New Developments in Employment Discrimination in Korea

Sung-Wook Lee
Ewha Womans University

I. Overall System of Employment Discrimination Law in Korea

1. Constitutional Basis

The Korean Constitution Article 11, Clause 1 provides that "All citizens are equal before the law. No one shall be discriminated based on his or her political, economic, social, cultural, and any other activities. Additionally, such activities shall not be restricted on the basis of sex, religion, or any social position." This clause is predicated upon the concept of "general equality," or "equality before the law." The provision grants equality to every citizen, "individual equality," in specifically defined fields, as set forth in the clause. Every citizen has the rights to the "individual equality" without any discriminatory treatment. Although the Constitution only lists sex, religious and any social position as a basis to prohibit discrimination, most leading academics agree on the interpretation that discrimination shall be forbidden on the basis of any unfair reasons, even if not specifically listed in the Constitution.[1]

The Korean Constitution Article 32, Clause 3 states that "the terms and conditions of employment shall be determined by the law to promote the value of humanity," which sets forth the national responsibilities to protect employees as a whole. In particular, the Clause 4 provides that "working condition for women shall be protected with due care. Any discrimination against women on the basis of sex with respect to employment, compensation or working condition in employment shall be prohibited." This clause forbids any arbitrary discrimination against women and any disadvantage that women may face on the basis of sex in employment. It is important to note that the Constitution not only prohibits any discrimination against women compared to men in employment, but also *actively* seeks a special due care in protecting the working condition for women. It is also essential to note that the Constitution acknowledges barriers that women face to the full participation in employment.

These principles of gender equality in employment have significantly affected the decisions of The Constitutional Court of Korea, who has leniently been interpreting the Constitution on the issues of gender equality.

A good example is a point system for discharged soldiers in administering the Government Official Recruitment Examination.[2] The Constitutional Court found the point system unconstitutional. This point system was to give additional 3% or 5% points of a perfect score for each subject to discharged soldiers when they took the Government Official

[1] Young-Sung Kwon, *Constitutional Law,* 391 (2006).
[2] The Constitutional Court of Korea (Dec. 23, 1999), 98 Hunma 363.

Recruitment Examination. This system reflected on the Korean draft scheme that requires every man to serve in the military for a certain number of years. The purpose of the point system was to compensate for the lost opportunities that the soldiers will need to bear; the soldiers will lose their opportunities to be employed or prepare for employment while serving in the military. As a result, this system was designed to help the discharged solders integrate into the work place quickly.

Most of the Korean men spend years in the military in their twenties in a strictly regulated environment while giving up on their opportunities to develop and improve themselves. The point system was therefore, to assist the discharged soldiers who will be at a disadvantage in obtaining employment by giving extra points on the Government Official Recruitment Examination, if they decide to take the exam. The Constitutional Court of Korea acknowledged the justifications and the purposes of the current point system; however, the Court held that such a social support for discharged soldiers, if any, should be provided by appropriate and reasonable means. The Court then held that the current point system does not seem appropriate and reasonable in terms of its means and methods in achieving the underlying purpose of the system.

The Court reasoned that only few women would fall under the category of "discharged soldiers," while most men would satisfy the standards of the group, especially under the current mandatory military draft structure. Women are not required to serve in the military. As a result, the Court concluded that the point system was in fact, discriminatory against women. Also, the Court further reasoned that whether a man is qualified to serve in the military is not determined by his willingness to serve; rather, the results of physical test, education and the demand for soldiers at the moment will determine whether he is qualified enough to serve in the military.

The Court, therefore, held that this system constitutes unfair discrimination against those who are exempted from the military service or those who are not qualified enough to serve in the military, irrespective of their gender. Consequently, the Court found the point system unconstitutional based on Article 11 of the Constitution. Interestingly, the Constitution does not explicitly mention indirect discrimination; however, it is important to note that the Court in this matter reached the conclusion based on statistical data that a seemingly neutral military draft system may have a disparate impact on women in their employment opportunities.[3]

2. The Overall Employment Discrimination Law

1) General Prohibition on Discrimination

National Human Rights Commission is the primary institution that is established to prevent from any arbitrary discrimination in Korea. The purpose of "National Human Rights Commission Act" (Act No. 6481, May 24. 2001) is to contribute to the realization of human dignity and worth, and the safeguard of the basic order of democracy.

The National Human Rights Commission is created by the Act to ensure the protection of the inviolable and fundamental human rights of all individuals and the promotion of the standards of human rights (Section 1). The National Human Rights Commission founded

[3] See, e.g., Personnel Administrator of Massachusetts et al. v. Feeney, 442 U.S. 256; 99 S. Ct. 2282; 60 L. Ed. 2d 870 (1979). This case in the United States involves a similar issue but the court held differently. The Supreme Court of the United States found the statute constitutional in this case. "Although the statute had a disparate impact on women, it did not have a discriminatory intent. The Constitutional Court of Korea did not mention whether discriminatory intent was present in deciding on the issues of gender equality.

based on the Act, is primarily called upon to promote general equality in various fields, including in employment and to prevent any discrimination in light of the Constitution. The scope and reasons of forbidden discrimination are defined in Section 2, Clause 2 of the Act.

> The term "discriminatory act violating the right to equality" means any of the following acts committed without reasonable cause based on gender, religion, disability, age, social status, region of birth (including place of birth, domicile of origin, one's legal domicile, and major residential district where a minor lives until he/she becomes an adult), national origin, ethnic origin, appearance,
> marital status (i.e., married, single, separated, divorced, widowed, and de facto married), race, skin color, thoughts or political opinions, family type or family status, pregnancy or birth, criminal record of which effective term of the punishment has expired, sexual orientation, academic background or medical history, etc. If a particular person (including groups of particular persons; hereinafter the same shall apply) receives favorable treatment for the purpose of remedying existing discrimination, and the favorable treatment is excluded from the scope of discriminatory acts by any other Acts, then such favorable treatment shall not be deemed a discriminatory act:
>
> (a) Any act of favorably treating, excluding, differentiating, or unfavorably treating a particular person in employment (including recruitment, hiring, training, placement, promotion, wages, payment of commodities other than wages, loans, age limit, retirement, and dismissal, etc.);
>
> (b) Any act of favorably treating, excluding, differentiating, or unfavorably treating a particular person in the supply or use of goods, services, transportation, commercial facilities, land, and residential facilities;
>
> (c) Any act of favorably treating, excluding, differentiating, or unfavorable treating a particular person in the provision of education and training at or usage of educational facilities or vocational training institutions; and
>
> (d) An act of sexual harassment.

As set forth above, the National Human Rights Commission Act is one of the most extensive statutes, which defines four areas of discriminatory acts, including sexual harassment, and nineteen discriminatory acts without reasonable cause which violate the right to equality. The list of discriminatory acts exemplified in the statute is not deemed exhaustive.[4] The National Human Rights Commission may remedy any discriminatory acts that are prohibited under the National Human Rights Commission Act. The remedy through general judicial procedures is costly and time-consuming, and such a complicated judicial procedure makes it difficult for the public to have an easy access to the system. Therefore, the National Human Rights Commission promptly provides remedies for victims of discretionary acts defined in the National Human Rights Commission Act for free of charge.

The National Human Rights Commission may investigate victims' complaints and public inquiries on various discriminations. The Commission is granted a power to investigate the case on discrimination without victim's specific complaints or inquiries. This is because many victims are usually placed in a socially disadvantaged class, and therefore, they face significant barriers in seeking remedies for discrimination themselves. Therefore, it is important to note that the National Human Rights Commission in fact, empowers the victims to voice their opinions about the discriminatory acts by undertaking and investigating the

[4] The National Human Rights Committee eds., *Annotated to The National Human Rights Committee Act*, 10 (2005).

matters itself. As a result, the society may pay more attention to the discriminatory acts which occur more often to the socially disadvantaged groups than what the public acknowledges.[5]

If the National Human Rights Commission finds remedy necessary for a victim, Section 40 provides for "Recommendation of Compromise." If it fails, Conciliation Committee may attempt to reach conciliation (Section 41-43); if all fails, the Commission will seek "Recommendation of Remedies" (Section 44, 45, 47, and 48).

An important characteristic of the remedial procedure in this case is that the remedy conferred upon victims by the National Human Rights Commission is not legally enforceable. Even if the Commission acknowledges the discriminatory acts, they do not have a power to make the discriminatory acts void or to enjoin injunction against an individual or an institution who committed discriminatory acts. I think this is desirable given the special status of the National Human Rights Commission in the society. Because the Commission's decision is not legally enforceable, the Commission can freely envision and direct to the desirable mechanism to protect human rights in the Korean society. It is important to note that the National Human Rights Commission can function as an independent institution[6] to promote such a goal without being bound by any strict legal precedents.[7]

2) Anti-discrimination Acts in Employment

As for January in 2008, there are fifteen statutes that prohibit discriminatory acts in employment or require equal treatments in the employment, followed by the Constitution.[8] Each statute has its own purpose; for example, the reasons for which discriminatory acts are prohibited, the areas in which the discriminatory acts are prohibited, and the remedial procedures all vary across the statutes. Due to the lack of uniformity in this area of law, understanding the overall system in anti-discrimination law in employment in Korea is challenging.

These various statutes can be classified as following:

First, there are two categories based on the areas in which the discriminatory acts are committed. One is to regulate employment policy or labor market; individual terms and conditions of employment are not regulated in this case. Another is to intervene and specifically prohibit any discrimination on terms and conditions of employment. The former includes Employment Policy Act, the Act to Stabilize Labor Market, and the Act to Develop

[5] *Id.* at 464.

[6] Although the National Human Rights Commission is not founded based on the Constitution, it is an independent institution that does not belong to Congress, executive or judicial branch. However, there is a limit to the independence of the Commission. The National Human Rights Commission Act Section 3, Clause 2 provides that "the Commission independently addresses matters which fall within the purview of its authority." The Act defines how long each member will serve in the Commission and confirms the status of members during that time period (Section 6-8). On the other hand, the Act does not confer upon the Commission the right to make its own budget, neither give the members immunity in their terms.

[7] Although the Commission's decision is not legally enforceable, their impacts on individuals or institutions in fact, have been significant. For example, the parties actually agreed to compromise in 46 in 60 cases among which the Commission recommended compromise. As a result, the acceptance rate by the parties has reached approximately 92% (The National Human Rights Commission, *supra* note 4, at 568).

[8] National Human Rights Commission Act; Labor Standards Act; Trade Union and Labor Relations Act; Employment Policy Act; the Act to Stabilize Labor Market; the Act on Protecting Agency Workers; the Act to Provide Equal Opportunities in Employment for Men and Women and to Support the Balance between Work and Family; the Act to Promote Disabilities Employment and Rehabilitation; Disabilities Welfare Act; the Act to Promote Older Workers Employment; the Act to Develop Women's Social Status; Foreign Workers Employment Act; Employee Job Training Act; the Act to Protect Fixed-Term Employees and Part-Time Employees; Anti-Discrimination against Disabilities and Remedial Procedure Act.

Women's Social Status, and the Act to Protect Aged Workers in Employment. The latter includes Labor Standards Act, the Act to Provide Equal Opportunities in Employment for Men and Women and to Support the Balance between Work and Family, the Act to Protect Agency Workers, and the Act to Protect Fixed-term Employees and Part-time Employees.

Next, three categories can be defined in light of the remedial means. First, some statutes impose penal sanctions to enforce the law. Labor Standards Act and the Act to Provide Equal Opportunities in Employment for Men and Women fall into this category. If any discriminatory acts defined in these statutes are committed, a criminal prosecution will be enforced. Furthermore, such discriminatory acts will be legally deemed void. These statutes provide one of the most substantial remedies for victims of discrimination. Second, other statutes provide special remedial means other than the general judicial procedures. The Act to Protect Agency Workers, the Act to Protect Fixed-term Employees and Part-time Employees, and the Act to Protect the Disabilities fall under this second category. These statutes allow its own unique system to provide the convenient remedial means for victims. Lastly, other statutes only declare their principle against discriminatory acts. Employment Policy Act, the Act to Stabilize Labor market, the Act to Develop Women's Social Status, and the Act to Protect Aged Workers in Employment are included in this category. These statutes do not have legally binding effect. At most the National Human Rights Commission can provide remedies through Recommendation of Compromise.

Another classification is based on the reasons for which discriminatory acts are committed. Statutes in this category include the Act to Promote Equal Employment Opportunities for Men and Women and to Support the Balance between Work and Family, the main purpose of which prohibits sex discrimination; The Act to Protect Fixed-term Employees and Part-time Employees and the Act to Protect Agency Workers, which forbid discrimination on basis of the types of employment; Foreign Workers Employment Act, which forbids any discrimination on the basis of nationality; Anti-discrimination Act with the Disabilities, which bans any discrimination on the basis of disabilities; and the Act to Protect Aged Workers in Employment, which prohibits any discrimination on the basis of age.

In the following, we will examine more substantive aspects of statutes where independent remedial means and legal enforceability are equipped. We will also focus on the specific ways to enforce those statutes in the Korean society. This will include the Act to Provide Equal Employment Opportunities for Men and Women and to Support the Balance between Work and Family, the Act to Protect Fixed-term Employees and Part-time Employees, the Act to Protect Agency Workers, and Anti-discrimination Act with the Disabilities.[9]

III. The Ban on Sex Discrimination

1. The Law that Prohibits Sex Discrimination

The ban on sex discrimination appears in many statutes, including the Constitution. Labor Standards, the Labor Union and Labor Relations Act, and the National Human Rights Commission Act are good examples. [10] The most fundamental statute that provides a basis

[9] As seen above, the National Human Rights Commission can provide remedies for other reasons of discriminatory acts.

[10] Some other statutes also prohibit sex discrimination. The examples are as followings: Employment Policy Law, the Act to Stabilize Labor Market, the Act to Protect Agency Workers, the Act to Develop Women's Social Status, Child Care Support Act.

for the anti-discrimination law on the basis of sex is "the Act to Promote Equal Employment Opportunities for Men and Women and to Support the Balance between Work and Family."

"The Act to Promote Equal Employment Opportunities Act for Men and Women" was enacted under the Constitution Article 32, Clause 4 in 1987. On December 21, 2007, the Eighth Amendment provided that "The Act to Promote Equal Employment Opportunities Act for Men and Women" will be renamed to "The Act to promote the Equal Employment Opportunities for Men and Women and to Support the Balance between Work and Family," (hereinafter "Equal Employment Opportunities Act") effective of June 22, 2008.

This Act is effective in any business.[11] The Act provides for the ban on any discriminatory acts outlined in the Labor Law. This Act defines the meaning of "discrimination;" ban on discrimination on recruitment and work assignment (Section 7); ban on discrimination on pay and any other benefits besides pay in the strict meaning(Section 8, 9); ban on training, assignment, and promotion (Section 10); and ban on discrimination on retirement, and termination of employment (Section 11). The violation of any of those provisions results in criminal prosecution. Furthermore, the Act prohibits sexual harassment in the work place and provides preventative remedies for it (Section 12-14).

2. The Definition of "Discrimination"

Equal Employment Opportunities Act defines both direct discrimination and indirect discrimination in Section 2, Clause 1. First, direct discrimination includes any acts by an employer offering *different* terms and conditions of employment or any unfair treatments to employees based on sex, marriage status, pregnancy or maternity without any reasonable reason (Section 2, Clause 1). Indirect discrimination refers to all the unfair situations in which a particular sex will be at a significant disadvantage to comply the conditions of hiring or employment compared to another sex. Even if the terms and conditions of employment are the *same* for both sexes, if the particular condition set forth by employer significantly increases employment possibilities for one sex over another, indirect discrimination can be found absent any justifiable reasons to have such conditions (Section 2, Clause 1).

However, there are three exceptions to this rule of discrimination: 1) when a particular sex is inevitably required to undertake the task in light of the nature of work; 2) when employer makes measures to protect female workers in case of pregnancy, or maternity; 3) when affirmative action is undertaken by this Act or other statutes (Section 2, Clause 1).

When the Equal Employment Opportunities Act was first enacted, only ban on direct discrimination provision was found in the Act. The enactment of this Act in fact decreased direct and overt sex discrimination in the work place. However, implicit nature of discrimination started to appear. The new recruiting system adopted in the bank industry in early 1990s is a good example. This system distinguishes general position from associate position, which caused inequality between genders. Most female workers were led to select general position in the recruiting process, while most male workers were to select associate position. As this type of discriminatory system started to widely spread and to become a common practice, many women's rights activists demanded regulation for indirect discrimination as well as direct discrimination. As a consequent of such activism, the Equal

[11] The exceptions include the business with close family members in the same residence; and the business which employs less than five employees. Section 8-10 and Section 11 Clause 1 will not apply to those cases.

Employment Opportunities Act was amended to include provisions on indirect discrimination in 1999.[12]

However, the indirect discrimination has not been much dealt at the Court level. Even when the case was submitted before the Court, the Court has not granted certiorari for such a matter. A good example is the case in which a company restructured its organization to reserve a division for only women. Women in the division were neither permitted to move to another division in the company nor were they able to be promoted within the division. Then, after the company eliminated the "women-only" division, the company still did not create any means to compensate for disadvantages women had previously faced. In fact, because women were not considered for promotion under the previous structure, the disadvantages were carried over to a new system absent any structural mechanism to provide for equal opportunities between men and women. In particular, the early retirement by-law provision applicable for women under the previous structure still applied to women in the newly organized company.

This issue may be a typical case of indirect discrimination; a division in a company was used to determine various benefits for employees, though, the organizational structure had disparate impacts on women. Plaintiff argued that this case should be adjudicated under the rule of indirect discrimination. Although the Court acknowledged that this case is in violation of Equal Employment Opportunities Act, the Court did not base its decision on indirect discrimination.[13]

Another example involves a case in which a company considered one person of a married couple working in the same company as a primary candidate for lay-off, when the company decided to decrease the number of employees. Whether this practice is legitimate was the issue of indirect discrimination. The Court noted that the company only selected a "married couple" working the same company as a primary candidate for terminating the employment, not exclusively a "woman." The Court further held that the couple then could freely decide whether a husband or a wife will remain in the company. According to the Court, the fact that women are more likely to terminate their employment under such circumstances due to the social and economic perspectives in society is not sufficient to constitute indirect discrimination. In fact, in this case some men chose terminated the employment instead of their wives. The Court concluded that the company did not violate any Labor Standards Act or the Constitution.[14]

These cases show that indirect indiscrimination has not been fully acknowledged in the Courts due to the traditional perspectives on men and women in society. The Courts have ignored the important disparate effects on women caused by the conventional social and economic perspectives on women.[15] As you can see, the law on indirect discrimination has not yet been sufficiently recognized by the Courts.[16]

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[12] For details, see Kim, El-Rim, *Accomplishments and Future Plans of Equal Employment Act between Men and Women*, 41-44 (Korea Women's Development Institute, 1999).

[13] Seoul Court of Appeals (Jan. 12, 2006) 2004 Nu 8851. (Supreme Court of Korea (Jul. 28, 2006) 2006 Doo 3476).

[14] Seoul Court of Appeals (May 17, 2002) 2001 Na 1661. (Supreme Court (Nov. 8, 2002) 2002 Da 35379).

[15] Sung-Wook Lee, *Regulation for Indirect Discrimination with respect to Women Labor Force*, 17 LABOUR LAW JOURNAL 25 (2003).

[16] Some academics suggested that the current law applies extremely stringent standards and therefore, 4/5 rule should apply, suggested by EEOC in the United States. Soon-Kyung Cho, *Studies for appropriate standards to determine indirect discrimination*, 157 (2002).

3. Principle of Equal Pay for Equal Value of Work

The Equal Employment Opportunities Act states that all employers shall pay equal wages for equal value of work (Section 8, Clause 1). This principle was not included in the Act at the time of enactment, but was included in the First Amendment of the Act in 1987. It is important to note that this principle is beyond what is so called "principles of equal pay for equal work." Although the wage discrepancies between men and women are in fact substantial in work places,[17] however, this principle has been seldom contested at the Court level.

The Court first clarified the meaning of the rule in 2003, 14 years after enactment.[18] The Court held that the wage discrepancies are not justifiable absent differences in skills and efforts in work places. For example, male employees are not entitled to higher wages just because they undertake tasks that require more physical strength, or more aggressive operation of machines. The Court concluded that such a practice is in violation of the "Principle of Equal Pay for Equal Value of Work."

The Court further explained in this case that the "equal value of work" refers to the very nature of tasks in the work places. Even if the actual work is not identical, if the nature of the work is comparable based on the objective evaluation of the nature of work, the equal value of work should be recognized under the principle of equal pay for equal value of work. Whether the task includes the equal value of work will be determined by various factors, including skills, efforts, responsibilities, working conditions that are required to undertake the tasks; education; previous experiences in the relevant fields; seniority of employees. Those factors should be all taken into consideration in determining the meaning of "equal value of work."

Skills, efforts, responsibilities, and working conditions refer to what would be required to undertake the tasks in the work place. "Skills" include certificates, any degrees from higher education institution, or techniques that a person acquires through previous experiences in the relevant fields. "Efforts" refer to the degree to which the labor is required, including intensity of work, and physical and mental efforts to accomplish tasks under time constraints. "Responsibilities" refer to characteristics, scope, complication, and dependency of employer on employee. Finally, "Working Conditions" mean noise, physical and chemical threats to which employees will be exposed while undertaking the tasks, any segregation, and temperature of work places given the nature of work. These definitions are informative to identify the uniformed standards for equal value of work.

Although it is important to note that this Court's opinion adopted the principle of equal pay for equal value of work for the first time, some limitations should be also pointed out as follows. First, the sub-factors that the Court suggested to determine equal value of work – skills, efforts, responsibilities, and working conditions – weigh too much on the male-dominated fields. On the other hand, such sub-factors as are usually existed in the female-dominated fields are likely to be overlooked. In determining the degree of responsibilities, efforts, and terms and conditions, it is important to consider psychological aspects, stress levels caused by relationships with customers, or the frequency of interruption at work by phone calls or interactions with other employees. Also, multi-tasking skills should be considered in determining "intellectual efforts" in work places.

[17] The average wages for women only counts for 66.2% of the average wages for men as of December in 2006. Ministry of Labor, *Women and Employment*, 38 (2006).

[18] Supreme Court of Korea (Mar. 14, 2003) 2002 Do 3883.

Second, it is generally true that wage discrepancies are not justifiable just because male employees undertake tasks which require more physical strength or more aggressive operation of machines. However, this principle should be further examined to determine whether the male employees need to spend more time in moving heavy boxes, for example. In addition, the Court should decide whether the differences are fundamental enough to change the very nature of the work. In short, the court should determine whether the differences are substantial or incidental to the performance of the essential part of the job compared. However, the Court in the present matter did not sufficiently consider the details of those sub-factors in defining the terms.[19]

4. Affirmative Action in Employment

The Constitutional Court of Korea defined the term "affirmative action" as providing interim direct or indirect benefits in employment and education to those who have been traditionally discriminated based on their social status.[20]

The Korean government has adopted "Measures to increase Women Government Officials" in 1995. These Measures were temporarily effective from 1996 to 2002. Then, these Measures were renamed to "Gender Equality Project" in 2003[21], which was effective for 5 years till 2007.[22] For example, one sex should constitute at least 30% in recruiting government officials in case of hiring less than 5th rank (i.e., senior) officials. This Project has been adopted in administrating the Government Official Recruitment Examination. Studies have shown that these efforts have been successful.[23]

This affirmative action is extended to private sectors, called "Affirmative Action in Employment." The Equal Employment Opportunities Act defines "affirmative action in employment" as a way to eliminate employment discrimination between men and women and to temporarily provide benefits for one gender in order to promote equal employment opportunities in the long run. This Act provides that any affirmative actions provided by law will be deemed legal and legitimate.

According to the affirmative action in employment, the number of female employees will be compared in the relevant fields to examine whether one company significantly underemployed women given the nature of work or discouraged promotion against women. The significantly low rate of women officials in work places can be a signal to indicate indirect discrimination. In such a case, the company will be requested to investigate the case and find out solutions under the scheme. This Act is applicable to 439 businesses which have

[19] Limitations are further examined in Sung-Wook Lee, *The Standards for Equal Value of Work under the Equal Employment Opportunities Act*, 21 ADJUSTMENT AND VERDICT, 37-54 (2005).

[20] The Constitutional Court of Korea (Dec. 23, 1999) 98 Hunma 363.

[21] Women Work Force in Science and Technology Project and Women Professor Recruiting Project were also adopted.

[22] The Korean government decided on December 27, 2007 to extend the Gender Equality Project from 2008 to 2012.

[23] When the Women government official recruitment project was first adopted in 1996, the women's government officials recruitment examination passage rate was 26.5%. But the rate increased to 42.8% in 2002 and even further to 50.8% in 2006. This is why the Women government officials recruitment project was renamed to gender equality project. However, the passage rate is only high on the lower government officials recruitment examination. The rate is significantly low on the high government officials recruitment examination. For example, women constitute 25.8% for the high government officials in local governments, 38.1% for the national government officials, and only 3% for the higher government officials. This reality encouraged the government to extend the gender equality project till 2012.

more than 1,000 employees, 92 government branches, and 14 government investment institutions (this Act will also apply to businesses with 500-999 employees effective of March 1, 2008).

Those businesses should submit the current data with respect to male and female employees in its industry and position within a company to the Ministry of Labor. If the women employment rate falls below 60% in comparison to businesses in the relevant industry, the company is requested to submit "Plans to accord with the affirmative action in employment." Once submitted, the company should implement the policies for a year as stated in their Plans and submit any progresses it made in the previous year. If the company refuses to comply with the rule, or submits misleading documents, a fine will be imposed by the Act. The plans and progresses are evaluated on a regular basis to award companies who exceed their competitors and will be administratively and financially supported. On the other hand, the companies that do not comply with the scheme will be strongly requested to implement better policies.

5. Evaluations of the Equal Employment Opportunities Act

Although, as we have seen, the Equal Employment Opportunities Act regulates indirect discrimination, established the principle of equal pay for equal value of work, and adopted the affirmative action in employment in order to promote gender equality in work places, whether the actual effects have shown is questionable and the extent to which the Act is utilized seems relatively limited.

Female employees are not likely to bring lawsuits on sex discrimination against their employer. They will face difficulties in continuing to work at the company while litigating the discrimination case against the employer given the Asian-style employment environments in Korea. Moreover, the problem is that female employees themselves tend to accept indirect discrimination practices as normal situations which has been considered traditionally acceptable in the Korean society. In other words, what we define as "indirect discrimination" now has not been historically viewed as "discrimination," in Korea, and therefore, the indirect discrimination is likely to occur unintentionally in work places.

I believe one of the solutions would be to challenge the patterns of employment discrimination that are prevalent in the society by organizing a group who can represent and voice their opinions about the work conditions for women. For example, we can adopt the class action system or broaden the scope of standing before the courts, e.g., allowing a trade union to seek remedies on behalf of a victim. The Equal Employment Opportunities Act allows criminal prosecutions, which requires a proof of intent; however, as we discussed above, indirect discrimination often takes place at work by an employer without any harmful intent. As a result, the criminal prosecutions can be in fact rarely found under this Act. Therefore, instead of a criminal prosecution system, we should adopt a more practical punitive damages system where victims can actually receive remedies,

IV. Ban on Employment Type-Based Discrimination

1. Background of the Enactment of Acts to Protect Irregular Employees

The number of irregular employees[24] has been consistently increased since 2001 in Korea, but the rate of irregular employees compared to all employees has been stabilized at 35% to 37% since 2004.[25] As of 2006, there are 4,457,000 irregular employees, 35.5% of total employees. In particular, fixed-term employees accounts for the largest group among irregular employees. There are 3,630,000 fixed-term employees, 49.9% of irregular employees, and 23.6% of total employees. This is the highest rate among OECD countries.[26] Part-time employees have recently been increased – 807,000 part-time employees in 2002 and 1,135,000 in 2006. But they only account for 7.4% of total irregular employees, which is relatively lower than other OECD countries.[27] As you can see, the rate of fixed-term employees is relatively high, whereas the rate of part-time employees is relatively low in Korea.[28] Another interesting aspect of the labor market in Korea is that the number of contracting workers has been constantly increased in the past years. There were 332,000 contracting workers in 2002, whereas we found 499,999 contracting workers in 2006. Also, the number of temporary agency employees has reached over 120,000.

The female irregular employees account for 42.7% of total female employees, which is 12.3% higher than that of male irregular employees. The wage of irregular employees seems to have been trapped at 62% to 65% of that of regular employees.[29]

Despite the increased number of irregular employees, law including case law has provided very little protection over irregular employees. Employers used to hire fixed-terms employees at their will without any formal restrictions until July 1, 2007. The employment period often span a period less than a year under the employment contract at the employer's will. According to case law, once the employment period ends, with very few exceptions,[30] it has been a common understanding that the employer terminates the employment without any notice in advance.[31]

According the dismissal law, if an employment contract is entered in open-ended period, employers may not be able to terminate the contract without any legitimate reasons. Therefore, employers have taken advantage of the fixed-term contract and continued to renew the fixed-term contract on a short term basis. When the company needs to downsize itself, the employers can freely terminate the employment with irregular employees by simply refusing

[24] Irregular employees refer to temporary agency employees, on-call employees, contracting employees, dependent contractors, as well as fixed-term employees and part-time employees.

[25] Byung-Hee Lee & Sung-Mi Jung, *Size and Structure of Irregular Employees*, 35 LABOR REVIEW 5 (2007).

[26] The rate of fixed-term employees to paid employees for each country is following: U.S. (4.0%); Germany (12.7%); France (14.9%); Japan (12.8%). *OECD, Employment Outlook*, 2003.

[27] The rate of part-time employees to paid employees for each country is following: U.S. (13.0%); Germany (17.6%); France (13.8%); Japan (24.9%). OECD, *Employment Outlook*, 2003.

[28] Employers have argued that the reason why the rate of fixed-term employees is high is because regular employees are overprotected. Therefore, they insist to release laws that provide substantial job security for regular employees.

[29] Announcement by Ministry of Labor in Korea, April, 2007.

[30] The Court reasoned that the Court will consider the followings to determine whether the employment period was open-ended: the contents of the employment contract; motives and purposes as to why the parties selected such an employment period; common practices in the similar industries; and by-law provisions with respect to employee protections. The Court further explained that if the Court decides that the employment period was determined open-ended, the Court may find the fixed-term employment contract partially void and find him a regular employee, rather than an irregular employee. Supreme Court of Korea (May 29, 1998) 98 Doo 625. However, the Court has considered fixed-term contract as open-ended contract in very few cases.

[31] Supreme Court of Korea, (Jul. 25, 1997) 96 Noo 10331; Supreme Court of Korea (May 9, 1989) 88 Daka 4277; Supreme Court of Korea (Oct. 27, 1992) 92 Noo 9722; Supreme Court of Korea (Jun. 30, 1995) 95 Noo 528; and the like.

to renew the employment contract with them. Employers have effectively circumvented dismissal law by taking advantage of the systematic loopholes in the fixed-term employment contract. Because employers can terminate the employment at will with irregular employees, they overused their power to avoid any restrictions imposed by dismissal law Studies show the average employment period for irregular employees was fifteen months in 2001, was increased to twenty-two months in 2003, and to twenty-five months in 2006. This recent trend shows that fixed-term employment contracts have been overused and replaced regular employment contracts.

Although fixed-term employees and part-time employees are often involved in the same or similar tasks in the work places as regular employees, their terms and conditions of employment tend to fall below those of regular employees.[32] However, no effective law has been implemented to protect the irregular employees. Labor Standards Act Section 6 provides that "employers are prohibited from discriminating employees on the basis of sex, nationality, religion, or social status." The Court refused to consider the employment type as "social status" under the Labor Standards Act. As a result, the Court held that the anti-discrimination policy in employment in Section 6 does not apply to irregular employees.

It is true that the increases in the number of irregular employees are unavoidable considering the recent developments in technology and service industries. However, the irregular employees have been exploited because employers could easily terminate the employment without legitimate reasons and could hire the same number of employees at lower costs. As a result, it was commonly agreed in Korea that we needed to implement effective policies to regulate such unreasonable practices, which would in turn, lead to a more integrated society. Consequently, Fixed-Term and Part-time Employees Protection Act was enacted on December 21, 2006. In addition, Temporary Agency Employees Protection Act was amended as to afford agency workers the right to be less unfavorable treatment as ordinary workers. These two Acts have been enforced in businesses with more than 300 employees effective of July 1, 2007. More businesses will need to comply with the Acts in the near future.

Some argued in the legislative procedures that regular employment should be the default rule with a few exceptions of irregular employment, especially among labor unions. However, irregular employment is already too widespread to significantly limit its use without any side effects. For example, if such a default rule were to be enforced, many irregular employees could have lost their jobs. Therefore, both Acts were instead, enacted to regulate the overuse of fixed-term employments and discriminatory acts against irregular employees.

2. Contents

Fixed-Term and Part-time Employees Protection Act provides that employers may not hire fixed-term employees more than two years and if they continue to renew the employment contract, the employees will be considered as regular employees unless otherwise provided (Section 4). Also, the Act states that in the event of recruiting regular employees, employers may exert efforts first to promote fixed-term or part-time employees already employed to regular employees (Section 5, 7). The Act further limits the maximum number of hours for part-time employees (Section 6).

[32] The average wages for irregular employees only counts for 63.5% of the average wages for regular employees as of December in 2007. See Byung-Hee Lee & Sung-Mi Jung, *supra* note 25, at 13.

Temporary Agency Employees Protection Act states that if temporary agency employees continue to work more than two years or are illegally employed as a temporary agency employee, user (client) employers may have responsibilities to directly hire such a person (Section 6, Clause 2). This Act also imposes duties to user employers to provide information as agreed to agency employers (Section 20).

Both Acts provide protections for irregular employees in various ways. We will examine more closely legal protections in effect for irregular employees with respect to discriminatory acts in work places.

1) Qualification to Seek Remedies against Discriminatory acts

To qualify as a person who can seek injunctive remedies at the labor relations committee against discriminatory acts in the work places, (i) a person shall be an employee[33] in the sense of Labor Standards Act; (ii) an employee shall be either a fixed-term employee or a part-time employee.

The term "fixed-term employee" refers to a person who agrees to work for a fixed employment period under an employment contract regardless of the reasons for the period; the length of the period; or title of the contract (Section 2, Para. 1). The term "part-time employee" refers to a person whose working hours within a period of one week[34] are less than those of regular employees (Labor Standards Act, Section 2, Clause 1, Para. 8).

Whether a person is a fixed-term employee or a part-time employee is determined based on the time at which the person was discriminated, rather than the time at which the person seeks injunctive remedies. In other words, as long as a person was either a fixed-term employee or a part-time employee at the time of the discrimination, even if the person is neither of them at the time of seeking remedies due to termination of employment or a change of his employment type, he or she is qualified to seek injunctive remedies.

It is interesting to note that temporary agency employees may seek remedies against both a user employer and an agency employer (Temporary Agency Employment Protection Act, Section 21, Clause 1). This Act clearly defines what falls under the responsibilities of agency employer and those of user employer (Temporary Agency Employment Protection Act, Section 34). For example, agency employers are responsible for wages or paid vacation, whereas user employers are accountable for working hours or holidays.

2) The Area of Prohibition on Discriminatory acts

"Wages and other terms and conditions of employment" are the area in which discriminatory acts are prohibited. Fixed-Term and Part-Time Employees Protection Act defines "discriminatory acts" as unfair acts with respect to wages and other terms and conditions of employment without any reasonable reasons (Section 2, Clause 3). The scope of "wages and other terms and conditions of employment" includes 1) terms and conditions of employment pursuant to Labor Standards Act; 2) terms and conditions of employment defined

[33] The term "employee" refers to a person who provides his or her work in a business or businesses for the purposes of earning wages regardless of the types of work (Labor Standards Act, Section 2, Clause 1, Paragraph 1). A person who provides work presumes an employer-employee relationship which means an employee is under the control of an employer, and therefore, absent such a relationship, a person is not an employee under Labor Standards Act. Supreme Court of Korea (Jun. 30, 1995) 94 Do 2122; Supreme Court of Korea (Feb. 14, 1997) 96 Noo 1795; Supreme Court of Korea (Jan. 10, 2003) 2002 Da 57959; Supreme Court of Korea (May 11, 2006) 2005 Da 20910; and the like.

[34] Working hours refer to hours on which an employer and an employee agree within the scope of hours defined by law. Labor Standards Act Section 2, Para. 7.

by collective agreements, work rules, employment contract, or any other customs in employment. This definition may extend to broader terms and conditions of employment, including working hours, holidays, vacation, safety and health or compensation for occupational accidents.

3) Comparable Employees

We need a group of employees comparable to irregular employees in order to determine whether fixed-term employees or part-time employees are discriminated. Comparable employees needs to be identified determine the existence of discriminatory acts. Therefore, whether comparable employees are present or are properly selected is the first question that the Court or Labor Relations Board would ask; the question on the existence of discriminatory acts then will be answered.

Comparable employees to fixed-term employees include employees in the same or similar tasks in the same company, who entered into an employment contract in open-ended period (Fixed-Term and Part-Time Employees Protection Act, Section 8, Clause 1). On the other hand, comparable employees to part-time employees include full-time employees in the same or similar tasks in the same company (Fixed-Term and Part-Time Employees Protection Act, Section 8, Clause 2). Because the comparable employees are limited to those who work in the same company, other employees working in the same or similar industry or in the geographically proximate region may not be considered comparable employees, unless working in the same company.

Comparable employees to temporary agency employees are those who are occupied with the same or similar tasks in the user employer's business (Temporary Agency Employees Protection Act, Section 21, Clause 1). "The same or similar task" refers to similar work in light of type, responsibility, and duty of work etc. Whether the work in question is the same or similar work will be determined by a subsequent decision made by the Court or by Labor Relations Board. In determining the extent to which the work is similar, the Court or Labor Relations Board will review whether the characteristics of work are similar and whether the works in question are replaceable.

Comparable employees in principle need to be present at the time of discriminatory acts in order to determine the existence of such acts. I think as long as comparable employees were present at the time of discriminatory acts, even if comparable employees are not present at the time of seeking remedies, the irregular employees can proceed to seek injunctive remedies.

4) Unfavorable Treatments

Unfavorable treatments refer to circumstances in which fixed-term and part-time employees received relatively poor treatments vis-à-vis comparable employees on wages and any other terms and conditions of employment. Unfavorable treatments are not necessarily identical to discriminatory acts. If reasonable reasons can be provided for unfavorable treatments, those would not be considered discriminatory acts (See Fixed-Term and Part-Time Employees Protection Act, Section 2, Clause 3).

There are still some remaining questions in this issue: whether individual terms and conditions of employment should be considered or whether the overall terms and conditions of employment should be compared as a whole package in order to determine the existence of unfavorable treatments; and whether it is acceptable to compare a particular aspect of terms and conditions of employment between comparable employees. For example, if one component of wages is unfavorably treated, the question becomes whether the particular

component will be compared or whether the wage structure as a whole should be considered between a fixed-term or part-time employee and a comparable employee.

5) Reasonable Reasons

As we have seen above, unfavorable treatments may be justified if reasonable reasons are provided and may not be considered as discriminatory acts. As for part-time employees, the existence of reasonable reasons will be determined based on whether the wages are proportional to working hours vis-à-vis regular employees who work in the same or similar tasks within the same company (so-called "principle of pro rata temporis") (see Labor Standards Act, Section 18, Clause 1). Therefore, reasonable reasons may be established if wages or other terms and conditions that can be proportionally divided are used as a tool to compensate for different working hours per part-time employee.

More specific guidelines as to what constitutes reasonable reasons should be provided by the Courts or Labor Relations Boards. Employers might insist that reasonable reasons be found on the basis of responsibilities and duties required for each task in the same or similar tasks. They may argue that the productivities of each employee will differ as a result of different duties inherent in the tasks. The Courts should take into account different factors in this issue to determine the scope of reasonable reasons.

6) Burdens of Proof

A fixed-term, part-time, or temporary agency employee shall provide, in his or her complaint, specifics of discriminatory acts on which he or she seeks injunctive remedies (Fixed-Term and Part-Time Employees Protection Act, Section 9, Clause 2). Employers have burden of proof for other related issues unless provided otherwise (*Id.*, Section 9, Clause 4).

7) Remedies

It is important to note that Labor Relations Board which is a type of administrative and quasi-judicial branch is responsible for remedial procedures, not the general Courts. This is because victims can receive remedies more quickly in a most cost-effective manner.

A fixed-term, part-time, or temporary agency employee may file a complaint seeking injunctive relief on discriminatory acts within three months from the date of occurrence of such discriminatory acts (Fixed-Term and Part-Time Employees Protection Act, Section 9, Clause 1). Then, Labor Relations Board may investigate and conduct a preliminary hearing to determine whether such discriminatory acts in fact occurred as stated in the complaint (*Id.* Section 12). If such discrimination is found, Labor Relations Board may enjoin the employer from discriminatory acts. Because discriminatory acts may vary, Labor Relations Board can order to provide different remedies, including injunction against any discriminatory acts or monetary relief (*Id.* Section 13).

The employer may refuse to comply with the Board's order and appeal to the Central Labor Relations Board (*Id.* Section 14, Clause 1). Ultimately, the employer may seek a petition to have the Court review his case (*Id.* Section 14, Clause 2). If the employer refuses to comply with the court order without any reasonable reasons, Minister of Labor may impose civil fines up to $100,000 (*Id.* Section 24, Clause 1).

3. Responses from Labor Markets

These Acts to protect irregular employees only applies to businesses which hire more than 300 employees since July 1, 2007. Because the Acts have been effective for such a short

period time, it does not seem feasible so far to accurately examine and analyze the economic effects of the Acts on labor markets in Korea. Employers have responded to the Acts in four different ways as following:

First, some employers have terminated employment of fixed-term employees. As we have been above, Fixed-Term and Part-Time Employees Protection Act provides that any fixed-term employees who have been employed more than two years may be considered as regular employees. As a result, some employers have terminated the employment relationship with them to circumvent such a provision, which occurs in both public and private sectors.

Second, other employers have replaced fixed-term employees with those who may form an employment relationship through outsourcing, subcontracting, or temporary agency. This is to avoid the strict restrictions set forth in Fixed-Term and Part-Time Employees Protection Act with respect to discriminatory acts in work places.

Third, others promote the fixed-term employees to regular employees if all the conditions set forth in the Act are met; but those newly promoted are separately placed under a different division in the company. It is important to note that any discriminatory acts among regular employees are not subject to the Act because the Act is only used to determine whether any discriminatory acts occur between *irregular* employees and *regular* employees. This response is an attempt to circumvent the regulations on discriminatory acts in employment with respect to irregular employees. In particular, this type of attempt is more likely to take place in the female-dominated industries and therefore, we cannot rule out a possibility of indirect discrimination.

Fourth, other employers comply with the Act and promote the fixed-term employees to regular employees. This rarely happens in practice because such compliance requires sacrifices from regular employees in terms of wages as well as terms and conditions of employment.

The second type of response in utilizing outsourcing as a way to circumvent the regulations is the most extreme case. Companies which selected to adopt the second type of policy have been facing stiff opposition from trade unions, which have caused significant social problems in Korea. The needs to take legal actions to regulate these companies' response have recently arisen due to their wide impacts on the society.

V. Anti-Discrimination in Employment On the Basis of Disability

1. Regulations to Ban Employment Discrimination On the Basis of Disability

Employment discrimination on the basis of disability is subject to "The Act to Promote Disabilities Employment and Rehabilitation" (hereinafter "Disabilities and Employment Act") and "Anti-Discrimination against Disabilities and Remedial Procedure Act" (hereinafter "Anti-Discrimination against Disabilities Act").

Disabilities and Employment Act was enacted to promote the employment prospects for people with disabilities because employment supports productive and fulfilling lives (Act No. 4219, January 13, 1990). Section 5, Clause 1 provides that "an employer shall collaborate with government's policies on disabilities employment and have duties to justly evaluate their abilities and to provide the disabilities with equal opportunities to employment." Also, Section 5, Clause 2 states that "an employer shall not discriminate the disabilities when making employment-related decisions, including recruitment, promotion, or training." In short, according to Disabilities and Employment Act, "disability" is the reason for prohibiting

employment discrimination with the disabilities and "employment-related decisions" is the scope of which discrimination is banned.

Although Disabilities and Employment Act prohibits discrimination against the disabilities in employment, however, the Act does not provide any specific guidelines on duties, liabilities and remedial procedures. Therefore, this Act is viewed as symbolic, rather than practical. National Human Rights Committee may provide remedies, instead.

It is true that Disabilities and Employment Act is not practical in terms of enforcing the policy on anti-discrimination in employment with the disabilities. As in Germany and France, however, "Mandatory Employment of Disabilities Policy" has been adopted to indirectly promote employment prospects for people with the disabilities in Korea.

In addition, "Anti-discrimination against Disabilities Act" was enacted on April 10, 2007 (Act No. 8341, April 10, 2007. Effective of April 11. 2008). As a result, the Mandatory employment of Disabilities Policy which has been an indirect means to regulate employment discrimination with the disabilities, and the new Anti-discrimination against Disabilities Act will co-exist.

The Policy and the Act at issue are complementary. Mandatory employment of Disabilities Policy cannot be effectively enforced without Anti-discrimination against Disabilities Act. This is because under such a system, there would be no means to regulate employers who discriminate against qualified disabilities in employment without any just cause. On the other hand, Anti-discrimination against Disabilities Act cannot be effectively implemented without Mandatory employment of Disabilities Policy, either. For example, it will be difficult to promote employment opportunities for people with severe disabilities absent Mandatory employment of Disabilities Policy. In fact, unlike people with minor disabilities, securing mere equal opportunities through Anti-discrimination Act would hardly provide real employment opportunities for people with severe disabilities.[35] Therefore, it is promising to have both Mandatory Employment of Disabilities Policy and Anti-Discrimination against Disabilities Act in effect in Korea.

2. Mandatory Employment of Disabilities Policy

A private employer with more than 50 employees is subject to Mandatory Employment of Disabilities Policy (Disabilities and Employment Act, Section 27, Clause 28). The Policy governs both people with severe disabilities and minor disabilities. Therefore, the degree of disabilities will not at issue in determining whether the Policy applies (Section 2, Clause 1, 2. Enforcement Regulation, Section 3, 4).

The rate of the mandatory employment of disabilities refers to the rate at which an employer should employ people with disabilities in proportion to the total number of employees in his or her business. The employees with disabilities should account for 2% of the total number employees in private sectors and 3% in public sectors. (Section 27, 28, Enforcement Regulation, Section 25). The rate of the mandatory employment of disabilities has been increased: 1% in 1991 when first adopted, 1.6% in 1992, and 2% in 1993.

An employer may pay fines if the rate of the mandatory employment of disabilities is not reached to what is required under the Act. The amount of fines is set forth in the Disabilities and Employment Act: the number of employees with disabilities that an employer is required to hire based on the rate of the mandatory employment of disabilities, first subtracted by the

[35] Yong-Man Choi, *Mandatory Employment of Disabilities and Anti-Discrimination in Employment*, 23 LABOR LAW STUDIES 62 (2007).

actual number of employees with disabilities that the employer hired, multiplied by the annual base fees (Disabilities and Employment Act, Section 33, Clause 1. 2). If an employer hires people with severe disabilities, the amount of fines will decrease by the number of employees with severe disabilities, subtracted by the half of annual base fee. This deductible amount may not exceed the half of the total amount (*Id.* Section 33, Clause 2.2). In addition, an employer with more than 100 employees not exceeding 300 employees may pay only half of the total amount of fines that is required under the Act for five years (Clause 8491. Rule 2. May 25, 2007).

3. Anti-Discrimination against Disabilities Act

1) Contents

Anti-discrimination against Disabilities Act directly prohibits any employment discrimination on the basis of disabilities. This Act does not only protect the disabilities from discrimination in employment, but also provide educational opportunities, services, and administrative support to paternal rights and maternal rights, and utilize various social services in general. We will particularly take a careful look at the employment section for the purposes of our analysis.

The "disabilities" subject to protection refers to a condition judged to be physically or mentally impaired for a long period of time, which results in significant limitations on his or her individual and social life (Section 2, Clause 1). Only people with long-term disabilities are subject to the Act, not people with short-term or interim disabilities.

It is important to note that the Act prohibits indirect discrimination as well as direct discrimination under Section 4. Unfair treatments include 1) discrimination by means of limitation, exclusion, or refusal on the basis of disabilities without any just cause; and 2) enforcement of standards that do not consider the disabilities without any just cause which places the disabilities at a significant disadvantage (Section 4, Clause 1. 2). Furthermore, the Act bans a refusal to provide a legitimate accommodation for the disabilities without just cause (Section 4, Clause 3). As you can see, the scope of discrimination is broadly defined under Anti-discrimination against Disabilities Act.

The Act consists of three sections with respect to employment of disabilities: anti-discrimination (Section 10); legitimate accommodation to people with the disabilities (Section 11); and prohibition on medical examination (Section 12).

Section 10 provides that an employer shall not discriminate against qualified individuals with disabilities in recruitment, hiring, firing, promotion, compensation, job training, or terms and conditions of employment (Clause 1). Also, people with disabilities shall not be discriminated on the basis of their membership and activities in trade unions (Clause 2).

Section 11 states that an employer shall provide legitimate accommodation to employees with disabilities to work under the same conditions so that they may enjoy equal opportunities provided to employees without disabilities. An employer also shall not place the employees with disabilities in a different division against the employee's will. The President should provide specific guidelines as to what legitimate accommodation means. There are many possible legitimate accommodations that an employer may need to provide in connection with modifications to the work environment or adjustments in how and when a job is performed; however, such guidance has not yet been enacted.

Section 12 states that an employer shall not conduct medical examinations prior to hiring. But an employer may require medical examinations after employment only if they are job-

related or consistent with business necessity, including work assignments. In principle, any costs incurred to conduct medical examinations shall be borne by an employer. The Act also provides that any medical information obtained from medical examinations, including history of disabilities or current health condition, should be treated as a confidential medical record and should not be released.

Women with disabilities can be subject to double discrimination on the basis of sex and disabilities and therefore, special protections are provided. An employer shall not provide unfair treatments to women with disabilities, compared to male employees or female employees without disabilities (Section 33). Additionally, an employer shall not refuse to provide legitimate accommodation to women with disabilities. Legitimate accommodations include: workplace breastfeeding support program, depending on the severity of disabilities; available communication channels through which female employees with disabilities may check their children's conditions; and additional child care support system.

2) Remedial Procedures

The most noteworthy feature in Anti-discrimination against Disabilities Act is its unique and a substantial remedy.

First, National Human Rights Committee is the primary institution that is responsible for remedies with respect to discrimination against the disabilities. As we have been above, their relief on general discrimination in fact serves as a recommendation. However, discrimination on the basis of disability may be different. Suppose, National Human Rights Committee ordered to provide a remedy. Its order should be submitted to the Minister of Justice; if the charged employer did not comply with the Committee order without just cause and such non-compliance appears to be so severe that is detrimental to the public, Minister of Justice may order to enjoin the discriminatory acts against the disabilities.

The injunction released by Minister of Justice includes 1) enjoining discriminatory acts; 2) recover damages; 3) actions to prohibit future discriminatory acts; and 4) actions to correct other potential discriminatory acts. If the Minister's order were not complied, fees may be charged (Section 42, 45, 50). Therefore, the remedies are enforceable in discrimination against the disabilities, which will be more effective than the ones provided for general discrimination under the jurisdiction of National Human Rights Committee.

Second, if damages have incurred due to the discrimination against disabilities, a different remedial system comes into play. Section 46, Clause 1 provides that anyone who violates Anti-discrimination against Disabilities shall pay damages for individuals who suffer damages as a result of his or her acts, unless he or she proves that discriminatory acts were committed without intent or negligence. As for general damages claim cases, the victims have a burden of proof to show that damages occurred with intent or negligence. On the other hand, as for discrimination against disabilities cases, the individuals who committed the discriminatory acts have a burden of proof in showing a lack of intent or negligence.

Furthermore, the amount of damages in the present issue is calculated differently from those for general damages claim cases. For example, a victim should prove the causation between wrongdoer's acts and damages in the general cases. On the other hand, the Court may infer the damages a victim suffered from the benefits that a wrongdoer enjoyed in the disability discrimination cases. This is because the Court acknowledges that the individuals with disabilities are generally socio-economically at a disadvantage and therefore, they will face difficulties in proving such causation. In cases where such an inference is not possible

due to the unique nature of factual evidence, the Court has a discretion to provide substantial damages based on available factual and circumstantial evidence (Section 46, Clause 2. 3).

Third, the Court distributes burdens of proof differently for disability discrimination cases. Section 47 provides that in any disputes arising from Anti-discrimination against Disabilities, a petitioner has a burden of proof to show that discriminatory acts occurred. On the other hand, a respondent has a burden of proof to show either such discrimination was not on the basis of disabilities or just cause was present.

Fourth, the Court has adopted a temporary remedy system. According to Section 48, a victim can seek temporary remedies prior to or in the middle of litigation, to enjoin discriminatory acts until the Court reached a conclusion. In addition, the Court may order to improve terms and conditions of employment, to enjoin discriminatory acts or to take affirmative actions to correct errors subject to the victim's complaint. If the Court ordered to take affirmative actions to prohibit further discriminatory acts, the Court may specify a period of time within which such a court order shall be followed. If the time line is not accorded, the Court may order to compensate for a delay. A victim may receive a form of temporary protection prior to or in the middle of litigation without fully satisfying a burden of proof. For example, a disabled employee may seek affirmative actions and receive a temporary remedy through a court order if he was discriminated on the basis of disability and received a lesser amount of wage.

Remedies provided for discrimination in employment with disabilities have been one of the most effective systems among anti-discrimination law in Korea. It is important to pay attention to any future developments in remedies provided for other kinds of discrimination. The effective remedial system in disability discrimination may extend to other anti-discrimination law.

VI. Future Plans for Anti-discrimination in Employment Policy

1. Current issues in Anti-discrimination in Employment Act

Three main areas for legislative reform with respect to anti-discrimination in employment are being discussed.

First, general Anti-Discrimination Law is at issue in the legislature. National Human Rights Committee recommended a bill draft to a government on "Anti-discrimination Law" as a basis to cover various kinds of discrimination on July 24, 2006. Because this bill includes employment discrimination, it is likely that if the bill is passed, it will substantially help correct employment discrimination.

National Human Rights Committee listed nineteen reasons on the basis of which discrimination should not take place. It is important to recognize that "types of employment" is added to this list in the bill. In particular, the bill introduces a Lawsuit Support Program to diversify general remedies and to promote the effectiveness of remedies. National Human Rights Committee will order injunction as a form of general remedy but if a wrongdoer does not comply with the Committee order, a victim will be able to utilize the Lawsuit Support Program.

The bill also introduces temporary remedy, injunction against discriminatory acts, affirmative action and monetary relief as a remedy that may be provided by the Court. These devices are adopted from Anti-discrimination against Disabilities Act. Furthermore, if discrimination occurred with malicious intent, the Court may order to pay additional

monetary damages more than twice, not exceeding five times, as much as normal damages. This device is a form of punitive damages, penalizing a wrongdoer. If this bill is passed, we can expect a new stage of developments in anti-discrimination in employment.[36]

Second, some argue that Age Discrimination in Employment Act should be enacted with respect to employment.[37] They claim that people in their twenties and thirties as well as older generation are subject to age discrimination when it comes to recruitment procedures and hiring and therefore, such a restriction on age should be banned. According to their view, prohibiting age discrimination can increase employment rates and promote employment of older persons based on their ability. The issue is whether the increase in employment of older persons would affect the employment rates for other age groups. Economic studies have shown that the overall employment rate will increase by 0.37% to 0.52% in Korea, if age discrimination is prohibited. Therefore, they insist to adopt a policy to ban on age discrimination in employment.

In pursuit of enactment of law to prohibit age discrimination, we need to consider a relationship between full retirement age system and prohibition on age discrimination law. The full retirement age system guarantees a job security until a person reaches the full retirement age. But Age Discrimination in Employment Act, if enacted, may threaten the current full retirement age system itself and ultimately, may practically lengthen the full retirement age. Because the wage tends to increase in proportion to seniority in Korea, the current wage structure should be reexamined following the enactment of Age Discrimination in Employment Act.

Lastly, there have been various discussions about regulations on employment relationship in outsourcing. As we have seen above, some employers hire irregular employees through outsourcing to circumvent many regulations that are designed to protect irregular employees. Some argue that the indirect employment such as agency employment as a whole should be abandoned; others say that outsourcing should be allowed under limited circumstances and employees who manage core or permanent tasks of the company should not be hired through outsourcing. Others also claim that indirect employment should be discussed with labor union representatives, or insist that all employees regardless of employment relationship be subject to the same wages.[38]

I think, even in the outsourcing situations where the outsourced job is undertaking in the contractee's facilities, it is unreasonable to infer the same employment responsibilities for a contractee as the ones for a contractor because a employee in contractor business in fact enters an employment contract with an contractor. Although a contractee may partially have a power to control the employees of contractor, it does not seem that a contractee has the same rights as a contractor. It is usually common that a contractee does not have a direct power to control the working conditions of contractor's employee. However, it is important to note that a contractor usually defers to a contractee a right to control, even indirectly, which results in profits for the contractee. In this respect, it seems reasonable that the contractee may be partially responsible for any issues arising under employment law. We need to acknowledge

[36] However, a bill subsequently introduced by a government on October 2, 2007 eliminated a section on types of employment on the list, punitive damages, and a right of National Human Rights Committee to order injunction. As of January 2007, this bill is under discussion, but it is very unlikely that it will be passed due to the Senate Election in April, 2008.

[37] For example, Yong-Man, Choi & In-Jae, Lee. *Socio-Economic Analysis on Regulations to Prohibit Age Discrimination* (2007).

[38] For details about each claim, see Sun-Soo Kim, *Recommendations for Outsourcing in the Flexible Era* (2007).

both a contractee and a contractor in in-site outsourcing as joint employers and distribute responsibilities accordingly.

2. Futures on Employment Discrimination Law

The employment discrimination law in Korea has been evolved and well-developed in quantity and in quality since 2000. The democracy in Korea has in fact come into effect in protecting human rights for minorities, rather than remained as a mere formal democracy. It was a significant improvement as Korea has adopted devices to prohibit discriminatory acts and promote equal treatments for the disabilities and irregular employees in employment.

Various employment discrimination Acts have recently enacted and therefore, it is too early to evaluate their practical effects on the Korean labor market. The fact that Equal Employment Opportunities Act which has been effective for a while is not effectively implemented shows that we need to wait longer to see what the employment discrimination law in fact will bring into the society. I believe the Equal Employment Opportunities Act has not been effective because it is difficult to resort to law while maintaining an employment relationship, especially in the Korean society. If a victim files a complaint to enjoin discriminatory acts, she will be afraid of late advancement, for example, as a form of retaliation by an employer. In this respect, class action system should be adopted and trade unions or labor representatives should be allowed to seek remedies on behalf of a victim or victims in order to effectively eliminate employment discrimination. In addition, Anti-discrimination against Disabilities Act was recently enacted, which adopted various remedial means. We should take affirmative actions to extend the application of such remedial means to other discrimination law.