Constitutional safeguard research of female equal employment right in China- Based on the perspective of empirical investigation

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Abstract. Employment is the foundation of people's livelihood. As a basic human right, the right to equal employment has always been a top priority for constitutional protection. Female workers are an important part of the economy and society, and their equal employment is an important catalyst for economic development. Women's right to equal employment is an important element in realizing women's personal and social values, as well as an important element of the State's efforts to build a harmonious society. Compared with the early days of the founding of the People's Republic of China, the protection of women's equal rights in employment has made great progress. However, the influence of history, culture and traditional concepts still lingers, and the burden of women's maternity has aggravated the invisible discrimination in employment, while the newly released “three-child” policy has also had a certain impact on equal employment. The phenomenon of women being discriminated against in employment is still not uncommon. Therefore, this paper explores the problems, countermeasures and future development direction of the protection of women's right to equal employment in China from the system of protection of women's right to employment in China's Constitution and other laws and judicial practice. On the one hand, China should improve the existing laws and regulations, improve judicial procedures, define the criteria for determining discrimination in employment, and formulate a special anti-discrimination law; on the other hand, we should strengthen the law enforcement mechanism, and set up a specialized labor inspection and enforcement agency to protect equal employment and a more pro-employment “Equal Employment Commission”.

Keywords: Female employment; The right to equality; Gender discrimination; The Constitution.

1. Research background

1.1 Current situation and causes of discrimination against women in employment

1.1.1 Current situation

Compared with the initial period of the founding of the People's Republic of China, the protection of female employment equality right in China has reached a new level, and remarkable progress and achievements have been made. But discrimination against women in employment persists. According to the 2023 China released zhaopin female status quo survey[1], marriage and childbearing are still shackles for women in the workplace, gender injustice still exists in the workplace, and women pursue equality through self-improvement: More than 60 percent of working women were asked about their marriage and childbearing during job search, more than 30 percent of working women were affected by their age, nearly 30 percent attributed gender inequality in the workplace to surplus, and more than half hoped that enterprises and society would share the burden of childbearing. In order to pursue gender equality in the workplace, 65.6 percent of working women are willing to improve their marriage and childbearing during job search, more than 30 percent of working women were affected by their age, nearly 30 percent attributed gender inequality in the workplace to surplus, and more than half hoped that enterprises and society would share the burden of childbearing. In order to pursue gender equality in the workplace, 65.6 percent of working women are willing to improve their workplace competitiveness. There are still unequal promotion opportunities for men and women in the workplace, and there is still a large difference in work income between men and women.

In terms of employment opportunities, men are still preferred under the same situation or even when women are more excellent, which is even more true after the announcement of the “two-child” and “three-child” policies. Some female employees are even required to sign a pledge with their employers, promising not to become pregnant within a certain period of time.
In terms of the income gap between men and women, according to the survey report, the income gap between men and women is small at the beginning of employment, but the overall income of men is much higher than that of women, which to a certain extent means that compared with women, more men are in the management level and have more promotion opportunities. According to the survey report, the main factor that causes the difference in promotability between men and women is when women passively lose promotability during the marriage and childbearing stage. Moreover, women spend on average more time at home than men, and continue to increase after marriage, while they spend less time at work.

In a search of “equal employment rights disputes”, more than 60% of the disputes were caused by workers believing that they had been discriminated against on the basis of gender, most of which were due to marriage and parenthood, in addition to recruitment restrictions on the gender of the position, unreasonable appearance or make-up requirements, and so on. In general, marriage and parenthood are the main reasons for employment discrimination against women in the workplace, such as investigating the marriage and parenthood status and willingness of female workers at the time of recruitment and using this as one of the criteria for employment, or requiring female workers to promise not to give birth to children for a certain period of time after joining the workforce, and so on. The current high rate of plaintiffs in disputes over equal employment rights in China is also related to workers' limited awareness of employment discrimination. It is therefore necessary for the Government to publish detailed scientific articles on employment discrimination standards to raise the level of public awareness.

1.1.2 Cause analysis

1.1.2.1 Historical culture and traditional concepts

In feudal society, male superiority and female inferiority, male cultivation and female weaving, three conformity and four virtues were the mainstream cognition at that time. Women are subordinated to their fathers when they are not married, to their husbands when they are married, and to their sons when their husbands die. Women did not have the right to inherit property until the Southern Song Dynasty. Even now, the idea that "men play outside, women play inside" is still the mainstream cognition of society. Traditional patriarchal thoughts and patriarchal thoughts have not completely subsided in modern society. Under the traditional mode of division of labor, men always play the role of breadwinner, active in the society, with social status and prestige, while the role of women is always described by words such as virtuous and gentle, taking care of husbands and children at home, and playing the role of wife and mother. The social concept encourages women to sacrifice their careers for the family, and the success of women is determined by whether the family is happy or not.[2]Society's evaluation standards for men and women are not equal. Men sloppy, reckless, aggressive is a symbol of strong power, women sloppy is fault, aggressive is a "bitch". China's deep-rooted tradition of gender discrimination, social role cognition and cultural ideas not only make the already imperfect legal system difficult to implement, but also deepen the existing gender difference in the division of labor and gender difference discrimination in occupational labor, making women in a more disadvantaged position in employment.

1.1.2.2 Physiological factors and labor costs

Women's strength and physical strength are inherently weaker than men's. In addition, women also have the burden of menstrual period and childbirth, which generally increases the labor cost of employers, and the competitiveness of the workplace is not as good as that of men. Enterprises are more inclined to recruit men with lower labor cost. The cost of birth of birth insurance in system of our country gives birth to insurance pays by the certain proportion that unit presses salary gross amount. Worker individuals do not undertake pay. This is also one of female extra labor cost. During the best childbearing age, women are faced with the dual tests of employment and marriage and childbearing, and often have to sacrifice their career promotion and self-development opportunities for marriage and family. Women assume the family and social responsibility of bearing offspring,
which is the dedication of women to the family and society. Such dedication should not be denied, but should be affirmed and helped by the society. However, women are often discriminated against in the workplace because of marriage and childbearing.

1.1.2.3 The orientation of the two-child and three-child policy

The three-child policy is the latest family planning policy in our country. On May 31, 2021, the Political Bureau of the CPC Central Committee held a meeting, which pointed out that the birth policy should be further optimized and the policy of allowing a couple to have three children and supporting measures should be implemented. Various regions have introduced corresponding welfare policies, such as Beijing, which announced that those who have three children can enjoy additional maternity leave in addition to the maternity leave stipulated by the state. This undoubtedly adds more labor costs to the employer. Employers are increasingly inclined to recruit men and women who have given birth, and require unmarried women to sign a guarantee that they will not have children within a few years when they enter the workplace. Women are increasingly discriminated against in employment. The three-child policy is an important measure to deal with the aging population structure, and its burden should be borne by the whole society, rather than by the employer alone, thus impacting the female workers.

1.2 Reasons why women's equal employment rights need to be protected

1.2.1 Women's equal employment rights are an important part of equality rights.

Women's equal employment right, as an important part of the protection of equal rights, is a basic right granted to women by the Constitution of our country, an important aspect of the constitutional system, and an important right confirmed by many international human rights documents.

According to the definition of the Constitution, Labor Law, Law on the Protection of Women's Rights and Interests and other laws, women's equal employment right means that women should enjoy the same rights as men in the whole process of participating in labor work, and they should not be discriminated in work opportunities and treatment due to gender differences. From the scope includes equal employment opportunities, employment conditions, labor remuneration, promotion opportunities, unemployment security and so on. In theory, it is divided into formal female equal employment rights and substantive female equal employment rights. The formal female equal employment right means that the state protects female workers' equal employment right through legislation, law enforcement and judicatory. The substantive equal employment right of women refers to the right of female workers to obtain the help of the state, and the "help" usually means that the state enables female workers to enjoy the equal employment right in essence through vocational training and social security.

The protection of women's equal employment right is an important aspect of perfecting human rights theory in law. It involves a wide range and has a high frequency of theoretical discussion. Women's equal employment right is one of the basic human rights of women. Improving the protection of female equal employment right is also improving the protection system of equality right in our country, and it is of great significance to enrich the connotation of equality right in our country. At the same time, realizing women's equal employment rights is also a basic responsibility that the state should bear.

1.2.2 Women's equal employment right is an important part of realizing women's personal value and social value.

By entering the labor market to participate in competition in the talent market, women receive remuneration for their work and obtain a stable economic income, thereby achieving economic independence, enhancing their own and others' recognition of themselves, and improving their family and social status, which makes it possible for women to obtain social value and personality independence and dignity at the same time as obtaining the economic value of their labor. It is
advocating women to gain a sense of self-identity from their work in the hope of standing out in a fully competitive labor market, thus helping women to improve their self-quality in the context of labor and employment.

From another perspective, female workers are an important part of the economy and society, and realizing women's personal value is also realizing women's social value. Through equal employment of women, social labor force has been fully developed and utilized, social human resources have been more comprehensively optimized allocation, employment quality has been improved, and economic and social development has been promoted efficiently. The improvement of women's self-quality in labor employment also promotes the overall improvement of the quality of the overall labor force in society.

1.2.3 Women's equal employment rights is an important part of the country's construction of a harmonious society.

"Harmony", "equality", "justice" and "rule of law" are the important contents of the core values of socialism in our country. Protecting women's equal employment right is the inevitable requirement of building a harmonious society. If women are discriminated against in employment, the legitimate rights and interests of female workers will be infringed, and social fairness and justice will be difficult to maintain. To guarantee women's equal employment rights is to guarantee social fairness and justice. Women's right to equal employment is guaranteed in accordance with the law, so that women workers can share in the results of reform and development through equal employment, and have a greater sense of recognition and gain from national reform.

The protection of women's rights, women's social status and the degree of liberation have always been of special significance in the development of national systems. The protection of women's equal employment rights means the progress of national society, and the improvement of its systems means the modernization of national culture and systems, reflecting the development degree of social civilization. It is of great significance to the prosperity of Chinese civilization and the realization of the great rejuvenation of the Chinese nation.

2. The system design of the protection of female employment right by the Constitution and other laws of China

2.1 Central legislation

2.1.1 Constitution

Article 48 of the Constitution stipulates that "women enjoy equal rights with men in all aspects of political, economic, cultural, social and family life. The state protects women's rights and interests, implements equal pay for equal work for men and women in the field of labor and employment, and trains and selects women officials."

The Constitution is our country's fundamental law, equality and the right to work has carried on the principle stipulation; At the same time, all branch laws have made more detailed provisions on women's equal employment rights based on the principle rights stipulated in the Constitution.

2.1.2 Labour Law

The Labor Law is a more detailed interpretation of women's equal employment rights in the Constitution. It not only increases the protection of women's health, but also gives employers the space to make their own decisions, and encourages employers to take into account the rights of workers while making profits. Article 12 of the Labor Law prohibits discrimination, and Article 13 further clarifies the equality of men and women in employment rights. Only in some statutory positions not suitable for women can men and women be treated differently. In addition, special labor protection for female workers during menstruation, pregnancy, childbirth and lactation is specified in
the remaining chapters, especially Chapter 7 "Special Protection for female workers and underage workers".

2.1.3 Employment Promotion Act

The Employment Promotion Law specially sets up Chapter III "Fair Employment", and stipulates that there shall be no restriction on female employees' marriage and childbirth in the labor contract.

2.1.4 Law of the People's Republic of China on the Guarantee of the Rights and Interests of Women

The Law on the Protection of Women's Rights and Interests stipulates equal employment rights for men and women, equal pay for equal work for men and women, protection of women's rights and interests by each unit according to its own characteristics, equal opportunities for career promotion, special protection of the "four periods" and prohibition of discrimination against women in marriage, childbirth and retirement, etc.

2.1.5 The Special Rules on the Labor Protection of Female Employees

The protection of women's "four periods" is also reflected in the Special Provisions on Labor Protection for Female Employees. In particular, it stipulates that women can enjoy 98 days of basic maternity leave during pregnancy and other special protection, and prohibits illegal dismissal of female employees during pregnancy and lactation. In particular, its appendix specifies the scope of labor that female workers are forbidden to engage in in detail, providing specific reference for the positions that are legally unsuitable for women to engage in.

2.2 Local normative documents

According to the detailed provisions of the Constitution and the laws of various departments, local governments have formulated normative documents on women's equal employment rights according to their own conditions, which specify in detail how local institutions can publicize, cooperate, supervise and open up channels for safeguarding rights, etc. For example, Opinions of Jiangsu Provincial Department of Human Resources and Social Security and Jiangsu Women's Federation on Promoting the Protection of Women's Equal Employment Rights.

3. The judicial practice of female equal employment right protection in China

3.1 Juridical practice

In early 2019, the Supreme People's Court added the cause of "equal employment right disputes" in the Notice on Increasing the Causes of Civil Cases, which is an important progress in the protection of women's equal employment right in China. Several subsequent guiding cases of the Supreme Court, although not all targeted at the protection of women's equal employment right, provided important guidance for the protection of women's equal employment right.

3.1.1 Enlightenment of cases: Take regional discrimination as an example

Although this case is a case of regional discrimination, the main points of judgment in this guiding case guide the direction of judicial guidance on women's equal employment rights -- differential treatment of female workers without justifiable reasons, which is the essential feature of female employment discrimination, including two elements: first, there is the behavior of differential treatment; Second, such differential treatment lacks a reasonable basis and is prohibited by law. For the allocation of burden of proof, job seekers should initially prove that there is a phenomenon of differential treatment, that is, to prove that the employer reclassifies the disorderly group according to a certain standard, but it is not necessary to prove whether there is a justifiable reason. Thereafter,
the employer shall prove that such division has legitimate reasons and does not violate the mandatory provisions of the law, otherwise it constitutes employment discrimination.

At the same time, the judgment makes it clear that the different treatment adopted by employers according to the self-earning factors of workers is justified, and the market economy recognizes the difference in the production cost of labor and the difference in the corresponding returns obtained through competition. However, it is not legal for the employing unit to discriminate based on the factor of workers' self-acquisition under any circumstances, but also to meet the requirements of having a legitimate purpose and that the means to achieve this purpose are necessary and appropriate.

The release of guiding cases has also attracted many scholars to discuss the judicial standards of equal employment rights and the principles to be followed. Second, the principle of association, this distinction should be intrinsically necessary with the corresponding work, is indeed a necessary and reasonable distinction to engage in the work. Third, the pro-worker principle, in case of implicit discrimination, should make an explanation in favor of the worker with full analysis of the specific case.

3.1.2 Reference: Shanghai Songjiang District People's Procuratorate urged the protection of disabled women's equal employment rights administrative public welfare lawsuit

In this case, a real estate company in Shanghai and a garden company in Shanghai limited the gender of the post in the employment recruitment for the disabled in the whole region, limiting the recruitment of men. However, the post does not belong to the type of work or post not suitable for women stipulated by the state, which belongs to gender discrimination in employment. After the hearing, the Songjiang District Court issued a pre-litigation inspection proposal for administrative public welfare litigation to the District Human Resources and Social Security Bureau in accordance with the law, suggesting that it perform the statutory supervision duty of protecting the equal employment right of disabled women, and issued the "On further regulating the state ownership of the jurisdiction" to the District State-owned Assets Supervision and Administration Commission and the District Guidance Center for the Promotion of Employment for Disabled People respectively.

Prompt Letter of Recruitment Work of the Enterprise Prompt Letter of Further Optimization of Employment Guidance Work for the Disabled in the jurisdiction. The district human resources and Social Security bureau replied that it had interviewed the enterprise involved in the first time, ordered it to correct the illegal behavior immediately, and made the overall deployment of the recruitment work of the enterprise units within the jurisdiction. The district SASAC replied that it had deleted the original recruitment link and republished it. The District Employment Promotion Guidance Center for the Disabled said in a reply that it had issued a notice to the disabled association of each street and town to cancel the gender restriction, extend the registration time, and optimize the recruitment process and mechanism. Up to now, disabled women have signed up. After receiving the reply letter, Songjiang District Hospital conducted follow-up supervision through offline door-to-door visits and online investigation and verification, confirmed the relevant rectification facts, and the social and public interests were maintained. At the same time, in order to further improve the traceability management, Songjiang District Hospital and District Women's Federation have established a working mechanism to comprehensively protect the legitimate rights and interests of disabled women.

3.2 Equal employment rights disputes and labor contract disputes

In practice, disputes over women's equal employment rights are often confused with labor contract disputes. Examples are shown in the following table:

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<tr>
<th>Name of cases</th>
<th>The plaintiff’s claim</th>
<th>Whether the court upholds</th>
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It maintains that Huaxin Company has problems in illegally terminating labor contracts, paying wages during the probation period, paying wages during pregnancy, illegally extending the probation period, paying year-end bonuses, and paying social security and provident funds, and maintains that the above problems belong to the category of employment discrimination.

On the one hand, the above factual issues belong to the scope of labor dispute dispute identification, and this case belongs to the scope of equal employment right dispute belongs to the scope of general personality right dispute, so the two parties' identification of the above disputed facts does not belong to the scope of the trial of this case; On the other hand, even if the above facts claimed by Sun Xizuo really exist, it is difficult to find that Huaxin Company has employment discrimination against Sun Xizuo, which then constitutes a civil infringement of Sun Xizuo's equal employment right.

The facts of the two claims occurred in the performance of the labor contract and fell within the scope of labor dispute trial.

1. Judge Kylin's job transfer during the term of the labor contract as illegal according to law; 2. The court ruled that Kylin's job transfer and dismissal during pregnancy violated the plaintiff's equal employment right.

The equal employment right is set under the general personality right case, which reflects the special protection of the state to the citizen's equal employment right and the right to choose a job independently. The protection of equal employment rights is different from the protection of general labor rights, which mainly protects personal dignity and employment opportunities. In addition to ensuring the employment of workers, it further guarantees the social value reflected in the freedom of labor. But as a violation of the general personality rights of the disputes, workers to bear a heavier burden of proof of the tort elements. Therefore, it can be considered that as a special labor tort dispute, the worker only needs to bear the initial burden of proof, and the subsequent burden of proof of legality and rationality is borne by the employer. The employer can claim the legitimate needs of occupation, reasonable business operation needs, special preferential treatment measures for specific groups and other defense.

Compared with the general labor rights disputes, which take economic compensation, compensation, continued performance of labor contract, and payment of full labor remuneration as the main judicial remedies, the value of compensation for mental damage and apology in equal employment rights disputes such as female equal employment rights is greater, which can better make up for the employer's damage to the personal dignity of the victim. As a result, court decisions are usually dominated by the latter two.
4. Legal interpretation of women's equal employment rights

4.1 Social and cultural foundation of equality and anti-employment discrimination and theoretical analysis of labor rights

Equality and fairness are values recognized and respected by the society, and the identification of employment discrimination standards is closely related to social and cultural concepts. If we want to define employment discrimination, we must base on the social reality of our country and try to solve practical problems. From the root, "fairness in the field of employment is mainly to solve the relationship between rights and obligations in the distribution of social resources such as employment opportunities, that is, whether it is reasonable for individuals to enjoy employment opportunities compared with others in the society." Fairness of opportunity is the pursuit of modern times, which does not require absolute fairness of results, but requires equal opportunities to enter employment regardless of social status, money and other conditions. Whether it is equality of opportunity or other fairness standards, rights and obligations are allocated according to the differences between people, and the specific distribution according to which difference is the specific content of fairness. "Researchers and the public generally agree that inequality in outcomes due to differences in individual effort and diligence is acceptable, but inequality in outcomes due to differences in individual backgrounds or circumstances with the same level of effort and diligence is a form of social injustice and is unacceptable."[3]"There should be roughly equal prospects for education and achievement in all parts of society for everyone with similar motives and endowments. The expectations of those with the same abilities and aspirations should not be influenced by their social origin."[4]

Society allocates resources based on individual labor contribution, and employment equality is the embodiment of equal distribution of labor rights among workers. If employment is not equal, labor rights cannot be distributed equally among workers. Employment discrimination not only damages the workers' equal employment right, but also damages the workers' right to work. To protect labor rights, we must oppose employment discrimination.

4.2 The concept of employment discrimination and its standard definition

To put it simply, employment discrimination mainly means that workers are treated unfairly when obtaining employment opportunities. When defining the concept of employment discrimination in the Convention on Employment and Discrimination in Employment adopted by the International Labour Conference in 1958, "discrimination" is understood as discrimination, exclusion and prejudice. The objects of discrimination include skin color, race, sex, political opinion, religious belief, national origin and political origin, and the result of discrimination is the deprivation or damage of equal employment opportunities.[5]That is to say, in the process of job hunting, other conditions are the same, workers are treated differently due to their skin color, race, gender and other factors, and are deprived or damaged of employment opportunities.

From the perspective of the overall stage, employment includes the process of workers obtaining employment opportunities, as well as the working state after obtaining employment opportunities. In the previous stage, workers and employers have not yet established labor relations, but only the possibility of establishing labor relations, which reflects the benefits of employment opportunities; In the latter stage, the two parties are the main body of labor relations, reflecting the interests of work treatment. Although there is a good distinction between the stage where labor relations have not been established and the stage where labor relations have been established, the two are not completely separated. If their job treatment is not guaranteed, then even if they enter the labor relationship, their employment fairness may become an empty letter. However, from the narrow sense of employment equity, it mainly refers to the equity that has not yet entered the stage of labor relations, and may also involve the equity that has left the employment post. The scope of employment discrimination in China is limited to "employing units recruiting personnel and job intermediary agencies engaging in job intermediary activities".
Some scholars advocate the differential impact standard in the American context and try to introduce it into China. The standard states that a law, policy or decision should be declared illegal if it has a differential negative impact on a group of people. Scholars have adapted and improved this standard, believing that differential impact can be used as evidence to prove the existence of discriminatory intention, help to discover discriminatory intention, and can also serve as a warning of social injustice in terms of unconscious discrimination and structural inequality. "Unconscious discrimination is when a person may honestly believe that they are neutral and equal to people of different races, genders or other identity groups, but in fact they are treating them very differently."

"By structural inequality, you mean institutional inaction that looks neutral and doesn't focus on individuals, established structures and socio-political norms."[6] However, in our country, the scope of application of this standard is small. At present, the protection of employment discrimination in our country is still in the development or even the initial stage. The distinction of differential impact discrimination has gone beyond the stage of objective anti-discrimination legislation process, and it is difficult to implement in at least a long period of time. After establishing a relatively complete system of general rules, new types of discrimination can be constructed.

Some scholars have concluded that employment discrimination, as a tort that infringes on fair employment rights, should have four factors from the perspective of the constitutive elements of tort liability (tort, damage consequences, causality and fault): differentiated treatment of behavior, based on reasons prohibited by law without other justifiable reasons, differential treatment of results, causal relationship. This view is also taken in this paper. The behavior of differential treatment is mainly manifested as "differentiation, exclusion, restriction or preference". The second point is the difference standard of workers, Chinese scholars generally said that the standard is divided into preendowed factors and self-acquired factors. Preendowed factors are factors that are difficult to change through acquired efforts, including race, family origin, gender, age and so on. Self-acquired factors can be cultivated through acquired efforts, including knowledge and ability, etc. However, such criteria are still somewhat generalizable, for example, sexual orientation is difficult to determine whether it is a priori or a self-acquired factor. Our country's Labor Law and Employment Promotion Law directly enumerate four kinds of causes, such as nationality, race, gender and religious belief. There are also provisions on factors of discrimination in terms of disability, household registration, and health. But if it is a proper distinction for a legitimate purpose, it does not constitute employment discrimination even if the job seeker is distinguished on the basis of a cause prohibited by law. Specifically, it may include reasons for professional necessity, reasons for the protection of the public interest, or reasons for national security. The "real vocational qualification" and "business necessity" in the British and American countries are based on the reasons of professional need, the former is necessary, the latter is necessary. If it is simply a matter of convenience to discriminate among the applicants concerned, there are alternative ways of making it less burden-and even if it is indeed "needed," the reason may be deemed improper by the court. In order to protect the public interest and national interest, it is generally in the field of public office. For example, countries generally require those who hold national public office to have their own nationality. The third result of differential treatment must have certain significance, not small differential treatment, but should cause certain damage to the party concerned. The fourth causal relationship is that tort liability should generally be possessed. If the employer does implement employment discrimination for reasons prohibited by law, and the worker does suffer adverse consequences in employment, but the consequences of damage are not caused by employment discrimination, then the worker shall not be required to bear tort liability. However, there are fewer cases in which the fourth item is not satisfied.

Guiding Case No. 185 in "Three" summarizes the standards of employment discrimination. First, there is the behavior of differential treatment; Second, such differential treatment lacks a reasonable basis and is prohibited by law. Only the first two requirements are required, that is, the consequences and the causal relationship with the consequences are not required, and discrimination can be established as long as there is a discriminatory act prohibited by law. This is the practice.
Theoretically, the completeness of the four elements can better ensure the theoretical completeness, so this paper completely retains the four elements.

4.3 Gender discrimination in employment and equal employment rights for women

In the statistics of discrimination cases over the years, gender discrimination in employment has occupied a large position. Gender discrimination against women, household registration discrimination against migrant workers, health discrimination against people infected with hepatitis B and HIV, and age discrimination against middle-aged and elderly workers are the main forms of employment discrimination at present. In the 11 years from 2000 to 2011, there were a total of 92 anti-discrimination cases, including 11 cases of gender discrimination and 5 cases of maternity discrimination.[7]The problem of female employment discrimination has become a more and more prominent legal and even social problem, but the winning rate is not very impressive.

The guarantee of women's equal employment rights not only reflects the basic national policy of gender equality, but also guarantees women's independent personality and status in the society, which is of vital significance to the publicity of equality thought and the healthy development of the labor market.[8]From the perspective of fairness and justice, the core is equality, which indicates the maintenance of women's dignity and the recognition of women's value; From the perspective of social benefits, ensuring women's equal employment rights is conducive to realizing equal employment opportunities for men and women, creating a harmonious employment environment, and thus promoting sustainable economic and social development. From the perspective of enterprise employment, ensuring women's equal employment rights can improve the quality of employment in China and ensure that the value of labor force is fully utilized.[9]In view of the increasingly prominent problem of female employment discrimination, the protection of female equal employment rights should be paid more and more attention.

5. The problems, countermeasures and future development direction of female equal employment right protection in China

5.1 The problem that our country female equal employment right protects existence

5.1.1 The perfection of laws and regulations is insufficient

The legislation is too principled and lack of maneuverability, and it is difficult to determine the standard of employment discrimination against women, and it is difficult to protect women's equal employment rights. There are no clear provisions on the attribution of the burden of proof and the extent to which it needs to be proved, which are entirely up to the discretion of people's courts at all levels. Some women do not even know that they are discriminated against. Even if the facts of gender discrimination in employment are known, it is difficult to know how to remedy their employment rights. The court and the corresponding security department also fell into the predicament of difficult relief because of the lack of certain standards.

Although the Law on the Protection of Women's Rights and Interests stipulates the administrative punishment of the directly responsible person and the Labor Law stipulates the compensation liability of the employer, there are no clear provisions on the specific amount of compensation liability and the way to bear it.

The existing laws and regulations lack relevant details and are limited in scope of application, disconnected from reality, unable to cover all kinds of employment discrimination in real life, so that female workers cannot be truly protected.

At present our country local legislative policy documents are in the majority, but the policy documents are very local and revised frequently, which is unfavorable to the concrete implementation.
Too scattered legislation has also damaged the majesty of the constitution and the unity of the rule of law, so it is urgent to formulate laws with uniform standards for all regions.

5.1.2 Single way of relief

At present, the main ways include two: file a lawsuit to the court or report a complaint to the relevant labor security department. The way to file a lawsuit in court is reliable, but it also costs a lot of manpower and material costs, making female workers who may have lost their jobs due to equal employment rights disputes bear a greater burden. The way to complain and report to the relevant labor security department is faster, but due to the lack of corresponding entity and procedure legislation, various standards and procedures have not been determined, this way is a mess. And there is still a lack of specialized labor dispute handling institutions to provide women suffering from gender discrimination in employment with complaints, professional legal advice and legal rescue and other legal help.

5.1.3 Insufficient supervision of the implementation of public power

At present, there is a lack of a special gender discrimination supervision department to supervise and manage the relevant violations, and the implementation is lack of strength. Therefore, employers may delay the implementation by various means or carry out more hidden discrimination. At present, the law enforcement and administrative departments of employment discrimination are collectively referred to as "relevant departments and superior units," with scattered powers and responsibilities and vague division of labor, which is easy to lead to problems such as low work efficiency. It is difficult for women to find a law enforcement agency that can truly safeguard their rights, and there is no corresponding way to complain about the relevant departments of lazy government. A series of administrative penalties such as order to correct and fine are the main punishment measures taken by the government at present, but their scope of application is narrow, the ways are few, the fine intensity is small, and the deterrence is limited.

5.2 Countermeasures and future development direction

5.2.1 Improving Relevant Laws And Regulations

On the one hand, we should define the standards of employment discrimination and formulate special anti-employment discrimination laws,[10] directly define the concept, constitutive elements, judgment standards, scope of application, competent authorities, channels of appeal and relief, relevant procedures, legal liability and so on of employment discrimination, combine overview with enumeration, combine positive enumeration with negative enumeration, and make clear "reasonable difference" standards according to the specific nature of work and special occupation. Specify "jobs or positions that are not suitable for women." While issuing the new anti-employment discrimination law, the existing labor law, employment promotion Law, women's rights protection law and other laws should be updated and improved to supplement the provisions on the burden of proof for gender discrimination in employment, so as to adapt to the development of The Times.

On the other hand, it is necessary to clarify the legal responsibility that employers should bear, stipulate punitive compensation liability, and clearly stipulate the terms and rules of punishment, including but not limited to stopping discrimination, granting admission, fines, paying compensation, detention and even criminal punishment, so as to strengthen the relevant legal responsibility and responsibility awareness.

In addition, special protections for women based on gender differences should be improved and the scope of protection appropriately narrowed. For example, the labor that some women are forbidden to participate in is no longer in line with the actual situation, and the early retirement system for women is no longer enough to adapt to the development of The Times in today's society with serious aging, so moderately extending the retirement age for women is a common call. The protection of marriage and childbirth for women should be maintained, but it needs to be adjusted
5.2.2 Improving judicial procedures

For the standard problem of burden of proof, we draw lessons from the relevant experience of developed countries and divide different burden of proof according to two different types of direct discrimination and indirect discrimination. For the indirect discrimination of female workers, which is especially difficult to prove, the employer shall directly bear the burden of proof. For direct discrimination, female workers shall first bear the initial burden of proof to prove the existence of differential treatment, regardless of whether there is a justifiable reason, and then the employer shall bear the burden of proof with justifiable reason.

At the same time, it is necessary to establish a legal aid mechanism for employment discrimination and provide professional legal aid. The people's courts shall, on the basis of fully protecting women's equal employment right, improve efficiency in mediating and judging disputes, minimize the impact on the normal work and life of female workers, and strive to achieve substantive protection of women's equal employment. In addition, it can also expand the scope of legal aid, establish a public interest litigation mechanism, and so on.

5.2.3 strengthening the mechanism for ensuring law enforcement

On the one hand, the specific responsibilities of relevant law enforcement agencies, namely "relevant departments" or "superior departments," should be clarified. A labor supervision and law enforcement organization dedicated to ensuring equal employment shall be established, and its specific administrative powers and responsibilities and law enforcement procedures shall be stipulated in legal form. Women shall account for a certain proportion of law enforcement personnel, and relevant professionals shall be recruited. It is required to conduct regular surveys on female employment and issue annual work reports on discrimination against women in employment. Labor supervisors shall conduct regular training on labor and employment laws and regulations, and strengthen the internal supervision mechanism. We will strengthen the "transparency and openness" of the whole process of employment and recruitment and the construction of a complaint and appeal mechanism. We will innovate the forms and methods of law enforcement and actively carry out various and in-depth law enforcement activities.

On the other hand, special equal employment agencies for women should be established. We can combine our country's actual national conditions and refer to foreign experience to establish an Equal Employment Commission that is more close to the people[11]. The main ways of dispute settlement are mediation and other harmonious ways, which provide corresponding psychological counseling services for women who are discriminated against in employment, so as to promote the mediation and settlement of labor disputes in a gentle way. The composition of its personnel shall be professional, and professional legal personnel, labor experts and enterprise personnel shall be hired to provide professional advice. It is better to provide free or nominal services to women in society, and to provide legal advice and professional legal advice to the whole society. They can be given the power to take the initiative to investigate employment discrimination against women and directly file a lawsuit with the court.

5.3 A special study on the "three children" policy

The new "three-child" policy is the only way to comply with the trend of "aging and fewer children" in China and promote the high-quality development of the population, but after its introduction, it has also caused some new situations and new problems for women's equal employment, which need special exploration and give different plans for the right medicine.
5.3.1 The influence of "three-child" policy on women's equal employment

On the one hand, due to the special provisions of local policies, the maternity leave for giving birth to a "third child" is longer than the ordinary maternity leave (for example, in the regulations of Zhejiang, the maternity leave for a second child and a third child is 60 days longer than the ordinary maternity leave), making the employment of women who give birth to a "third child" more unstable, which will increase the cost of employing units. It makes employers more inclined to hire fewer women of childbearing age or reduce their welfare benefits. Many women reported a drop in earnings because they were reassigned after becoming pregnant.

On the other hand, after a long maternity leave, women's business familiarity and competitiveness will also decline to a certain extent, which will be affected when they return to work. Studies have shown that women's promotion accumulation and network management will also be interrupted, because long distance from the job is greatly affected, thereby reducing women's competitiveness in the workplace.

And, unlike men, children are more dependent on their mothers, so it is usually women who take on more long-term childcare responsibilities and invest more time and energy after childbirth, and women are more tied to their families, which has a greater impact on professional competitiveness.

5.3.2 The corresponding countermeasures are given for the impact of the "three-child" policy

5.3.2.1 The state should share more of the cost of childbirth to reduce the burden on enterprises

The main reason why enterprises discriminate against women in employment is still the purpose of seeking profits from capital. Therefore, the way of fiscal subsidies and tax reduction is the most accurate and effective. The "Implementation Plan of Jiangsu Province on Optimizing the birth Policy and Promoting the Long-term Balanced Development of Population" gives enterprises 50% of the "second child" and 80% of the "third child" maternity insurance cost reduction. We can also learn from the experience of Guangdong Province and the European Union, and provide certain financial subsidies for enterprises that implement flexible working systems for women in the "fourth period", or set up a "maternity insurance fund", and directly include women's wages and remuneration during the "fourth period" into the payment scope of the maternity insurance fund.[12]

5.3.2.2 Develop infant and child care services to relieve women's burden

In order to reduce the impact of childcare on women's professional quality and competitiveness, a powerful measure is to reduce the burden of childcare for women. On the one hand, the state can encourage the development of infant and child care institutions, while setting up public childcare institutions, increase support for private childcare institutions and give certain subsidies, moderately reduce their market access threshold, and reduce women's worries about employment. On the other hand, the state can give some childcare subsidies to affected women who have spent a lot of time raising infants and young children, and the affected women will apply to the relevant departments or committees, and the relevant departments will decide whether to grant subsidies according to the actual situation, so as to give substantial compensation to women whose employment is affected by childbirth.

5.3.2.3 The relevant departments strengthen the supervision of enterprises and give certain rewards to enterprises with better performance

Avoiding direct or indirect discrimination in recruitment, strictly implementing maternity leave and paternity leave, providing vocational skills training for female workers after entering the workforce, and establishing maternity and infant rooms and maternity lounges for enterprises with flexible working during pregnancy are all obligations that enterprises should undertake. The relevant departments should strengthen supervision over this, carry out regular spot checks, check whether
there are enterprises that transfer pregnant women unreasonable or reduce wages and remuneration, and give corresponding rewards to enterprises with better performance.

5.3.2.4 Strengthen publicity and provide free online vocational skills training courses for pregnant women

The government should strengthen publicity, strengthen corporate social responsibility awareness, and call on enterprises to consciously and strictly abide by relevant employment regulations. Publicize male family responsibilities and family division of labor, call on more men to equally share the responsibility of taking care of the family and children, and change the traditional idea of "men in charge of the outside and women in charge of the inside". Research shows that male and female co-parenting is good for character development. We will extend male paternity leave and implement male parental leave. Pregnant women are encouraged to learn independently to improve their professional literacy, and pregnant women are provided with free online vocational skills training courses to facilitate their return to work and reduce the impact of pregnancy and childcare on women's workplace competitiveness. In order to prevent pregnant women from being discriminated against and unable to find corresponding legal channels, popular science publicity of relevant laws and regulations is carried out to encourage them to take up legal weapons to protect their legal and equal employment rights.

6. Conclusion

Employment is the foundation of people's livelihood, and women's employment is an important issue in today's society. The protection of women's equal rights is an important part of the protection of equal rights, and is an important proof of the development of civilization, as well as an important element in the realization of women's personal and social values, which is conducive to the promotion of the quality of the workforce and the improvement of the quality of employment, and is of great significance to the realization of the great renaissance of the Chinese nation and to the development of a strong, modernized and socialist country. Compared with the early days of the founding of the nation, China has already established a complete set of legislative system with the Constitution as the core, sectoral laws as the cornerstone, and local normative documents as the specific implementation program, and further promoted the development of China's equal employment rights through the establishment of the "right to equal employment" cause of action, and strengthened the judgment standard of women's discrimination in employment in a number of guiding cases. However, China's legislation, judicial system, and judicial system have not yet been fully implemented. However, there are still deficiencies in China's legislation, judiciary and law enforcement, and the traditional thinking that men are superior to women and that "men should be the outsiders and women should be the insiders" still influences today's society, coupled with the impact of the "two-child" and "three-child" policies. Coupled with the impact of the "two-child" and "three-child" policies, employers are reluctant to hire married women for reasons of labor costs, and female workers are still discriminated against in today's society. For this reason, we should improve the corresponding laws and regulations, clearly define the criteria for recognizing employment discrimination, and formulate an anti-employment discrimination law. We should clarify the punitive liability of employers, but at the same time, we should improve the special protection of women against gender differences. Distinguish between direct and indirect discrimination and set the burden of proof, and establish a complete legal aid mechanism so that more women can receive effective legal assistance. Enforcement mechanisms should be strengthened, with the establishment of governmental labor inspection and enforcement agencies and women's equal employment committees that are accessible to the public, and with more varied law-enforcement activities.
References


