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On the Legal Issues of Female Employment Discrimination in China -- From the Perspective of Gender

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Abstract

There is a serious phenomenon of gender discrimination in employment in China. The equal rights of women in employment have been greatly damaged, such as "gender barriers to job hunting", "different pay for equal work", and "difficult promotion of female employees". Although the government has taken a series of measures to alleviate gender discrimination in employment in recent years, the phenomenon that women are treated differently is still emerging. In addition to the traditional social stereotype that "men are in charge of the job and women are in charge of their own affairs", the imperfect legal system in the protection of women's equal rights in employment is also an important reason for this phenomenon. This paper proposes to protect women's equal employment rights by making special laws, perfecting existing laws and carrying out the inversion of burden of proof.

Keywords: Women's equal employment right, Gender discrimination in employment, Anti-Employment gender discrimination law, Inversion of burden of proof

I. Introduction

Gender discrimination in employment is a worldwide problem. In China, it has a long history. In recent years, with the development of China's economy and society and the implementation of the "comprehensive two child policy", the phenomenon of gender discrimination in employment faced by Chinese women is becoming more and more serious.

Although China has formed a legal system based on labor law, employment promotion law and women's rights and interest protection law to safeguard women's equal employment rights. However, although these laws and regulations have clear provisions on the issue of women's equal employment rights, they lack of operability in practice. Women are unable to find effective relief channels when they face gender discrimination in employment. From the perspective of gender, this paper analyzes the legal defects in the issue of female employment discrimination in China, and proposes to improve the laws and regulations system to protect women's equal employment rights in China.

II. Definition of core concepts

1. Gender discrimination in employment

At present, there is no clear definition of gender discrimination in employment in China. The definition of gender discrimination in employment is mostly based on the relevant provisions of international conventions.

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women defines gender discrimination as any distinction, exclusion or restriction based on gender (CEDAW, 1999). Its effect or purpose is sufficient to hinder or deny women, whether married or unmarried, to recognize, enjoy or exercise human rights and fundamental freedoms in political, economic, cultural, civil or any other fields on the basis of equality between men and women.¹ C111 - *Discrimination (Employment and Occupation) Convention, 1958 (No. 111) of the International Labor Organization (ILO)* interprets employment discrimination as any distinction, exclusion or preference based on race, skin color, gender, religion, political opinion, national origin or social origin, which eliminates and impairs equal employment opportunities or equal treatment in the field of employment and occupation(No.111, 1958).²

Some scholars in China have proposed that the gender discrimination in employment refers to the unequal treatment of employment opportunities, employment treatment, career promotion, etc. only because of gender differences under the same or similar conditions of labor and production. The author believes that gender discrimination in employment refers to that employers have no legal reasons to restrict women's employment opportunities, hinder women's career promotion, and damage the equal employment opportunities and peaceful waiting of female employees, without legal reasons when employing workers or after the establishment of labor relations.

2. Women's equal employment rights

The substantive meaning of the right to equality means that citizens enjoy equal rights in society without any discriminatory differential treatment. Women's equal employment rights refer to women with labor capacity and willingness to enjoy equal rights with men in employment.

The Constitution clearly stipulates that the People's Republic of China is equal before the law. Article 13 of the Labor Law also clearly stipulates that women enjoy equal employment rights with men. When hiring employees, an enterprise shall not refuse to hire women or raise employment standards for women on the grounds of gender except for jobs or positions that are not suitable for women as stipulated by the state.

III. Manifestations of gender discrimination in employment

1. Gender discrimination in job hunting

As an important subject of market economy, enterprises' profit maximization is its important goal. Therefore, in the recruitment process, enterprises usually focus on the cost of labor. Women are not favored in the labor market. Many employers are unwilling to employ female employees in order to save labor costs. Many employers set gender requirements. Even though some employers do not openly refuse to recruit women, they employ employees according to the principle of male priority in actual operation. Some employers deliberately lower wages or raise recruitment conditions to prevent women from joining. Gender discrimination is very serious in the process of job hunting. Many female employees have encountered gender discrimination in the process of job hunting.

¹ The United Nations Convention on the Elimination of All Forms of Discrimination Against Women, 1999 are available online <http://www.npc.gov.cn/wxzl/wxzl/2000-12/26/content_1211.htm> accessed on 25 June, 2020.

² C111 - Discrimination (Employment and Occupation) Convention, 1958 are available online <http://www.npc.gov.cn/wxzl/wxzl/2005-10/20/content_343967.htm> last accessed on 25 June 2020.

2. Gender discrimination in course of job

After women enter the workplace, there will be a variety of obvious gender discrimination in all aspects of actual work. In terms of wages, the phenomenon of different pay for equal work between men and women is very serious. According to the report on gender pay gap in China in 2018, the average wage of women in China was 84% of that of men in 2018.³ And the report shows that the wage gap between men and women is not big when they are just employed, but with the increase of working years, the wage gap between men and women is widening. In terms of career development and promotion, according to the relevant survey reality, women in the workplace play an important role in very few, and the promotion of women in the workplace is much more difficult than men.

IV. On the legal defects of gender employment discrimination in China

At present, in the field of labor and employment in China, even if the competitive advantage of female workers is greater than that of men, female workers may still encounter unequal employment treatment. This is a rule that employers generally follow in order to reduce labor costs, and employers are not subject to legal sanctions for this behavior. The reason is that there are many defects in the current legal system of our country in regulating gender employment discrimination.

1. Lack of special Anti-Employment gender discrimination law

Employment discrimination, especially gender discrimination in employment, not only challenges the authority of China's constitution and laws, but also destroys social equity and justice and infringes women's employment rights.

In order to alleviate the malpractice of gender discrimination in employment and protect women's equal rights in employment, at present, China has initially formed a legal standard system with "labor law", "Employment Promotion Law" and "women's rights and interests protection law" as the core, and has played an important role in safeguarding women's equal employment rights, but these laws and regulations are very abstract and scattered.

At present, China lacks a systematic and special Anti-Employment gender discrimination law to clearly define the concept and scope of employment gender discrimination. In China, a lot of gender discrimination in employment occurs before the establishment of labor relations, that is, in the recruitment process of enterprises. However, the existing labor laws and regulations only adjust the labor relations that have been signed and formally established. Therefore, it is difficult for the employment gender discrimination cases in recruitment to enter the litigation stage, which makes it difficult for China's labor laws and regulations to protect the equal employment rights of female workers. At present, the lack of special Anti-Employment gender discrimination law in China has become one of the biggest legal obstacles to protect women's equal employment rights.

2. The legal provisions are general and lack of operability

Most of the existing laws regulating labor relations in China are not perfect. The labor law only provides in principle that women enjoy the same employment rights as men, and the legal provisions are vague and general. At the same time, China's "labor law" adjustment scope is relatively small, the main scope of adjustment of the labor law excludes civil servants, public institutions, social organizations staff, soldiers, farmers, family nannies. Therefore, it is difficult for the excluded subjects to seek relief from labor law when they are discriminated against by gender employment.

Although China's labor laws and regulations stipulate that the employers who implement employment discrimination should mainly investigate the political responsibility and the civil liability of compensation for losses, they do not clearly specify the range of civil compensation and fine, so it is very difficult in the actual operation process.

³Under the sex discrimination in the workplace, women's wages are only 84% of men's' July 2018 are available online <<http://xuebao.sdwu.edu.cn/info/1112/2402.htm>> accessed on 25 June 2020.

3. Lack of law enforcement supervision

The regulation on labor and social security supervision is a special legal norm for the supervision of employers. However, due to its administrative level, its effect level is not high. Moreover, in Article 11 of the regulations on labor and social security supervision, there is no explicit listing provision on gender discrimination. At the same time, China's legal provisions on the protection of women's equal employment rights are relatively scattered and lack of unity and integration, which leads to the lack of initiative and enthusiasm of labor supervision agencies to crack down on gender employment discrimination in practice.

At the legislative level, the protection of women's equal rights in employment is not perfect, which directly leads to the lack of law enforcement. As a department clearly authorized by law to supervise and manage the employing units, labor supervision institutions cannot effectively restrain the existence and spread of gender discrimination in employment. In addition, in practice, the unclear division of powers and responsibilities of law enforcement agencies and the difference of law enforcement ability of law enforcement personnel directly lead to the difficulty of effective supervision of gender discrimination in employment.

4. There are defects in judicial relief

Article 62 of China's Employment Promotion Law clearly stipulates that workers can file a lawsuit to the court because of the employer's discrimination, and safeguard their rights through judicial means. The intervention of judicial means makes the realization of women's equal right to employment more possible. However, China's employment promotion law only provides for litigation in a general way, and does not involve in specific system on how to file a lawsuit. In practice, women who are seldom discriminated against in employment will take the form of litigation to protect their rights. The mechanism of appeal relief is in vain. At the same time, China's law on the protection of women's employment does not involve the distribution of the burden of proof, nor does it make a series of special provisions on who should provide evidence for employment discrimination and the size of the burden of proof.

In labor dispute cases, China adopts the general rule of evidence system in civil litigation, that is, the principle of "who claims, who provides evidence". Compared with employers, female job seekers are in a weak position, usually the means of discrimination is more secret, female job seekers are difficult to collect evidence of their own discrimination, besides this, the cost of labor dispute litigation in China is high, and the litigation cycle is long, so most of the female employees finally give up the lawsuit because of the difficulty of proof.

V. The improvement of the legal system of gender discrimination in employment in China

1. To formulate a special law against gender discrimination in employment

Currently, it is the development trend of international anti-discrimination legislation to enact special anti-discrimination law in employment. Many countries have or are working on formulating basic laws against gender discrimination in employment to eliminate gender discrimination in employment and protect women's equal employment rights. For example, the United States promulgated and implemented the equal pay act and the Pregnancy Discrimination Act in 1963. Sweden has promulgated and implemented six anti employment discrimination laws, including the fair opportunity law and the prohibition of sexual orientation discrimination in workplace life (Li, 2017). These countries have made and implemented these laws, which have a positive impact on the realization of women's equal employment rights.

At present, in view of the increasingly serious employment gender discrimination in China, it is urgent to formulate a special Anti-Employment gender discrimination law in line with China's basic national conditions, so as to clarify the concept and scope of employment gender discrimination. Eliminate gender discrimination in employment from the source.

2. Perfecting the existing legal system

At present, China's labor law mainly adjusts the labor relations that have signed labor contracts. However, many gender discriminations in employment occurs in the process of seeking employment, so it cannot be protected by labor law. China's current labor law can consider the relationship between employers and workers in the process of job hunting and recruitment into the scope of adjustment and application of the labor law.

At the same time, China's "labor law" should clearly specify the scope of civil and administrative responsibilities that employers should bear after implementing gender discrimination in employment, so as to increase the operability of the law and protect women's equal employment rights.

3. Giving full play to the supervision role of labor supervision department

The labor supervision department is the most effective department to contact, supervise and manage the employing units. In the regulations on labor and social security supervision, China should explicitly take Anti-Employment gender discrimination as the supervision items of labor supervision departments, clarify the responsibilities of labor supervision departments, and strengthen the institutional construction and professional training of labor supervision departments. It makes the supervision and inspection of labor supervision departments more targeted, definite and binding, so as to better promote the realization of women's equal employment rights.

4. Perfecting litigation relief system

China should establish and improve the appeal mechanism of gender discrimination in employment, so that women can seek legal weapons to protect their rights when they encounter employment gender discrimination. At the same time, China should carry out the principle of inversion of burden of proof. In the general labor dispute litigation in China, the principle of "who claims, who provides proof" is followed. In the relationship between female workers and employers, it is obvious that employers are in an absolute dominant position. It is extremely unfair for female workers if the two sides still follow the rule of "who claims, who provides evidence" when they have disputes. According to the situation of disputes, the principle of inversion of burden of proof can be implemented, and the employer should bear the burden of proof. As long as female workers have preliminary evidence to prove that they suffer from unfair treatment due to their gender in the process of employment, employers need to prove that this kind of treatment is not gender discrimination, otherwise, they have to bear the responsibility of proof failure. This system design can better regulate the employment rights of employers, so as to protect women's equal employment rights.

At the same time, China can bring the employment gender discrimination into the scope of public interest litigation system. Due to the wide existence of gender discrimination in employment in China, it is difficult to protect their rights and interests only by a female worker. At the same time, due to the constraints of traditional concepts, many female workers are not willing to file a lawsuit. Therefore, it can be included in the scope of public interest litigation, and the labor supervision department or the public welfare organizations established according to law should file public interest litigation when it involves the equal rights of female workers in employment. This is more conducive to alleviate gender discrimination in employment and protect women's equal employment rights.

VI. Conclusion

As a global problem, gender discrimination in employment exists widely, and it is also the same in China. Although a set of laws and regulations against gender discrimination in employment has been initially formed in China. However, these laws and regulations are too principled, and there are still some problems to be solved in practice.

Based on the analysis of the manifestations of gender discrimination in employment in China, this paper finds that part of gender discrimination in employment is manifested in the recruitment process, while the other is reflected in the different pay for equal work and promotion ceiling in the process of female employment.

Then it analyzes the obstacles in the current legal system of our country in regulating the employment gender discrimination, including the lack of special Anti-Employment gender discrimination law in legislation, the existing laws and regulations are too principled, the law enforcement supervision of labor supervision agencies is not strict, the judicial channels are not smooth, and it is difficult to provide evidence.

Finally, this paper proposes to formulate Anti-Employment discrimination laws and regulations, improve the existing labor laws and regulations, and give full play to the law enforcement and supervision function of labor supervision departments. We should improve the litigation relief system and bring gender discrimination in employment into the scope of public interest litigation. We should protect women's equal employment right from legislation, law enforcement and judicature. Optimize the allocation of labor resources, so as to build a harmonious society of equality between men and women.

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