

# ***Study on the Legal Protection of Women's Equal Rights in Employment in China under the Comparative Law Perspective of China and the United States***

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**Abstract:** This research mainly lays emphasis on women's employment discrimination in China. In order to study this issue, various research methods are applied, such as comparative method, case-studying method and etc. The current situation of this issue is getting better with the development of domestic legal system, but problems still exist. Considering that America has more experience in dealing with this discrimination because of its history, it is chosen as the object of this research. The author compares China with America in legal system of women's employment discrimination, including legislation and law enforcement, after which problems are raised and solutions are put forward.

**Keywords:** equal employment right, women, gender discrimination, China, America

## **1. Introduction**

Gender discrimination against Chinese women in employment is gradually decreasing, but it still exists in many areas [1] as occurred in our first equal employment rights dispute in 2019 [2]. Mrs Fan took a leave of absence due to pregnancy for more than a month after starting her job in a property company in Zhuhai, only to be dismissed. Meanwhile, the property company did not respond to Mrs Fan's *Notice of Request to Continue Labor Relationships*. In consequence, Mrs Fan suffered a spontaneous miscarriage a month later under great stress and pain. In the following judgement, the court redefined the scope of protection of the right to equal employment. Later, China also take measures to regulate discrimination in employment, such as increasing the compensation for moral damages. Long before that case, discrimination against women in employment had occurred on a large scale since the beginning of the last century and has intensified since the turn of the century. However, American government regulated this by means of legislation, among other things.

The famous Ledbetter v. Goodyear Tire & Rubber Co case happened in 2007. Lily Ledbetter was a female employee at the Goodyear Tire & Rubber Company in the United States. During her tenure, as the manager, she held the same job and rank as a male employee, but it wasn't until she was close to retirement that she realized the huge discrepancy in her company's paychecks each time she was paid compared with that male manager. Therefore, she submitted a questionnaire to the Equal Employment Opportunity Commission (EEOC) in March 1998 and filed a EEOC charge in July 1998 [3]. Employment discrimination is prevalent in both China and the United States, but the differences in legal system between the two countries decide different protection situations of the right to equal

employment.

Women's right to equal employment opportunity refers to the right that women who have the capacity, qualifications and the intention to work have the same and equal status and rights as men in the process of seeking employment and that they can choose their jobs and employment under equal competition with men and enjoy all the rights to which they are entitled in accordance with the law [4]. The content of women's right to equal employment consists of two main points: women and men are equal in terms of qualifications for employment and should enjoy equal rights and that women and men compete fairly for employment opportunities and job applicants should be held to the same standards [4].

This paper mainly applies a comparative law research approach to horizontally compare the legal protection of equal employment rights in China and the United States from the perspectives of legislation and law enforcement, including legislation, enforcement, etc. At the same time, case study approach is applied to inspect the differences in legal protection of equal employment rights between China and the United States by illustrating through the presentation of cases. Based on this, recommendations have been put forward on several issues of China's legal system for equal employment rights, with a view to helping more women take up employment on an equal employment and promoting further development of the domestic economy.

## **2. Contrast of Legal Systems of China and America on Women's Equal Employment Rights**

### **2.1. Legislation**

#### **2.1.1. The Definition of the Legal Concept of "Gender Discrimination in Employment"**

There is a lack of a clear legal definition of gender discrimination in employment in China with only expressing vaguely in several legal provisions [5]. The Article 42 of *Constitution of the People's Republic of China* regulates the equal employment right of Chinese citizens [6]; the Article 3 of *Labor Law of the People's Republic of China* regulates that employees possess a range of related rights, including the equal employment right [7]; the Article 3 of *Employment Promotion Law of the People's Republic of China* (hereinafter referred to as *Employment Promotion Law*) prohibits employees from being discriminated by gender [8] and the Article 23 of *Law of the People's Republic of China on the Protection of Women's Rights and Interests* stipulates that employers must not refuse to hire or raise the criteria for hiring women on the basis of their gender [9]. However, except that the *Employment Promotion Law* mentions "discrimination" and merely prohibits employment discrimination, none of the laws enumerate discrimination reasons, that is, which kind of behavior is employment discrimination behavior [10].

On the contrary, the concept of "discrimination in employment" is clearly defined in United States law and the reasons for discrimination are listed in basically all laws. For example, "illegal employment practices" of Section 703 in *Civil Rights Act* lists the illegal acts of the employer, including refusing to hire or reduction of employment opportunities for job applicants because of race, color, religion, sex or national origin [11].

In addition, the US Congress regulates from the perspectives of discriminatory acts, consequences of discrimination, types of discrimination, areas of discrimination, causes of discrimination, and exceptions to discrimination, in which causes of discrimination and areas of discrimination matter most.

Initially, from types of discrimination, there are no clear categories of employment discrimination in China while discrimination is categorized into direct discrimination (disparate treatment) and indirect discrimination (disparate impact) in America.

Direct discrimination refers to that under the same conditions, intentionally based on a certain characteristic of the person (like race, color, gender, religious belief, ages, etc) provide a person or a group with opportunities and treatment markedly lower than another person or group. Typical cases like the case of *City of Los Angeles Department of Water and Power v. Manhart*. Indirect discrimination refers to apparently neutral provisions, standards or practices actually have a disproportionately negative impact on persons or groups of persons with certain characteristics in terms of opportunities and treatment. Typical cases like *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

There are some similarities and differences between direct and indirect discrimination. Differences include: (1)Using direct/indirect language/signal of sex discrimination; (2)Different treatment/policy that were targeted due to your protected characteristic or your relation to that protected characteristic; (3)Difficulty in detecting it; (4)Whether or not to sue using the claim of workplace sex discrimination. Similarity is that they both could be hard to prove due to its subtle nature whatever compelling evidence.

Furthermore, seeing from areas of discrimination, *The Equal Pay Act of 1963 (EPA)* issued in 1963 prohibits unequal pay among employees with different gender, that is, prohibits wage discrimination on the basis of gender between working men and women in the same company that requires essentially the same skills, effort and responsibility under similar working conditions [12].

Besides, in terms of causes of discrimination, Title VII of *the Civil Rights Act of 1964* prohibits discrimination on the basis of race or country of birth, color, religion, sex, age and disability [11]. Later in *the Pregnancy Discrimination Act of 1978* make amendments to the previous Act in respect of pregnancy, forbidding employment discrimination in relation to pregnancy, maternity and diseases arising from both [13]. Recently, with the LGBTQ movement approaching, the Supreme Court added “sex” to the scope of employment discrimination protections to include LGBT employees on June 15, 2020 [14].

### 2.1.2. Legislative Provisions on Proof of Gender Discrimination in Employment

Our burden of proof regarding gender discrimination in employment by employees is too heavy [15] and the court has comparatively much greater discretion regarding methods of testification and the distribution of responsibility of testification. In contrast, the United States provides for a reversal of the burden of proof on gender discrimination in employment and there are direct and indirect discrimination in the ways of testification. In the aspect of testification, the American law stipulates that the review of gender discrimination in employment should be rooted in the concept of substantive fairness, provide employers with heavier testification responsibility ranging from aspects like “Validity Testing”, “Real Professional Qualifications” to procedural review criteria. The employer should prove that “the same decision would have been made even if there had been no discrimination on the basis of sex” in terms of the purpose and means of the differential treatment [16].

## 2.2. Law Enforcement

The enforcement agencies for equal employment rights is also different in China and the United States.

Labor disputes in the country are prioritized for arbitration by the Arbitration Commission and is a one-judgement system. If the parties are dissatisfied with the outcome of the arbitration, either may initiate further proceedings in a court of competent jurisdiction. As for labor disputes, in addition to the courts, there are mainly labor dispute mediation committees and labor dispute arbitration committees in China. The Labour Dispute Mediation Committee is a primary-level people’s mediation organization set up within an enterprise to mediate labour disputes and is composed of employee representatives and enterprise representatives [17]. The Labor Dispute Arbitration

Committee, on the other hand, is administrative in nature and is established by the local government, which consists of representatives of the labor administration, trade unions, and representatives of the business sector [17]. These two committees cover a wider scope and can handle all cases related to labor disputes.

In America, there is specialized organization called Equal Employment Opportunity Commission (hereinafter referred to as “EEOC”). Unlike the two domestic commissions, which have broader jurisdictions, the EEOC is primarily responsible for combating employment discrimination and promoting employment equity. Established on July, 1965, EEOC was limited in rights and could only investigate and mediate labor disputes within a certain range. Then legislated by the United States Congress through *the Equal Employment Commission Act of 1972* [18], EEOC was given broad enforcement powers and the limitation of individuals to sue to EEOC and the federal court since employment discrimination [19].

### **3. Issues and Solutions of Legal System of Equal Employment Right for Women in China**

#### **3.1. Legal System Issues**

##### **3.1.1. Lack of a Clear Definition of Legal Concepts and Difficulties in Recognizing Discrimination**

Whether it is “gender discrimination in employment” or “discrimination”, these concepts don’t have any legal basis, thus creating obstacles in adjudicating relevant cases. At the same time, when recruiting employees’ employers often do not directly state the reasons for acceptance/non-acceptance, but simply inform of the results. When inquired about the reason, other excuses can also be used to cover up the real reason. For instance, the recruitment requirements often say “men only” but when asked about the reason, employers often vaguely answered by physical demands, which is hard to be defined as gender discrimination.

##### **3.1.2. Lack of Specialized Law Provisions on Proof of Discrimination in Employment**

Although it is stipulated in many laws that there shall be no discrimination in employment, victims of discrimination in employment are faced with the difficulties of how to adduce evidence and the validity of the evidence. Most job seekers leave directly after not being accepted, lacking the opportunity to learn more about the company, let alone having the chance to discover the real reasons behind their non-acceptance. Also how to obtain and fix the effective evidence is also a big challenge because Many companies do not allow electronic devices during written interviews to prevent cheating, preventing job hunters from using electrical equipment to preserve the evidence. In addition, at present, the burden of proof for discrimination in employment is still allocated in the mode of “whoever claims, whoever proves”, giving rise to the heavier burden of women in disadvantageous position who claim employment discrimination [20].

##### **3.1.3. The Cost of Violating the Law for Employers Is Low and the Effect Is Weak**

Overall, in cases where plaintiffs prevail, the employment discrimination cases are often ended with compensatory pecuniary damages or are judged to restore labor relationship [15]. But on one hand, a small amount of monetary damages is not enough for the employer and is too weak to have a deterrent effect [4]. On the other hand, the employer may intentionally make things difficult for the plaintiff during the work period after the labor relationship is reinstated in order to retaliate.

### **3.1.4. Lack of Law Enforcement Agencies Specializing in Discrimination in Employment**

There is only the Arbitration Committee for Labour Disputes in the country, but there is no enforcement committee specialized in discrimination in employment, resulting in a lack of specialized legal organization in dealing with the issue of the right to equal employment. As a consequence, the Arbitration Committee's mixed functions hinder it from coping with more detailed and specialized problems.

## **3.2. Solutions**

### **3.2.1. Clarify the Definition of Gender Discrimination in Employment**

The United States differs from China in that the legal system of the former is dominated by case laws, meaning later cases can quote the consequences of subsequent cases but China is a system of statutory law. Ever since a long time ago, the women equal employment rights in China “put emphasis on legal pronouncements but neglect institutional safeguards [16]”.

There is currently no single enactment in the country that specifically regulates discrimination in employment. Employment discrimination in China manifests itself mainly in the form of direct discrimination, which is not clear in legislation and relevant concepts should be more clarified.

Reference can be made to the provisions of the United States legislation on the categorization of discrimination and the areas and causes of discrimination, which can be brought into line with the national situation through the subsequent enactment of a separate law, such as the protection of the equal employment right in relation to transgender persons in the country, which can help millions of victims of employment discrimination.

### **3.2.2. Clarify the Approaches of Proof of Discrimination in Employment in Procedural Law and the Distribution of the Burden of Proof to Reduce the Difficulty of Litigation**

One of the major difficulties of domestic employment discrimination is that it is too difficult and complicated to prove, so the application of relevant laws needs to be clarified to reduce the difficulty of defending rights. Moreover, further clarification should be provided in the procedural law on the elements of evidence of discrimination in employment and its probative value.

In addition, with regard to the burden of proof, reference can be made to the legislation of the United States, which adopts the approach of reversing the burden of proof. Proof methods can be further categorized into direct and indirect methods. Promoting the burden of proof towards systematization, rationalization and standardization should be the consensus of the academic community. Theory should be higher than practice in order to guide practice and should not be confined to the gains and losses of one side and should strive to explore the rational allocation of the burden of proof program [21].

### **3.2.3. Raise the Cost of Illegal Employment Discrimination by Employers**

The penalties for employers in the legal provisions ought to be increased in order to achieve a deterrent effect. For example, a separate and specialized penalty clause could be created and the range of penalties is not limited to money, but rises to the administrative or criminal level.

### **3.2.4. Establish a Specialized Enforcement Agency for Employment Discrimination**

There is currently no domestic law enforcement agency specializing in employment discrimination, which has led to a mix of functions within the Labour Dispute Arbitration Commission, which is not conducive to professionalization and efficient law enforcement. Relevant equal employment



committees can be established like America to specialize in dealing with cases involving equal employment. In this way, not only it can reduce the pressure on the work of the public prosecutors and lawyers in this type of cases and improve their efficiency in handling other cases, but it can also enable the right to equality in employment to be better protected through specialization.

### 3.3. Legal Education on Gender Equality

For example, we can conduct legal education in remote areas to hold lessons or organize legal activities. As a matter of fact, those remote areas are lacking in education and have lower legal awareness. Therefore, there is a greater need for children there to be educated in legal literacy and to develop legal awareness and correct values. Children are also the main force in building the next generation of villages, so their education is the key to breaking down the bad habits of villages in the future.

## 4. Conclusion

This research utilizes a comparative approach to research in order to compare the legal protection of women's equal employment rights in China and the United States, in an attempt to draw on the experience of the relevant system of the United States to solve the problems of the legal system arising from China's national conditions.

As can be seen from the current state of legislation, discrimination in employment has not been given sufficient attention at the legal level. Both the lack of clarity in the legislative definition of legal concepts and the lack of specialized law enforcement agencies reflect the fact that discrimination in employment has not received the attention it deserves.

The research elaborates on various aspects of employment discrimination, including the definition of employment discrimination, the provisions on proof, the cost of violation by employers, and law enforcement agencies, and proposes corresponding solutions. Employment, as the root of national revitalization, has a bearing on people's livelihood. Only when equal employment right is guaranteed, can the right to employment be guaranteed to more women to create a healthy job market, benefit the well-being of the people and promote further growth of the country's economy. This step is not only the advancement of the legal system, but also an advancement of the times.

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