

ENFORCING EQUAL EMPLOYMENT OPPORTUNITIES IN CHINA

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I. INTRODUCTION: MR. JIANG TAO'S STORY¹

In December 2001, Jiang Tao, a law student at Sichuan University, read an advertisement, which indicated that the Chengdu Branch of People's Bank of China (PBOC), was hiring new staff members.² The advertisement contained a minimum height requirement: male candidates were required to be at least 168cm (5ft 6in) tall and females 155cm (5ft 3in).³

Such height requirements are very common in China; thus, many qualified applicants for government positions are rejected because they are too short. Mr. Jiang is only 165 cm (5ft 5in) and therefore ineligible for the job. Mr. Jiang sought to challenge PBOC's hiring practice on the basis that it was employment discrimination.⁴ However, he faced one important legal constraint: neither constitutional nor national statutory provisions in China specifically prohibit height discrimination in workplace. Despite the lack of direct protection, Mr. Jiang filed suit under Article 33 of the 1993 Constitution of the People's Republic of China, which declares all citizens "equal before the law."⁵ Mr. Jiang alleged that the minimum height requirement violated his constitutional right to equal treatment before the law.⁶ Specifically, he claimed that "[t]he defendant should assume corresponding legal liabilities" and "asked the court to confirm the administrative action containing 'height discrimination' as illegal."⁷

Mr. Jiang's case is significant not only because it was the first to

1. *First Case Involving Right to Equality*, BEIJING REVIEW (Feb. 26, 2002), available at <http://www.china.org.cn/english/2002/Feb/27798.htm> (discussing the case brought by Mr. Jiang).

2. *Id.*

3. *Id.*

4. *Id.*

5. XIAN FA [Constitution] art. 33 (1993) (P.R.C.), translated in 5 P.R.C. LAWS 8, 20.

6. *First Case Involving Right to Equality*, *supra* note 1.

7. *Id.*

challenge the legitimacy of height discrimination in the workplace, but also because it was the “first case involving right to equality under the Chinese Constitution.”⁸ Furthermore, Mr. Jiang was the “first person to persuade a district court in China to consider if a citizen’s constitutional rights have been infringed by a government institution.”⁹ Observers theorized that this case would open the way for citizens to make use of their constitutional rights; however, the court in China never addressed the legitimacy and constitutionality of height discrimination in workplace. Mr. Jiang’s case was dismissed for mootness because of the defendant’s removal of the questionable advertisement.¹⁰ The court further suggested in its opinion that even a plaintiff in a similar case but with timely standing would fail due to a significant legal barrier: “the Chinese Administrative Litigation Law only permits review of administrative action taken within the scope of the sued entity’s formal regulatory responsibilities.”¹¹ In this case, the defendant People’s Bank of China’s formal administrative responsibilities include managing and administering financial activities, and the hiring practices are not within its formal regulatory responsibilities.¹² Accordingly, the court concluded that the height requirement would not likely be “judicially reviewable.”¹³

Jiang Tao’s story reflects not only the pervasive employment discrimination in China, but also the obstacles to redressing grievances within the Chinese legal system. Over the past few decades, China’s workplace discrimination has reached an intolerable level. In 2006, a research team consisting of 24 professors and experts from Peking University, Tsinghua University, China University of Political Science and Law, and other institutions conducted an employment discrimination survey (hereinafter “The 2006 Employment Discrimination Survey”) in ten large cities, including Beijing and Shanghai.¹⁴ About 85.5% of the 3,424

8. Wang Shan, *Zhongguo Xianfa Pingdengquan Diyian Tingshen Shilu*, [Authentic Records of the Court Hearing for China’s First Constitutional Equal Protection Case] ZHONGGUO LU’SHI WANG [China Lawyer Net], Dec. 12, 2002, available at <http://www.law.com.cn/pg/newsShow.php?Id=6457>.

9. *No Small Matter*, *ECONOMIST*, Mar. 2, 2002, at 42.

10. Wang, *supra* note 8 (stating defendant bank removed the questionable hiring advertisement and that the case is not judicially reviewable); see also Michael C. Dorf, *What a Chinese Height Discrimination Case says about Chinese (and American) Constitutional Law*, *FIND LAW*, May 26, 2004, <http://writ.news.findlaw.com/dorf/20040526.html> (stating that claim was revoked for mootness because of removal of advertisement).

11. Dorf, *supra* note 10. See also Wang, *supra* note 8; Zhonghua renmin gongheguo xingzheng susongfa [Administrative Procedure Law] (promulgated by Order No. 16 of the President, Apr. 4, 1989, effective Oct. 1, 1990), translated in 4 P.R.C. LAWS 283 (indicating limited scope of legal action regarding administrative agencies).

12. Wang, *supra* note 8.

13. *Id.* See also Dorf, *supra* note 10.

14. 85.5% ren renwei cunzai jiuye qishi, guoren dui qishi jiti meiyishi [Survey showed

respondents surveyed “said discrimination in work and employment did exist . . . [and] 58 percent thought the problem to be severe.”¹⁵ In China, employers have broad discretion in the selection of employees: among other factors, they discriminate against people based on their “[a]pppearance, height, gender, and marital status,” as well as people who are “from certain regions and areas.”¹⁶ Recently, it was reported that some employers in China seeking new employees “passed over candidates born as dogs in China’s ancient 12-animal astrological cycle.”¹⁷ Among all factors used in considering applicants and employees, only some considerations are specifically “prohibited by Chinese labor laws.”¹⁸

The prohibition of some types of employment discrimination has been codified in China.¹⁹ However, while China has enacted some laws that appear to afford some groups of people protection against certain forms of discrimination in the workplace, the inadequacies and internal ineffectiveness of these laws are quite apparent: the present legislation is insufficient and the scope of existing laws is narrow.²⁰ For example, Chinese Labor law only prohibits employment discrimination on the grounds of “ethnic group, race, sex, or religious belief.”²¹ By issuing repeated executive directives and administrative guidelines, China is taking an inconsistent and patchwork approach to addressing its general employment discrimination problem. As such, a successful challenge to employment discrimination in China is difficult.

This Comment describes the current status of discrimination practices

85.5% of People Thought Employment Discrimination Exists, Chinese People are Not Conscious of Discrimination], BEIJING CHENBAO [Beijing Morning Post], Jan. 5, 2007 [hereinafter *Discrimination Survey*], available at http://news.xinhuanet.com/edu/2007-01/05/content_5567473.htm.

15. Zhu Zhe, *Bias is a 'Way of Life in Jobs'*, CHINA DAILY, Jan. 8, 2007, available at http://www.chinadaily.com.cn/china/2007-01/08/content_776547.htm.

16. *Id.*

17. *Jiuye qishi: Gounian weihe bu zhaopin shugou de ren?* [Employment Discrimination: Why Refuse to Hire Candidates Born as Dogs in the Dog years], XINHUA NEWS AGENCY, Dec. 28, 2005, available at http://news.xinhuanet.com/employment/2005-12/28/content_3978176.htm; see also *Dogs Year Bigots Barking Up Wrong Tree, Says China*, RED ORBIT, Dec. 28, 2005, available at http://www.redorbit.com/news/general/341669/dog_year_bigots_barking_up_wrong_tree_says_china/index.html.

18. Ronald C. Brown, *China's Employment Discrimination Laws During Economic Transition*, 19 COLUM. J. ASIAN. L. 362, 362 (2006).

19. See *Zhonghua renmin gongheguo laodongfa* [Labor Law] (promulgated by Order No. 28 of the President, and effective Jan. 1, 1995) art. 12 (P.R.C.), translated in 6 P.R.C. LAWS 55, 57 [hereinafter Labor Law] (“Laborers, regardless of their ethnic group, race, sex, or religious belief, shall not be discriminated against in employment.”).

20. See, e.g., Christine M. Bulger, Note, *Fighting Gender Discrimination in Chinese Workplace*, 20 B.C. THIRD WORLD L.J. 345, 348-49 (2000) (stating that the protections provided for equal employment for women in China is limited in reach).

21. Labor Law art. 12, translated in 6 P.R.C. LAWS at 57.

in the Chinese workplace, examines the effectiveness of current legal recourse available to fight workplace discrimination, and proposes a systematic approach to protect equal employment opportunities. Part II describes the existence of employment discrimination in China, emphasizing discrimination based on gender, age, height, and an individual's status as a Hepatitis B Virus carrier. It also discusses how different factors such as lack of social awareness, economic restructuring, and competitive labor markets contribute to employment discrimination in China. Part III evaluates the effectiveness of China's current antidiscrimination mechanisms, including legislation, the mediation process and the legal system. Part IV discusses reasons why China should develop a coherent public policy to eliminate employment discrimination. Part V demonstrates the significance of assuring equal employment opportunities in China and urges China to adopt a systemic approach, which includes taking positive steps toward developing a coherent antidiscrimination policy, as well as a comprehensive mechanism for combating employment discrimination.

II. EMPLOYMENT DISCRIMINATION IN CHINA

A. *An Overview*

Employment discrimination is a complicated social problem. A historical overview of China's employment situation and opportunities indicates that there has been a significant connection between China's economic transition and its current employment discrimination.

Prior to China's economic transition "from a centrally planned economy based mainly on import substitution to a guided market economy open to foreign investment in the late 1970s,"²² employment discrimination did exist in China, but was not serious.²³ At that time, "the so-called iron rice bowl system prevailed" in China.²⁴ "Under this system, employees were assigned to state-owned enterprises (SOEs), which guaranteed lifetime employment and a wide range of benefits, including housing and education."²⁵ Since the employment activities were conducted strictly in accordance with government plans and policies, employers usually did not

22. Stephen Frenkel & Sarosh Kuruvilla, *Logics of Action, Globalization, and Changing Employment Relations in China, India, Malaysia, and the Philippines*, 55 *IND. & LAB. REL. REV.* 387, 398 (2002).

23. Yue Songdong, *Jiuye Qishi Xungen Suyuan* [The Root of Employment Discrimination], REMIN WANG [People.com], Mar. 12, 2007, available at <http://theory.people.com.cn/GB/49154/49156/5463450.html>.

24. Frenkel & Kuruvilla, *supra* note 22, at 399.

25. *Id.*

have much discretion in their hiring practices.²⁶ Therefore, during the iron rice bowl period there was no significant relationship between employment discrimination and employer discretion.²⁷

During the transition from a planned to a market economy, the iron rice bowl system was proved inefficient because it was unable to provide sufficient incentives to workers.²⁸ During this period, in order to ensure the future profitability of its large SOEs and promote greater economic efficiency, China permitted the small and medium-sized SOE's to go bankrupt, or to merge with other businesses.²⁹ As a result, state centralization of jobs, as well as the guarantees of benefit provision, became less prevalent.³⁰ In addition, under the new law, new employees must be "hired on fixed-term contracts with a maximum duration of four years."³¹ Further, for the first time, "workers could be dismissed under certain circumstances."³² Employers were thus left in a position of greater power, as they were given discretion over tangible employment decisions,³³ which created conditions for the occurrence of later widespread employment discrimination.

During the economic transition period, several other factors such as the competitive labor market, lack of social awareness and insufficient legal remedies have contributed to the severity and pervasiveness of employment discrimination in China. First, the economic reforms occurring throughout the 1980s which were based upon the premise of privatization left China with a notably high unemployment rates.³⁴ Under this historical circumstance, employment discrimination became more and more widespread as the labor market became increasingly competitive.³⁵ China's cutthroat labor market, in which demand for jobs far outstrips supply, places the employer in a position of power when compared to prospective employees. In 2006, the Minister of Labor and Social Security, Tian Chengping, said that China's urban centers "need to create 13 million

26. Yue Songdong, *supra* note 23.

27. *See id.* (noting that prior to the economic transition period employment discrimination has no economic root).

28. Bulger, *supra* note 20, at 351.

29. *China's State-owned Enterprises: Beijing Rules*, *ECONOMIST*, May 3, 1997, at 54.

30. *See Frenkel & Kuruvilla, supra* note 22, at 399 (identifying changes in China's economic structure and subsequent effects upon workers).

31. *Id.*

32. *Id.*

33. *See* Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in People's Republic of China*, 19 *BERKELEY J. INT'L L.* 161, 208 (2001) (noting increased employer discretion that came with the end of the iron rice bowl period).

34. *See* Bulger, *supra* note 20, at 351 (noting the increased unemployment brought about by market reforms).

35. Yue Songdong, *supra* note 23.

new jobs a year.”³⁶ Further,

At least 24 million urban residents will be looking for jobs each year in the coming several years but there are likely to be only 11 million openings The number of university and college graduates who cannot find jobs is also on [sic] steadily rising. . . . 1.24 million university and college graduates who graduated [in 2006] did not have a job when they completed their studies.³⁷

The sheer size of the labor force, along with the high unemployment rate and employers’ nearly unlimited discretion in employment decisions, leave job applicants and employees, especially former SOE workers, in an extremely unfavorable position with almost no bargaining power. As a result, “as unemployment rates have risen, the use of unfair hiring practices . . . also has increased.”³⁸ Complex social and legal mechanisms have reinforced this social phenomenon. While employers have actively practiced employment discrimination during recent years, Chinese society does not act in a manner to dissuade employers from such discriminatory acts. The 2006 Employment Discrimination Survey showed that Chinese people generally lack social awareness regarding equal employment rights, and are not aware that employment discrimination is a violation of their rights.³⁹ In an interview conducted by Chinese Central Television (CCTV) following the 2006 Employment Discrimination Survey, many job applicants said that they didn’t think widespread job requirements limiting gender, age, height, residency, facial appearance and other similar characteristics were “discriminatory”; instead they thought these requirements were just “not quite fair.”⁴⁰ Besides failing to notice discrimination, these applicants also said they would try to make their own qualifications “more excellent” in order to get hired.⁴¹

Moreover, although during the economic transition period employment and labor law in China has developed rapidly in tandem with the speed of economic reform, employment discrimination has all along remained a gray zone. As a result, in China’s currently free but poorly

36. *China’s Urban Areas Lack 13 Million Job Opportunities a Year*, XINHUA, Nov. 28, 2006, available at <http://english.cri.cn/2946/2006/11/28/1021@168424.htm>.

37. *Id.*

38. Bulger, *supra* note 20, at 353.

39. See *Employment Discrimination Survey*, *supra* note 14 (citing Professor Cai Dingjian, who argues that the results of the 2006 Employment Discrimination Survey demonstrate that there is a lack of social awareness of employment discrimination among Chinese people).

40. *Fanjiuye qishi chongdong falv ruanlei, huyu chutai zhuanmen falv* [The Law Does Not Prohibit Employment Discriminations, Enactment of Specialized Law is Expected], GUOJIZAXIAN NEWS AGENCY [China Central Television], Dec. 13, 2006, available at http://news.xinhuanet.com/edu/2006-12/13/content_5480015.htm.

41. *Id.*

monitored market, without the prior guarantees of the “iron rice bowl” system, and without sufficient and effective legal protection, employers at all levels routinely and openly engage in discriminatory hiring and dismissal practices with almost no limitations.

B. Discriminatory Practices in China's Labor Market

For many years, rigorous requirements for gender, age, height, ethnic origin, and physique have operated in China as mechanisms by which employers might screen potential applicants.⁴² Such discriminatory requirements are often expressly listed in job advertisements.⁴³ In addition, a typical employment application in China requires the applicant to provide information regarding name, sex, age, ethnicity, education, place of birth, family background, height, health, plus a picture of the applicant. Each or all of these considerations, although they may be unrelated to the individual's capacity to perform the required job function, can be used by Chinese employers for the purpose of discriminating against job applicants.⁴⁴ From hiring to training, from evaluation to dismissal, from promotion to involuntary retirement, employers are making decisions that affect individual lives based on irrelevant or immutable characteristics.

It must be noted that employment discrimination exists not only in private companies, but also at all levels of government and governmental agencies.⁴⁵ According to a survey, when asked about which employers they believed practiced employment discrimination most actively, respondents ranked government agencies first, followed by private companies and SOEs.⁴⁶

The following is a general description of four major types of

42. See Editorial, *Law Should Curb Job Discriminations*, CHINA DAILY, Sept. 9, 2005, available at <http://www.china.org.cn/english/GS-e/141396.htm> (noting the use of various physical or ethnic requirements by employers to screen job applicants).

43. *Id.*

44. See Zhang Wei, *Jiuye Qishi: Rencai Buneng Chengshou Zhizhong* [Employment Discrimination: A Heavy Burden for Job Applicants], PENGCHENG [Pengcheng Magazine], Aug. 2004, available at http://www.szzx.gov.cn/pczz/2004/42/200602/t20060223_40685.htm (describing various forms of employment discriminations in China).

45. See *Employment Discrimination Survey*, *supra* note 14 (noting that both private companies and government agencies practice employment discrimination in China).

46. See *Discrimination in Work and Employment*, LIAONING GATEWAY, Jan. 8, 2007, available at <http://www.liaoning-gateway.com/74591976929886208/20070108/2121095.shtml> (quoting a scholar who provides an example of discrimination within Chinese civil service); *Guonei Jin Qicheng Nvdaxuesheng renwei Qiuzhi Zhong Zhao Xingbie Qishi* [70% of College female students experienced gender discrimination in seeking jobs], XINXI SHIBAO [Information Times], Jan. 17, 2007, available at http://news.xinhuanet.com/edu/2007-01/19/content_5623980.htm.

widespread discrimination existing within the Chinese workplace.

1. Gender Discrimination in Employment

Gender inequalities permeate many aspects of the employment problem.⁴⁷ Although the Chinese government has made consistent efforts to prohibit gender discrimination in the workplace by creating constitutional provisions and legislation that promote gender equality,⁴⁸ the practical influence that these laws have exerted on the society and employers has been limited. Today, discrimination against women is still among the most flagrant in China's labor market. Chinese women have consistently reported practices such as "preferences in hiring men . . . unfair dismissals, periodic employment plans, earlier retirement ages for women, wage discrepancies, and outright sexual harassment."⁴⁹

During the economic restructuring, women bore a disproportionate percentage of the millions of negative employment actions. Generally, women were more likely to be laid off, and receive pay cuts when their employers experienced financial trouble.⁵⁰ According to a 1998 report entitled *China's Unemployment Problems and Employment Strategies* by Chinese economist Mr. Hu Angang, women accounted for 60% of the workers who had been laid off at China's SOEs.⁵¹

47. See Bulger, *supra* note 20, at 351-59 (noting various forms of employment discrimination felt by women within China).

48. See, e.g., XIAN FA art. 33 (1993) (P.R.C.), translated in 5 P.R.C. LAWS at 20 ("All citizens of the People's Republic of China are equal before the law."); Labor Law art. 12, translated in 6 P.R.C. LAWS at 20 (including sex as a factor that may not be used as a basis for employment discrimination); Int'l Labour Organisation [ILO], Convention No. C100 was Ratified by 163 Countries, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C100> (last visited May 11, 2007) (showing that China has ratified ILO Convention No. 100, which demands equal pay between genders).

49. Bulger, *supra* note 20, at 345-46.

50. *Equality for Women Begins in Workplace*, CHINA DAILY, July 2, 2004. The situation was also outlined in a 25-page report released by the All-China Federation of Trade-Unions (ACFTU). The report, based on information gathered in several cities and provinces from 1978 to 2002, found that during China's transition to a market economy, traditional industries sustained large-scale layoffs and a disproportionate number of the laid-off workers were women. Only 39% of women who lose their jobs become re-employed, 24.9% less than men who lose their jobs. Moreover, because a large proportion of women took temporary jobs and earn less than the minimum wages required by the government, which "reinforces the ever-widening gap between the incomes of men and women". From 1990 to 2000, the gap between men and women's income grew 7.4%. Gender discrimination is also reflected in managerial and leadership positions in private companies and governments. Women account for just 1.3% of management post in all organizations in 2002.

51. Hu Angang, *Zhongguo de shiye wenti yu jiuye zhanlue* [China's Unemployment Problems and Employment Strategies], http://www.66wen.com/02jix/jingjixue/jingjixue/06515/15916_2.html (last visited Jan. 31,

Younger generations of females entering the workforce also report serious gender discrimination. In 2002 a female college students' job-fair in Beijing was cancelled because only five of five hundred companies invited accepted the invitation.⁵² Many companies said they were "'not interested' in hiring female graduates."⁵³ A survey conducted by the Women's Federation in Jiangsu Province in 2002 showed that out of 1,100 college graduates surveyed, 80% of female graduates experienced gender discrimination during their job searches, and 34.3% experienced multiple rejections by potential employers.⁵⁴ The same survey also showed that the employment rate of male graduates with same qualifications was 8% higher than that of the female graduates, and that the male graduates usually find better jobs with higher salary than female graduates.⁵⁵

Many employers in China discriminate against women to avoid the prospect of maternity leave.⁵⁶ These employers justify their discriminatory practices on the grounds that maternity leave increases labor costs, affects the "consistency of employment," and that "females in general are less creative and aggressive than men."⁵⁷ Some employers even require young female graduates to agree not to have a child within a set number of years after being hired.⁵⁸ Ironically, the laws and regulations enacted to protect female employees have resulted in an aggravation of the gender discrimination problem. Article 29 of the Labor Law provides that female workers cannot be dismissed during pregnancy, childbirth, or while

2007).

52. *Nv daxuesheng zaoyu zhaopin kongchang* [Female College Student Job Fair Was Called Off], BEIJING QINGNIANBAO [Beijing Youth], XINHUA NEWS AGENCY, Nov. 25, 2002, available at http://news.xinhuanet.com/edu/2002-11/25/content_640009.htm (describing the results of an employment survey conducted by Women Federation of Jiangsu Province in 2001 proves gender discrimination).

53. *Id.*

54. *Nv daxuesheng zouzai jianxin qiuzhi lushang* [A Rocky Road for Female College Students to Seek Employment], XINHUA NET, April 1, 2003, <http://www.yn.xinhuanet.com/ynnews/zt/2003/nxsqzh/index.htm> (describing the results of an employment survey conducted by Women Federation of Jiangsu Province in 2001 proves gender discrimination).

55. *Id.*

56. See Bulger, *supra* note 20, at 353 (stating that employers discriminate against women in hiring because of potential maternity leave).

57. *Nv daxuesheng jiuye, za zeme nan?* [Why is it so difficult for female college students to find a job?], XINHUA NEWS AGENCY, Mar. 10, 2004, available at http://www.hq.xinhuanet.com/tbgz/2004-03/10/content_1756475.htm.

58. Wu yanjun, *Wunian bude huaiyun cheng zhaopin tiaojian Nanjing zhuanjia pibo bu chengwen guiju* [Nanjing Experts Criticizes Job Requirements Prohibits Pregnancy for Five Years], NEWS.EASTDAY.COM, Aug. 18, 2003, <http://news.eastday.com/epublish/gb/paper148/20030818/class014800012/hwz998344.htm> (noting that some employers require female job applicants to agree not to get pregnant within five years after the employment begins).

breastfeeding.⁵⁹ To avoid Article 29, some employers even refuse to hire females from the beginning in order to avoid the inconveniences caused by female employees' pregnancy and maternity leaves, and thus "cut down the cost".⁶⁰

2. Age discrimination in employment

Age discrimination in employment in China is a relatively recent social phenomenon and did not fully appear until the economic restructuring period. During that period, the economic reform has resulted in huge unemployment and caused a large number of middle-aged or older workers to seek reemployment.⁶¹ These people are likely to be the first affected by downsizing in the state sector and find it difficult to compete with younger workers.

Chinese employers demonstrate an aversion to hiring relatively older people by imposing an age requirements on job applicants. Many employers, including government agencies, SOEs and private companies impose an age requirement of thirty-five or below.⁶² For example, in the 2004 civil service recruiting season, the age requirement for positions at various central government agencies ranged from 22 to 35.⁶³

Age discrimination by a large number of employers not only excludes many older individuals from employment, but also results in a heavy burden on society to provide support for these unemployed.

Age discrimination is often combined with gender discrimination.⁶⁴ One issue in particular--the different mandatory retirement age requirements for men and women--has captured public interest in recent years. According to one author, "Chinese law sanctions age discrimination

59. See Labor Law art. 29, translated in 6 P.R.C. LAWS at 60 ("[T]he employing unit shall not cancel its labour contract with . . . a female staff member or worker during pregnant, puerperal, or breast-feeding period.")

60. *Guonei Jin Qicheng Nvdaxuesheng renwei Qiuzhi Zhong Zhao Xingbie Qishi* [70% of College female students experienced gender discrimination in seeking jobs], *supra* note 46.

61. Angang Hu, *supra* note 51.

62. *35 Sui: Qiuzhi Lushang Xin de Fenshuiling* [35 Years Old: the New Obstacle in Job Seeking], DONGNAN KUAIBAO [Northeast Post], Mar. 5 2006, available at <http://news.sohu.com/20060305/n242129867.shtml>.

63. *Nianling shouxian kao gongwuyun zaoju, falv shuoshi gao renshibu* [Law Student sued the Personnel Ministry for Age Discrimination in Civil Servant Qualification Exam], BBS.PEOPLE.COM, Nov. 17, 2005, <http://edu.people.com.cn/GB/1053/3863412.html>.

64. See Xinjian Li & Rui-Mei Zhao, *The Protection of Women's Labor Rights in China: Situation, Problems and Strategies*, INTERNATIONAL INDUSTRIAL RELATIONS ASSOCIATION, 5-6 (2004), available at <http://www.kli.re.kr/iira2004/pro/papers/LIXinjian.pdf> (noting that gender and age discrimination are both prevalent, resulting in doubly harsh employment prospects for older women).

in the form of earlier retirement ages for women".⁶⁵ Under the current law, the mandatory retirement age for male workers is sixty and for the female workers is fifty.⁶⁶ The mandatory retirement age for some "essential" females teachers, medical doctors, scientists and technicians can be extended to sixty, but males in the same profession or position do not have to retire until sixty-five.⁶⁷

In August 2005, for the first time a female employee stood up to challenge the discriminatory mandatory retirement age for women. Her employer, the China Construction Bank, forced the plaintiff, Ms. Zhou Xianghua, to retire at age 55, while her male coworkers could retire at the age of 60.⁶⁸ Ms. Zhou brought a civil action against her employer, alleging that the mandatory retirement age requirement violated her constitutional right to be treated equally and was gender discrimination.⁶⁹ Under the Article 48 of the Constitution, males and females have equal rights.⁷⁰ However, the Zhaihe District People's Court in Pingdingshan did not resolve the underlying claim, rejecting it for lack of effective evidence and legal support.⁷¹

3. Height Discrimination in Employment

In China, the bias against short people is pervasive and systematic. Based on a deeply rooted belief that being tall is a symbol of popularity and capability, many employers impose willful and unreasonable height requirements for jobs, ignoring the job-relatedness factors.⁷² "Given the hordes of qualified applicants that descend on any opportunity" in China, many employers, including government agencies and private sectors, "find

65. Bulger, *supra* note 20, at 358 (internal citation omitted).

66. Guowuyuan Guanyu Gongren Tuixiu, Yuizhide Zanxing Banfa [State Council Interim Procedure Concerning Retirement or Resignation for Workers], art. 1(1) (June 3, 1978), available at <http://www.hhrsbb.gov.cn/Article/ShowArticle.asp?ArticleID=276>.

67. Guowuyuan Guanyu Yanchang Bufen Gugan Laoshi, Yisheng, Kejianrenyuan Tuixiu Nianlingde Tongzhi [State Council Circular Extending the Retirement Age of Some Essential Teachers, Doctors, Scientists and Technicians], Sep. 12, 1983, available at <http://www.cnread.net/cnread1/flfg/fldd/083/043.htm>.

68. Niu Zhonghan & Zhang Chunyang, *Pingdingshan Zhaihequ Fayuan dui "Tuixiu Xingbie Qishi An" Zuo Yishen Panjue*, [The Zhaihe District People's Court in Pingdingshan Ruled the "Retirement Age Discrimination" Case], XINHUA NET, Feb. 9, 2006, available at http://news.xinhuanet.com/legal/2006-02/09/content_4158073.htm.

69. Zhang Chunyang & Su Chunjian, *Tuixiu Nvrong Weixiang Nannv Tongling Tuixiuquan Zhuanggao Danwei* [Retired Female Worker Sued Employer for Equal Retirement Age], ZHONGGUO FAYUAN WANG [Chinacourt Net], Nov. 15, 2005, <http://www.chinacourt.org/public/detail.php?id=185593>.

70. XIAN FA art. 48 (1993) (P.R.C), translated in 5 P.R.C. LAWS at 22.

71. Niu Zhonghan & Zhang Chunyang, *supra* note 68.

72. Craig S. Smith, *Risking Limbs for Height, and success, in China*. N.Y. TIMES, May 5, 2002, at A13.

height an easy way to cut down the field.”⁷³ As a result, if unable to meet an employer’s height requirement, many applicants are deprived of even the opportunity to interview, no matter how qualified they may be.⁷⁴

Many local governments impose height requirements in hiring their civil servants. In 2003, the personnel bureau of Yiyang, Hunan Province rejected an applicant who received the highest score in its civil servant qualification exam but failed to meet the height requirement by only 5 millimeters (0.2 in.).⁷⁵ The height requirement has been challenged in courts. However, Chinese courts are generally reluctant to review the legitimacy of such requirements.

Because of the widespread height discrimination in China, short people’s options are sharply limited. Fearing discrimination due to height, thousands of otherwise healthy Chinese people choose to undertake a time-consuming, extremely risky and expensive surgery to increase their height.⁷⁶

The surgery most commonly involves breaking the legs in two places, one just below the knee and the other above the ankle, and inserting metal rods that attach to the tibia and the fibula. . . . Problems commonly encountered are the bones failing to reattach properly, the killing of blood vessels and nerves around the leg, as well as deformation of knee joints, and the potential collapse of the ankles.⁷⁷

Because of these surgical complications, some people become permanently paralyzed,⁷⁸ and thus may fall victim to a different form of social stereotyping and discrimination.

4. Hepatitis B Virus Status

According to experts, approximately 10% of the population in China

73. *Id.*

74. *Qiuzhizhe Heshi Buzhai ShouQishi* [When Would the Job Applicants Stop Being Discriminated Against?], RENMIN RIBAO [People Daily], Apr. 29, 2003, available at <http://past.people.com.cn/GB/guandian/183/6103/6104/20030429/981981.html>.

75. *A Job Applicant in Yiyang City cannot be a Civil Servant for Being 5 millimeters Shorter than Required*, REDNET.CN, Sept. 19, 2003, <http://hlj.rednet.com.cn/Articles/2003/09/468912.htm>.

76. See *The “Half-Hour Program”*, *Xiankai zenggao shoushu de heimu* [Piercing the Veil of Boost-height Surgery], CCTV, XINHUA NEWS AGENCY, May 30, 2004, available at http://news.xinhuanet.com/health/2004-05/30/content_1497990.htm (discussing generally, height-boosting surgery and its high risk); Benjamin Morgan, *Height Discrimination Prompts Young in China to Risk Surgery*, DAILY NEWS (Sri Lanka), Nov. 13, 2002, available at <http://www.dailynews.lk/2002/11/13/fea06.html> (examining height-boosting surgery within Chinese culture).

77. Morgan, *supra* note 76.

78. *Id.*

(over 120 million people) are either infected by or are carriers of the Hepatitis B Virus (HBV).⁷⁹ According to the World Health Organization (WHO), HBV is primarily transmitted by contact with blood and blood products, through sexual contact, and from mother to infant.⁸⁰ Because of a strong but nonetheless erroneous belief that they pose a serious threat to the surrounding people and environment, the large population of HBV carriers face tremendous social pressure and discrimination: they are virtually excluded both from most entry-level government civil servant positions and from employment in many state and private companies.⁸¹

In recent years, disputes between people infected with HBV and employers and schools have attracted increasing media and public attention.⁸² The landmark event regarding media publication of disputes involving HBV carriers has been dubbed the “Zhou Yichao event.” In April 2003, Zhou Yichao, a Zhejiang University graduate, found that although he successfully passed the city’s civil servant qualification examination, he was rejected because he tested positive for HBV.⁸³ He subsequently attacked two government officials in charge of hiring civil servants in the government building, killing one and injuring another.⁸⁴ In September 2003, Zhou was sentenced to death for murder of a government official, and was executed on March 2, 2004.⁸⁵

In November 2003, the first case of discrimination against HBV carriers was brought before the courts, and it received national attention. The plaintiff, Mr. Zhang Xianzhu, sued the local Municipal Personnel Bureau for refusing to employ him based on his HBV-positive status.⁸⁶ Mr.

79. *Yigan bingdu bu tongguo shejiao huodong chuanbo* [The Hepatitis B Virus Does not Transmit Though Social Activities], XINHUA WANG [Xinhua News Agency], Jan. 4, 2004, http://www.gd.xinhuanet.com/newscenter/2004-04/01/content_1895304.htm.

80. World Health Organization, Fact Sheet No. 204: Hepatitis B (2000) available at <http://www.who.int/mediacentre/factsheets/fs204/en/>.

81. See *B Is for Bigotry, Hepatitis B in China*, ECONOMIST, Nov. 18, 2006 at 66 (discussing the discrimination faced by those with HBV in Urumqi).

82. See Chang Tianle, *Hepatitis B Stigma Provokes Outcry in Xinjiang*, CHINA DEVELOPMENT BRIEF, Oct. 30, 2006, <http://www.chinadevelopmentbrief.com/node/840> (discussing a case where a mother petitioned government departments before finding a lawyer to represent HBV victim expelled from a Xinjiang university in 2005. This case was dropped before going to the court as the University agreed to take the student back).

83. See *Zhejiang daxuesheng cisi gongwuyuan an zhuizong: Zhou yichao bei zhixing sixing* [Zhejiang College Graduate Killed Civil Servant: Zhou Yichao was Sentenced to Death], XINHUA NEWS AGENCY, Mar. 3, 2004, available at http://news.xinhuanet.com/legal/2004-03/03/content_1343729.htm (relating the story of Zhou Yichao).

84. *Id.*

85. *Id.*

86. Sun Wenying, *Zhang Xianzhu An: Zhongjie Yigan Qishi* [The Zhang Xianzhu Case: Termination of Discrimination Against HBV Carriers], RENMIN FAYUANBAO [People’s Court Daily], Nov. 3, 2006, available at <http://rmfby.chinacourt.org/public/detail.php?id=102369>.

Zhang won the case, although on purely technical grounds; the court refused to rule on the issue of whether the regulations on which the defendant relied to reject hiring HBV carriers as civil servants violated the plaintiff's constitutional rights of equality and political participation.⁸⁷

The Chinese government has gradually recognized the discrimination and tried to alleviate the tension. On January 20, 2005, China's Ministry of Personnel and Ministry of Health jointly issued a new regulation called the General Standards on Physical Examinations Relating to the Employment of Civil Servants (Trial Implementation). The regulation states that an applicant for a civil servant position would be disqualified if infected with HBV, but carriers of the virus are qualified so long as a contagious infection can be ruled out through further tests.⁸⁸ This new regulation can be seen as a significant achievement for the HBV carriers in China who consistently fight for equal rights. However, due to the widespread and deeply rooted discrimination against HBV carriers, and in spite of the government agencies' efforts to decrease the discrimination, uniform enforcement of antidiscrimination laws remains a challenge.⁸⁹

III. THE CURRENT ANTI-EMPLOYMENT-DISCRIMINATION MECHANISM IN CHINA

The goal of eliminating employment discrimination is recognized in China. However, despite the fact that in recent years many people have brought employment discrimination suits, few have ever won such a case in China.⁹⁰ An examination of China's anti-employment-discrimination legal framework suggests that the inherent inadequacy and internal inconsistency of Chinese legislation, as well as barriers and failures within the court system, present the two main sources of this problem.

87. *Id.*

88. See *Gongwuyuan Luyong Tujian Tongyong Bianzhun (Shixing)* [The General Standards on Physical Examinations relating to the Employment of Civil Servants (Trial Implementation)], ZHONGGUO WANG [China Net], Jan. 20, 2005, <http://www.china.com.cn/chinese/zhuanti/pta/763351.htm> (indicating standards regarding civil service employment for HBV infected individuals).

89. Chang, *supra* note 82 ("Hadler notes that some government agencies and NGOs have worked to decrease discrimination, but that 'the uniform enforcement of the laws is always a challenge.'").

90. Zhao Zhijiang, *Qiaodong fanjiuye qishi de zhidian shi falu baozhang* [The Pivot of Anti-employment-discrimination is Legal Protection] CHINA YOUTH DAILY, Jan. 9, 2007, available at <http://www.chinacourt.org/public/detail.php?id=229994>.

A. *China's Current Anti-employment-discrimination Laws*

1. The Constitution of the People's Republic of China (1993) and Judicial Review

Article 33 of the Constitution of the People's Republic of China establishes that "All citizens of People's Republic of China are equal before the law. Every citizen is entitled to the rights and at the same time must perform the duties prescribed by the Constitution and the law."⁹¹ It specifically guarantees women "equal rights with men in all spheres of life, in political, economic, cultural, social and family life."⁹²

Since many employment discrimination victims cannot find direct legal support in statutory law, they have to base their cause of action solely on a right enumerated in the Constitution, namely the Constitution's "equal rights" provision.⁹³ However, the outcome of these cases suggests that the "equal rights" provision in Constitution provides weak support to their case and in effect, the Constitution is not directly actionable. It is "more like a declaration of policy than actionable law."⁹⁴ Chinese constitutional rights are "granted, modified, suspended, and withdrawn for the sole purpose of implementing particular policies."⁹⁵ Therefore, "any right listed in the Constitution is only a "theoretical possibility of a right, and one must look to individual laws for actual effective government policy."⁹⁶ A comment may explain the situation: "That the act of some governmental body may have been in violation of the Constitution is not an argument against the act's legal validity. The courts do not have the power to base decision on the constitutional provisions, and constitutional rights are not protected except by statute."⁹⁷

Another troubling phenomenon is the courts' extreme reluctance to interpret the Constitution to find a particular law or government enactment in violation of the Constitution. The rejection of interpretation of constitutional law by Chinese courts results in a highly restricted reading of these rights, and in effect, it causes the constitutional rights to be inactionable.⁹⁸ There are remarkable similarities among Mr. Jiang Tao's aforementioned height discrimination case, Mr. Zhou Xianghua's

91. XIAN FA art. 33 (1993) (P.R.C.), *translated in* 5 P.R.C. LAWS at 20.

92. *Id.* at art. 48, *translated in* 5 P.R.C. LAWS at 22.

93. *See supra*, Part II.B.

94. *See* Bulger, *supra* note 20, at 361.

95. *Id.*

96. *Id.* (quoting Ann D. Jordan, *Women's Rights in People's Republic of China: Patriarchal Wine Poured From a Socialist Bottle*, 8 J. CHINESE L. 47, 58 (1994)).

97. Donald C. Clarke, *What's Law Got to Do With It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1, 33 (1991).

98. *See* Bulger, *supra* note 20, at 361.

aforementioned age discrimination case, and Mr. Zhang Xianzhu's aforementioned HBV carrier discrimination case.⁹⁹ In all three cases, the plaintiffs cited the Constitution as their sole or primary authority, arguing that the employment discrimination violated their constitutional rights to equal treatment. The defendants in these three cases are all government agencies. However, in each of the three cases, the courts tried all available means to avoid interpreting the Constitution. In Jiang's case, the court refused to review the case because of mootness (the defendant had removed the questionable advertisement). In Zhou's case, the court adjudicated the case, but held that the plaintiff's claim lacked legal support. Furthermore, in Zhang's case, the court held that the defendant's specific administrative action (to refuse to hire the plaintiff) was inappropriate because it was unsupported by evidence. However, in Zhang, the Court never ruled on the constitutionality of the defendant's hiring practice. Thus, in practice, if a plaintiff in an employment discrimination case only has a claim of "equal right" under the Constitution and does not have a given right supported by a specific law or regulation, his or her right to equal employment opportunities would usually not be recognized or protected.¹⁰⁰

2. The Labor Law (1994)

Article 3 of The Labor Law of the People's Republic of China provides:

*Laborers shall have equal right to employment and choice of occupation, the right to remuneration for labor, to rest and vacations, to protection of occupational safety and health, to training in vocational skills, to social insurance and welfare, to submission of labor disputes for settlement and other rights relating to labor stipulated by law.*¹⁰¹

It further stipulates in Article 12 that "Laborers, *regardless of their ethnic group, race, sex or religious belief*, shall not be discriminated against in employment."¹⁰²

The Labor Law provides very limited legal support for plaintiffs in employment discrimination cases. First, the scope of employment discrimination defined in the Labor Law is very narrow; Article 12 indicates that the Law only prohibits employment discriminations based on four limited grounds: ethnic group, race, religion and sex. Other types of employment discrimination, such as age discrimination and height discrimination, are not prohibited. Second, the Labor Law includes many

99. *See supra*, Parts I & II.B.

100. *See* Clarke, *supra* note 9, at 33.

101. Labor Law art. 3, *translated in* 6 P.R.C. LAWS at 56 (emphasis added).

102. *Id.* art. 12, *translated in* 6 P.R.C. LAWS at 57 (emphasis added).

vague and ambiguous terms without giving precise definition. There is no definition of “discrimination” in Chinese legislation.¹⁰³ Third, under the Labor Law, laborers “shall not be discriminated against in employment.” The term “employment” is not defined in the law.¹⁰⁴ The plain meaning of the Chinese term “jiuye”, although translated to the word “employment”, has a narrower meaning than “employment.” It is thus unclear whether the scope of employment encompasses all process of employment, including recruitment, training, evaluation, promotion and termination. As such, the Labor Law in China is not operative as a general anti-employment-discrimination mechanism. While the Labor Law does provide enforcement provisions for gender discrimination, there are no enforcement provisions prohibiting other forms of employment discrimination. Furthermore, the Law fails to provide legal criteria, burden of proof, and legal remedies.¹⁰⁵

3. Other laws and Regulations

Recent progress has been made in laying the foundation of a more comprehensive approach to eliminate employment discrimination in China. However, the existing employment discrimination legislation in China primarily focuses on the elimination of gender inequality. For the other types of employment discrimination, China takes a largely passive, patchy, and unsystematic approach, by taking either little or no action until social pressure has reached the point where the government can no longer ignore public demand for change.¹⁰⁶ This approach can be identified and illustrated by two examples.

The first example is China’s legislation dealing with the employment discrimination against the HBV carriers. In 2003, the Zhou Yichao case caught much public attention and inspired a great deal of social sympathy.¹⁰⁷ During Zhou’s trial, more than 3,700 people petitioned the court for leniency.¹⁰⁸ Most of the public dissatisfaction was directed against the government’s discriminatory hiring practices. Fearing massive

103. *Id.* See also Press Release, Committee to Eliminate Discrimination Against Women Recognizes China’s Advances Since Last Review, But Urges Greater Progress, U.N. Doc. WOM/1575 (Aug. 10, 2006) available at <http://www.un.org/News/Press/docs//2006/wom1575.doc.htm> (noting the concern of international experts regarding the absence of a definition for discrimination).

104. Labor Law art. 3, translated in 6 P.R.C. LAWS at 56.

105. *Id.*

106. This approach can be observed in the Chinese government’s response to the public objection to employment discrimination against HBV carriers and migrant workers seeking jobs in urban areas.

107. See *supra* Part II.B.4.

108. See *infra* Part IV.A.1.

social pressure, the government in 2005 adopted the General Standard on Physical Examinations Relating to the Employment of Civil Servants, stating that HBV carriers will be able to pass the physical examination.¹⁰⁹ However, the government did not extend this beyond civil servant employment: it still has not adopted any legislation prohibiting systematic and institutionalized discrimination against HBV carriers.

The second primary example is China's authorization of residency discrimination. China has a long history of systematic and institutionalized discrimination against rural residents seeking employment in urban areas.¹¹⁰ In 2001, a 27-year-old college graduate, Mr. Sun Zhigang, was detained by the Police in Guangzhou because he did not have temporary residence permit; "three days later he died at a clinic for holding vagrants and beggars."¹¹¹ Further investigations determined that Sun Zhigang was beaten to death in the local police station.¹¹² Sun was a victim of China's residency discrimination, and his case was extensively discussed in China. In 2003, under the force of huge social pressure, China issued an executive directive prohibiting job discrimination against rural migrants.¹¹³

Because of the government's passive and patchy approach, the existing regulations are generally insufficient, and the enforcement provisions in many major anti-employment-discrimination laws and regulations are substantially lacking. For example, in 2000, the Ministry of Labor and Social Security (MOLSS) issued the Regulations on Labor Market Management, which prohibits discrimination in recruitment based on the basis of "gender, nationality, race or religion" in the Article 12.¹¹⁴ But the law provides only administrative penalties without specific remedies to the victim of Article 12 violation.¹¹⁵

109. *Supra* Part II.B.4.

110. The P.R.C government implemented a household registration system called "Hukou" system in the 1950's which requires Chinese citizens to register either as urban or rural residents. The system effectively restricts rural residents' ability to travel to and seek employment in the urban areas. Cong. Executive Comm'n on China, *China's Household Registration System: Sustained Reform Needed to Protect China's Rural Migrants* (Oct. 7, 2005).

111. *84 Days and Nights in Guangzhou*, CHINA.ORG.CN, July 8, 2003, <http://www.china.org.cn/english/2003/Jul/69295.htm>.

112. *Id.*

113. Guowuyuan Bangongting Guanyu Jin yi bu zuo hao Wanshan Nongmin Jincheng jiuye Huanjing Gongzuo de Tongzhi [State Council Office Notice Regarding Improving Employment Prospective for Migrants in Urban Areas], issued Dec. 27, 2004, available at http://www.gov.cn/zwjk/2005-08/15/content_23262.htm (The directive instructs local governments to remove discriminatory regulations and unreasonable limitations on rural migrants seeking employments in the urban areas).

114. LAODONGLI SHICHANG GUANLI GUIDING [Regulation on Labor Market Management], art. 12, effective Dec. 8, 2000 (P.R.C.), available at <http://www.people.com.cn/zcxx/2000/12/121401.html>.

115. *Id.*

B. *The Current Enforcement Mechanism*

In China, mediation and litigation are two basic mechanisms in enforcing people's labor rights.¹¹⁶ "China's current system for enforcing individual labor rights is to first channel them into intra-enterprise mediation, and then into the arbitration under labor bureaus vertically connected with the MOLSS and horizontally connected with the local governments."¹¹⁷ Additionally, "[t]he labor tribunals mediate and arbitrate the labor rights issues that arise from both contracts and statutes."¹¹⁸ However, as discussed above, many types of employment discrimination are not prohibited by a specific law.¹¹⁹ Moreover, many employment discrimination victims have no claims because they are simply job applicants and don't have contracts with the employers. As such, the victims would have no claims arising from either contract or statutes; all that they can do is to seek judicial help directly.¹²⁰

Today more and more people take legal actions to challenge government's discriminatory regulations and practices. Insufficient legal support is a significant legal barrier for plaintiffs to win an employment discrimination case.

IV. PROTECTING EQUAL EMPLOYMENT OPPORTUNITIES IN CHINA

A. *China Should Develop a Coherent Public Policy to Eliminate Employment Discrimination*

Many countries treat anti-employment-discrimination law as one of their most basic legislative acts.¹²¹ By contrast, China has not fully realized the significance of assuring equal employment opportunities. For quite a

116. Labor Law art. 77, *translated in* 6 P.R.C. LAWS at 67 ("If a labor dispute between employing unit and a laborer arises, the parties may apply for mediation or arbitration or take legal proceedings according to law, or may seek for a settlement through consultation").

117. Brown, *supra* note 18, at 408; Labor Law arts. 77-84, *translated in* 6 P.R.C. LAWS at 67-68.

118. Brown, *supra* note 18, at 409.

119. *See supra* Part III.A.3.

120. Brown, *supra* note 18, at 408; Labor Law arts. 77-84, *translated in* 6 P.R.C. LAWS at 67-68.

121. For example, among other laws, the United States has enacted Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991 to prohibit various forms of employment discrimination. The United Kingdom has enacted the Sex Discrimination Act of 1975, the Disability Discrimination Act of 1995 and Employment Equality Regulations. Canada has enacted the Employment Equity Act – Chapter E-5.4 (1995, c. 44).

long time China has focused its attention on issues such as creating more employment opportunities, avoiding a high unemployment rate, or arranging re-employment for laid-off workers.¹²² Undoubtedly these issues are critical to economic development, but the value of equal opportunities should not be ignored. To gain healthy and rapid development, a fair system that assures equal opportunities is essential. A Chinese college graduate said in an interview, “We are not afraid of competitions [in the job market], we are afraid of not having an equal opportunity to compete.”¹²³

The employment pressure, together with people’s constant frustration due to employment discrimination and their increasing awareness of rights, will inevitably cause social tension, and may lead to social discontent and unrest. With a huge labor force, significant problems in China’s labor sector would have the potential to seriously impede economic reforms and negatively affect social stability in China. As discussed above, China is taking a patchy and passive approach to deal with its employment discrimination problems in order to alleviate social tensions.¹²⁴ However, this approach is not enough to cure the overwhelming, pervasive, and widespread employment discrimination in China, but rather may only be used as a temporary measure. In the long term, it results in an internally inconsistent antidiscrimination system; in practice, due largely to problems with enforcement, it has failed to produce an overall improvement in protecting people’s equal employment rights. The Chinese government is urged to adopt a more comprehensive approach and to develop a coherent public policy. Identified below are three significant pressures for such a legislative reform.

1. Increasing Social Awareness of the Right of Equality

Employment discrimination is fundamentally unfair because it imposes costs on the victim as a result of their immutable characteristics, which are unrelated to the individual’s abilities.¹²⁵ According to the 2006

122. See Information Office of the State Council of the People’s Republic of China, *China’s Employment Situations and Policies*, XINHUA NET, Apr. 2004, available at http://news.xinhuanet.com/zhengfu/2004-04/26/content_1440838.htm (discussing China’s employment policies).

123. *Getou Buzu Yi Mi Wu Bei Shouhui Zhunkaozheng, Baokao Gongwuyuan Zhaoyu Shengao Qishi*, [An Applicant was Not Permitted to Take the Public Servant Qualification Exam due to Her Height] ZHONGGUO WANG [China Net], March, 28, 2002, available at <http://www.china.com.cn/chinese/EDU-c/124661.htm> (noting a college student was not permitted to take the Public Servant Qualification Exam because she was too short).

124. See *supra* Part III.A.3.

125. See MICHAEL ZIMMER ET. AL, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 33-54 (5th ed. 2000). The underlying theory of prohibiting discrimination emerges from the consideration of fairness and morality. Most obviously, discrimination on the basis of certain characteristics, such as gender and height, is usually viewed as unfair

Employment Discrimination Survey, the Chinese people's social awareness of the inherent unfairness of employment discrimination is low.¹²⁶

However, an increasing number of people are becoming aware of their rights: in recent years, more and more Chinese citizens have sued in court based on employment discrimination.¹²⁷ Most important of all, people with similar interests have begun to group together to fight against employment discrimination. This trend is clearly identified by the so-called "HBV carrier movements for equal rights."¹²⁸ The Zhou Yichao case, discussed above, marked the beginnings of the HBV carrier movement.¹²⁹ During his trial, more than 3700 people, most of whom are HBV carriers, petitioned the court for leniency.¹³⁰ This petition asserted that the employment discrimination against the HBV carriers in China is so severe that they faced a survival crisis due to the frequent frustrations met in seeking jobs. Further, it made the statement that, because the group of affected individuals is so large, it was "inevitable" that some people in the group such as Zhou Yichao would go to such desperate extremes.¹³¹

Compared to other groups similarly vulnerable to employment discrimination, the HBV carrier group has the largest population (120 million), and is more socially active and organized. In China, many HBV carriers have met each other through a website, www.hbvhbv.com--"the HBV Carrier BBS"; they call themselves "HBVers" and as a group consistently fight for their own rights against social stereotypes and institutional discrimination.¹³² A large number of HBVers have completed college or graduate schools with a variety of professional backgrounds;¹³³ they are often more aware of their own rights, and thus less willing to swallow the bitter reality of employment discrimination. They have formed a large interest group with strong and clear claims: they want equal employment opportunities and other equal rights.¹³⁴ They have taken many steps to protect their rights, including providing legal help to other HBV carriers who have brought suits, contacting national and international organizations and media, inviting celebrities to be spokespersons to attract

because such characteristic are immutable, and therefore, beyond an individual's control.

126. See *Discrimination in Work and Employment*, *supra* note 46.

127. See *supra* Part II.

128. Tang Jianguang, *HBVER Weiquan Yundong* [HBV Carrier Movements for Equal Rights], *ZHONGGUO XINWEN ZHOUKAN* [Chinese Newsweek], Vol. 157, Nov. 24, 2003, <http://www.chinanewsweek.com.cn/2003-11-27/1/2631.html> (describing the HBV carriers in China's movement to fight against discrimination).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

more attention, among others.¹³⁵

In November 20, 2003, 1611 Chinese citizens submitted a petition to the National Party Commission (NPC, the Chinese legislative institution) and the State Council of the People's Republic of China (the Chinese administrative institution) requesting a review of the constitutionality of the hiring practice of the 31 provinces which exclude HBV carriers, and further calling for legislation protection for HBV carriers.¹³⁶ The petition says, "31 provinces, cities and districts have adopted a 'Civil servant Physical Examination Standard' which disqualifies HBV carriers.¹³⁷ It deprives 120 million HBV carriers the right of being a civil servant.¹³⁸ This is a serious violation of people's labor rights and right of equality granted by the Chinese Constitution."¹³⁹ Notably, this petition by the HBV carriers ends by mimicking the words of Dr. Martin Luther King: "We have a dream that one day we can study, work and live like all other people. We hope this day is no longer far away from us."¹⁴⁰

Will the HBV carrier movement mark the beginning of China's potentially larger employment rights (or civil rights) movement? This remains to be seen. One thing is for certain: with the advance of the HBV carrier movement, more Chinese people will become aware of their equal employment rights, and they will choose to stand up and fight for them. It will be difficult for the government to ignore so many people's claims.

2. Employment Discrimination Affects Social Stability

Employment discrimination can cause many social problems. First, employment discrimination is closely related to the problem of unemployment.¹⁴¹ Because of the changing nature of China's job market, with an influx of individuals seeking jobs as a result of the closing of SOEs, at least one scholar has suggested a potential "deteriorating situation that could undermine social stability"¹⁴² In a competitive labor market with high unemployment rate, people who are subject to employment discrimination tend to lose confidence in society, causing further social

135. *Id.*

136. *1611 ren suqing weixian shencha, huyu xiugai kao gongwuyuan yigan jinling* [1,611 Chinese Citizens Petition for Constitutionality Review, Asking for a Lift of Ban on HBV Carriers to Become Civil Servants], XINHUA NET, Nov. 26, 2004, http://news.xinhuanet.com/legal/2003-11/26/content_1198971.htm.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *See supra* Part II.

142. *China Faces Worst Unemployment Problems in 4 years*, ASIAN ECONOMIC NEWS, May 6, 2002, http://findarticles.com/p/articles/mi_m0WDP/is_2002_May_6/ai_85519929.

problems. The Zhou Yichao case is a typical example.¹⁴³

The economic consequence of employment discrimination is another social concern. Chinese leaders have frequently expressed the government's wish to create "social harmony."¹⁴⁴ "Social harmony is a complicated issue arising from unbalanced regional development, uneven allocation of resources, unfair distribution of income, corruption, and deficiencies in [the Chinese] legal system."¹⁴⁵ But "Chinese officials and researchers now generally agree that the widening wealth gap is the major factor hampering social harmony."¹⁴⁶ The direct consequence of employment discrimination is an infringement of people's ability to earn a living, which "can be devastating to individual victims and to the groups to which they belong."¹⁴⁷ In general, poor people are more vulnerable to employment discrimination than wealthier people because the poor are often older, less educated, or lack social networks, and the poor will become even poorer if they cannot find appropriate employment.

The government claims that they would narrow the income gap through reforms in the current wealth distribution system.¹⁴⁸ Among other measures, taking steps to ensure equal employment opportunities for all people is important to achieving the goal of social harmony. Eliminating discrimination in the workplace can improve the economic condition of older people by ensuring that they can compete equally for jobs on the basis of their qualifications. On the other hand, "if the government fails to take effective measures to narrow inequalities, the public may stop supporting its economic reform and open-door policy, resulting in more social unrest."¹⁴⁹

143. See *Zhejiang College Graduate Killed Civil Servant*, *supra* note 83.

144. See *Development Seeks to Achieve Social Harmony*, CHINA DAILY, Sept. 13, 2006, available at <http://www.china.org.cn/english/GS-e/180978.htm>.

145. *Id.*

146. Wu Zhong, *China Yearns for Hu's 'Harmonious Society'*, ASIA TIMES, Oct. 11, 2006, available at <http://www.atimes.com/atimes/China/HJ11Ad01.html> ("A [2005] survey by the National Bureau of Statistics . . . showed that 10% of urban residents commanded 45% of the total wealth in Chinese cities, while the bottom 10% shared only 2% of the total wealth. Another survey, by the New Fortune Magazine, showed that in 2003, the top 400 tycoons had already amassed more than 303 billion yen (US\$38 billion)--more than triple that year's entire gross domestic product . . . of Guizhou, one of China's poorest provinces . . . The wealth gap between urban and rural area is also expanding").

147. See ZIMMER, *supra* note 125, at 34.

148. The inequitable wealth distribution system and huge income disparities have become a social concern. On May 26, 2006, the Central Committee of the Communist Party of China held a meeting emphasizing wealth distribution reform and the regulation of the wealth distribution rules. *Hu jintao Zhuchi Zhengzhiju Gongzuo Huiyi, Yanjiu Gaige Shouru Fenpei Zhudu*, [Hu Jintao Held a Meeting for the Political Bureau of the Central Committee to Address the Issue of Wealth Distribution Reform], XINHUA NET, May 26, 2006, http://news.xinhuanet.com/newscenter/2006-05/26/content_4605552.htm.

149. Wu, *supra* note 146.

3. The Pressure from the International Society

Globalization may provide a strong argument for eliminating employment discrimination in China. According to the International Labor Organization (ILO)'s 2003 global report entitled "Time for Equality at Work", "[t]he elimination of discrimination at work is essential if the values of human dignity and individual freedom, social justice and social cohesion are to go beyond formal proclamations."¹⁵⁰

As a member of the ILO,¹⁵¹ China is obligated to recognize certain rights considered to be fundamental to every human being.¹⁵² These fundamental rights are: "(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labor; (d) and the elimination of discrimination in respect of employment and occupation."¹⁵³ ILO member countries recognize these rights by adopting various conventions, recommendations, and declarations. Since the member states adopted the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, the recognition of the four core fundamental rights has been required by all ILO members.

The labor standards promoted by the ILO consist of international labor conventions and recommendations.¹⁵⁴ In 1990, China ratified the ILO Convention on Equal Remuneration for Equal Work.¹⁵⁵ On December 1, 2006, China finally made the decision to ratify the ILO Discrimination (Employment and Occupation) Convention (No. 111).¹⁵⁶

Convention No. 111 imposes a substantial obligation to take affirmative measures to eliminate employment discrimination, which may

150. Int'l Labour Organisation [ILO], International Labor Conference, 91st Session, 2003, *Time for Equality at Work*, Report I(B), ix., available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=1558.

151. ILO, Alphabetical List of ILO Member Countries, available at <http://www.ilo.org/public/english/standards/re/m/country.htm> (last visited Mar. 20, 2007).

152. ILO, *Declaration on Fundamental Principles and Rights at Work and Annex*, June 18, 1998, 37 I.L.M., 1233, 1237-38 (1998).

153. *Id.* at 1238.

154. THE CONSTITUTION OF INTERNATIONAL LABOR ORGANIZATION, art. 19, ¶ 1 (1944) available at <http://www.ilo.org/public/english/about/iloconst.htm> (stating that proposals should take the form of either an international Convention or a Recommendation).

155. See <http://www.ilo.org/ilolex/english/convdisp1.htm> (follow "C100" hyperlink, then follow "See the ratifications for this Convention" hyperlink) (last visited Mar. 28, 2007) (listing ILO Conventions and when they were ratified by member states). International Labor Organization Convention (No. 100): Concerns Equal Remuneration for Men and Women for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303.

156. See <http://www.ilo.org/ilolex/english/convdisp1.htm> (follow "C100" hyperlink, then follow "See the ratifications for this Convention" hyperlink) (last visited Mar. 20, 2007) (listing ILO Conventions and when they were ratified by member states).

cause major changes to China's domestic laws.¹⁵⁷ Under Article 3, each member of the Convention is to undertake, "by methods appropriate to national condition and practice . . . to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy"¹⁵⁸

Specifically, under this convention, the term "discrimination" includes:

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.¹⁵⁹

The broad definition of "discrimination" under Convention No. 111 will provide an excellent guideline for China to enact its own antidiscrimination laws because it clarifies the legal definition of "discrimination".

Ratifying the Convention is significant progress in China's effort to combat employment discrimination. Under this Convention, many instances of employment discrimination currently existing in China would be prohibited. For example, the Convention specifically prohibits discrimination based on "social origin,"¹⁶⁰ which encompasses the widespread discrimination against the internal migrant workers in China.

Conventions are binding treaties upon the Members which ratify it.¹⁶¹ The ILO is structured with significant monitoring and reporting powers, but Article 33 of the ILO's Constitution also gives the ILO certain enforcement powers: "In the event of any Member failing to carry out within the time specified the recommendations . . . the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith."¹⁶² Historically, the ILO is more likely to rely on less confrontational methods--such as public shaming--than it is to issue documentation in the form of ILO reports and use technical expertise and

157. International Labor Organization Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31.

158. *Id.* at 32.

159. *Id.* at 31-32.

160. *Id.*

161. THE CONSTITUTION OF INTERNATIONAL LABOR ORGANIZATION, art. 20 (1944) available at <http://www.ilo.org/public/english/about/iloconst.htm>.

162. *Id.* at art. 33.

financial assistance to promote compliance with its international labor standards.¹⁶³ China's application of ILO core labor standards and Convention No. 111 is supervised by the ILO. Therefore, it is time for China to consider adopting more antidiscrimination measures to better comply with international standards.

V. ESTABLISHING AN ANTI-EMPLOYMENT-DISCRIMINATION SYSTEM IN CHINA

Based on the previous discussion, and given the widespread public demand for action against discrimination and the international obligation to take such action, it is important that China adopt a systematic and comprehensive approach to eliminate its employment discrimination. Such an approach may include developing a coherent antidiscrimination policy and establishing a comprehensive anti-employment-discrimination system, including enacting anti-employment-discrimination laws and establishing an independent agency to enforce such law and the policy.

A. *Enacting an Antidiscrimination Law*

First, China should enact a comprehensive body of antidiscrimination law to deal with the various aspects of employment discrimination. Without a basis in law, an individual who feels his or her rights to employment have been violated has no real cause of action. In 2005, a delegate of the National People's Congress (NPC) stated that "[a] law on fair employment is an urgent need in China."¹⁶⁴ Furthermore, he explained that a harmonious society should allow talent to compete equally and develop to its fullest because wasting human resources would not facilitate economic or social development.¹⁶⁵

Any newly enacted antidiscrimination laws should clearly recognize the principle that employment discrimination is prohibited. What follows are some legislative suggestions for China's new antidiscrimination laws.

163. See Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361, 388-389 (1995) ("The ILO relies on moral persuasion, publicity, shame, diplomacy, and dialogue to ensure compliance by member states. . . . Moreover, the ILO rarely utilizes its contentious proceedings."); Michael J. Trebilcock & Robert Howse, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL TRADE 261, 274 (2005) (discussing ILO's use of "soft" enforcement mechanisms, including public shaming as well as provision of technical expertise).

164. NPC Deputy Proposes Law Against Employment Discrimination, PEOPLE'S DAILY, Mar. 3, 2005, available at http://english.peopledaily.com.cn/200503/04/eng20050304_175554.html.

165. *Id.*

1. The Scope of Law and the “Protected Class” of Workers

Antidiscrimination laws generally prohibit employers from basing their employment decisions on membership in a protected group, “rather than on an employee’s qualification or some other neutral factor”.¹⁶⁶ Therefore, the term “employment discrimination” is usually limited to discrimination against employees on the basis of “statutorily defined characteristics”.¹⁶⁷ As such, definition of discrimination against employees on the basis of statutorily defined characteristics should be clearly stated.

The Chinese Labor Law provides legal protection against discrimination based on race, ethnicity, gender and religious belief.¹⁶⁸ However, as discussed above, there are insufficient legal protections for workers who are older, disabled, HBV carriers, or have other medical problems.¹⁶⁹ The new antidiscrimination law should expand the scope of prohibited employment discrimination to at least include age, height, disability, social origin, and certain medical conditions and diseases.

Furthermore, any anti-employment-discrimination law should clarify the scope of the coverage of protected classes.¹⁷⁰ The existing antidiscrimination laws and regulations are inconsistent and confusing.¹⁷¹ Currently, the people whose rights are “protected by some type of antidiscrimination law must look to a variety of laws and institutions to determine their rights.”¹⁷² “For example, the Women’s Rights Law purports to protect female applicants, while Labor Law only protects female employees. Disabled workers have varying rights in public and private employment, and those with certain medical ailments may be protected differently as civil servants than elsewhere.”¹⁷³ A new antidiscrimination law would change the situation by establishing a general law against employment discrimination.

2. The Defenses Available to Employers

The new law should impose both general and vicarious liability on employers for unlawful acts of employees committed during the course of employment. The business community in China may worry that the new law would limit the employer’s discretion in hiring and would be hard to

166. ZIMMER, *supra* note 125, at 33.

167. *Id.*

168. Labor Law art 12, *translated in* 6 P.R.C. LAWS at 57.

169. *See supra* Part III.

170. Brown, *supra* note 18, at 422 (arguing that clarifications as to what rights are protected under Chinese labor laws are needed).

171. *See supra* Part IV.

172. Brown, *supra* note 18, at 422.

173. *Id.*

enforce in practice because it will be difficult to distinguish between discrimination and legitimate hiring criteria. It should be pointed out that the antidiscrimination laws only focus on prohibiting employers from making employment decisions based on membership in statutorily protected groups.¹⁷⁴ Therefore, some other bases of differentiation, if relating to job qualification, are perfectly legal.

To ease the difficulty that would be placed on employers, the new law should provide employers with certain affirmative defenses against discrimination complaints. One option is that the new law could allow an employer to avoid liability if they can prove they have taken all reasonably practicable steps to prevent the unlawful acts. Alternatively, China could provide one such defense by adopting the United States' bona fide occupation qualification (BFOQ) standard in determining the existence of employment discrimination. The BFOQ is a defense against claims of discrimination in employment under Title VII of the Civil Rights Act of 1964 of the United States.¹⁷⁵ The BFOQ defense permits employers to make hiring decisions based on otherwise prohibited reasons, such as sex, if such decisions are necessary for the "normal operation of [the] particular business or enterprise"¹⁷⁶ For example, the BFOQ exception permits hospitals to hire nurses based on gender because respecting the privacy interests of patients is essential to the business of running a hospital. In contrast, because gender is not essential to the business of transporting passengers, gender is not a BFOQ for the position of airline attendant.¹⁷⁷

3. Application

The new law should have broad application, covering employees and prospective employees, contract workers, commission agents, and partners and prospective partners. One significant weakness of the current legislation is that job applicants are not protected against employment discrimination. The Labor Law states only "laborers who form a labor relationship" and "laborers who form a labor contract relationship" have labor rights.¹⁷⁸ Under the Labor Law, the job applicants would not have labor rights and thus cannot challenge an employer's discriminatory hiring practices.¹⁷⁹ However, many instances of employment discrimination arise during the course of recruitment.¹⁸⁰ If the job applicants are not afforded

174. ZIMMER, *supra* note 125, at 33.

175. 42 U.S.C. § 2000e-2(e) (2000).

176. *Id.*

177. *Id.*

178. Labor Law art 2, *translated in* 6 P.R.C. LAWS at 56.

179. Brown, *supra* note 18 at 402.

180. *See supra* Part III.

meaningful protections under the new law, the employment discrimination would not be effectively prohibited. Therefore, the new law should specify that protection from unlawful discrimination is extended to applicants.

The statute should also apply both to the public sector as well as the private sector. The Chinese government--the country's largest employer--usually commits various forms of employment discrimination by imposing unreasonable restrictions on applicants' qualifications, and therefore any new law needs to be extended to cover the government.¹⁸¹ Moreover, as discussed above, China has ratified the ILO's Convention No. 111.¹⁸² Therefore, the Chinese government should be guided by both its legal and international obligations to eliminate its internal discriminatory practices.

4. Remedies and Enforcement

Effective remedies and enforcement should be two basic components of the antidiscrimination law. Strong legislative remedies can enhance enforcement and serve as both a deterrent to employers who violate the law and provide an incentive to enforce the law.¹⁸³ As such, the impact of the new law should be measured by what remedies are available to victims and the effectiveness of the law's implementation.

In the United States, under the Civil Rights Act of 1991, parties can obtain jury trials and recover compensatory as well as punitive damages, in Title VII and ADA (Americans with Disabilities Act) lawsuits involving intentional discrimination.¹⁸⁴ Under these statutes, "many corporate giants have been held liable for millions-of-dollars in monetary penalties for violations. These liabilities, coming from in the form of back pay, front pay, compensatory damages, and even punitive damages are thought to act as a deterrent to law violators."¹⁸⁵

China does not have jury trials, so it is necessary to provide the nature and the amount of damages in the statute. The monetary damages should include compensatory damages and punitive damages. The rationale is that "profit-motivated employer[s] naturally pay better attention to labor laws when the possibility of large monetary liability exists."¹⁸⁶

Moreover, the effectiveness of the laws will depend largely on how

181. See *supra* Part II and notes 47-48.

182. See *supra* note 151.

183. Brown, *supra* note 18, at 425.

184. Under the Civil Rights Act of 1991, punitive damages may be awarded under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), when the claimant has demonstrated that the respondent has engaged in unlawful practices with malice or with reckless indifference to the individual's protected rights. 42 U.S.C. § 1981 (2000); 42 U.S.C. § 2000e (2000).

185. Brown, *supra* note 18, at 425.

186. *Id.*

proactive the enforcement agency is with regard to aiding complaints, investigating employers, and enforcing the laws.¹⁸⁷ This author's suggestion is that China should establish a specialized enforcement agency to handle anti-employment-discrimination laws and to promote a policy of enforcing equal employment opportunities for the public. This subject is explored in detail in the next subsection.

5. Set up an Independent Enforcement Agency in China

Under the current legal framework in China, the capacity to monitor and enforce the settlement of labor disputes within the legal system is generally weak.¹⁸⁸ To enforce an antidiscrimination law, prevent future violations, and provide remedies to victims, it is necessary for China to establish an independent enforcement agency to promote and protect equal employment opportunities. Many countries and districts in the world have established an independent mechanism to enforce equal employment opportunities: for example, in the United States, Title VII of the Civil Rights Act of 1964 created the Equal Employment Opportunity Commission (EEOC) to combat employment discrimination.¹⁸⁹ In 1996, Hong Kong established a "statutory body," the Equal Opportunity Commission (EOC), to "implement the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance."¹⁹⁰

In many countries, such enforcement agencies have proved to be effective mechanisms in combating employment discrimination. The EEOC in the United States receives approximately 80,000 private sector charges annually.¹⁹¹ Similarly, as one scholar noted, the EOC in Hong Kong has also achieved a remarkable accomplishment since its establishment in 1996 by "producing a large volume of educational materials, handling a steadily increasing number of complaints, and

187. Xun Zeng, *Zhongguo Fanjiuye Qishi Lifa Wenti Chutan: Jianlun Meiguo Fanjiuye Qishi Lifa Zhi jiejian* [An Overview of Chinese Anti-employment-discrimination Legislations and Lessons from the U.S. Legislative Experience], BEIDA FALV XINXI WANG [Peking University Law Information Net], <http://www.chinalawinfo.com/research/academy/details.asp?lid=3907> (last visited March 20, 2007).

188. See *supra* Part III.

189. 42 U.S.C. § 2000e-4(a) (2000).

190. EOC Corporate Statement, *available at* <http://www.eoc.org.hk/EOC/GraphicsFolder/showcontent.aspx?content=Vision%20and%20Mission> (last visited Mar. 20, 2007).

191. U.S. Equal Employment Opportunity Commission: Charge Statistics FY 1997 Through FY 2006, <http://www.eeoc.gov/stats/charges.html> (last visited July 7, 2007) (indicating the number of total charges EEOC received for fiscal year 1997 to 2006 varies from 75,000 to 84,000).

litigating some high-profile cases.”¹⁹²

In the past, China has established independent commissions to enforce specific laws for the protection of specific groups, including the State Council established by the Women and Children’s Affairs Commission, the State Nationalities Affairs Commission, and the State Religion Affairs Commission, which respectively assume the responsibilities of safeguarding the rights of women, protecting rights of minority nationalities, and protecting the freedom of religious belief of all citizens.¹⁹³ Similarly, setting up an independent and specialized agency in China to enforce antidiscrimination laws, promote equal employment opportunities, and protect groups in need of protection from employment discrimination should not be impossible.

The operations of the agencies in both the United States and Hong Kong are fundamentally similar. As enforcement agencies, they have the power to investigate facts and enforce the law.¹⁹⁴ Additionally, the agencies are organized and funded by the government as public bodies.¹⁹⁵ Both of these features should be true of the Chinese agency.

This enforcement agency should have significant responsibilities and multilateral functions. In both the United States and Hong Kong, the central functions of such an agency are investigating facts and advocating for victims.¹⁹⁶ If a person claims to be aggrieved by an alleged act of discrimination, he or she may file a charge with the agency. Upon the receipt of a complaint, the agency should conduct investigation and determine whether there is reasonable cause to believe the charge is true. If the agency finds no reasonable cause, it must dismiss the charge and the charging party may then bring a private action within a specific period of time.

The second function of such an enforcement agency is to promote reconciliation. If the agency finds the plaintiff has reasonable cause, the

192. Carole J. Petersen, *Investigation and Conciliation of Employment Discrimination Claims in the Context of Hong Kong*, 5 *EMPL. RTS. & EMPLOY. POL’Y J.*, 627, 628 (2001).

193. Int’l Labour Organisation [ILO], Annex 6, Information from Reports, No. 101 (2000), available at <http://www.ilo.org/public/english/standards/reln/gb/docs/gb277/pdf/d1-annex.pdf>. (The ILO report mentioned that the Chinese Government reported that the State Council has established several Commissions to protect rights of those concerned).

194. Compare EOC, Our Work, <http://www.eoc.org.hk/EOC/GraphicsFolder/Ourwork.aspx?content=Our%20Work-EO%20works> (last visited May 1, 2007) (noting in Hong Kong, the EOC will conduct preliminary investigations of complaints, and if reconciliation fails, EOC will initiate formal investigation in the public interest), with 42 U.S.C. § 2000e-5 (2000) (providing in the United States, after a charge is filed with the EEOC, the EEOC may investigate facts by making written request for information, conducting interviews, and as needed visiting the facility where the alleged discrimination occurred).

195. See 42 U.S.C. § 2000e-4(a) (2000); EOC Corporate Statement, *supra* note 190.

196. See *supra* note 194.

agency can first attempt to mediate or conciliate the case.¹⁹⁷ If the conciliation fails, the complainants may abandon the claim or bring a lawsuit in court. At this stage, the agency can, but is not obligated to, provide free legal assistance in the claimant's case.¹⁹⁸

In promoting reconciliation, the EEOC in the United States adopted a National Enforcement Plan. "[This plan] encompasses a three-pronged approach to eliminate discrimination in the workplace: (1) prevention through education and outreach; (2) the voluntary resolution of disputes; and (3) where voluntary resolution fails, strong and fair enforcement."¹⁹⁹ This three-pronged approach has proved to be a great success in the United States. In recent years, mediation and alternative resolutions of disputes are becoming more and more important.²⁰⁰ To effectively eliminate employment discrimination and maximize the resources of the agency, China could learn from the United States to create a similar efficient enforcement plan.

The EOC in Hong Kong also has a statutory duty to encourage conciliation between the parties. An EOC officer will act as an objective facilitator to help the parties to explore mutually acceptable solutions, although the parties are not required to go through the reconciliation process.²⁰¹

Although the enforcement agencies in the United States and Hong Kong both adopt an approach that encourages compromise and reconciliation, they actually have different effects. The EEOC enforcement plan encourages reconciliation but does not undermine the importance of litigation.²⁰² In fact, the initial mediation process centers around the

197. Both the EEOC in the U.S. and EOC in Hong Kong have this function. *See supra* note 194.

198. *See* EOC, Complaints Handling & Conciliation, <http://www.eoc.org.hk/EOC/GraphicsFolder/showcontent.aspx?content=Our%20service#2> (last visited May 1, 2007) (stating in Hong Kong, if a case is not conciliated and charging party wants to bring suits against the employer, he or she may apply to EOC for assistance. The EOC lawyer will prepare a report making recommendation to EOC whether to grant legal assistance to the party. Assistance offered by EOC may include providing legal advice and trial advocacy).

199. EEOC, National Enforcement Plan, II.A, *available at* <http://www.eeoc.gov/abouteeoc/plan/nep.html> (last visited Mar. 20, 2007).

200. Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 690 (2005).

201. Equal Opportunities Commission, *What is Conciliation*, *available at* <http://www.eoc.org.hk/EOC/GraphicsFolder/showcontent.aspx?content=About%20Conciliation> (last visited Mar. 20, 2007).

202. Plaintiffs alleging employment discrimination under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, must first exhaust all administrative remedies within the Equal Employment Opportunity Commission (EEOC), the federal administrative agency that enforces and interprets Title VII, the Equal Pay Act, and the Age Discrimination Act. If, after investigation, the EEOC finds reasonable

enforcement of legal rights through the court process.²⁰³ According to the EEOC's litigation statistics from 1997 to 2006, the number of EEOC enforcement suits filed in 1997 and 1998 were 332 and 414; the EEOC's mediation program was not fully implemented until 1999, and from 1999 to 2006, the average number of lawsuits filed was 404.²⁰⁴ Therefore, the number of lawsuits filed did not change too much because of the EEOC's successful mediation program.

By contrast, Hong Kong adopts a "compromise model" which "has the effect of discouraging litigation" because of Hong Kong's legal and cultural context.²⁰⁵ In Hong Kong, victims in discrimination cases usually cannot afford lawyers because "Hong Kong has notoriously high legal fees and almost no legal clinics," "contingency fee arrangements are not permitted," jury trials are not available in discrimination cases, and "plaintiffs cannot expect large damage awards".²⁰⁶ Therefore, in Hong Kong, most victims in discrimination cases will choose to use EEOC's service and go through the reconciliation process.²⁰⁷

China's situation is very similar to that of Hong Kong. In China, people usually do not prefer litigation. Similar to Hong Kong, many victims of discrimination cannot afford a lawyer. Even if they can afford one, they might doubt whether it is worthwhile to do so. China has no jury trial system. In addition, under the current law, the amount of compensation is usually very small.²⁰⁸ As a consequence, even if the contingency fee arrangement is not prohibited in China, attorneys are less motivated to vigorously advocate for their clients.

cause to intervene, it first attempts conciliation and, failing that, brings a civil suit in federal district court. However, complainants must only show a timely resort to the EEOC, rather than a total reliance on the bureaucratic mechanism. If the EEOC should choose to sue, the agency limits the plaintiffs' right to intervene in the suit. See 42 U.S.C. § 2000e-5(f)(1), (g) (2000).

203. See *Id.*

204. The U.S. Equal Employment Opportunity Commission: EEOC Litigation Statistics, FY 1997 through FY 2006, available at <http://www.eeoc.gov/stats/litigation.html> (last visited Mar. 31, 2007); EEOC Mediation Statistics FY 1999 through FY 2003, http://www.eeoc.gov/mediate/mediation_stats.html; History of the EEOC Mediation Program, available at <http://www.eeoc.gov/mediate/history.html> (last visited Mar. 31, 2007).

205. Petersen, *supra* note 192, at 638 (arguing Hong Kong's enforcement model has the effect of discouraging litigation due to various factors.)

206. *Id.*

207. *Id.*

208. For example, when citizens' lawful rights or interests are infringed by government, "the amount of money for compensation per day shall be calculated according to the average salary per day of the staff of the state in the preceding year" and no punitive damages is permitted. Zhonghua Renmin Gongheguo Guojia Peichangfa [Law on State Compensation] (promulgated by Order No. 23 of the President, May 12, 1994, effective Jan. 1, 1995) chap. IV, translated in 6 P.R.C. LAWS 39, 48-49.

Thus, after examining the similarities and differences between the enforcement systems in the United States and in Hong Kong, the ideal enforcement model of employment discrimination cases in China would be a compromise model that places more emphasis on conciliation. This model will be more consistent with traditional Chinese culture.²⁰⁹ After all, Chinese society is more accustomed to resolving disputes through informal compromise because of its cultural heritage.²¹⁰ Thus, many Chinese would prefer to reconcile rather than to litigate their employment discrimination disputes.

While a compromise model based on conciliation might be an appropriate and preferable model for China, the enforcement of legal rights in employment discrimination cases would center on the mediation process conducted by the enforcement agency. As discussed above, in order to facilitate the process, the agency should be granted a broad range of powers such as investigation, preliminary determination, mediation, and enforcement. Furthermore, the agency's decision should be binding on the parties.

Additionally, China's machinery for conciliation and arbitration should be made more effective and the integrity and impartiality of the process should be maintained. For example, the current law does not allow a worker to bypass the arbitration process and go directly to the People's court.²¹¹ The stringent requirement that the party dissatisfied with the arbitration award must bring a lawsuit within fifteen days of receiving the arbitration ruling provides inadequate time to seek legal help.²¹² By contrast, a new antidiscrimination system should be designed to provide adequate and more flexible protection to victims of employment discrimination by allowing the victims to file a lawsuit directly to the People's court. For example, in Hong Kong, victims of discrimination and harassment are not obligated to use the services of the EOC or to participate in any prior conciliation.²¹³ They may, if they wish, file a complaint directly in the District Court.²¹⁴

Another important function of the proposed agency is to educate the public about employment discrimination. Governmental bodies should

209. Because the praise of harmony is central to traditional Chinese culture, Chinese society demonstrates a preference for extra-legal means to resolve disputes. For more discussion, see Bobby K. Y. Wong, *Traditional Chinese Philosophy and Dispute Resolution*, 30 HONG KONG L.J. 304 (2000).

210. *See id.* However, this assumption has been called into question and it may be that Hong Kong complaints are not that different in this respect from their counterpart in more "western" societies. *See Petersen, supra* note 192 at 628.

211. *See* Labor Law art. 79, *translated in* 6 P.R.C. LAWS at 67.

212. *Id.*

213. *What is Conciliation, supra* note 201.

214. *Id.*

clarify the legislation to the public and provide enforcement guidance for society, focusing on the rights and specific responsibilities of the employers and the individuals of various groups.

However, there are still many obstacles and challenges to the establishment and operation of such an independent enforcement agency like the EEOC or EOC in China. First, setting up an independent agency will unavoidably add administrative costs.²¹⁵ Because China has many cities, the cost of running such a huge agency with a large number of branches will be tremendously high. The changing policies, the huge but poorly-monitored employment market, and the prevailing local protectionism will be the biggest obstacles for the future EEOC to function effectively in China.

VI. CONCLUSION

China's transition from a planned economy to a market-oriented economy created many employment-related problems. Among other problems, employment discrimination has become increasingly serious and pervasive. Currently, employers have almost unlimited power in the selection of employees, and they discriminate against people based on age, height, sex, marital status, appearance, disability, certain medical conditions, etc. Although China has some laws and regulations that appear to afford some groups of people protection against some forms of discrimination in the workplace, there are still significant obstacles to redressing the grievance within the Chinese legal system. As a result, despite the fact that in recent years many people have brought employment discrimination cases, few have won. Therefore, to protect equal employment opportunity, China should implement a comprehensive body of antidiscrimination laws and a coherent antidiscrimination policy to deal with the various aspects of employment discrimination. In addition, China should establish an independent enforcement agency to enforce the anti-employment-discrimination laws. After all, a critical element in combating discrimination at the workplace is not only implementing a body of laws to deter people from illegitimately distinguishing people, but actually enforcing those laws stringently.

215. ZIMMER, *supra* note 125 at 67.