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Research of Legal Issues of Employment Discrimination Against Female Migrant Workers

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Abstract

Since the reform and opening policy, the number of Chinese labors has been increasing for over 30 years, of which women labors take up a substantial percentage. Women labors have made great contribution to modernization of socialism, industrialization and urbanization. However, phenomena of employment discriminations to women labors still exist everywhere. Though in Labor Law, Employment Promotion Law many rules stipulate that people should not be kept away from discrimination because of gender or registration, in practice, defects that subjects and responsibilities and so on, are blurry, still confuse us a lot. Therefore, it is necessary to learn from other countries, with an advanced legal system of anti-employment discrimination, our current status need considering fully as well. Only through these can we provide a guarantee of women labor employment in the future, justice of employment order, in order to promote the construction of Socialism.

Key words: Female migrant workers; Employment discrimination

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INTRODUCTION

Since the reform and open up, China is experiencing a trend of rural residents entering cities for work. The rural surplus labor transfer to urban area plays a crucial role in accelerating the urban industrialization process. In 2012 the national monitoring survey report on migrant workers showed that the number of migrant workers was almost 262.61 million and still increased every year. And the female migrant workers accounted for 33.6%. Female migrant workers are the group who work in the city and whose household registrations are still in rural areas. In addition, the labor income is their main living source. They contribute much to facilitate the development of industrialization and urbanization of city, which is an important element in the process of national modernization. But in fact, the phenomenon of employment discrimination is common and the female migrant workers suffer from different kinds of unequal treatment in employment due to their gender, low level of education and so on. Constitution of China provides that each citizen shall have the right and obligation to work, so labor has double attributes of right and obligation. Employment is the premise and basis of labor, equal employment thus become the basic requirement for the employment right. This right should not be affected by different ethnicity, gender, age, household registration and other factors. However, up to now there are still existing numerous obstacles which prevent the female migrant workers from achieving the equal employment right.

1. CURRENT EMPLOYMENT SITUATIONS OF FEMALE MIGRANT WORKERS

On one hand, female migrant workers are not only women but also rural residents. At the same time, due to the low level of education and other reasons,

female migrant workers are not only subjected to sex discrimination in the course of employment, but also face domicile discrimination, education discrimination and other obstacles. On the other hand, employment discrimination against female migrant workers include the discrimination both in job-seeking process and hiring process, sometimes discrimination still exist after the end of the employment relationship. Discrimination in the job-seeking process can be divided into the employer's discrimination and discrimination done by professional intermediaries who are engaged in brokering activities of career. The discrimination is mainly manifested in the following aspects.

1.1 Lack of Employment Opportunities

The Labor Law of the People's Republic of China states that women have the equal right in employment as men. According to the States, employers shall not refuse to employ women on grounds of sex or raise the employment standards for women expect for unsuitable jobs or posts for women When hiring employees. In fact, in the advertisement many employers clearly state that they refuse to hire women or have significant inequalities in the employment requirements for men and women. They used to think that female employees cannot concentrate on work because of the marriage, pregnancy and breastfeeding, while male work harder than female. Therefore, even if the employer stated that men and women have equal access to employment opportunities on the surface, in the actual recruitment, the employer prefer to the male workers under the same conditions. Some employers even will simply dismiss female workers, and implicit discrimination generates. In 2006, ACWF set a special questionnaire named survey of thousands of migrant workers in 10 cities. The survey showed that female migrant workers faced more difficulties than male when seeking a job. The greatest difficulties encountered by half of the women were "their education is too low to looking for a job". The national monitoring survey report on migrant workers in 2012 points out that migrant workers are mainly employed in manufacturing, construction and service industries. Society has great discrimination against migrant workers. It is even more difficult for female migrant workers to find jobs in formal and medium-sized enterprises since of their sex. Most of them can only seek opportunities in informal job market. Usually the jobs they do are those which city workers and male migrant workers are not willing to do, such as sanitation workers, cleaners, babysitters, etc. These jobs are dirty, poor, tired. Their employment positions are generally lower and kinds of labor rights and interests could not be guaranteed. In other words, they are in a more vulnerable position than male migrant workers when seeking job opportunities.

Taking the group of female migrant workers into account, it is evident that the employment situation of

older and poor educated women is worse than the younger and better educated ones. For example, when they are both working in the service industry, the younger could be a waitress or cashier while the older can only be a cleaner or nanny. The latter suffer from discrimination of age and appearance. Thus, we can deduce that older and poor educated female migrant workers face more problems in the employment. The government and society should pay more attention to them and supply more help.

Furthermore, the number of job-seekers has significantly increased in recent years while the job positions offered by the society are limited. The current situation of employment is so severe that many people have been unemployed for a long time. All of these have made the governments publish some policy that are more protective of their local workers in order to enhance the rate of re-employment and reduce that of unemployment in urban areas. Migrant labors are considered as competitors for urban labors and the native corporate are forced to fire migrant workers to spare room for the urban laid-off workers.

1.2 Low Signing Rate of Labor Contract

The Labor Contract Law stipulates that the labor relationship between the employer and the worker is established from the first day of the employment. To establish the labor relationship, a labor contract in written forms should be signed. Therefore, a formal employment relation should include a contract. Since most female migrant workers work in the non-public enterprises or ordinary families, it is difficult to ensure the signing of labor contract. Naturally, they cannot enjoy the endowment insurance, medical insurance, unemployment insurance, maternity insurance and industrial injury insurance which are stipulated by law. Especially when some accidents happened or dispute with employers and the migrant workers resume to the court or administrative organs for remedy, relief is often difficult to run smoothly because they fail to provide formal labor contracts.

1.3 Poor Working Conditions

Poor working conditions of female migrant workers refer to they are treated differently from other workers because of identity, gender and other non-capacity factors. These differences reflect in the economic, political and social aspects. The rural workers cannot get the same payment, identity and right for the same work as the urban workers in fact. For example, the employers could increase their working time without overtime wages. Sometimes their wage levels are lower than other workers or the local minimum wage.

Due to the low labor contract signing rate, most female migrant workers work as temporary workers in work units. Some employers would not pay for social insurance for them or only buy one of them. Female migrant workers therefore cannot enjoy the all-around

social insurance welfare. Given that women's physical and physiological characteristics are different from men's, the law provides special protections for female migrant workers. Women's special period such as menstrual, pregnancy and lactation should be specially protected. But many employers still force women to work when they are in unsuitable conditions and these provisions thus cannot be fully implemented. Also, female migrant workers face sexual harassment in workplace, and they choose to keep silence about this in order to keep their jobs.

2. DEFECTS IN THE SYSTEM OF ANTI-EMPLOYMENT DISCRIMINATION AND ORIGINS

2.1 Legislation

At present, no specific code of anti-employment discrimination law is available in China, nor is the anti-employment discrimination law on gender and identity. The main anti-employment discrimination legislations on female migrant workers can be listed as follows.

As the fundamental law of our country, the Constitution certainly contains regulations about people's livelihood. According to the second paragraph of Article 33 of the Constitution, all citizens of People's Republic of China are equal before the law. And Article 42 is that citizens have the right and obligation to work. These articles establish sound constitutional basis to relieve women migrant workers who may confront employment discrimination.

The third article of the Labor Law confirms that all workers have equal rights in employment and career choice. Article 12 points out that workers can obtain jobs without suffering ethnic, racial, gender and religious belief discrimination, and Article 14 is a provision on the employment of special personnel. Article 62 of Employment Promotion law also provides discriminated workers with legal remedies. Besides, Law on the Protection of Women's Rights contains some provisions about women's rights of employment as well.

In addition, some administrative regulations, local regulations and departmental rules also state provisions on this issue. To ensure the implementation of law with specific rules, the State Council, the Ministry of Labor, Ministry of Civil Affairs, Ministry of Health and the Ministry of Personnel have developed a variety of regulations. Some regions have made regulations in the light of local condition, such as files on joint activities, like Women's Rights Week, released by the National Women's Federation, the Ministry of Justice, Ministry of Agriculture, Ministry of Labor and Social Security, and Regulation on the Protection of Women and Children of Shanghai, etc.

Despite the above-mentioned laws and regulations prohibiting discrimination in employment, the provisions are too macroscopic to be practical, mainly in:

2.1.1 The Legislation Is Scattered and Blurred

Our anti-discrimination legislation on gender and identity is dispersed, and the relevant provisions are far from adequate. The current provisions to guarantee employment rights of women mainly lie in the Labor Law, Employment Promotion Law and the Law on the Protection of Women's Rights. However, these macroscopic provisions, usually principles of the regulations, have not stipulated special protection rules for female migrant workers' employment rights. For instance, Article 13 of Labor Law is "women enjoy equality in employment with men." When hiring employees, employers shall not refuse to employ women for their gender or raise the employment standards for women, except the job or position which is prescribed by the State, is unsuitable for women. The vague Law and regulation make the whole system in an uncertain state. In fact, female migrant workers who have suffered discrimination in employment find it difficult to put forward clear sound legal basis when seeking relief, and therefore equality in employment rights cannot be reasonably protected.

2.1.2 The Scope That Legislations Cover Is Limited

Article 12 of the Labor Law provides that workers can obtain jobs without suffering ethnic, racial, gender and religious belief discrimination. Article 3 of Employment Promotion Law stipulates that workers have equal rights in employment and freedom in career choice without suffering ethnic, racial, gender, religious belief discrimination. Article 27 to Article 31 of Employment Promotion Law prohibit discrimination against women, ethnic minorities, disabled persons, pathogen carriers of an infectious disease and rural workers. It can be seen from the above that, the law only provides four prohibited kinds of discriminations in employment: Discriminations on race, ethnicity, gender, and religion. Although the Employment Promotion Law has added an "other", but it's not clear whether the "other" contains discrimination on age, region, residence, religion, physical characteristics, etc or not. As migrant workers have become an indispensable force in the industrialization and urbanization, and they have taken a high proportion of overall laborers, we should develop anti-discrimination laws and regulations to lay a foundation for protecting female migrant workers' employment rights and improving the system of China's anti-discrimination legislation as soon as possible.

Besides the limited provided categories of discrimination, the scope of prohibited discrimination in employment laws and regulations is limited to the process of job-seeking and employment, not including employers' adverse behaviors exerted on workers after the end of employment relationships. As for domestic service, it's tough for workers, who has quitted for a dispute with the employer, to get another job after negative information has been released by the employer

in the industry. For such discrimination for revenge, we should pay more attention.

2.1.3 Legislative Loopholes in the Reasonable Distinct Treatments

Our laws ensure employers' freedom to choose employees, namely the autonomy of employment. They can decide which kind of workers to hire by themselves. On the face of it, this seems to conflict with the provisions which forbid discrimination in employment, as a matter of fact, what anti-discrimination system in employment requires employers to have is a reasonable standard for employment. That's to say, anti-discrimination in employment does not limit the autonomy of the employers, and standards set by the employers in the recruitment should be reasonable but not biased. The anti-employment discrimination system is against useless prejudice, rather than reasonable request, and employers can establish reasonable criteria according to their needs and characteristics of positions. Female migrant workers, who have special physical and social characteristics, can't engage in heavy labor, long working hours and dangerous work. Particular attention should be paid to their security during menstrual period, pregnancy and nursing period. As female migrant workers are poorly educated, when they are incompetent to some professional work, the distinct treatments can be accepted by law. But in this case, it's likely to lead to indirect discrimination against female migrant workers or unequal treatments in employment, and employers frequently abuse the loopholes, so it is supposed to set a reasonable standard for distinct treatments legally.

2.2 Law Enforcement

Currently the anti-discrimination legislations are of poor operability. Although Labor Law and Employment Promotion Law provide prohibition on discrimination in employment, its principled provisions still make it difficult to determine whether a situation constitutes employment discrimination when specific sectors dealing with disputes, whom to undertake the burden of proof of employment discrimination and how to take the responsibility when violating provisions of prohibiting discrimination. What's more, the complexity of multiple discriminations that female migrant workers often face, like gender and residence, gets their rights and interests more difficult to be under comprehensive and timely protection.

The absence of specialized enforcement agencies makes female migrant workers have little guarantee for equal employment rights. Employment Promotion Law stipulates that all levels of governments should cooperate to promote employment: The Ministry of Labor and Social Security are responsible for it specifically, and other social organizations should assist governments to carry out the work of promoting employment. As these departments are not sectors that specifically regulate employment discrimination, confusions are likely to occur

in practice, such as the Women's Federation and the Trade Unions would shirk responsibility to each other when female migrant workers encounter discrimination and seek remedy.

2.3 Judicial Aspect

The prohibition system of discrimination against female migrant workers in employment has defects not only in terms of legislation and law enforcement, but also in judicial administrations. Judging from the entire judicial remedy system against discrimination, China has not yet established effective public interest litigation system for this type of dispute. Although Employment Promotion Law provides that it can be resolved through litigation for the first time, it merely stipulates the litigation rights enjoyed by individuals whose equal employment opportunities are damaged. So it is unable to put the act which does not impair individual's right at the expense of social equity order into judicial proceedings. Employment discrimination is usually for unspecific majority, and the ordinary procedures of civil litigation characterized with "one to one" could not regulate such infringement effectively. In this case, female migrant workers often choose to give up their lawsuit rights because of economic conditions, which makes the employers discriminate them more reckless.

At the same time, the law does not provide specific rules of limitation and evidence, nor does the critical rule about burden of proof. The universal principle of burden of proof in civil action in our country is that "who claim, who quote." According to this, if workers advocate that the employers implement discrimination in the employment, they should prove the fact of discrimination by themselves, or they will face the consequences of losing. However, the workers are in a vulnerable position, and generally their education level is low; it is difficult for them to offer proofs that can prove they are discriminated. As a result, their claim cannot be met.

2.4 Deeply Rooted Traditional Culture

In fact, employment discrimination reflects society's view of the group that suffers from discrimination. It is the continuation of discriminatory thought in traditional culture. The employer's discrimination against this group comes from the deeply rooted traditional culture.

For example, people are intentionally divided into country folk and city folk, men and women, which is household registration discrimination and gender discrimination obviously. But such discrimination is mainly caused by the thoughts shaped in the feudal society. The feudal system has been existing for thousands of years in China, thus has had a tremendous impact on society. Members of the community had been assorted into different classes because of the rigid class system.

In the patriarchal feudal society women were dominated by men. Although Chinese women did not feel direct oppression in several years after the founding of the

PRC, deeply-rooted culture of gender hierarchy still exist. Confucian Ritualism advocates Three Cardinal Guides and Three Obediences which aimed at bounding women. These guides were ethical standards between people, and left miserable marks in the depth of the soul. "Women's ability to work is weaker than men." "Family is the main place that women can develop and display their talent." "Women's adaptability of future development and changes in job content is inferior to men." It is these concepts that have made female peasant workers in a disadvantaged position in employment.

Discriminatory ideas are not only the reasons of the existence of the employment discrimination phenomenon, also are the reasons of the discrimination issues difficult to solve. The phenomenon of employment discrimination widely exists in our life. Some of it has lead to tragedy. Therefore, it is bound to be a cause for great concern, so as to eliminate discrimination.

2.5 Research Aspect

Widespread discrimination in employment has aroused great concern of the community in recent years. The scholars are naturally without exception. Newspapers, magazines and other media are full of scholars' various views on anti-discrimination in employment. Academic research about this is popular in recent years, and the thought of discrimination is deeply rooted since these the research is demanding and immature. Scholars have different views on many issues, thus affect the legislative process. But in other aspects, establishing a dedicated capacity to safeguard equal employment is a common voice of scholars.

3. CHINA'S COUNTERMEASURES

3.1 Establish Relevant Laws

Nowadays China does not have specialized anti-discrimination laws about female migrant workers, so we should establish relevant laws and regulations as soon as possible. We can develop the "Anti-employment Discrimination Act" which is a comprehensive system of provisions on discrimination. We can also learn from the British advanced legislation practice to develop separate regulations for certain types of discrimination, and formulate unified discrimination code to establish a sound system of laws against discrimination in employment in future. Only in this way can we eliminate discrimination in employment and effectively protect the equal right of female migrant workers.

First of all, although female migrant workers primarily faced with gender and domicile discrimination in employment, we should broaden the provisions about the rest of the types of discrimination that they may be subjected to, such as beliefs and nationality. After classification, corresponding criteria should be formulated

according to different kinds of discrimination in order to provide a clear legal basis for them. Prohibiting employment discrimination should not only be limited to the processes of job-seeking and hiring, but also be further expanded after the end of the employment discrimination.

Second, there must be reasonable exceptions to the provisions of employment discrimination against female migrant workers. For example, real professional qualification is a reasonable standard. But in practice the employer must offer written instruments about the reasons of discrimination for job-seekers, the chief and the judiciary to review.

Then, we should establish the anti-employment discrimination litigation system to make the rules of timelines and burden of proof clear. The system should distribute the burden reasonably in cases of employment discrimination. We can learn from the British advanced legislation to let the employees offer the initial facts. But the employers should prove that the discrimination does not exist unless they have reasonable grounds. It should allow citizens and groups to bring their suits to the court in order to protect the social order in employment. This will reduce economic and psychological burden on employees to guarantee the efficient conduct of the court proceedings. The employees' labor rights can also be better safeguarded in this way.

Finally, when it comes to the responsibility the employers should take in the employment discrimination, we can benefit from the UK's practice to ask the employers to re-employ the workers to reduce the adverse consequences.

3.2 Establish Professional Organizations to Protect Equal Employment Rights

At present, discrimination of female migrant workers and the breadth of the ambiguity of the law in China require legislative authorization or set up a special body to guarantee equal employment rights of workers. According to law provision, the labor department, women's federation and other departments cooperate with each other to deal with employment discrimination disputes. Since these departments work itself is too complicated to spare energy to handle such disputes. Coupled with the elastic legal provisions, each of these departments pass the buck to shirk responsibility, making the protection of employment equality for female peasant workers become empty. Therefore, specialized agencies similar to Britain's Equality and Human Rights Commission of the same class should be set up to deal with such disputes.

In the "anti-employment discrimination research group" submitted to the "anti-employment discrimination law (experts recommend draft)" in National People's Congress contains the proposal of the establishment of National Equal Opportunity Commission. The expert research team leader Professor Cai DingJian believes that the Committee should consist of the staff composed by

many departments and it is a comprehensive organization of quasi-judicial, because employment discrimination dispute is not just a legal issue. Only a staff with multi-faceted knowledge and ability can coordinate and handle such issues. It is also the result of their investigation into the status of UK and other countries and regions.

Establishing the National Equal Opportunity Commission provides a convenient way for workers who are seeking relief. Whether female migrant workers or other workers can complain about the employers to the organization and get all-around help. It can adequately solve the problem, save social administrative resources and improve the efficiency and convenience of the enforcement of administrative law. Due to the large number of such disputes, specialized organizations continue to accumulate experience in the settlement process, and it is able to provide practical experience to optimize the anti-employment discrimination system. Besides, it can solve subsequent employment discrimination disputes and bring pressure to the employers to raise their awareness of abiding by the laws and promote the development of the social economy.

3.3 Strengthen the Discretionary Power of the Judges

Since the legislation about the employees how to seek legal remedies for discrimination in employment and the provisions of law enforcement is ambiguous, the judges' discretionary power should be strengthened in the judicial trial. They can use the standards of fairness and justice in their soul to referee the cases of labor dispute. It also asked the judges to have a high level of legal technology. The examinations of expertise should often be held. They should often have profound ideological and moral education to compensate for the defects in the judicial remedy.

3.4 Step up Efforts to Propaganda the Concept of Equal Employment

The idea of discrimination has formulated for a long time in Chinese history. It has rooted deeply in people's minds, so changing it is not an easy task. It is necessary

for the administrations to step up efforts to propaganda, especially the Women's Federation. They can set up billboards and organize public lectures in all communities, streets, parks and other public places to enhance the status of employment equity ideas in people's minds, thereby changing people's views on discrimination. Only in these ways can fundamentally solve the issue of employment discrimination.

3.5 Encourage Academic Research to Find Solutions

At present, academic studies of prohibiting employment discrimination against female peasant workers are not enough, which is one of the key factors affecting the legislative, judicial and law enforcement. Therefore we should encourage, support and guide the academic study of this system to find an effective solution and optimize the system, thereby improving the overall anti-employment discrimination system. The studies can provide scientific theoretical basis and ideological theory for legislative, judicial and law enforcement. They can strengthen legal workers' comprehension and application of the system as well. The final purpose is to help female peasant workers protect their legitimate rights better.

REFERENCES

- Helen, W., Diane, G., Mark, M., & Ian, C. (2007). Women's experiences and perceptions of age discrimination in employment: Implications for research and policy. *Social Policy and Society*.
- Liu, H. R. (2008). Analysis of the reasons for employment discrimination. *Economic Tribune*.
- Liu, S. (2006). *Survey on female migrant workers: I want a house in the city*. Retrieved from http://news.xinhuanet.com/society/2006-10/30/content_5265874.htm
- Rao, Z. J. (2011). *Research about the British Anti-Employment Gender Discrimination Act*. Beijing: The Law Press.
- Sun, P. Y. (2004). The legal protection of the workers' equal employment right. *Journal of Hangzhou College of Commerce*.