



12-22-2012

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Crystal Roberts

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52 Santa Clara L. Rev. 1531

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FAR FROM A HARMONIOUS SOCIETY: EMPLOYMENT DISCRIMINATION IN CHINA

Crystal Roberts*

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INTRODUCTION

China's economic growth has increased dramatically, and in August 2010, China surpassed Japan as the world's second largest economy.¹ China's economy is growing at a rate of about ten percent per year, demonstrating "China's emergence as an economic power that is changing everything from the balance of military and financial power to how cars are designed. It is already the biggest exporter, auto buyer and steel producer, and its worldwide influence is growing."² This exponential development demonstrates the influence China currently has on the global economy. Since China will continue to have a profound impact and presence in the world, China's cooperation and leadership in the global anti-discrimination movement is essential, calling for stronger legislation against employment discrimination.³

This Comment analyzes China's current anti-discrimination legislation as well as its effectiveness at eliminating discrimination in China's workforce. In order to understand the need for stronger anti-discrimination laws in China, it is important to demonstrate where discriminating practices originate and their current prevalence throughout the country. It is also essential to understand the

1. Tomoko A. Hosaka, *China Surpasses Japan as World's No. 2 Economy*, WASH. POST, Aug. 16, 2010, at A10, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/15/AR2010081503697.html>; see also *China Overtakes Japan as World's Second-Biggest Economy*, BLOOMBERG (Aug. 16, 2010), <http://www.bloomberg.com/news/2010-08-16/china-economy-passes-japan-s-in-second-quarter-capping-three-decade-rise.html> [hereinafter *China Overtakes Japan*] (stating that China's gross domestic product for the second quarter 2010 was \$1.337 trillion, surpassing Japan's \$1.288 trillion Gross Domestic Product for the same period).

2. Hosaka, *supra* note 1, at A10. See also *China Overtakes Japan*, *supra* note 1 (stating that China "will overtake the U.S. . . . as the world's largest economy by 2027, according to Goldman Sachs Group Inc. chief economist Jim O'Neill").

3. "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.'" Xun Zeng, *Enforcing Equal Employment Opportunities in China*, 9 U. PA. J. LAB. & EMP. L. 991, 1014 (2007) (citing Int'l Labour Org. [ILO], International Labor Conference, 91st Session, 2003, *Time for Equality at Work*, Report I(B), ix).

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weaknesses of current anti-discrimination laws in order to provide stronger solutions to employment discrimination.

Part II explores some of the cultural practices and norms underlying employment discrimination and the way China's economic changes in the past thirty years have negatively impacted certain groups of workers.⁴ Part III reviews several studies documenting the extent of employment discrimination in China.⁵ Part IV discusses the anti-discrimination laws that are currently in place, and argues that these laws are ineffective in preventing employment discrimination.⁶ Lastly, methods are proposed through which the Chinese government can address instances of employment discrimination, furthering its ultimate goal of creating a just and "harmonious society."⁷

I. BACKGROUND

A. *Introduction to Employment Discrimination in China*

There is no clear definition of Chinese employment discrimination.⁸ However, employment discrimination has been defined broadly as a "distinct criteria, treatment, or consideration by an employer to job applicants or employees based on classifications or categories rather than individual merit."⁹ For the purposes of this Comment, such classifications are assumed contradictory to basic notions of fairness and equality in the workplace, and should be explicitly outlawed by Chinese national employment anti-discrimination laws.¹⁰

4. *See infra* Part II.

5. *See infra* Part III.

6. *See infra* Part IV.

7. *See infra* Part V. The phrase "socialist harmonious society" originates from China's Resolution on Major Issues Regarding the Building of a Harmonious Socialist Society. *See CPC Central Committee on Building a Sociality Harmonious Society Decisions on Major Issues* [hereinafter *CPC Central Committee*], available at <http://cpc.people.com.cn/GB/64162/64168/64569/72347/6347991.html>.

8. Jiefeng Lu, *Employment Discrimination in China: The Current Situation and Principle Challenges*, 32 *HAMLIN L. REV.* 133, 142 (2009).

9. *Id.*

10. *Cf. id.* (explaining that whether these classifications are reasonable or legal is beyond the discussion of the article).

In a 2006 survey,¹¹ the China University of Political Science and Law found that a staggering 85% of survey participants experienced discrimination or observed discrimination affecting others.¹² Fifty percent believed that the discrimination was extremely severe, while only 6.6% reported not seeing or experiencing discrimination.¹³

Employment discrimination “occurs primarily against women, migrant workers . . . and workers perceived to have health problems or disabilities.”¹⁴ Furthermore, “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.”¹⁵ Employment discrimination occurs during all stages of employment, “from application, hiring, work assignment, compensation and benefits, to promotion and termination of employment.”¹⁶ It is not unusual to see job advertisements requiring the applicants to be “above average looking” or “with A blood type.”¹⁷ What is more shocking is employers’

11. The study involved nearly 3500 survey participants, 55.2% of which were male and 44.8% were female. Constitutionalism Research Inst., China Univ. of Political Sci. & Law, *A Survey of Employment Discrimination in Ten Major Cities in China*, in *TAKING EMPLOYMENT DISCRIMINATION SERIOUSLY: CHINESE AND EUROPEAN PERSPECTIVES* 157 (Yuwen Li & Jenny Goldschmidt eds., 2009), available at http://books.google.com/books?id=7Rdd2LYm1NcC&pg=PA157&lpg=PA157&dq=China+University+of+Political+Science+and+Law+2006+survey&source=bl&ots=Y97d3dhiBn&sig=y5ZoOilcRzaSs2PcL6FT18x3W9w&hl=en&ei=RAgpTbrZCpS6sQP-pLCyCA&sa=X&oi=book_result&ct=result&resnum=3&ved=0CCUQ6AEwAg#v=onepage&q=China%20University%20of%20Political%20Science%20and%20Law%202006%20survey&f=false.

12. Timothy Webster, *Ambivalence and Activism: Employment Discrimination in China*, 44 *VAND. J. TRANSNAT'L L.* 643, 659 (2011).

13. *Id.*

14. Ronald C. Brown, *China's Employment Discrimination Laws During Economic Transition*, 19 *COLUM. J. ASIAN L.* 361, 364 (2006).

15. Zeng, *supra* note 3, at 1013.

16. Lu, *supra* note 8, at 138 (citing CAI DINGJIAN, *THE EMPLOYMENT DISCRIMINATION IN CHINA: CURRENT CONDITIONS AND ANTIDISCRIMINATION STRATEGIES* 505–47 (China Social Science Press 2007)).

17. Lu, *supra* note 8, at 138 (internal citations omitted). Blood type discrimination is based partially on the belief that a particular blood type determines one's personality. See Liu Xiaoyan, *Discrimination Based on Blood Type Constitutional?*, *CHINA YOUTH DAILY*, Nov. 23, 2001, available at http://news.xinhuanet.com/st/2001-12/03/content_145118.htm. Blood types have been thought among some Chinese people to have a correlation to personality traits, similar to the way astrologists believe a person's zodiac sign will influence their personality. *Id.*

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lack of hesitation in blatantly requiring female applicants to have symmetric and even-sized breasts.¹⁸

In 2006, the Communist Party of China (“CPC”) adopted the Resolution on Major Issues Regarding the Building of a Harmonious Socialist Society.¹⁹ “Employment discrimination can cause many social problems” and runs contrary to building a socialist harmonious society.²⁰ Employment discrimination is “closely related to the problem of unemployment,” and “[i]n a competitive labor market with high unemployment rate, people who are subject to employment discrimination tend to lose confidence in society, causing further social problems.”²¹ It is crucial to Chinese society that the Chinese government eliminates discrimination within the labor force to prevent social unrest and protests,²² and to accomplish its goal of a socialist harmonious society.

B. Chinese Culture and Society Before the Communist Party of China

Discrimination is deeply rooted in Chinese history. As early as the eighth century, during the Tang dynasty, the government established discriminating policies, such as forbidding Uighurs from trying to “pass themselves off as Chinese in any way.”²³ Additionally, like many cultures, a Chinese woman’s traditional role was in the home, caring for her husband and sons.²⁴ Chinese women could not hold title to property, despite their responsibility in tilling land in the

18. Lu, *supra* note 8, at 139 (citing Ren Zhengying, *Discrimination Against Women in Civil Servant Recruitment*, CHINA WOMAN DAILY, Feb. 23, 2004, available at <http://www.women.org.cn/allnews/06/574.html>). In this particular example, symmetrical breasts were required for civil servant positions, even though the job positions were entirely unrelated to appearance. Lu, *supra* note 8, at 139.

19. See Communiqué of the Sixth Plenum of the 16th CPC Central Committee, available at http://news.xinhuanet.com/english/2006-10/11/content_5191071.htm; *CPC Central Committee*, *supra* note 7.

20. Zeng, *supra* note 3, at 1012.

21. *Id.* at 1012–13 (internal citations omitted).

22. Brown, *supra* note 14, at 364 (“[H]istory suggests [large wage disparities between urban and rural workers, and between management officers and workers] could lead to social unrest and protest.”).

23. EDWARD H. SCHAFER, *THE GOLDEN PEACHES OF SAMARKANO: A STUDY OF TANG EXOTICS* 22 (1963).

24. Jamie Burnett, *Women’s Employment Rights in China: Creating Harmony for Women in the Workforce*, 17 *IND. J. GLOBAL LEGAL STUD.* 289, 292 (2010) (internal citations omitted).

countryside, which meant that they could never “accumulate wealth and wield any economic influence on society,” leaving them “economically powerless and dependent upon men.”²⁵ Men saw women as property, who belonged to their fathers, husbands, brothers or sons.²⁶ Chinese philosophy further reinforced this concept, as the Confucian doctrine of the “Three Following” provides that “daughters were to honor and obey their fathers until married, heed their husbands upon marriage and yield to their sons if widowed.”²⁷ Each of these cultural notions relegated women to second-class citizenship, and led to abuse and violence against them, which remains prevalent through this day.²⁸

C. *From Communism to a Socialist Market Economy*

Upon the establishment of the Communist Party of China (“CPC”) in 1921, the CPC “adopted a policy of mobilizing peasant and working class women.”²⁹ During this time, the conditions and treatment of women started to improve, and when Mao Zedong introduced Marxist reforms, *legal* discrimination against women was eliminated.³⁰ Women’s participation in the workforce was encouraged by the government, which used campaigns with slogans such as “women hold up half the sky” and “anything a man can do, a woman can do also.”³¹

Despite the possibilities for women to join the workforce, women continued to face several barriers to equality in the workplace.³² Few jobs were considered suitable for women.³³ Women also received significantly lower salaries than men for the same work,³⁴ and women working outside of the home faced overwhelming societal disapproval.³⁵

25. Anna M. Han, *Holding-Up More than Half the Sky: Marketization and the Status of Women in China*, 11 J. CONTEMP. LEGAL ISSUES 791, 793 (2001).

26. *Id.* (internal citation omitted).

27. *Id.* at 795.

28. *Id.* (internal citations omitted).

29. *Id.* at 796.

30. Although discrimination was legally banned, it often continued in practice despite the laws in place. *See id.* at 797.

31. Burnett, *supra* note 24, at 294 (internal citations omitted).

32. *Id.* at 293.

33. *Id.*

34. *Id.*

35. *Id.*

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Reforms to the Chinese constitution in 1949, although not very impactful in practice, helped to “lay the foundation for providing and protecting basic rights for Chinese women for the first time in Chinese history.”³⁶ Prior to China’s marketization in the 1990s, Chinese enterprises were not particularly concerned with the individual characteristics of the person assigned to the job.³⁷ “[T]here was a blurring of differences between men and women.”³⁸ Since the government confiscated any profits and subsidized any losses,³⁹ (the so-called “iron rice bowl system”⁴⁰) employers had no cause to be concerned with the individual characteristics of their workers. The planned economy system “took away incentives for enterprises to be profitable,” and in turn, “the costs of labor and the efficacy of the workers were unimportant to these enterprises.”⁴¹ “[E]mployment activities were conducted strictly in accordance with government plans and policies,”⁴² and therefore “employers usually did not have much discretion in their hiring practices.”⁴³ Managers lacked the authority to hire or fire workers, and the job assignment system was nondiscriminatory.⁴⁴

When China transitioned to a socialist market economy in the 1990s, shifting towards “greater economic efficiency and the free market system,”⁴⁵ employers were forced to maximize profits and minimize costs “if they hoped to survive without government subsidies of the former planned economy, and lawmakers responded by allowing greater employer autonomy.”⁴⁶ Ultimately, the transition encouraged employers to cut costs and seek the cheapest labor, and as a result (intentionally or unintentionally) ignore labor laws, leading to a host of discriminating practices against those

36. Han, *supra* note 25, at 797.

37. *Id.* at 803.

38. Charles J. Ogletree & Rangita de Silva-de Alwis, *When Gender Differences Become a Trap: The Impact of China’s Labor Law on Women*, 14 *YALE J.L. & FEMINISM* 69, 72 (2002).

39. *See* Han, *supra* note 25, at 803.

40. *See* Zeng, *supra* note 3, at 994.

41. Han, *supra* note 25, at 803–04.

42. Zeng, *supra* note 3, at 994.

43. *Id.* at 994–95 (internal citation omitted).

44. *See* Han, *supra* note 25, at 803.

45. Ogletree & Alwis, *supra* note 38, at 72.

46. Brown, *supra* note 14, at 363.

employees who were seen as less productive.⁴⁷ For the first time, workers could be fired under certain circumstances.⁴⁸ In addition, “the economic reforms have generally caused women in China to lose their jobs at a rate disproportionate to men and have effectively moved women farther away from the equality promised by the constitution.”⁴⁹ While workplaces in other countries are progressing, albeit slowly in many cases, China’s workforce is digressing, moving away from equal employment opportunity and treatment under the law and in practice.

D. *Prevalence of Employment Discrimination*

1. *Gender Discrimination*

Employment discrimination based on gender occurs when “an employer fails or refuses to hire female applicants because of their gender; or sets a higher and stricter standard in considering female applicants; or discharges or unilaterally terminates labor contracts with female employees when they want to marry, get pregnant, or request maternity leave or breast-feeding leave.”⁵⁰ “Many employers in China discriminate against women to avoid the prospect of maternity leave. These employers justify their discriminatory practices on the grounds that maternity leave increases labor costs [and] affects the ‘consistency of employment.’”⁵¹ Gender discrimination is “visible in hiring, dismissal, earlier

47. *Id.* (“This trend was particularly prevalent among employers outside of the state-owned enterprise (SOE) system.”); *see also* Han, *supra* note 25, at 804 (“Since enterprises face the prospect of either surviving by being profitable or extinction, and since selection of employees now bears a direct relationship to the bottom line, employers are seeking the cheapest labor.”).

48. Zeng, *supra* note 3, at 995 (internal citation omitted).

49. Burnett, *supra* note 24, at 290.

50. Lu, *supra* note 8, at 143 (citing ALL-CHINA WOMEN’S FEDERATION, <http://www.women.org.cn/english/english/aboutacwf/mulu/htm> (last visited May 14, 2012)). An example of such discrimination is demonstrated by Angel Feng, a graduate of a French business school, who, when searching for a job in early 2010, experienced extensive discrimination in the private sector. *See* Didi Kirsten Tatlow, *Old Biases Hamper Women in China’s New Economy*, N.Y. TIMES, Nov. 30, 2010, at A18, available at <http://query.nytimes.com/gst/fullpage.html?res=9F03E3D61F3DF933A05752C1A9669D8B63&pagewanted=all> (“The boss would ask several questions about my qualifications, then he’d say: ‘I see you just got married. When will you have a baby?’ It was always the last question. I’d say not for five years, at least, but they didn’t believe me.”).

51. Zeng, *supra* note 3, at 999 (internal citations omitted).

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retirement, fines for violation of family planning regulations, wage differences, denial of certain social welfare benefits, and sexual harassment.”⁵² Women are often the “last hired and the first fired,” and “increasingly work in lower-paid, less-valued jobs.”⁵³

In 2000, 71.52% of Chinese women were employed.⁵⁴ By 2008, that figure dropped to 67.5%.⁵⁵ Women were also paid only 63.5% of men’s salaries.⁵⁶ Additionally, women are greatly underrepresented in high-ranking positions.⁵⁷ In 2002, only 1.3% of women held management and leadership roles in private businesses and governments in China.⁵⁸ The “lower representation of Chinese women in high paying jobs”⁵⁹ is seen as a cause of gender discrimination. Employers rationalize their practices by stating that “women do not make good leaders; male employees will resist having to report to a female boss; and women are not as ‘capable’ as men in terms of physical strength or intellectual ability.”⁶⁰ One employer stated:

I don’t advocate hiring women, they are too much trouble. They get married, get pregnant and have children, and after that it’s an endless round of domestic responsibilities. You can’t expect them to deal with any work matters at all. Anyone who is a leader doesn’t wish to have too many women working under him.⁶¹

52. Burnett, *supra* note 24, at 298 (internal citation omitted).

53. Christine M. Bulger, *Fighting Gender Discrimination in the Chinese Workplace*, 20 B.C. THIRD WORLD L.J. 345, 354 (2000) (citing Human Rights in China, *Caught Between Tradition and the State: Violations of the Human Rights of Chinese Women*, 17 WOMEN’S RTS. L. REP. 285, 286 (1996)).

54. Tatlow, *supra* note 50 (citing Yang Juhua of Renmin University of China’s Center for Population and Development Studies, citing World Bank statistics).

55. *Id.*; *cf. Data & Statistics*, U.S. DEPT OF LABOR, http://www.dol.gov/wb/stats/stats_data.htm (last visited June 11, 2012) (stating that in 2010, only 58.6% of women in the U.S. were working or looking for work).

56. Tatlow, *supra* note 50; *cf. Data & Statistics*, *supra* note 55 (stating that in 2009, women in the U.S. earned eighty percent of men’s salaries).

57. Lu, *supra* note 8, at 145 (citing Dwight Daniels, *Equality for Women Begins in Workplace*, CHINA DAILY, July 2, 2004, available at http://www.chinadaily.com.cn/english/doc/2004-07/02/content_344886.htm).

58. *Id.*

59. Burnett, *supra* note 24, at 297 (citing Bulger, *supra* note 53, at 355).

60. Bulger, *supra* note 53, at 355 (internal citation omitted).

61. *Id.* (citing Human Rights in China, *supra* note 53, at 303).

Moreover, female college graduates are more likely to experience discrimination in employment.⁶² Hundreds of companies invited to a female college students' job fair in 2002 indicated that they were "not interested" in hiring female graduates.⁶³ A 2002 survey conducted by the Women's Federation in Jiangsu Province 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."⁶⁴ The survey also showed that "the employment rate of male graduates with [the] 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."⁶⁵

Although gender discrimination in employment exists throughout the world, "certain Chinese practices go beyond discrimination to the point of being violations of human rights."⁶⁶ Women have experienced discrimination in age and appearance, especially from consumer-oriented companies who are seeking to increase their market shares.⁶⁷ It is common to see job advertisements "specifying that the applicant must be 'young, female and attractive.'"⁶⁸ "Five facial organs in the right place," "decent looking," and "with elegance" are common phrases used in requirements for attractive employees.⁶⁹ While appearance discrimination may be characterized as disability-based discrimination,⁷⁰ rather than gender-based discrimination, attractiveness is more likely to be required of female applicants.⁷¹ Other job adver-

62. See Zeng, *supra* note 3, at 999.

63. *Id.*

64. *Id.* (internal citation omitted).

65. *Id.* (internal citation omitted).

66. Bulger, *supra* note 53, at 346 (internal citation omitted).

67. Han, *supra* note 25, at 808.

68. *Id.* (quoting Sheryl WuDunn, *Profit and Loss: China's Affection for Capitalism Erodes Gains in Equal Rights*, CHI. TRIB., Sept. 20, 1992, at 5).

69. Lu, *supra* note 8, at 166 (internal citations omitted).

70. See *id.* at 165–66 ("Some argue that employment discrimination on the basis of largely immutable aspects of bodily and facial appearance should be construed as disability-based discrimination."). For example, a woman with an unattractive nose might be classified as disabled, because there is something "wrong" with her appearance; therefore she is labeled "unable" to perform her job, even when appearance is not an essential element of her career.

71. *Id.* at 166 (explaining that 39.9% of advertisements with appearance requirements apply to females, as compared to 6.1% for men).

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tisements often state, “Saleswoman: less than 30,” “Waitress: 18 to 25,” and “English-speaking secretary: less than 25.”⁷² “Middle-aged women are regularly told that they are too old, too fat, too ugly and too short for service positions such as waitress or salesperson.”⁷³

Sexual harassment is also extremely prevalent in Chinese employment.⁷⁴ Working environments have become increasingly unsafe for women.⁷⁵ “[O]ffenders typically abuse their authority of office, combining threats of discharge or defamation with inducements of promotions and pay raises, in a bid to force female subordinates to submit to their advances.”⁷⁶ Despite the laws in place,⁷⁷ harassment continues in the workplace. In a national survey of 8000 people, conducted by two major media organizations, 79% of women said they had experienced sexual harassment, compared to 22% of men.⁷⁸ A study by the Chinese Academy of Social Sciences found that women working for private firms were twice as likely as women in state-owned companies to be victims of harassment.⁷⁹

Thus, female workers experience widespread discrimination in a variety of forms, from implicit to explicit discrimination, in a variety of companies, and at all levels of employment.

2. *Migrant Worker Discrimination*

Since China’s reform and decreased isolation in the late 1970s, a new group of rural laborers have continued to migrate to urban areas to work, also known as the “floating population” or “migrant workers,”⁸⁰ many of which were women.⁸¹ As of 2009, China had over 200 million migrant

72. Bulger, *supra* note 53, at 358 (internal citation omitted).

73. *Id.* (internal citation omitted).

74. *Sexual Harassment: A Growing Social Problem*, CHINA DAILY (May 20, 2005), http://www.chinadaily.com.cn/english/doc/2005-05/20/content_444316.htm.

75. *Id.*

76. *Id.*

77. *See infra* Part IV.

78. *China Outlaws Sexual Harassment*, BBC NEWS (Aug. 28, 2005), <http://news.bbc.co.uk/2/hi/4192672.stm>.

79. *Id.*

80. Na Lan, *Is There New Hope in Labor Rights Protection for Chinese Migrant Workers?*, 10 *ASIAN-PAC. L. & POL’Y J.* 482, 483 (2009).

81. Burnett, *supra* note 24, at 299 (internal citation omitted) (“Young

workers, which is approximately 15% of the total population or 27% of the rural population, and most of these workers are doing “low-paying manual jobs in big cities.”⁸²

Migrant worker discrimination is partly grounded in and attributed to the *hukou* household registration system.⁸³ Introduced in 1958, *hukou* prevented unauthorized rural-urban mobility and “effectively chained Chinese farmers to the land.”⁸⁴ Although the *hukou* system has been relaxed in recent years—and the government issued a directive in 2003 affirming the rights of migrant workers to work in the cities⁸⁵—*hukou* “continues to bar migrant workers’ employment opportunities and access to social security,”⁸⁶ and in some ways Chinese migrant workers are considered “foreigners within the cities of their own country.”⁸⁷ One scholar has suggested the need to “further reform the *hukou* system to allow those migrant workers, with competent work skills who want to stay in the cities, enjoy equal treatment as urban citizens.”⁸⁸

women are especially likely to take the risk of moving to the city in order to find a job.”).

82. Lan, *supra* note 80, at 483.

83. *Id.* at 487 n.22.

Under the 1958 Regulations on Household Registration in the People’s Republic of China, every Chinese citizen is assigned a ‘hukou’ location and a rural or urban classification. A rural hukou provides access to farmland use; an urban hukou provides access to jobs, housing, food, and state-sponsored benefits. The hukou location specifies where a worker belongs. Until the mid-1980s, it was extremely difficult for rural Chinese to survive in the cities without an urban hukou. Rural workers did not have access to the necessities of life, which were all centrally controlled and allocated.

Id. (internal citations omitted).

84. *Id.* at 487.

85. *Id.* (citing Cindy C. Fan, *Migration, Hukou, and the City, in CHINA URBANIZES: CONSEQUENCES, STRATEGIES, AND POLICIES* 68 (Shahid Yusuf & Anthony Saich eds., The World Bank 2008)). There has also been progress with respect to the public perception of migrant workers as reflected in the media. *Id.* at 489 (citing Paul French, *Asia Pacific: China’s Mobile Workforce – Goodbye Migrant Workers, Hello New Urban Citizens*, ETHICAL CORPORATION, available at <http://web.archive.org/web/20071012031044/http://www.ethicalcorp.com/content.asp?ContentID=4846>) (In 2007, the Chinese media began to promote changing the official reference to migrant workers from “peasant labourers” to “new urban citizens”).

86. *Id.* at 488.

87. *Id.* (quoting Ling Li, *Towards a More Civil Society: Mingong and Expanding Social Space in Reform-Era China*, 33 COLUM. HUM. RTS. L. REV. 149, 156 (2001)).

88. *Id.* at 517 (emphasis added).

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Forms of migrant worker discrimination vary greatly, and “[m]any employers consider migrant workers as cheap, temporary work hands rather than formal employees and are thus reluctant to sign contracts with them.”⁸⁹ Furthermore, migrant workers “are frequently portrayed negatively in the media and blamed by local residents for over-crowded public transportation, increasing crime rates, and race-to-the-bottom job competition against laid-off state-owned enterprise (“SOE”) employees.”⁹⁰ Moreover, extra tuition fees are often charged for no apparent reason by public schools for migrant workers’ children who stay with their parents in the cities and despite no additional associated costs to have these children attend schools in the cities.⁹¹

In addition, underpayment and unpaid wages are very common for migrant workers.⁹² On average, “[a] migrant worker receives only about one-quarter the wage of an urban worker for the same work.”⁹³ Wages are also often delayed from one month to eight years, with only 48% of migrant workers being able to receive their salaries on time in 2006.⁹⁴ Additionally, migrant workers have to work long hours and rarely get overtime pay. Forty-six percent of migrant workers work “seven days a week” and over 36% of migrant workers work “six days a week,” while seventy-six percent of them do not receive “overtime payment.”⁹⁵ In addition to lower wages, migrant workers are also the most vulnerable group with respect to work safety.⁹⁶ Almost 80% of workplace accidents

89. *Id.* at 492 (“Only 12.5% of migrant workers had employment contracts in 2005.”). However, the new Labor Contract Law, effective as of January 1, 2008, provides that employers must sign labor contracts, even with temporary workers who are employed for unfixed terms, within one month of use of labor services. See Labor Contract Law (promulgated by the Standing Comm. Nat’l People’s Cong., June 29, 2007, effective Jan. 1, 2008), art. 10 & 14 (2008) (China). Despite this law, many employers do not comply with its requirements and workers still go without labor contracts. See generally Virginia E. Harper Ho, *From Contracts to Compliance? An Early Look at Implementation Under China’s New Labor Legislation*, 23 COLUM. J. ASIAN L. 35 (2009).

90. Lan, *supra* note 80, at 492 (citing Daniel F. K. Wong et al., *Rural Migrant Workers in Urban China: Living a Marginalized Life*, 16 INT’L J. SOC. WELFARE 32, 36 (2007)).

91. Lan, *supra* note 80, at 492 (citing Wong, *supra* note 90, at 32, 36).

92. Lan, *supra* note 80, at 489.

93. *Id.* (internal citations omitted).

94. *Id.* at 490.

95. *Id.*

96. *Id.*

in 2005 occurred in the industries where most employees are migrant workers, including the coal mining, metal, dangerous chemicals and fireworks industries.⁹⁷ In fact, “entire provinces have been known to prohibit the hiring of migrant workers from outside provinces because of the threat they pose to local wages and social order.”⁹⁸ Migrant workers experience some of the worst working conditions and blatant discrimination.

3. *Infectious Disease Discrimination*

Infectious disease discrimination is defined as discrimination on the basis of a person being a carrier of a contagious disease.⁹⁹ It is estimated that approximately 10% of China’s population are either infected by or are carriers of the Hepatitis B virus (HBV).¹⁰⁰ This population faces tremendous social pressure and discrimination because of “a strong but nonetheless erroneous belief that they pose a serious threat to the surrounding people and environment.”¹⁰¹ They are “virtually excluded both from most entry-level government civil servant positions and from employment in many state and private companies.”¹⁰²

A lawsuit filed by a citizen, Zhang Xianzhu, in 2004 was the first lawsuit against a Chinese governmental agency who discriminated against a government employment applicant because he was a carrier of HBV.¹⁰³ After this case, the government released new standards for government employee recruitment outlawing discrimination against people with HBV.¹⁰⁴ This law, however, has no impact on private com-

97. *Id.*

98. Burnett, *supra* note 24, at 300 (internal citation omitted).

99. Law on Prevention and Treatment of Contagious Disease (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 21, 1989, effective Sept. 1, 1989, amended Aug. 28, 2004), art. 16 (1989) (China), *available at* http://www.chinacourt.org/flwk/show1.php?file_id=96086.

100. Zeng, *supra* note 3, at 1002–03 (citing *The Hepatitis B Virus Does Not Transmit Through Social Activities*, XINHUA NEWS AGENCY (Jan. 4, 2004), http://www.gd.xinhuanet.com/newscenter/2004-04/01/content_1895304.htm).

101. *Id.* at 1003.

102. *Id.*

103. Lu, *supra* note 8, at 169–70; *see also id.* at 140 n.36 (explaining that despite the fact that the plaintiff scored the highest on all required examinations and was disqualified after testing positive for HBV, the court supported one of the plaintiff’s claims but nevertheless did not grant the plaintiff a remedy).

104. *Id.* at 170.

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panies, many of which conduct mandatory HBV tests and reject applicants with positive test results.¹⁰⁵

On October 13, 2010, a court heard the first employment discrimination case related to an HIV-positive job seeker in China.¹⁰⁶ The court in the eastern Anhui province held that the Anqing Education Bureau had discretion to determine whether it wants to hire HIV carriers, and upheld bureau standards relating to the teaching profession, which state that HIV carriers should not be employed.¹⁰⁷ Despite the provision in the Employment Promotion Law addressing infectious disease,¹⁰⁸ as discussed *infra*, the Bureau claimed that “the law does not forbid employers from rejecting HIV carriers.”¹⁰⁹

These two cases exemplify the widespread employment discrimination related to infectious disease, which exists in different forms: “mandatory testing at recruitment, mandatory testing during employment, questions on recruitment forms, lack of confidentiality, dismissal, restriction in job duties, and denial of employment.”¹¹⁰ A 2008 study discovered that people with diseases may have difficulty meeting their basic needs because of “discrimination in hiring and employment, which contributes to social isolation and can further exacerbate symptoms of illness.”¹¹¹ The same study found that employers in Beijing in the healthcare, manufacturing and technology fields questioned whether a person with HIV could physically and psychologically handle the workload.¹¹² The study also found:

105. *Id.*

106. Pang Qi, *HIV Carrier Loses Lawsuit*, GLOBAL TIMES (Nov. 12, 2010), <http://www.globaltimes.cn/china/society/2010-11/591811.html>.

107. *Id.*; see also Teachers Law (promulgated by Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994) (China), available at <http://tradeinservices.mofcom.gov.cn/en/b/1993-10-31/13698.shtml>.

108. See Employment Promotion Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008), art. 30 (2008) (China); *infra* Part II.E.

109. Qi, *supra* note 106. As of the writing of this comment, the Plaintiff has decided to appeal the court's decision. See *Report: Chinese Man Plans to Appeal HIV Discrimination Case*, CNN.COM (Nov. 14, 2010, 10:57 PM), <http://edition.cnn.com/2010/WORLD/asiapcf/11/15/china.hiv.suit/>.

110. Deepa Rao et al., *Stigma in the Workplace: Employer Attitudes About People with HIV in Beijing, Hong Kong, and Chicago*, 67 SOC. SCI. & MED. 1541, 1543 (2008).

111. *Id.* at 1542.

112. *Id.* at 1545.

[E]mployers appeared to have concerns about the contagiousness of HIV/AIDS. Notions of contagion took on two forms: social and biological. In terms of biological contagion, employers had concerns about becoming infected themselves, and about their employees' fear of becoming infected. Employers who described social contagion were concerned that persons with HIV might negatively influence others around them and lower the social status of those associated with them.¹¹³

Citizens have made blatant statements about the acceptability of employment discrimination, such as, "I think [people with HIV] are like a time bomb . . . I would not hire [a person with HIV] under any circumstances, unless everyone in the world were dead or had AIDS; people in this society should discriminate against them . . . the society requires stability and peace."¹¹⁴ Furthermore, employers were concerned that their companies' reputations would be affected by hiring persons with HIV, and assumed that a person with HIV has "engaged in immoral behaviors associated with HIV, and because of this, people with HIV should be kept separate from others."¹¹⁵ Infectious disease discrimination is clearly a social and economic issue throughout the country, and has only recently been addressed by legislation and the courts.

II. IDENTIFICATION OF THE PROBLEM

In the past thirty years, China has taken action to promote equality in the workplace, after being heavily influenced by international participants.¹¹⁶ However, much of this effort has been hindered by a number of limitations that prevent workers from enforcing their rights.¹¹⁷ This section addresses the various limitations on the efforts to promote equality in the work place.

A. *International Law's Influence*

In the past thirty years, China has slowly become more involved in the global women's movement. In 1975, China attended the International Women's Assembly, the first

113. *Id.*

114. *Id.* at 1547.

115. *Id.*

116. *See* Burnett, *supra* note 24, at 303.

117. *See id.*

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international forum on women's development.¹¹⁸ In 1979, China attended the Convention on the Elimination of All Forms of Discrimination Against Women.¹¹⁹ Additionally, in 1990, China signed onto the International Labor Organization (ILO) Convention for Equal Remuneration for Equal Work.¹²⁰ It later ratified the ILO Convention on Employment and Occupational Discrimination in 2006,¹²¹ and thereby committed to implementing affirmative measures and policies to eliminate employment discrimination.¹²²

Although China has ratified these international conventions, they have proven less than effective due to enforcement problems.¹²³ Despite being technically enforceable through the International Court of Justice, the ILO must "often resort to soft power, such as public shaming or providing incentives for compliance such as funding or technology."¹²⁴ The ratifications and subsequent implementation of domestic laws,¹²⁵ however, demonstrate China's commitment to improving women's participation and equality in the labor force.¹²⁶ Moreover, China's international participation and passing of domestic regulations can serve as an "expressive function in communicating public policy objectives and priorities, and the policy message transmitted through legislation has consequences for society that may be equally or more important than the content of the regulation itself."¹²⁷

B. *PRC Constitution*

The Constitution of the People's Republic of China ("PRC Constitution") provides that all citizens are "equal before the law."¹²⁸ It further provides, "Women . . . enjoy equal rights

118. *Id.* at 301.

119. *Id.*

120. *Id.*

121. *Id.* at 302.

122. Zeng, *supra* note 3, at 1014–15 (citing International Labor Organization Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31).

123. Burnett, *supra* note 24, at 302.

124. *Id.*; see also Zeng, *supra* note 3, at 1014–16.

125. See *infra* Part II.C–F.

126. Burnett, *supra* note 24, at 302.

127. Ho, *supra* note 89, at 72 (internal quotation marks omitted).

128. XIANFA art. 33 (1982) (China); see also Lu, *supra* note 8, at 173 ("[I]t is widely believed that equal rights to employment are a fundamental element of

with men in all spheres of life, in political, economic cultural and social, and family life. The state protects the rights and interests of women, applies the principle of equal pay for equal work for men and women alike”¹²⁹ Although this shows China’s commitment to women’s rights and equality, the Constitution is not self-executing and “is meant to be a guide for legislators . . . to follow and can only be enforced if there is a national law that articulates a given doctrine.”¹³⁰

This portion of the Constitution is further criticized because while a “focus on accommodating the reproductive roles of women in the workplace benefits women . . . this focus can stereotype women and reinforce traditional subordinate roles.”¹³¹ To make matters worse, the “added responsibility of employers to provide special treatment to women translates into a disincentive to hire women and an inducement to lay off female employees when demand wanes.”¹³²

Additionally, the U.S. Department of State found in 2000 that “despite equal rights promised by the Constitution and the [Law on the Protection of the Rights and Interest of Women, as discussed *infra*], Chinese women have continued to report discrimination, sexual harassment, unfair dismissal, demotion, and wage discrepancies in employment.”¹³³

C. Labor Law of the PRC

The Labor Law states that workers enjoy the rights to equal employment opportunities and choice of jobs, providing protection against discrimination on the basis of gender, nationality, race and religion.¹³⁴ It states:

Women shall enjoy equal rights as men in employment.
Sex shall not be used as a pretext for excluding women from employment during recruitment of workers unless the types of work or posts for which workers are being

‘equal [before the] law.’”).

129. XIANFA art. 48. (1982) (China).

130. Burnett, *supra* note 24, at 303.

131. Ogletree & Alwis, *supra* note 38, at 73.

132. *Id.*

133. Bulger, *supra* note 53, at 353 (citing U.S. DEP’T OF STATE: BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR 1999, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2000), available at <http://www.state.gov/j/drl/rls/hrrpt/1999/284.htm>).

134. Labor Law (promulgated by the Standing Comm. Nat’l People’s Cong., July 5, 1994, effective Jan. 1, 1995), art. 3 (1995) (China).

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recruited are not suitable for women according to State regulations. Nor shall the standards of recruitment be raised when it comes to women.¹³⁵

However, the law has several flaws. For instance, the law “require[s] violators to provide the employee who has been discriminated against with economic compensation,” but it does not provide a way to calculate compensation amounts.¹³⁶

D. Law on the Protection of Rights and Interests of Women

In 2005, the Standing Committee of the National People’s Congress passed amendments to the Law of the People’s Republic of China on the Protection of Rights and Interests of Women.¹³⁷ This law provides rules for preventing discrimination in the workplace on the basis of gender and specifically protects women from sexual harassment.¹³⁸ The law states, “[w]ith the exception of the special types of work or post unsuitable to women, no unit may, in employing staff and workers, refuse to employ women by reason of sex or raise the employment standards for women.”¹³⁹

One drawback to this law is that it emphasizes the differences between men and women.¹⁴⁰ While China’s labor legislation “guarantees protection for women during pregnancy, nursing, child birth and neo-natal care . . . these provisions make women easy targets when enterprises seek to eliminate redundant staff.”¹⁴¹ The law also “deters employers from hiring women who might become pregnant during the time in which the [labor] contract is to be terminated.”¹⁴² The law prevents women from performing certain jobs that are considered “unsuitable”, including “mining on hills or underground, scaffolding work, work that involves logging timber . . . and other work categorized as

135. *Id.* art. 13.

136. Burnett, *supra* note 24, at 307 (citing *id.* art. 28).

137. See Law on the Protection of Rights and Interests of Women (promulgated by the Standing Comm. Nat’l People’s Cong., April 3, 1992, effective Oct. 1, 1992, amended Aug. 28, 2005) (China), available at <http://www.china.org.cn/english/government/207405.htm>.

138. *Id.* ch. IV.

139. *Id.* art. 23.

140. See Ogletree & Alwis, *supra* note 38, at 75.

141. *Id.* at 75–76.

142. *Id.* at 76.

physically intense.”¹⁴³ The fact that women are restricted from certain jobs in the law itself weakens the anti-discriminatory effect the law is intended to remedy.¹⁴⁴ Moreover, one scholar has identified “an analogous cause-and-effect relationship between protective labor laws and gender bias in the hiring and firing of employees.”¹⁴⁵ Thus, China should move away from emphasizing women’s biological functions.¹⁴⁶

E. Contagious Disease Law

The 2004 Law on Prevention and Treatment of Contagious Disease provides that an employer cannot discriminate on the basis of a person being a carrier of a contagious disease, unless and except required by statute.¹⁴⁷ Yet, the law does not contain remedies for this type of discrimination.¹⁴⁸ While the law addresses the problem of discrimination on the basis of infectious disease, the government has been unable to effectively implement and enforce this policy.¹⁴⁹

F. Employment Promotion Law

The Employment Promotion Law (“EPL”), passed in 2007 and effective as of January 1, 2008, provides several protections against discrimination in the workplace.¹⁵⁰ The law aims to “create fair employment conditions, stop employment discrimination, advance employment, and create

143. *Id.* at 77.

144. *See id.*

145. *Id.* at 78.

146. *Id.* at 80;

Chinese laws and regulations that attach to women’s biological functions and prohibit women from engaging in hazardous physical work limit women’s work opportunities. The theory behind these laws translates into actual practice when women are forced into the role of primary caretaker of the family, and women’s work opportunities are considerably limited compared to those of men.

Id.

147. Law on Prevention and Treatment of Contagious Disease (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 21, 1989, effective Sept. 1, 1989, amended Aug. 28, 2004), art. 16 (2004) (China); *see also* Brown, *supra* note 14, at 397.

148. Law on Prevention and Treatment of Contagious Disease, art. 16.

149. *See* Rao et al., *supra* note 110, at 1543.

150. Employment Promotion Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Jan. 1, 2008) (China).

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social harmony in China.”¹⁵¹ It also “prohibits discrimination on numerous grounds, including gender, and places the obligation of avoiding discriminatory employment practices on the employer.”¹⁵²

Several Articles within the EPL directly address fairness and equality in its text. Article 25 provides that the “people’s governments at all levels shall create a fair employment environment to eliminate discriminatory employment practices and shall . . . adopt measures in support and aid of persons who encounter difficulties in seeking employment.”¹⁵³ Article 26 states, “[Employers] . . . shall provide workers with equal employment opportunities and equitable conditions of employment, and shall avoid discriminatory employment practices.”¹⁵⁴

The EPL goes on to address women’s rights specifically, demonstrating that the government has realized the need to provide for the protection of female workers. Article 27 provides, “The state shall safeguard the equality of women with men in the enjoyment of labor rights. With the exception of certain types of work or position designated by the state as unsuitable for women, no employment unit . . . shall refuse to recruit women by reason of gender or impose higher employment criteria for women.”¹⁵⁵ The EPL further provides that employers cannot impose marriage or childbirth restrictions on the employee.¹⁵⁶

In addition to addressing women’s rights specifically, the EPL also provides for rights of rural workers and prohibits discrimination based on their origins. Article 31 of the EPL states, “Rural workers who move to urban areas to seek employment shall enjoy equal labor rights to urban workers and shall not be subjected to discriminatory restrictions.”¹⁵⁷

151. Burnett, *supra* note 24, at 311.

152. *Id.*

153. Employment Promotion Law, art. 25.

154. *Id.* art. 26.

155. *Id.* art. 27. While this might be seen as an improvement for women’s rights, the fact that the Law contains specific reference to positions “unsuitable for women” as provided by the government reinforces gender stereotypes and the position that women are inferior to men. See Burnett, *supra* note 24, at 312 (“[The EPL] maintains the traditional and patriarchal idea that women are weaker than men and must be protected because they are incapable of determining for themselves which jobs they are capable of performing.”).

156. Employment Promotion Law, art. 27.

157. *Id.* art. 31.

This is the first nationwide law to outlaw local policies discriminating against rural workers in favor of urban residents.¹⁵⁸

Article 30 prevents an employer from refusing to employ a job candidate on the basis that he or she is “a carrier of any infectious pathogen.”¹⁵⁹ However, this provision is subject to the exception that the employee shall not be permitted to “enter into any type of employment prone to facilitate the spread of infectious diseases . . . before he/she is cured or eliminates the suspicion that he/she carries the infectious pathogen in question.”¹⁶⁰ This provision arguably provides weak protection to workers with diseases, as the law leaves room for interpretation regarding which professions are prone to spread disease, and may therefore be used by employers to avoid hiring anyone with a disease on the basis of this exception.

Despite the EPL right to bring lawsuits in Chinese courts for employment discrimination,¹⁶¹ there is no clear standard with respect to what powers the courts possess to penalize discriminating employers in violation of the EPL’s articles. The EPL does not provide the employee with specific remedies for discrimination suffered, nor does it provide any specific liability for violation of the law,¹⁶² and therefore the employer has little incentive to avoid discriminating practices and the employee has little incentive to pursue a claim against the employer.¹⁶³

Additionally, the EPL has serious limitations.¹⁶⁴ While the EPL “proclaims that ‘the state shall safeguard the equality of women with men in their enjoyment of labor rights,’ which could be interpreted to protect women employees, the remaining articles of the Employment Promotion Law appear to protect only those women seeking

158. Ho, *supra* note 89, at 68.

159. Employment Promotion Law, art. 30.

160. *Id.*

161. *See id.* art. 62 (“In the event of any employment discrimination in violation of the provisions of this Law, the relevant worker(s) shall be entitled to initiate legal proceedings in the people’s court.”).

162. Lan, *supra* note 80, at 512.

163. For further discussion of the lack of incentive for employees to file employment discrimination lawsuits, see *infra* Part III.A.

164. *See* Burnett, *supra* note 24, at 312.

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employment.”¹⁶⁵ The ILO criticized the law by stating:

Following the ILO resolution of 1985 on equality of opportunity and treatment between men and women workers, specific measures of protection for women that are based on stereotyped thinking about their ability and their role in society have been called into question and may lead unnecessarily to breach of the principle of equality of opportunity and treatment. In this draft, although the phrases might be an expression of acknowledgment of the role women play in the modern Chinese labour market, the wording could be misinterpreted, and possibly lead to segregated job vacancies, training, guidance and job offers.¹⁶⁶

Therefore, although the EPL is a step closer towards anti-discrimination, there are several aspects that weaken the effort.¹⁶⁷

G. *Independent Trade Unions*

Independent trade unions are groups that represent workers' rights, entirely independent from any government involvement. Currently, independent trade unions in China are illegal.¹⁶⁸ The only worker's federation allowed to operate is the All-China Federation of Trade Unions (ACFTU), and any union established must be registered under the ACFTU.¹⁶⁹ The ACFTU is essentially an arm of the government and a subsidiary organ of the CPC that is designed to facilitate and support government policies within enterprises and ensure the continued governmental control of the working population.¹⁷⁰ As such, Chinese workers are unable to protect their own interests without

165. *Id.*

166. *Id.* (citing John Balzano, *Toward a Gay-Friendly China?: Legal Implications of Transition for Gays and Lesbians*, 16 *LAW & SEXUALITY REV.* 1, 19 (2007)).

167. For further discussion, see *id.* at 311–12.

168. See Trade Union Law (promulgated by the Standing Comm. Nat'l People's Cong., April 3, 1992, effective April 3, 1992, amended Oct. 27, 2001), art. 4 (2002) (China); Yin Lily Zheng, Note, *It's Not What is On Paper, But What Is In Practice: China's New Labor Contract Law and the Enforcement Problem*, 8 *WASH. U. GLOB. STUD. L. REV.* 595, 608–09 (2009).

169. *The All-China Federation of Trade Unions (ACFTU)*, HUMAN RIGHTS IN CHINA, http://www.hrichina.org/public/contents/article?revision_id=18142&item_id=18141 (last visited May 14, 2012).

170. *Id.*

government interference.¹⁷¹

In addition, anyone attempting to create an independent trade union risks harsh punishment. For example, the case of Hu Shigen demonstrates the injustice in making independent trade unions illegal. Hu Shigen, the founder of an independent trade union, was arrested and sentenced to a twenty-year prison sentence for attempting to form an independent trade union and political party in the early 1990s.¹⁷² He was released from prison in 2008 after serving a sixteen-year sentence.¹⁷³ The illegality of establishing independent trade unions is a strong deterrent against anyone attempting to organize and take part in collective action to enforce their rights.

The government has instituted rules that disable unions from enforcing workers' equality. "[T]he law prohibits unions from organizing strikes," and "the primary role of unions in China is to 'prevent work stoppages.'"¹⁷⁴ "Without the right to organize strikes, unions in China lack the basic weapon to defend workers' rights from arbitrary and abusive management practices."¹⁷⁵ One scholar has called for the enhancement of trade unions "in helping migrant workers with the signing of labor contracts, education on labor rights consciousness, communication with legal aid, and collective bargaining."¹⁷⁶

III. OBSTACLES TO EQUAL EMPLOYMENT OPPORTUNITIES

A. *Lack of Access to Enforcement Mechanisms*

Many workers affected by employment discrimination face similar obstacles to enforcing their rights against discriminating employers, despite the particular type of discrimination experienced.¹⁷⁷ "Insufficient legal support is a significant legal barrier for plaintiffs to win an employment

171. See Mingwei Liu, *Union Organizing in China: Still a Monolithic Labor Movement?*, 64 INDUS. & LAB. REL. REV. 30, 30–31 (2010).

172. *Founder of Independent Trade Union Released from Prison*, CHINA LAB. BULL. (Aug. 27, 2008), <http://www.clb.org.hk/en/node/100296>.

173. *Id.*

174. Zheng, *supra* note 168, at 609.

175. *Id.*

176. See Lan, *supra* note 80, at 517.

177. See *id.* at 493.

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discrimination case.”¹⁷⁸ Most of the workers usually cannot afford to stop working in order to find legal counsel and go through the complicated labor dispute resolution process or litigation.¹⁷⁹ Litigation costs are often too high, and the likelihood of success at a discrimination claim is too low, to make pursuing litigation worthwhile.¹⁸⁰ The lack of incentive to bring discrimination claims against employers is exacerbated by the lack of a clear or guaranteed remedy upon a successful case.¹⁸¹

Plaintiffs must satisfy a heavy burden of proof in employment discrimination claims. In the United States, once the plaintiff establishes his *prima facie* case of discrimination, the burden of proof shifts to the defendant to provide a non-discriminatory reason for its decision. If the defendant meets that burden, the burden then shifts back to the plaintiff to prove why the proffered reason is merely pretext for discrimination.¹⁸² This burden-shifting standard levels “the playing field” between a plaintiff and a defendant, since a defendant often possesses all of the necessary information for the claim.¹⁸³

In contrast, Chinese laws do not articulate an evidentiary standard and do not include the same burden-shifting between plaintiffs and defendants. As a result, employers do not have to produce information and plaintiffs must rely on “stray comments or circumstantial evidence to prove their case.”¹⁸⁴ This high bar provides a strong disincentive for workers to enforce their rights under the existing laws.

Beyond the logistical barriers to legal claims, discrimination is deeply rooted in Chinese culture and society. Traditional views held by some Chinese citizens of women, migrant workers and those with

178. Zeng, *supra* note 3, at 1009.

179. The labor dispute resolution process and litigation would involve great legal costs, lost income and lost time. See Lan, *supra* note 80, at 493.

180. See Ho, *supra* note 89, at 58 (“[A] typical recovery in most cases will be less than a few thousand RMB In light of these returns, the cost of litigating has historically been too high for many potential plaintiffs.”) (internal citations omitted).

181. See generally Employment Promotion Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Jan. 1, 2008), art. 61–68 (2008) (China); see *infra* Part IV.B.

182. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

183. Webster, *supra* note 12, at 702.

184. *Id.*

infectious disease exacerbate unfair treatment in the workplace.¹⁸⁵ Additionally, migrant workers (as well as some other employees) are less educated than urban workers, so their overall awareness of their rights, with respect to discrimination in the workplace, is relatively lower and they are less likely to understand they are being mistreated.¹⁸⁶ Many local government officials “view migrant workers as troublemakers, and they choose to tolerate the abusive conduct of enterprises to avoid loss of capital investment and local revenue, which are important indexes for their promotions.”¹⁸⁷ These entrenched realities pose complex obstacles to overcoming employment discrimination.

B. Lack of Clear Standard of Proof

There is little guidance as to what is required for a showing of discrimination.¹⁸⁸ Although proving discrimination in China “does not involve the complex burdens of proof and production, and the rules of evidence it does in the United States,”¹⁸⁹ the regulations are silent as to what is necessary for proof.¹⁹⁰ The lack of a clear standard makes it difficult to predict whether an employee will have a case against an employer and, since the costs of litigation are high, especially for workers who have low wages, there is little incentive for an employer to pursue a discrimination claim against an employer.

The absence of bureaucracy and a clear definition of “discrimination” also presents difficulties for Chinese workers. “China lacks implementing regulations or judicial interpretations that tell courts how to handle employment discrimination claims or remedy successfully litigated claims.”¹⁹¹ In the United States, the Equal Employment Opportunity Commission helps to enforce the anti-discrimination laws and provide guidance on interpreting and

185. See Lan, *supra* note 80, at 493.

186. *Id.*

187. *Id.*

188. See Brown, *supra* note 14, at 412 n.296 (“The use of evidentiary and procedural devices to prove discrimination, such as prima facie, disparate treatment, disparate impact, mixed motives, affirmative defenses, and burdens of proof, all seem possible to use, though there is little legislative guidance.”).

189. *Id.* at 411.

190. *Id.*

191. Webster, *supra* note 12, at 664.

enforcing employees' rights. No such organization exists in China.

C. Lack of Incentive to Comply with Labor Laws

While numerous laws address the rights of workers, enforcement of these laws has proven problematic. "China has earned a reputation for lax enforcement of its labor laws, and the gap between the law on the books and the law in practice has been wide indeed."¹⁹² Despite the government's underlying policy and position against employment discrimination, as demonstrated by the various laws mentioned *supra*, these laws have little significance or impact if they are ineffective in remedying discrimination in practice.

Scholars have identified two strategies for enforcing the labor laws: deterrence-based strategies and cooperative strategies.¹⁹³ Under the deterrence approach, "regulators appeal to negative motivations, namely the fear of sanction [by the government], to promote compliance; administrative monitoring and inspections are therefore the primary enforcement tool."¹⁹⁴ Under the cooperative approach, "regulators and regulated firms work together toward compliance objectives, and enforcement relies more heavily on positive incentives and rewards rather than penalties."¹⁹⁵ Cooperative mechanisms include "waivers of penalties for voluntary self-disclosure and correction, educational programs, and tax incentives to companies who implement appropriate compliance programs."¹⁹⁶

Unfortunately, both of these approaches have their faults. With the deterrence-based approach, discrimination will continue, despite the fear of sanctions, if the sanctions are not sufficiently high to deter employers from discriminating practices.¹⁹⁷ Since the sanctions in effect are relatively low, employers may simply accept the fees as a labor cost, and continue practices that are profit-maximizing, regardless of treatment of employees.¹⁹⁸ Furthermore, "there

192. Ho, *supra* note 89, at 39.

193. *See generally id.* at 47–54.

194. *Id.* at 43–44.

195. *Id.* at 44.

196. *Id.*

197. *See id.* at 51–52.

198. *See id.*

are effectively no direct consequences to violations as long as they are corrected when the employer is ‘caught.’ Thus, employers have little incentive to be pro-active about compliance.”¹⁹⁹ The cooperative approach relies too heavily on employer initiative, allowing employers to maintain their employment practices as is because they have no fear of punishment. There is insufficient incentive for employers to abandon their deeply rooted attitudes surrounding discrimination. Considering the statistics presented *supra* in Part II, the cooperative strategy has not been effective.

D. Education and Awareness of Differences

Another reason for the continued discriminating practices in employment is the lack of information among Chinese people about individual differences. For instance, with respect to infectious disease discrimination, the Chinese government did not begin its response to HIV/AIDS until relatively recently in the late 1990s.²⁰⁰ As such, much of the general public is just learning about HIV/AIDS and it may take some time to permeate through society and influence public stigmas—especially employers’ attitudes about people with HIV.²⁰¹

IV. PROPOSAL

A. Enact a Pure Employment Anti-Discrimination Law

In China, unlike in the United States, there is no law solely addressing employment discrimination.²⁰² While the EPL includes provisions on discrimination, it lacks any clear standards and does not specify remedies for violations of the law. Consequently, China’s legislators should pass a law specifically addressing discrimination in employment in order to provide clear rules against employment discrimination, and provisions addressing the standards for proving

199. *Id.* at 49.

200. See Rao et al., *supra* note 110, at 1547.

201. *Id.*

202. Lu, *supra* note 8, at 173 n.218 (“However, sometimes, general anti-discrimination principles may be found in other Chinese laws. Then the question becomes whether these general anti-discrimination principles can be used to apply to employment issues. Unless an individual law is enacted, this problem will linger.”).

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discrimination. In order to effectively remedy cases of employment discrimination, this law should allow employees and job applicants to bring cases into arbitration and the courts for any discriminating practices exhibited by employers.

Within this law, China should provide express legal remedies that are clearly articulated and guaranteed upon the showing of a successful case of employment discrimination.²⁰³ This would provide incentive for employees to bring cases against employers for discrimination and increase the probability that employees will gain equal employment opportunities.

B. Permit Independent Trade Unions

China should allow and encourage the establishment of independent trade unions in order for employees to have greater representation and bargaining power against discriminating employers, among other reasons.²⁰⁴ Such unions would be more effective if independent from the Chinese government, which may be influenced by other interests rather than solely employees' interests in their rights. This would further assist employees in obtaining representation without having to expend their resources in order to maintain legal counsel. Independent trade unions would also contribute towards preventing riots and ultimately attaining the government's goal of a truly harmonious society.²⁰⁵

203. In the United States, a multitude of laws prohibit employment discrimination, including Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Title I and Title V of the Americans with Disabilities Act of 1990, Sections 501 and 505 of the Rehabilitation Act of 1973, Title II of the Genetic Information Nondiscrimination Act of 2008, and the Civil Rights Act of 1991. *Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/facts/qanda.html> (last updated Nov. 21, 2009). Depending on which statute applies, various remedies are available for victims of discrimination, including back pay, hiring, promotion, reinstatement, front pay, reasonable accommodation, and attorneys' fees. *Id.*

204. See Lan, *supra* note 80, at 517 ("[T]he government should enhance the role of trade unions in helping migrant workers with . . . education on labor rights consciousness, communication with legal aid, and collective bargaining?").

205. The demand for trade unions independent from the government has increased in recent years. See Keith Bradsher, *An Independent Labor Movement Stirs in China*, N.Y. TIMES, June 11, 2010, at A4, available at <http://www.nytimes.com/2010/06/11/business/global/11strike.html?pagewanted=>

CONCLUSION

While discrimination in the workplace has existed throughout China's history, the Chinese government has taken several steps towards alleviating this problem by enacting nationwide legislation and participating in international movements towards equal rights for all individuals. However, many of these laws and policies have proven ineffective in practice, and discrimination remains prevalent in the workplace and daily life. Enacting stronger legislation, providing greater incentives and fewer barriers to employees to enforce their rights, and permitting independent organizations to represent workers' rights would help workers to establish equality in the workplace, lifting the longstanding barriers to equality in the workplace. Ultimately, a more peaceful and stable society, a harmonious and just society in China, would result.