: PASSIONS, POLITICS, AND POLICIES, 355 (David L. Kirp & Ronald Bayer, eds., 1992). For example, in 1986, an African-American citizen was denied entrance into her local public bath on account of the owner’s fear that the presence of a foreigner—someone who “might have AIDS”—would cause regular patrons to go elsewhere. Id. Feldman & Yonemoto also report that prior to the AIDS era, Western homosexuals in Japan were seen as particularly desirable sexual partners for Japanese homosexuals. As public awareness of AIDS grew, rather than encourage condom use, Japanese gay bathhouses simply barred foreigners to “control” the disease. Id. at 342, 355-56.

9 Salzberg, supra note 7, at 244.

10 On March 22, 1985, a 36-year-old homosexual artist was reported to have tested positive for HIV. Id. at 245. The Ministry of Health and Welfare long maintained that the first confirmed hemophiliac AIDS patient also occurred in this year. However, it admitted during the 1996 hearings regarding the importation of tainted blood products that it had known and tried to conceal the AIDS-related death of a hemophiliac in July of 1983. See Awaji Takehisa, The HIV Litigation and its Settlement [in Japan], 6 PAC. RIM L. & POL’Y J. 581, 586 (Keisuke Mark Abe, trans. 1997).

11 Feldman & Yonemoto, supra note 8, at 341.

12 These statistics include HIV-positive hemophiliacs. Salzberg, supra note 7, at 245.


14 See Feldman & Yonemoto, supra note 8, at 349-50, 353. Of Japan’s approximately 5,000 hemophiliacs, about 40% are said to be infected with HIV, with one-third of those exhibiting full-blown AIDS symptoms. Takehisa, supra note 10, at 581.

15 In 1994, based on a global survey by the World Health Organization, the United States had 22.7 cases of AIDS per 100,000 people, France had 9.3 cases per 100,000, and Cote d’Ivoire in Africa had 44.6
predictions. As such, the full extent of the AIDS situation in Japan has yet to be realized.

A. The Public Reaction to AIDS in Japan

The Japanese public’s awareness of AIDS exploded in 1986 and 1987 due to three highly-publicized reports of HIV infection. As a measure of the effectiveness of the media blitz that surrounded these cases, a survey by the Japanese Ministry of Health and Welfare ("The Health Ministry") of approximately 8,000 adults in 1987 showed that ninety-six percent of them had heard of AIDS through television. However, the same media blitz also resulted in an "AIDS panic" in which Japanese society—the public, the government, and industry—saw AIDS as a palpable and immediate threat to the population at large. Although the nascent public desire to protect against AIDS was immense, this wave of interest failed to educate the public. In fact,
even the health profession viewed AIDS in an uneducated and irrational manner. A 1993 survey of 848 hospitals in Japan found seventy-three percent reluctant to treat AIDS patients.22 Indeed, as a society traditionally oriented to a “foreign-versus-us” mentality, the public viewed AIDS almost immediately as a “foreign” disease23 and discriminated against foreigners living in Japan without regard to their HIV status.24 AIDS prevention and education efforts stereotyped the disease as a “foreign” risk when traveling abroad.25

Public discrimination against AIDS sufferers has remained a considerable problem. As one Japanese AIDS sufferer stated, “I keep my HIV secret because I want to live a full life . . . [Otherwise] my family would lose friends in our neighborhood, my little girl would be ostracized at school, and I could lose my job.”26 Perhaps the best testament to this public discrimination was that, of the 685 Japanese living with full-blown AIDS in 1993,27 only three people had made public their illnesses.28

22 P.H. Ferguson, AIDS: A Major Stigma for Japanese Victims, CALGARY HERALD, Aug. 14, 1994, available in 1994 WL 7538282. To combat this problem, the government in 1993 requested each of the 47 prefectures to designate two vanguard hospitals to treat AIDS patients. Junji Ono, Hospitals Shun HIV-Positive Patients, DAILY YOMIURI, Jan. 13, 1995, available in LEXIS, Asiapc Library, Yomiuri File. However, two years later, only 12 hospitals in four prefectures had been publicly designated as vanguard hospitals. Id.

23 This image was spurred because the initial AIDS outbreaks in Japan involved mostly Japanese nationals who became infected during overseas business trips and foreign prostitutes working in Japan. Jonathan Friedland, Fatal Error: Ignorance over AIDS Hampers Countermeasures, FAR E. ECON. REV., Jan. 7, 1993, available in 1993 WL-FEER 2005473.


25 A 1992 campaign by the Aids Prevention Foundation, a national non-profit organization, showed a Japanese businessman shielding his face with a passport and had the caption, “Have a nice trip, but be careful of AIDS.” Friedland, supra note 23. Two years later, the organization withdrew another AIDS education pamphlet after homosexual groups complained the pamphlet characterized Thailand as a “major AIDS power” and Germany as “infested with homosexuals since ancient times.” Id.

26 Ferguson, supra note 22.


28 Friedland, supra note 23.
B. The Governmental Response to AIDS

The governmental response to AIDS in the late 1980s and early 1990s echoed the public response, with political leaders initially also seeing the disease as a "foreigner's disease." However, public panic regarding AIDS spurred the government to establish AIDS hotlines and disseminate AIDS information to the public. AIDS' presence in both the national media as well as the international arena prompted a twenty-month debate in the National Diet which culminated in the enactment of the AIDS Prevention Law on January 17, 1989. The AIDS Prevention Law establishes a framework for monitoring the AIDS situation in Japan and creates privacy provisions intended to protect AIDS sufferers' rights.

After this initial domestic activity, the national government charted a more reactive path in the early 1990s, seemingly content to disseminate AIDS information to the public. Yet such serenity was short-lived. In 1995, it was discovered that the Health Ministry had known as early as 1983 of the risk of AIDS in unheated blood products, but did not disclose this to the public. Instead, at the request of Japanese pharmaceutical companies, the Health Ministry intentionally prohibited importation of heated blood products.

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29 The remark which opened this Comment typified the governmental outlook during the late 1980s and early 1990s. See supra note 1. Perhaps the most telling comments came from then-Minister of Health and Welfare Keigo Ouchi in 1993 at a party conference in Fukui, Japan. In discussing AIDS, Minister Ouchi remarked that the countries surrounding Japan were "AIDS countries" and that any Japanese units involved in United Nations peace-keeping operations would return "infected with AIDS." Ouchi Says Countries around Japan Are "AIDS Countries," Japan Econ. Newswire, Dec. 11, 1993, available in LEXIS, Asiapci Library, Japan File.

30 See Salzberg, supra note 7, at 248; see also Tokyo Chamber of Commerce Releases Booklet on AIDS, Japan Econ. Newswire, Oct. 8, 1992, available in LEXIS, Asiapci Library, Japan File.

31 Under the leadership of the World Health Organization, a unified international front against AIDS has developed, with UN organizations, bilateral development agencies, and non-governmental organizations all cooperating to combat the disease. See generally Marjory Dam & Susan Holck, M.D., Global Coordination of National Public Health Strategies, in INTERNATIONAL LAW AND AIDS: INTERNATIONAL RESPONSE, CURRENT ISSUES, AND FUTURE DIRECTIONS 67 (Lawrence Gustin & Lane Porter, eds., 1992).

32 For an in-depth analysis of the controversy surrounding the AIDS Prevention Law's passage, see Salzberg, supra note 7, at 270.

33 Law No. 2 of 1989.

34 See infra, notes 135-46 and accompanying text for a discussion of this legislation's importance to AIDS Dismissal Case.

35 For example, in 1992, the Education Ministry distributed 300,000 leaflets to high school seniors explaining the routes of AIDS infections, preventative measures, and social issues arising from the disease. Education Ministry to Distribute AIDS Leaflets, Japan Econ. Newswire, Oct. 12, 1992, available in LEXIS, Asiapci Library, Japan File.

36 Takehisa, supra note 10, at 585-86.
until 1985 to allow the companies time to develop competitive products.\textsuperscript{37} During these two years, thousands of hemophiliacs became infected with HIV.\textsuperscript{38}

C. The Corporate Reaction to AIDS

The societal reaction to AIDS eventually filtered into the corporate sector, partly in response to the duties imposed on employers by the AIDS Prevention Law\textsuperscript{39} and partly to address employees' fears about AIDS in general. However, corporate reaction to AIDS in the late 1980s and early 1990s was less than fully informed because employers associated the disease mainly with foreigners. Attempts were made to mandate HIV testing of foreign workers to "contain" the disease.\textsuperscript{40} For example, at a 1992 press conference, Kazu Kamiya, the head of a Tokyo Chamber of Commerce and Industry AIDS study panel, advocated mandatory HIV testing of foreign workers to prevent "possible HIV virus transmission when foreigners are hurt while working at plants of smaller companies."\textsuperscript{41}

In addition to this xenophobic reaction, corporate policies remained scarce and poorly designed to support employees with AIDS. In a 1992 survey of 220 companies, 150 of them failed to even see AIDS as an "imminent problem" such that an AIDS policy was necessary.\textsuperscript{42} Other companies indicated they would deal with AIDS by urging HIV-positive

\textsuperscript{37} For an in-depth translation and analysis of the litigation arising out of this catastrophe, see \textit{Id.} at 583-86.

\textsuperscript{38} Of Japan's approximately 5,000 hemophiliacs, about 40\%, or between 1,800 and 2,000 people, are said to have become HIV-positive from unheated blood products. \textit{Id.} at 581.

\textsuperscript{39} The 1989 AIDS Prevention Law in part imposes general duties on employers to be educated as to the disease as well as to provide working environments free from AIDS discrimination. The AIDS Prevention Law, §§ 3-4; see also, notes 136-39 and accompanying text.

\textsuperscript{40} Companies Said to Want HIV Tests for Foreign Workers, JAPAN WKLY MONITOR, May 18, 1992, available in 1992 WL 2355793.

\textsuperscript{41} Rieko Saito, \textit{Firms Look for Ways to Cope with AIDS in the Workplace}, Japan Econ. Newswire, Apr. 7, 1993, available in 1993 WL 2481616. In response, the Tokyo Chamber of Commerce and Industry in October of 1992 issued guidelines for dealing with AIDS-related problems in the workplace. \textit{Id.} The guidelines counseled against mandatory AIDS testing and advocated employee discretion to report their condition to the company. \textit{Id.} Within the first six months of the pamphlets' publication, more than 30,000 had been sold or given to corporations, industry organizations, regional government offices, and libraries. \textit{Id.} However, three months after the distribution of the guidelines, a survey of 336 Japanese companies disclosed that 91\% of them were still undecided on the scope of their AIDS policies. \textit{Id.}

\textsuperscript{42} One in 10 firms Would Urge HIV-Positive Staff to Quit, JAPAN WKLY MONITOR, Aug. 8, 1994, available in 1994 WL 2095346. Per a survey conducted by the Osaka Center for Adult Diseases, 88\% had not implemented AIDS education programs or prepared management to deal with HIV infections. \textit{Id.}
employees to quit. For example, an HIV-positive teacher working with the Japan Overseas Cooperation Volunteers organization in Tokyo was fired for disclosing his HIV-status even though his company had pledged that HIV workers could keep their jobs. In another example, in 1993, eighteen hotels in Tokyo rejected an American playwright suffering from AIDS when he tried to book a room.

Later surveys conducted by various organizations indicate that this mindset still exists in the Japanese business sector. From these surveys, the following conclusions are apparent about Japanese corporate attitudes around the time of the HIV Dismissal Case:

1. The vast majority of companies do not provide any formal AIDS education for their workers;
2. Management sees isolation and/or forced retirement or transfer of the infected individual as the best solution to containing AIDS;
3. The rights of an HIV-infected employee to work and keep his identity private exist only marginally; and
4. The long-term extent of the business sector's reaction is unknown and will unfold as the number of AIDS cases increases in the next several years.

In the Osaka survey in note 42, 10% indicated they would urge HIV-positive workers to quit. Id. Only 30% felt they would allow HIV-positive employees to continue working provided the employee was able to fulfill the job requirements. Id.


Company Section Chiefs Claim Indifference to HIV at Work, supra note 46. Perhaps even more disturbing, in the 1996 poll, only 31% indicated they would allow HIV-infected workers to continue working so long as their infection did not hinder their work. *Yokohama Firms Showing Increased AIDS Awareness*, supra note 46.

III. THE BACKGROUND OF THE AIDS DISMISSAL CASE

The AIDS Dismissal Case was decided by the Tokyo District Court on March 30, 1995. The plaintiff, a thirty-five year old man, was employed by one of the defendants, a Tokyo-based computer software manufacturer ("Employer"). In 1992, he was transferred to a subsidiary ("Subsidiary") of the Employer located in Thailand. There the plaintiff, without his knowledge, was subjected to an HIV test in the course of a health checkup he underwent in a Thai hospital to obtain a work visa. He tested positive for HIV. However, instead of informing the plaintiff, the hospital disclosed this information to the director of the Subsidiary ("Director"). The Director then disclosed this information to the president of the Employer ("President"). The President ordered the plaintiff to return to Tokyo, where he disclosed to him by phone the HIV test results and ordered him to be re-tested. The plaintiff was dismissed from the company a few days later while awaiting the results of the second test.

In December 1992, the plaintiff brought suit in Tokyo District Court seeking rescission of the dismissal as well as monetary compensation for pain and suffering caused by his dismissal and the events leading up to the President informing him of his HIV-positive status. His specific claims

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51 AIDS Dismissal Case, 876 HANREI TAIMUZU at 122.
52 Id.
54 Id. Whether the HIV test actually was mandatory to obtain working permission in Thailand is questionable. At the time, the only express testing requirements were for leprosy or Hanson’s disease, tuberculosis, drug use, alcoholism, and elephantiasis. Shōzō Yamada, HIV Kansen o Riyō suru Kaikō no Kairyoku to Rōdōsha no Iryō Jōdō Puriibashii [The Effect of HIV-Based Dismissals and the Privacy of Workers’ Medical Information], 673 RODŌ HANREI 6, 6 (1995).
55 AIDS Dismissal Case, 876 HANREI TAIMUZU at 122.
56 Id.
57 Id.
58 Yamada, supra note 54, at 6.
60 Id. In a newspaper interview, the plaintiff recounted his pain and suffering caused by his superior’s method of disclosing the plaintiff’s condition to him when the plaintiff called for an explanation as to why he had been recalled:

President: “We have found you a carrier.”
Plaintiff: “What? What do you mean a carrier?”
President: “A carrier. You know, you have the AIDS virus.”
were as follows: (1) his termination by the Employer was based on his HIV status and constituted an abuse of rights under Civil Code Section 709;61 (2) he underwent enormous pain and suffering as a result of the manner in which the President informed him of his HIV-positive status; and (3) the Director's actions in disclosing the plaintiff's HIV status without authorization to the President as well as to other Subsidiary employees violated the plaintiff's right to privacy.62 Under Civil Code Section 709, the plaintiff sought reimbursement for lost wages as well as ¥20,000,00063 for pain and suffering from the Subsidiary and the Employer.

After hearing arguments from both sides, the Tokyo District Court ruled for the plaintiff, rescinded his dismissal, and ordered the Employer and the Subsidiary to pay the plaintiff ¥3,000,000 each, plus lost wages, for a total of around ¥15,000,000.65 The defendants appealed the decision to the Tokyo High Court, but settled with the plaintiff and later withdrew the petition.66

IV. THE TOKYO DISTRICT COURT'S DECISION

The court first dealt with the legality of the President's disclosure to the plaintiff of his HIV status. It then analyzed the legality of the Employer's termination of the plaintiff based solely on his HIV status. Finally, it discussed the legality of the Director's disclosure to the President of the plaintiff's HIV status as well to internal employees who in the course of their employment became involved in the plaintiff's situation.

Id. The defendant was fired shortly thereafter.


62 Yamada, supra note 54, at 6-7.

63 As exchange rates vary, all monetary figures in this article will be given in yen. At an exchange rate of 125 yen to one dollar, this amount is approximately $83,000.

64 AIDS Dismissal Case, 876 HANREI TAIMUZU at 122. In a later newspaper interview, the plaintiff indicated that his intention in filing the lawsuit was not to get money but to bring attention to the plight of HIV and AIDS sufferers in Japan. Kelleher, supra note 44.

65 AIDS Dismissal Case, 876 HANREI TAIMUZU at 123.

66 E-mail interview with Keisuke Abe, University of Tokyo scholar (Mar. 9, 1998) (on file with author). The defendants agreed to pay the plaintiff seven million yen as well as to apologize to him. HIV Carrier to Get 7 Mil. Yen, Apology, DAILY YOMIURI, Jan. 24, 1996, available in LEXIS, Asiapc Library, Yomiuri File.
A. The Legality of the President’s Disclosure to the Plaintiff of His HIV Status

The court’s decision begins with a general affirmation of an employer’s duty of care to protect the health of company employees.67 "Because an employer has a duty to be aware of and protect the health of its employees," the court states, "where special considerations do not exist, disclosure by an employer to an employee of that employee’s contraction of an infectious disease is permissible, and in some cases mandatory."68 The opinion however qualifies this framework with a second tier by stating that where special circumstances do exist, an employer’s disclosure to an employee of that employee’s medical condition will not be permitted.69 If the disclosure

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67 AIDS Dismissal Case, 876 HANREI TAIMUZU at 123-24. A private employer’s duty to its employees to provide a safe environment for their physical and mental health was defined by the Supreme Court in the Kawagi Incident Case. RYŪICHĪ YAMAOKA, KÔYO KANKEI HÔ [Employment Law], 217 (Shinsesha, 1996), citing Judgment of Apr. 10, 1984 (Supreme Court, 3rd P.B.), 38-6 MINSHU 557. In later cases, lower courts included within this duty the duty to provide safety education (or AIDS education in this case). Id at 219, citing Judgment of Mar. 28, 1996 (Telephone Incident Case, Tokyo Dist. Court), 692 RÔDÔ HANREI 13.

68 The court’s test accepts as a basis an employer’s ability absent special circumstances, or tokujou no nai, to disclose an employee’s medical conditions. AIDS Dismissal Case, 876 HANREI TAIMUZU at 124. However, the opinion never details what factors make up “special circumstances” such that disclosure would violate the employee’s right to privacy. Ikuko Mizushima, Shiyasha ni yoru Râdôsha he no HIV Kansen Kokuchi no Tekihi [Appropriateness of Employer Notification to an Employee of the Employee’s HIV status], 114 MINSHÔHOZASSHI 561, 568 (1996).

This has led some Japanese academics to limit the case to its unique fact pattern. See Michio Tsuchida, HIV Kansen o Riyû to suru Kaikô oyobi Kansen Jiitsu no Ikôei [Dismissals Based on HIV Infection as well as the Illegality of Disclosing the Reality of the Infection], 1546 HANREI JIHO 212, 215 (1996). (arguing that the method and manner of the employee’s dismissal as well as the extra-jurisdictional nature of the Thai hospital which tested the plaintiff and disclosed the results to his company are unique circumstances and limit the case’s holding) This explanation, however, does not account for the court’s statement that the societal prejudice and discrimination surrounding AIDS create an “extremely high need for secrecy” in regards to an employee’s HIV status.

69 AIDS Dismissal Case, 876 HANREI TAIMUZU at 124. This viewpoint underscores the general approach the courts in Japan have taken with respect to an employer’s disclosure of personal information of its employees. For example, in the Kyowa Taxi Case (Judgment of Oct. 7, 1982 (Kyoto Dist. Cl.), 404 RÔDÔ HANREI 72), the court held the defendant taxi company liable for failure to disclose to the plaintiff relevant information regarding the plaintiff’s medical condition that the company had received from the plaintiff’s hospital. The plaintiff’s condition subsequently worsened and he was forced to quit the company. Kyowa Taxi Case, 404 RÔDÔ HANREI at 72. The court found that an employer’s arises from the employer-employee relationship and requires the employer, when it knows of an employee’s medical condition, not to act so as to worsen that condition. Id. For more analysis on an employee’s right to privacy in his or her medical condition, see infra, notes 170-189 and accompanying text.

70 AIDS Dismissal Case, 876 HANREI TAIMUZU at 124. The court uses the word yurusarenai to define the line between an appropriate disclosure and an inappropriate disclosure. Yurusarenai can be translated either as “impermissible,” which connotes legalistic implications, or “unforgivable,” which connotes more moralistic implications. Compare definition (1) and (6) of yurusu in KENKYÛSHA’S NEW JAPANESE-ENGLISH DICTIONARY 2029 (Koh Masuda ed., 1984). Defining the term on moral grounds may
does occur, a third tier comes in where a court must evaluate the methods of disclosure and whether they reflect or exceed reasonable societal expectations. If they deviated from reasonable societal expectations, the disclosure will be considered illegal and an infringement upon the employee’s right to privacy.

Having established this foundation, the court then applied this test to the facts of the instant case. While giving some credence to the defense’s argument that the President’s disclosure to the plaintiff of his HIV status was necessary to prevent the plaintiff from unknowingly spreading the disease, the court found this argument secondary to the volatile nature of AIDS and the social stigma and prejudice attached to it. It noted in particular the deep mental anguish a person could suffer upon learning of his or her contraction of the disease. Focusing on these same factors, it distinguished the plaintiff’s situation from a “normal” situation in which disclosure would be permissible and instead found that AIDS is a “special circumstance” where disclosure is prohibited.

While the court concluded that the President’s manner of and reasons for disclosing to the plaintiff his HIV-infected status caused great suffering and exceeded any socially acceptable method of disclosure, it stopped short of calling the disclosure illegal. The court’s decision to do this is noteworthy in that the three-tiered framework the court had established to analyze this issue would have allowed it to make such a holding. Instead, the court seemed simply content to find the defendants liable under the tort principles of Civil Code Section 709. This conservatism may dampen the

actually limit the case’s precedential value, as the fact situation to which the court strongly rejects is not likely to reoccur with any regularity. Ultimately, the exact definition of this term is left to future courts to interpret.

71 Id. The court couches this statement with the phrase to kai suru, which translates to “it can be understood that . . . .” KENKYUSHÀ’S NEW JAPANESE-ENGLISH DICTIONARY, supra note 70, at 673. American courts generally phrase their rulings in language much stronger and more definite than the language the Tokyo court used. While the softness of the court’s language may be explained by the cultural tendency in Japan to play down one’s own opinion, the fact that the court is breaking new ground in its opinion may also be a factor.

72 AIDS Dismissal Case, 876 HANREI TAIMUZU at 124.
73 Tsuchida, supra note 68, at 217.
74 AIDS Dismissal Case, 876 HANREI TAIMUZU at 125.
75 Id.
76 Id. at 124.
77 Id.
78 See supra notes 67-72 for the framework of this test.
79 AIDS Dismissal Case, 876 HANREI TAIMUZU at 124.
80 Id. For the text of Civil Code Section 709, see supra note 61. For further analysis regarding the court’s use of Civil Code § 709, see infra notes 154-69 and accompanying text.
protections the AIDS Dismissal Case affords against AIDS-based workplace discrimination.

B. The Legality of the Employer's Dismissal of the Plaintiff

The second issue upon which the court ruled involved the legality of the Employer's dismissal of the plaintiff. Whereas the court's arguably conservative approach to the first issue may lead one to question the precedential power of the opinion with regards to the right to protect oneself against disclosure of one's medical condition, its approach to the dismissal issue is clear: the court termed the Employer's dismissal of the plaintiff as "utterly impermissible." \(^8\) Examining the plaintiff's dismissal, \(^8\) the court found that the underlying reason for the dismissal was the HIV-infected status of the plaintiff. \(^8\) It dismissed for lack of evidence the Employer's justification of its dismissal of the plaintiff that the plaintiff had become "defiant" toward the company and had refused to come into the office. \(^4\) Instead, the court ruled the defendant's dismissal of the plaintiff to be "feeble," totally divergent from any common societal expectations, illegal, and thus a tort under Civil Code Section 709. \(^5\)

The strong language with which the court decided this issue arguably provides a solid basis upon which to build future case law further protecting an HIV-positive worker from unfair dismissal based on the worker's medical condition. \(^6\) The opinion's language is especially forceful in its condemnation of the plaintiff's forced return to Japan by the President, his subjection to additional AIDS testing, and then his dismissal...

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\(^8\) AIDS Dismissal Case, 876 Hanrei Taimuzu at 124.

\(^2\) For the text of the conversation leading to the plaintiff's dismissal, see Saito, supra note 59.

\(^3\) AIDS Dismissal Case, 876 Hanrei Taimuzu at 124.


\(^5\) AIDS Dismissal Case, 876 Hanrei Taimuzu at 124-25. The general trend in Japanese case law has been to treat unfair dismissals as torts under Civil Code Section 709 but not find them "illegal." Tsuchida, supra note 68, at 215 (citing Sugano Kazuo, Rodo Ho [Labor Law], 405 (4th ed.)). The AIDS Dismissal Case's unusual choice to term the plaintiff's dismissal as illegal has struck academics such as Tsuchida as precedent-setting. Id.

\(^6\) In particular, academics have seen AIDS Dismissal Case as applying the principles of equality of treatment, codified in Labor Standards Law § 3 (Law No. 97 of 1947) and prohibition of unfair labor practices, codified in the Labor Union Law § 7 (Law No. 174 of 1949), to provide AIDS sufferers protection for the first time against employment discrimination. Shimizu Yoji, Eizu o Meguru Rodo Ho no Shuyo Mondai [Labor Law's Main Problems Regarding AIDS], 101 Hogaku Shinpo 415, 423-24 (1995); but see Tsuchida, supra note 68, at 215. (opining that as the AIDS Dismissal Case makes no direct reference to these laws, this argument is only speculation).
by the Employer by letter the same day the additional tests results came to the plaintiff.\footnote{AIDS Dismissal Case, 876 HANREI TAIMUZU at 124.} Some Japanese academics consider this language helpful not just for HIV-infected individuals but also for individuals with other socially stigmatized medical conditions.\footnote{See Kenji Tokuzuma, HIV Kansensha he no Rōdō [Good News for HIV-Infected Individuals], 1358 RODO HORITSU JUNPO 4, 5 (1995) (enthusiastically supporting the case’s protection not just for AIDS victims but also for those suffering from cancer and other serious diseases).} Other critics view the unique and condemning aspects of the AIDS Dismissal Case as possibly limiting the case to its facts.\footnote{See Ikuko Mizushima, supra note 68, at 569 (questioning whether the case is limited to just AIDS).} Future courts must decide the degree to which the Tokyo District Court recognized an HIV-infected employee’s rights versus the degree to which that court was only reacting to the set of facts before it.

C. The Disclosure by the Subsidiary and the Director of the Plaintiff’s HIV Test Results to the President Violated the Plaintiff’s Right to Privacy

The last issue upon which the court ruled involved whether the negligent disclosure by the Subsidiary and the Director to the President of the plaintiff’s HIV status without his knowledge or permission violated his right to privacy.\footnote{As the court ultimately does in the AIDS Dismissal Case, negligence claims and claims involving invasions of privacy are generally brought under the tort principles of Civil Code Section 709. See note 61 for text of Section 709.} As with the former issues, the court began by reconfirming a company’s duty of care to protect its employees’ health as a collateral duty to the employment contract.\footnote{AIDS Dismissal Case, 876 HANREI TAIMUZU at 125; see also, the discussion of this duty, supra note 67.} Under that duty, an employer shall protect an employee’s privacy and shall not disclose related information to a third party without permission or good reason.\footnote{Id. In considering an employer’s disclosure to a third party of the employee’s HIV condition, the court concludes that the disclosure will be a violation of the employee’s privacy where it occurs “without good reason,” or midari ni. Id. at 125. However, the actual meaning of the term midari ni varies from “without justifiable reason” to “without permission” to “without cause.” KENKYUSHÅA’S NEW JAPANESE-ENGLISH DICTIONARY, supra note 70, at 1089. Three definitions that have very different legal consequences. See Yamada, supra note 54, at 11. (arguing for three possible situations to which the use of midari ni in the AIDS Dismissal Case applies: (1) limited just to the employer-employee relationship; (2) dependent upon the information disclosed and the necessity to keep such information secret; and (3) the duty and/or necessity to disclose the information). Absent further judicial definition as to this term, the full impact of the AIDS Dismissal Case will remain uncertain.}
Any such disclosure would be considered illegal and an invasion of the employee's privacy.93

However, the court did not stop here. Instead, it went further and stated that even where a direct employer/employee relationship does not exist, any third party who knowingly possesses information relating to the employee's privacy and discloses that information without permission or good reason violates the employee's privacy.94 As such, that third party could be subjected to liability under the tort provisions of Civil Code Section 709.95

Turning to the case at hand, the court first considered and rejected the Director's arguments that, as a fiduciary of the Subsidiary, he had no duty of care to the plaintiff because the plaintiff was an employee of the Employer, not the Subsidiary.96 In so doing, the court noted that the Subsidiary's ties to the Employer as well as its authority to control and supervise the plaintiff justified placing a duty of care on it to protect the plaintiff's health.97 The court next tackled the Director's assertion that disclosure of the plaintiff's HIV status to the President was necessary, as the plaintiff was under the care of the President, and thus with good reason.98 The court dismissed this argument by ruling that other less intrusive avenues existed which could have achieved the same goal but without violating the plaintiff's privacy.99 The court concluded that justification for the disclosure did not exist and the disclosure, due to the highly inflammatory nature of AIDS and the sure discrimination the plaintiff would suffer should word of his HIV status be spread, constituted

93 AIDS Dismissal Case, 876 HANREI TAIMUZU at 125.
94 Id.
95 While the AIDS Prevention Law also contains privacy provisions for HIV-positive individuals and individuals suffering from AIDS, it does not allow a private cause of action, which may be why the AIDS Dismissal Case does not refer to it. For a detailed discussion of this issue, see infra notes 135-47 and accompanying text.
96 AIDS Dismissal Case, 876 HANREI TAIMUZU at 125.
97 Id. at 126.
98 Id.
99 Id. The court does not expressly define these avenues. But noting the court's decision to hold the diagnosing physician responsible for informing the employee of his HIV status, academics have suggested the employer's reliance on the physician to inform the employee as one of the avenues the court intended. See Tokuzuma, supra note 88, at 5. However, other academics have criticized this point of the opinion, noting the central importance the company traditionally has in the employee's life and the security the employee derives from it. See Mizushima, supra note 68, at 570. This security can act to alleviate any fear the employee would feel upon being told of his HIV status. Id. Mizushima also notes that in the AIDS Dismissal Case in particular, active company involvement with assurances of continued employment would have been proper because the diagnosing physician was unavailable. Id.
an invasion of privacy and thus gave rise to a tort under Civil Code Section 709.100

V. ANALYSIS

A. Implications of the AIDS Dismissal Case

The court’s ruling was greeted by a hail of scholastic analysis as to its correctness and its current and future impact on Japanese labor law. A number of legal scholars supported the court’s holding.101 However, a roughly equal number of legal scholars pointed out ambiguities in the case holding.102 As a case of first impression, the AIDS Dismissal Case arguably heralds a new line of judicial activism to enlarge the protection net afforded to individual rights within the employment context. Alternatively, it may be the product of a rogue judge bucking the system’s unwritten rule of showing judicial restraint in areas in which the legislature has spoken. The academic debate on the AIDS Dismissal Case has reflected elements of all these theories. Because the AIDS Dismissal Case is relatively recent, history has yet to determine the full impact the case will have. However, recent developments offer the chance for the case to become the basis for protection against AIDS discrimination in the workplace.103

100 AIDS Dismissal Case, 876 Honrei Taimuzu at 124-25.
101 See, e.g., Yamada, supra note 54, at 9 (asserting the Japanese courts in the AIDS Dismissal Case acknowledge for the first time the illegality of dismissing an employee based on HIV status).
102 For detailed analyses in Japanese of this debate and how the AIDS Dismissal Case fits into it, see Id.; Naofumi Kaneko, HIV Kansen Kaiko Mukō Nado Kakunin Seikyo Soshō Daiichiban Hanketsu, [The First Judgment to Affirm a Lawsuit to Invalidate a Dismissal Based on HIV Infection] 48-10 Horitsu no Hiroba 60 (1995); Seigo Mori, Kōyō Shokuba to Puraibashi [Dismissal, the Workplace, and Privacy], Jurisuto Zōkan at 239 (1994).
103 On December 24, 1997, a Brazilian man working in Japan filed suit in the Chiba District Court against his employer and the head of a hospital for violating his privacy by conducting an HIV test without his permission. Brazilian Man Sues Firm, Hospital over Secret HIV Test, Kyodo News Service, Dec. 24, 1997, available in LEXIS, Asiapr Library, Japan File. He was fired after testing positive. Id. As this case bears a remarkable similarity to the AIDS Dismissal Case, the Japanese judiciary has the chance to expand its protections against AIDS discrimination in the workplace. Because the suit names the hospital which disclosed the plaintiff’s test results to his employer, it provides added opportunity to cement the right of an employee to privacy in his medical records. Id. The AIDS Dismissal Case did not fully address this last issue because the Thai hospital in question was outside the jurisdiction of Japanese law.

On December 16, 1997, the Health Ministry unveiled new regulations to designate HIV carriers as “physically handicapped” and make them eligible for public welfare. HIV Carriers to be Designated as “Handicapped,” Kyodo News Service, Dec. 16, 1997, available in LEXIS, Asiapr Library, Japan File. The regulations take effect in April 1998 and create four classes of HIV carriers to be designated as “physically handicapped.” Id. This designation will afford legal protection against AIDS discrimination and may provide a stronger base upon which to file a tort claim of action under Civil Code § 709.
Interpreting the AIDS Dismissal Case as future precedent presents a challenging task. Whereas the United States has clearly defined rules of *stare decisis* and judicial review, Japan’s approach to precedent is less formalized and more flexible, allowing greater latitude for judges to depart from prior opinion. At the same time, the areas in which the Japanese judiciary has shown judicial activism in creating law have generally been areas which have not posed a direct challenge to existing legislative efforts. As privacy protections against AIDS-based workplace discrimination is an area in which the legislature has spoken, the importance of the AIDS Dismissal Case in exceeding the protections of the AIDS Prevention Law presents opportunities to further develop AIDS discrimination law in the Japanese employment arena.

Interpreting the significance of the AIDS Dismissal Case requires some background in the philosophy of the Japanese judiciary and its role in relation to the legislature and elite bureaucrats. A widespread stereotype concerning Japanese law is that Japanese judges play an extremely limited role in Japan’s civil law system and are a paragon of judicial restraint. This stereotype leads to an interpretation, and possibly a misconception, that judicial decisions are reached by uniform application of established rules. In most instances, judges hardly ever question the constitutionality of statutes and are loath to second guess bureaucrats or the government. However, in the area of employment law, judicial activism has greatly weakened this stereotype. In areas such as sexual harassment and employment litigation, the courts, in the absence of clear legislative intent, have crafted together principles of constitutional law, civil law and labor law to protect personal rights such as sexual equality and the right of

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105 This text discusses two such areas—sex-discrimination cases (*infra* notes 122-28 and accompanying text) and sexual harassment cases (*infra* notes 151-68 and accompanying text). In addition, Japanese courts have showed judicial activism in the areas of pollution, traffic accidents, landlord-tenant relations, and divorce. Foote, *supra* note 104, at 685.


107 *Id.* at 636.


110 *Id.* at 637.
In this light, one can plausibly consider the AIDS Dismissal Case as the judiciary's first venture into creating a body of law to protect employees suffering from AIDS or HIV from both violations of their right to privacy in their medical status and from unfair dismissals based on that status. In its first venture, the court at times fails to define key provisions, lacks any reference to the constitutional issues at hand, and does not mention the AIDS Prevention Law, a seminal piece of legislation. However, the case's implications as a vehicle for judicial activism in creating protections for AIDS sufferers as well as its impact on privacy law in Japan are well worth noting.

1. Failure to Mention Constitutional Issues

It seems curious that the AIDS Dismissal Case, which holds an HIV-positive worker may not be dismissed on account of his HIV status, makes no mention of an individual's constitutional rights to work, to hold an occupation, or to equal protection. Cases in the U.S. involving violations of privacy similar to the AIDS Dismissal Case have made reference to and even based themselves upon constitutional principles. A simple answer for the omission of constitutional references in the AIDS Dismissal Case is that, similar to the U.S. Supreme Court's interpretation of U.S. constitutional law, Japanese courts have interpreted a state cause of action...
to be required in order to sustain a claim based on infringement of fundamental human rights.\textsuperscript{118} As such, the plaintiff in the AIDS Dismissal Case may have been barred under this doctrine from directly basing his claim on constitutional principles. Yet another possible answer for the court’s failure to mention constitutional principles may lie in the Japanese judiciary’s reluctance to directly challenge an area in which the legislative branch has spoken.\textsuperscript{119}

While these answers raise valid points, a question they do not answer is why the AIDS Dismissal Case does not refer to Civil Code Section 90, a statute which the Japanese judiciary has used to imply private rights of action under the Japanese Constitution.\textsuperscript{120} Judges often have applied Civil Code Section 90 to workplace discrimination cases such as the AIDS Dismissal Case.\textsuperscript{121} One particular area in which such private rights were created is workplace sexual discrimination.

With the passage of the Equal Employment Opportunity Law ("EEOL") in 1985,\textsuperscript{122} women gained the theoretical right to equal protection in the workplace.\textsuperscript{123} However, except for prohibiting discrimination in training, the EEOL did not grant women any new legal rights, including the

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No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
\end{flushright}


\textsuperscript{118} \textit{Daniel H. Foote, Labor Law in Japan} 368 (1989). The courts have found private party actions unconstitutional particularly in sexual discrimination cases. In \textit{Matsuro v. Mitsui Shipbuilding Corp.}, the Osaka District Court ruled out a female plaintiff’s application of Articles 14 and 27 to her claim of being unconstitutionally dismissed from her job on the basis of her married status. \textit{Id.} at 368, 370 (citing Judgment of Dec. 10, 1971 (Osaka Dist. Ct.)). The court stated that “fundamental human rights guaranteed by the Constitution are of a public nature in that they are rights of the people in relation to the State. If there is an infringement of a fundamental human right by a private party, one cannot seek relief directly on the basis of constitutional provisions.” \textit{Id.}

\textsuperscript{119} \textit{Foote, supra} note 104, at 685-86. The Japanese Supreme Court has invalidated statutes based upon constitutional grounds only five times. \textit{Id.} at 636 n.1 (discussing the laws which were struck down).

\textsuperscript{120} \textit{Minpo} § 90: "A juristic act whose object is contrary to the public order or good morals is null and void." \textit{Translated in Yukio Yanagida et al., supra} note 61, at 599. In interpreting this broad provision, courts have relied on the equality standard of Article 14 of the Constitution to give content to public policy and morals. Helen A. Goff, \textit{Glass Ceilings in the Land of the Rising Sons: The Failure of Workplace Gender Discrimination Law and Policy in Japan}, 26 \textit{Law \& Poly. Int’l Bus.} 1147, 1155 (1995).


\textsuperscript{123} \textit{Upham, supra} note 108, at 129.
right to bring a claim under the law. Nevertheless, in the landmark Sumitomo Cement case, the Japanese Supreme Court ruled that an employee whose employment contract discriminates on the basis of sex or who experiences sexual discrimination at work can sue under the "public order or good morals" principle of Civil Code Section 90. Courts later created similar implied private rights of action to protect against mandatory retirement of women upon pregnancy or childbirth, forced retirement of women at a lower age than men, and the laying off of only married women during times of economic stress. These decisions have generally interpreted Section 90 as intertwined with the "public welfare" provisions contained in Article 12 of the Japanese Constitution.

The similarities between outlawing sex discrimination under Civil Code Section 90 and prohibiting AIDS discrimination have been broached by academics critiquing the AIDS Dismissal Case. By recognizing the strong societal discrimination AIDS sufferers face and that the defendant's dismissal of the plaintiff unreasonably exceeded the bounds of societal expectation, the court may have implicitly been referring to Civil Code Section 90. However, it chose not to apply it expressly. Given the general

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124 Id. at 153.
125 In the Sumitomo Cement Case, a woman sued her employer for being unfairly dismissed pursuant to a clause in her employment contract mandating her dismissal at age 30. Upham, supra note 108, at 131-32 (citing Judgment of Dec. 20, 1966, 17 ROMINSHU 1407). Invalidating the contract on sex discrimination grounds, the Supreme Court held that "the fundamental principle of equality requires that unreasonable discrimination be prohibited . . . [and] that any . . . employment contract that is unreasonably discriminatory is null and void as violative of [Civil Code Section] 90." Id. at 133.
128 KENPO [CONSTITUTION] art. XII ("the people . . . shall refrain from any abuse of [constitutional] . . . freedoms and rights and shall always be responsible for utilizing them for the public welfare.") translated in YUKIO YANAGIDA ET AL., supra note 61.
129 See Shôzô Yamada, supra note 54, at 13 (stating Civil Code Section 90 should apply against AIDS discrimination in the workplace).
130 AIDS Dismissal Case, 876 HANREI TAMUZU at 124. The opinion recognizes the legitimate fear of HIV-infected individuals and AIDS sufferers that they will be socially isolated if their condition becomes publicly known. Id.
131 Id.
132 In general, courts using Civil Code Section 90 have balanced the reasonableness of the employer's conduct to determine whether such conduct is void as against the public welfare. Kamio Knapp, supra note 121, at 98. The AIDS Dismissal Case arguably echoed this test when it invalidated the
incremental approach to creating precedent in Japan, this route may be traveled in the future.

2. **Failure to Mention the AIDS Prevention Law**

More perplexing than the court’s failure to analyze the constitutional aspects of the AIDS Dismissal Case is its failure to refer to the AIDS Prevention Law of 1989, the only national legislation enacted to combat AIDS in Japan. In response to growing public awareness of AIDS and three high-profile incidents which threw the question of a national AIDS policy to the forefront of Japanese politics, the AIDS Prevention Law went into effect February 17, 1989. The law establishes a framework for public health surveillance centered around the reporting of HIV-positive individuals by physicians to regional centers, sanctions for enforcement, and privacy provisions intended to protect citizen’s rights.

The law expressly emphasizes protecting individual rights and acknowledges a private employer’s duty to respect the privacy of an HIV-positive employee and not divulge his medical condition to unauthorized parties. Article 15 of this law imposes upon an employer who improperly discloses an employee’s HIV status sanctions up to a maximum fine of ¥200,000 and imprisonment up to six months.

The most immediate reason the court based its opinion on the tort principles of Civil Code Section 709 instead of Article 15 of the AIDS Prevention Law is that the AIDS Prevention Law does not contain an express provision allowing for a private cause of action. However, the failure of

defendant’s dismissal based on the unreasonableness of the manner in which it occurred. See supra notes 73-80 and accompanying text.

134 For example, see *infra*, notes 151-68 and accompanying text for a discussion of the incremental approach the Japanese judiciary used to establish sexual harassment laws.

135 See FELDMAN & YONEMOTO, *supra* note 8, at 345-47.

136 Salzberg, *supra* note 7, at 270.

137 Id. at 271.

138 The AIDS Prevention Law, § 3: “The public...must work to take all necessary precautions against the spread of AIDS and must act so as not to infringe upon the human rights of AIDS-infected persons”; see also, Salzberg, *supra* note 7, at 277.

139 AIDS Prevention Law, art. 15.

140 AIDS Prevention Law, art. 15. The ¥200,000 fines under the AIDS Prevention Law are heavier than similar provisions in laws such as the National Public Employees Law, Law No. 120 of 1947 (¥30,000 yen fine), or the Venereal Disease Prevention Law, Law No. 167 of 1948 (¥5,000 yen fine). Salzberg, *supra* note 7, at n.137. However, when compared to the ¥15,000,000 judgment that the plaintiff was eventually awarded, the provisions of the AIDS Prevention Law lack the severity necessary to make use of the law attractive.

141 It is rare for a statute in Japan to contain clauses allowing for a private cause of action.
the first case regarding an HIV-positive employee’s right to privacy in his medical condition to even mention the AIDS Prevention Law’s express remedy for that employee’s situation is puzzling.\footnote{142}

Perhaps one explanation is the hail of controversy that surrounded the passage of the AIDS Prevention Law\footnote{143} and the flaws some academics see in the law.\footnote{144} Another explanation could be that the court, having awarded the plaintiff ¥15,000,000,\footnote{145} saw the ¥200,000 fine of Article 15\footnote{146} as insufficient to compensate the plaintiff for his loss. Yet another possible explanation may be that, although not directly referring to the AIDS Prevention Law, the court’s opinion supports and thus indirectly strengthens it. One way it does this is by stiffening the penalties against tortious disclosure of an HIV-infected employee’s condition.\footnote{147} In addition, the emphasis of dicta in the opinion on the role of the physician in informing the patient echoes the pivotal role the physician plays under the AIDS Prevention Law.\footnote{148}

When seen in this light, the AIDS Dismissal Case substantiates the principles of the AIDS Prevention Law and provides teeth to enforce them against private parties.\footnote{149} Whereas prior to the case individuals had no individual ability to summon the protections afforded by the AIDS Prevention Law, the AIDS Dismissal Case may now allow those individuals an avenue to

\footnote{142} Tadashi Hanami, a Sophia University professor, has taken a similar view, opining that the plaintiff tort claims against the Employer and the Subsidiary could be based upon the duty against disclosures found in Article 15 of the AIDS Prevention Law. See Tadashi Hanami, HIV Kansensha ni tai suru Kigyō no Hairyo Gimu [The Company’s Duty of Care towards HIV-Infected Employees], 1074 JURISUTO 141, 143 (1995).

\footnote{143} For a complete analysis of the passage of the AIDS Prevention Law and the controversy surrounding it, see Feldman & Yonemoto, supra note 8, at 343-49.

\footnote{144} Criticizing the leniency of the AIDS Prevention Law’s protections against disclosure, Yukio Yasuda, vice chairman of the National Association of Friends of Hemophiliacs, observed that the law “fuel[s] . . . prejudice and discrimination against AIDS victims [and] treats carriers as if they were socially dangerous.” \textit{Id.} at 349. For a detailed analysis of the criticisms of the AIDS Prevention Law, see Salzberg, supra note 7, at 16-18.

\footnote{145} The AIDS Dismissal Case judgment awarded 30 times the penalties allowable under the AIDS Prevention Law. \textit{See supra} note 140.

\footnote{146} \textit{See supra} note 140 and accompanying text.

\footnote{147} AIDS Dismissal Case, 876 HANREI TAIMUZU at 123.

\footnote{148} In placing the duty to inform an employee of his HIV status upon the diagnosing physician, the AIDS Dismissal Case points to the need to cushion the chaos and shock the employee will invariably experience as well as the need to prevent the spread of HIV to unsuspecting third parties. AIDS Dismissal Case, 876 HANREI TAIMUZU at 124. Likewise, the AIDS Prevention Law balances reporting requirements upon physicians who diagnose HIV so as to prevent its spread (AIDS Prevention Law, §§ 4-5) with penalties against physicians who divulge the names of infected persons without good reason. AIDS Prevention Law, § 14(1). The law also requires physicians to notify and educate the HIV-infected individuals so as to allow them to come to terms with their status in as painless a process as possible. \textit{Id.} § 6.

\footnote{149} Various Japanese academics have taken this viewpoint. \textit{See Tadashi, supra} note 142, at 143; \textit{see also} Mizushima, \textit{supra} note 68, at 567.
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compensation via a tort cause of action under Civil Code Section 709. As such, the AIDS Dismissal Case from this light represents an important step in the evolution protecting AIDS victims via the legal process in Japan.

3. An Example of Judicial Activism

Perhaps the potential significance of the AIDS Dismissal Case is best seen when compared to the development of laws against sexual harassment in Japan. Judicial activism has played a key role in creating and shaping the current legal protections against sexual harassment. Like AIDS, sexual harassment was dormant in Japan until the 1980s. The Japanese language had not even coined common terms for both issues until the late 1980s. The seminal legislation regarding sexual harassment, the Equal Opportunity Employment Law ("EEOL"), was enacted in response to international awareness against sexual harassment much as the AIDS Prevention Law came in response to international awareness about AIDS. Both the EEOL and the AIDS Prevention Law have played largely ancillary roles in further developing their respective legal areas, in part because neither expressly allows a private cause of action. Instead, Civil Code Section 709 has, through judicial activism, provided a base from which sexual harassment jurisprudence could grow. With the AIDS Dismissal Case, a similar path

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150 AIDS Dismissal Case, 876 HANREI TAIMUZU at 126.
151 The term sekushuaru harassment, commonly abbreviated as "seku hara", is based on the English word "sexual harassment" and did not enter popular usage until 1982. See Hiroko Hayashi, Sexual Harassment in the Workplace and Equal Employment Legislation, 69 ST. JOHN'S L. REV. 37, 45 (1995). Likewise, the term eizu is also a loose translation of the acronym "AIDS."
154 For an analysis of the EEOL, see UPHAM, supra note 108, at 124-65.
toward protection against AIDS discrimination in the workplace is arguably beginning.156

The Fukuoka Sexual Harassment Case,157 the second sexual harassment case in Japan, sheds the best light upon the AIDS Dismissal Case’s importance as a step in developing AIDS discrimination protections in the workplace. In that case, a female employee successfully brought suit against her manager and the company for violations of her constitutional rights stemming from repeated instances of verbal sexual abuse.158 The court ruled for the plaintiff, characterizing the employer’s actions as creating a hostile working environment and violating the plaintiff’s “right to privacy” under Civil Code Section 709.159 The court then created precedent by also finding the company liable under Civil Code Section 715160 for violating the employee’s “right to a non-hostile working environment.”161 While some critics point to the Fukuoka Sexual Harassment Case’s lack of clarity,162 later cases have followed its holding and established the principle that acts of sexual harassment may constitute a tort under Civil Code Section 709.163

The similarities between the Fukuoka Sexual Harassment Case and the AIDS Dismissal Case bear mentioning. Both cases involve issues upon which the international community has centered much limelight. Both AIDS and sexual harassment problems include societal discrimination and prejudice, an issue referred to by the judges in both cases.164 Both plaintiffs brought suit on constitutional principles as well as Civil Code Section 709.165

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156 Japanese legal practitioners have made this connection. Masaru Anzai, a lawyer (bengōchi) and professor at Chuo University, has championed the usefulness of the “right to a non-hostile working environment” established in sexual harassment cases for protecting AIDS victims against workplace discrimination. See Masaru Anzai, Eizu to Kigyōno Rōddai Mondai [AIDS and Industry Labor Problems], 1035 JURISUTO 33, 39 (1993)(citing the Fukuoka Sexual Harassment Case).

157 Fukuoka Sexual Harassment Case, 783 HANREI TAIMUZU 60.

158 Id. at 60-62; see also Patterson, supra note 153, at 216-18.

159 Fukuoka Sexual Harassment Case, 783 HANREI TAIMUZU at 66; see also Patterson, supra note 153, at 218.

160 MINPO § 715.1: “a person who employs another to carry out an undertaking is bound to make compensation for damage done to a third person by the employee in the course of the undertaking . . . .” translated in THE CIVIL CODE OF JAPAN (EHS Law Bulletin Series Vol. II, 1988) at FA 117.

161 Patterson, supra note 153, at 217.

162 The opinion established but did not define the right to a non-hostile working environment. Id. at 219. Additionally, the opinion failed to specify what employers must do to meet their duty of care in such a situation. Id. at 220.

163 Wolff, supra note 153, at 520.

164 AIDS Dismissal Case, 876 HANREI TAIMUZU at 124; Fukuoka Sexual Harassment Case, 783 HANREI TAIMUZU at 76-77.

165 AIDS Dismissal Case, 876 HANREI TAIMUZU at 124; Fukuoka Sexual Harassment Case, 783 HANREI TAIMUZU at 66.
Both courts chose to ignore the constitutional challenges and base their opinions on tort principles. As their vehicle, both courts characterized the torts committed upon the respective plaintiffs as invasions of their right to privacy. Ultimately, whether the AIDS Dismissal Case will establish legal protections as successfully as the Fukuoka Sexual Harassment Case has will be left to the future.

4. The AIDS Dismissal Case's Effect on Privacy Law in Japan

As previously analyzed, the court in the AIDS Dismissal Case creates a three-tiered approach to determining whether a disclosure without permission by an employer or other company employee of an employee’s medical status constitutes an invasion of privacy. Under this approach, the disclosure is only impermissible where “special circumstances” exist surrounding the employee’s medical condition. While the court throws AIDS into this category because of the societal prejudice surrounding the disease, it fails to elucidate a bright line as to what type of disclosure would violate the employee’s sphere of privacy. However, as some Japanese academics

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166 Verbal sexual abuse in the Fukuoka Sexual Harassment Case and invalid dismissal of the plaintiff based on his HIV status as well as unauthorized disclosure of that status by the defendant to third persons in the AIDS Dismissal Case.

167 AIDS Dismissal Case, 876 Hanrei Taimuzu at 125, Fukuoka Sexual Harassment Case, 783 Hanrei Taimuzu at 69. For further discussion, see infra notes 170-189 and accompanying text.

168 In the Fukuoka Sexual Harassment Case, the court expressly created this right, a remarkable instance of a district court judge moving beyond precedent to establish a new legal principle. Patterson, supra note 153, at 219. The court in the AIDS Dismissal Case more subtly and typically made the same point in its three-tiered analysis, with disclosure of an employee’s medical condition not allowable where that employee would suffer mental pain and face discrimination should his workplace learn of his condition. While Japan does not have a rule of stare decisis, courts will generally respect and abide by the decisions of past cases. See Hideo Tanaka, Jittei Hogaku Nyumon [Introduction to Positive Law] 157-158 (1966) (cited in Wolff, supra note 153, at 520).

169 As the ongoing case involving the HIV-positive Brazilian national develops. See supra note 103.

170 AIDS Dismissal Case, 876 Hanrei Taimuzu at 124. See supra notes 67-72 and accompanying text.

171 AIDS Dismissal Case, 876 Hanrei Taimuzu at 124.

172 In determining that the defendant’s disclosure invaded the employee’s privacy, the court considered the circumstances surrounding AIDS, the method and manner of the disclosure and the role of the physician in the disclosure. Its failure to clearly indicate which factors were prominent in its decision to term the disclosure an invasion of privacy has led some critics to question the case’s implications beyond its general fact pattern. See Kunishige Sumida, HIV Kansensha no Kaikō to Ji jitsu no Kokuchi [The Dismissal of HIV-infected Persons and the Reality of Notice], 1091 JURISUTO ZOKAN 193, 195 (1996), Mizushima, supra note 68, at 569.
have pointed out, a plausible argument exists that the case advances the development of the right toprivacy within Japanese labor law.\(^{173}\)

The concept of individual privacy and the right to one’s reputation and personal sphere has been recognized in Japan since the 1960s.\(^{174}\) The Japanese courts first recognized the tort of invasion of privacy in 1964 in *Arita v. Hiraoka.*\(^{175}\) Traditionally, this concept has been viewed not so much as a concept relating to the individual self but an infringement on the individual’s relationships and standing with others.\(^{176}\) Approached within this context, privacy rights were conceived in terms of interactions within the group, and thus, subject to intrusion by the group.\(^{177}\)

Within the business environment, limitations on the sphere of personal autonomy afforded to the employee were traditionally consistent with this context. While the employer’s right to intrude upon the privacy of an employee was not unlimited,\(^{178}\) mandatory surveys regarding an employee’s health, medical history and family relations were considered standard practices for businesses to mold their labor pools to their liking.\(^{179}\) Even such personal information as employees’ religious beliefs were found legally

\(^{173}\) See Hanami, *supra* note 142, at 142; Tsuchida, *supra* note 68, at 215 (concluding the AIDS Dismissal Case has a large precedential value extending the right to privacy in one’s medical condition beyond AIDS to similar medical conditions).

\(^{174}\) See Lawrence W. Beer, *Defamation, Privacy, and Freedom of Expression in Japan,* 5 L. JAPAN 192, 192-93 (1972) (discussing the right to privacy in Japan within the freedom of expression context).

\(^{175}\) Dan Rosen, *Private Lives an Public Eyes: Privacy in the United States and Japan,* 6 FLA. INT’L L. 141, 151 (1992) (citing Judgment of Sept. 28, 1964 (*After the Banquet Case,* Tokyo Dist. Ct.), 385 HANREI JHO 12). The *After the Banquet Case* involved a political official who sued author Yukio Mishima for invasion of privacy based on Mishima’s parodying the official and his ex-wife in his book, *After the Banquet.* *Id.* at 153. The court, in awarding the then-largest post-war damages claim to the plaintiff, found its decision “necessary . . . to secure the individual’s dignity and pursuit of happiness in [an] advanced . . . society.” *Id.*

\(^{176}\) *Id.* at 171.


\(^{178}\) One oasis has occurred in the hiring and firing areas, where a long line of Japanese case precedents has carved out the general premise that even in the face of contrary statutory authority, the judiciary will protect the privacy of employees where the employer’s intrusion reaches an “abuse of dismissal” standard. See Foote, *supra* note 104, at 637.

\(^{179}\) Labor Safety and Health Standards Law § 43 (Law No. 57 of 1972) permits medical testing of employees, with its objective being the determination of the employee’s medical history, mental awareness, and any manifesting medical symptoms. Yamada, *supra* note 54, at 13. While the law does not explicitly allow for HIV testing, an employer citing the laws objectives could argue the legality of subjecting employees to HIV testing. *Id.* Some academics, though, have interpreted the AIDS Dismissal Case as having foreclosed this avenue by ruling AIDS testing without the permission of the employee violates the employee’s privacy and thus should be illegal. *Id.*

\(^{179}\) Mori, *supra* note 102, at 239.
permissible subjects of inquiry. With such practices the norm, the risk of infringing upon an individual's privacy was very high.

While the right to privacy has developed in some areas of Japanese law, a broad right to privacy of one's personal information has not been recognized by the legislature or courts. The AIDS Dismissal Case arguably changes this. At least with regards to HIV-infected employees, the AIDS Dismissal Case specifically states that where the medical condition in question particularly has societal prejudices and discrimination attached to it, disclosure of that medical condition is a violation of privacy.

The AIDS Dismissal Case is significant also in that it acknowledges that a person's HIV status is within that person's sphere of privacy and is not an acceptable basis for dismissal. Because of this extension of an individual's sphere of privacy, the thousands of Japanese living with AIDS or

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181 In Mitsubishi Resin, Inc. v. Takano (Judgment of Dec. 12, 1963, (Sup. Ct.), 27 Minshū 11 at 1536), the court acknowledged an employer's concern for a smooth working environment and upheld its decision not to hire an employee based on the employee's religious beliefs. LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, 170-79 (1996). The court held that "For the benefit of his own enterprise, an enterpriser can, in principle freely decide . . . what kinds of people should be hired." Id. at 175.

182 The Japanese legislative and administrative responses to contain this risk of infringement have been very meager. Mori, supra note 102, at 239. While various guidelines have been promulgated over the years that touch on issues of confidentiality of personal information within the employment context, laws defining the sphere of protection afforded to an employee's privacy and regulating an employer's collection and use of such information have not been enacted. Id. However, Mori does cite various agency guidelines which touch upon this issue, including:

- The prohibition of "blacklisting" individuals within an industry. See Rōdō Kijunpō [Labor Standards Law], Law No. 49 of 1947, § 22.
- The protection of disclosure of an individual's medical records by public employees. See Rōdō Anzen Eisei Hō [Labor, Safety, and Sanitary Law], Law No. 57 of 1972, § 104.

183 For example, the sexual harassment line of cases established that violating an employee's right to a non-hostile working environment infringed her right to privacy. See supra note 159 and accompanying text. In addition, the computerization of the information age and the influence of western mass media has sparked a new focus on privacy laws in Japan. Mori, supra note 102, at 243 n.4 (citing TAKESHI SADAI, NYŪ MEDIA TO RÔDÔ KANKEI HE NO EIKYO [THE NEW MEDIA AND ITS INFLUENCE ON LABOR RELATIONS], (Jurisuto Zokan, 1984)).

184 Id. at 239.

185 AIDS Dismissal Case, 876 Hanrei Taimuji at 125; see also Tsuchida, supra note 68, at 216.

186 AIDS Dismissal Case, 876 Hanrei Taimuji at 125. Prior to AIDS Dismissal Case, the Japanese judiciary had only one prior opportunity to address the sphere of an AIDS sufferer's right to privacy. Kaneko, supra note 58, at 63. In that case, known colloquially as the AIDS Privacy Case (Judgment of Dec. 27, 1988, 1341 Hanrei Jiho 53), the family of an AIDS victim brought suit under Civil Code Section 709 claiming that several Japanese weekly magazines had violated their privacy by publishing their names and pictures. Feldman & Yonemoto, supra note 8, at 344-45. The court in the AIDS Privacy Case held that the defendants' actions in publishing the name of the AIDS victim infringed upon the victim's sphere of privacy and awarded damages to the deceased victim's family. Id.
HIV and facing discrimination because of their condition can now arguably rest more assured that they will not be fired from work nor will their HIV status be disclosed. One segment to assuredly benefit will be the thousands of hemophiliacs in Japan. The same public mentality that misguidedly associates all foreigners with AIDS has also branded Japan’s hemophiliac population. The national and international press that resulted from the 1995 disclosure and subsequent lawsuit regarding the Ministry of Health and Welfare’s role in the 1980s in importing risky unheated blood products only concentrated the stigma and discrimination faced by all hemophiliacs, whether or not they suffer from AIDS. The AIDS Dismissal Case provides a substantial link to stopping such discrimination by making dismissals based solely on AIDS an illegal infringement on the employee’s right to privacy.

VI. CONCLUSION

The AIDS Dismissal Case has arguably laid a major foundation in building a wall of protection for Japanese workers suffering from AIDS or infected with HIV. Similar to the protective walls judicial activism has built against such workplace issues as sexual harassment and sex-discrimination, the AIDS Dismissal Case represents a significant step in furthering civil protections in the Japanese corporate sector. It also may contribute to dispelling the isolation and societal discrimination that AIDS sufferers and HIV-positive individuals face in Japan.

187 Shogo Watanabe, HIV Shosō to Purabashii [The HIV Lawsuit and Privacy], 2 JIYU TO SEIGI 47, 50 (1997) (stating that “Hemophilia = AIDS” has become increasingly uncommon in Japan).
188 Takehisa, supra note 10, at 591, 600; see also Feldman & Yonemoto, supra note 8, at 349-50.
189 Shogo Watanabe offers the following examples of discrimination faced by hemophiliacs:
   * In Kyushu, a hospital technician who tested positive for HIV was dismissed after the technician’s HIV test results were publicized.
   * In Kansai, a hemophiliac applying to work at a local manufacturing plant was required to undergo AIDS testing.
   * A kindergarten-aged hemophiliac was tested for HIV without the knowledge or consent of the child’s parents. When the child tested positive, the child was forced to transfer schools.

Watanabe, supra note 187, at 50.