



JILPT REPORT

No. 6
2008

New Developments in Employment Discrimination Law

— 2008 JILPT Comparative Labor Law Seminar —

The Japan Institute for Labour Policy and Training

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Foreword

The Japan Institute for Labour Policy and Training (JILPT) held the Ninth Comparative Labor Law Seminar on February 19, 2008 in Tokyo. In the seminar, we planned to have cross-national discussion and analysis on the theme of "New Developments in Employment Discrimination Law." We invited eight scholars from the U.S., the U.K., Germany, France, Australia, Korea, Taiwan and Japan to present their national papers on the themes.

The issue of employment discrimination is an area of remarkable developments not only in Japan but in other countries as well. The issue is also related with some of our research projects such as "Comprehensive Research for Building Stable Labor and Management Relations in Individualized Labor Relations" or "Research and Study of the Development of Social Systems and Employment Environments for Work-Life Balance."

We believe the seminar was a great success, with much thought-provoking discussion and insights into the similarities and differences of employment discrimination law of each country from a comparative aspect. This Report is a compilation of papers presented to the seminar. The substance of these papers and the result of the discussion will be contained in the final reports of our research projects. We very much hope that these reports will provide useful and up-to-date information and also benefit those who are interested in comparative study of the issue.

We would like to express our sincere gratitude to the guests who submitted excellent national papers and we are deeply grateful to Professor Araki and Professor Nakakubo for the effort to coordinate the seminar, and also to the Japanese researchers for their participation.

May 2008

Takeshi Inagami
President

The Japan Institute for Labour Policy and Training

Table of Contents

Foreword

Introduction

Hiroya Nakakubo
Hitotsubashi University
Senior Research Fellow, JILPT

Takashi Araki
The University of Tokyo
Senior Research Fellow, JILPT

1. **United States** **Employment Discrimination Law in the United States:
On the Road to Equality?**
Risa Lieberwitz
Cornell University 1
2. **United Kingdom** **New Developments in Employment Discrimination Law:
The UK Report**
Catherine Barnard
Trinity College, Cambridge 31
3. **Germany** **New Developments in Employment Discrimination Law
- Country Report: Germany**
Bernd Waas
University of Hagen 55
4. **France** **Discrimination Law in France**
Pascal Lokiec
University Paris XIII 77
5. **Australia** **Australian Anti-Discrimination Laws
- Framework, Developments and Issues**
Belinda Smith
University of Sydney 93
6. **Korea** **New Developments in Employment Discrimination in Korea**
Sung-Wook Lee
Ewha Womans University 119
7. **Taiwan** **Employment Discrimination in Taiwan**
Cing-Kae Chiao
Academia Sinica 141
8. **Japan** **Employment Equality Law in Japan:
Human Rights or Employment Policy?**
Ryoko Sakuraba
Kobe University 181

List of Participants

Introduction

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The Theme and Its Background

The 9th Comparative Labor Law Seminar (JILPT Tokyo Seminar) was held in Tokyo on February 19, 2008, with participants from the U.S., the U.K., Germany, France, Australia, Korea, Taiwan and Japan. Under the theme of “New Developments in Employment Discrimination Law,” the seminar was designed to explore the current situation of employment discrimination law with special emphasis on its expansion into new areas. As organizers of the seminar, we sent the following memo to the participants to explain the theme and its background.

The theme of the 9th Tokyo Seminar is the law of employment discrimination, with special emphasis on its expansion into new areas such as discrimination because of age or part-time status. What are the recent developments in employment discrimination law in your country? How do the newer types of discrimination differ from the “traditional” ones such as race and sex?

In Japan, the Equal Employment Opportunity Act was amended in 2006 for the second time since its enactment. By shifting from a ban on “discrimination against women” to “discrimination on the basis of sex,” and by adopting the concept of indirect discrimination in certain areas, the amendment marked a significant development in Japanese sex discrimination law. In addition, in June 2007, other statutes were amended (1) to mandate that employers give equal opportunity regardless of age at the time of recruitment and hiring of workers and (2) to prohibit wage and benefits discrimination against part-time workers who are equivalent to regular workers in certain aspects. It appears that these measures are aimed at achieving broader employment-policy goals as well as vindicating equality rights of individual workers. While Japan has yet to prohibit discrimination because of disability, a new era of employment discrimination has certainly begun.

The same may be true of the European Union member states. The Framework Directive on Equal Treatment (2000/78/EC) added age, disability, and sexual orientation, among others, to the prohibited grounds, and the legislative body of each country has acted upon it. It is interesting to see how such new types of discrimination law operate along with the preexisting ones in achieving equality in the workplace. Meanwhile, in the U.S., where a federal statute has prohibited age discrimination in employment since 1967, the Supreme Court took the position in 2005 that prohibition of age discrimination is targeted at protection of older workers. Does this mean age discrimination is somewhat different from race or sex

discrimination? And why don't we hear about discrimination against part-time employees in the U.S.? In other countries as well, employment discrimination is an area experiencing remarkable developments in recent years and we believe it presents fascinating issues for comparative discussion.

Proposed Outlines

Based on such an idea, we asked the participants to cover the following issues in their national papers.

1. *General description of employment discrimination law in your country*
 - *Please present a brief historic overview of employment discrimination law. Have there been notable developments in recent years?*
 - *Do you have statutes to prohibit discrimination on the following grounds?*
 - *race/ethnicity*
 - *sex*
 - *religion/beliefs*
 - *age*
 - *disability*
 - *sexual orientation*
 - *employment status (such as part-time and fixed-term contract)*
 - Are there any other grounds for discrimination prohibited by law?*
 - *Do they cover all aspects of employment? Do you have special laws regarding wages, such as equal pay between men and women?*
 - *Does your Constitution offer a basis for anti-discrimination statutes?*
 - *What are the most typical cases of employment discrimination?*
2. *Structure of proof and remedy of employment discrimination*
 - *Taking the example of race and/or sex discrimination, what constitutes illegal discrimination and what are justifiable grounds for distinction or disparity?*
 - *Does your law mandate prohibition of so-called indirect discrimination? If yes, how are the courts applying the theory?*
 - *How do you compare newer types of discrimination (e.g. age, disability, employment status) with traditional ones (e.g. race, sex) in terms of definition and proof of discrimination?*
 - *Are there any particularly important issues of remedial procedure regarding employment discrimination cases?*
3. *Relationship between employment discrimination law and employment policy considerations*
 - *Did (or would) prohibition of age discrimination affect employment practices of your country? What about prohibition of employment-status discrimination?*
 - *Do you have measures to promote employment of elderly or disabled people? How do they relate to prohibition of discrimination because of such traits?*
 - *What are the merits and demerits of addressing employment issues from the standpoint of "discrimination"?*
4. *Finally, please identify the most important issue of employment discrimination in your country today and give your opinion as to its future direction*

Papers and the Discussion

The national papers presented at the seminar are contained in the following pages. They are all informative, and readers will find it interesting to see various developments of anti-discrimination laws in each country. While the growing importance of this area is commonly observed, there are differences in specific grounds covered by law and in legal and societal contexts in which they came to be addressed. It is impossible to summarize the contents of the papers here, but a word or two would be appropriate for each country by way of introduction.

In the United States, which led the history of employment discrimination law with the enactment of Title VII of the Civil Rights Act of 1964, the search for substantive equality is still in progress under a complex body of statutes and judicial interpretations, and the issue of contingent workforce is becoming serious.

In the United Kingdom, since the seminal Sex Discrimination Act of 1975, so many anti-discrimination statutes have been enacted under the influence of both the U.S. law and the EC law that an effort is being made to streamline them, and there was a remarkable increase of litigation recently regarding equal pay.

In Germany, a comprehensive statute called the General Equal Employment Act, which prohibits discrimination based on race or ethnic origin, gender, religious or secular belief, disability, age or sexual identity, was enacted in 2006 to comply with EC Directives, and the issue of age discrimination is raising particularly difficult problems.

In France, the legal framework to deal with EC Directives was adopted by a similarly comprehensive statute, the statute law of November 16, 2001, although it is only recently that the judicial court acknowledged the doctrine of indirect discrimination, and in 2006 the use of anonymous CV was mandated for larger employers.

In Australia, anti-discrimination laws developed relatively early with the adoption of the Racial Discrimination Act of 1975, followed by prohibition of sex discrimination in 1984, disability discrimination in 1992, and age discrimination in 2004, but their individual complaints-based model is showing its limits in promoting equality.

In Korea, prohibition of sex discrimination has been strengthened considerably in recent years through amendments of the Equal Employment Opportunity Act of 1987, and new laws were enacted to prohibit discrimination against fixed-term and part-time employees in 2006 and to prohibit disability discrimination in 2007.

In Taiwan, the Employment Service Act of 1992, a comprehensive statute prohibiting discrimination based on race, religion, country origin, sex, and disability, among others, was expanded in 2007 to cover age and sexual orientation, and another statute was enacted in 2002 to specifically deal with gender discrimination.

In Japan, despite the 2006 amendment of the Equal Employment Opportunity Act and the new legal provisions regarding age and part-time status mentioned above, anti-discrimination laws are still modest, leaving the stage of hiring largely unregulated, with a trend toward the approach of employment policy rather than human rights.

After presentations of these national papers, there was a general discussion among the participants. The issues include whether and in what respect the newer types of employment discrimination are different from the traditional “core;” the relationship between employment policy considerations and human rights aspect of equality; the position of employment discrimination law, especially its relation to the traditional labor law; and the role of the courts and the parties involved in the application of employment discrimination law. Naturally, there were no specific conclusions, but all the participants enjoyed the lively discussion and deepened their understanding of the theme.

Concluding Remarks

Before bringing the readers to the national papers, we would like to make three short points regarding employment discrimination law. Firstly, prohibition of employment discrimination is a valid cause. Nobody will doubt the evils of invidious discrimination, and law can and should play an important role in combating them. Secondly, on the other hand, anti-discrimination law is a powerful tool in that it condemns the violating employer as the discriminator. While such an effect is absolutely necessary in some areas, the legislator may choose to avoid it in other areas. Thirdly, even under anti-discrimination legislation, substantive equality is not an easy goal to achieve. Employment discrimination law may need to develop new tools and ideas in addition to negative rights of employees. It may also be necessary to improve general labor and employment laws so as to form the basis for substantive equality.

There is no ready-made recipe. Each country has to pursue the best portfolio of measures in view of its own conditions. However, it is definitely necessary and beneficial to learn from the systems and actual experiences of other countries. We believe this book provides invaluable information for this purpose.

Employment Discrimination Law in the United States: On the Road to Equality?

Risa Lieberwitz
Cornell University

I. Introduction

U.S. antidiscrimination law seeks to address a history of workplace exclusion of individuals and groups on the basis of race, sex, national origin, and religion. Added to the core protections against discrimination on these bases, more recent legislation has recognized the need to expand the law to include discrimination on the basis of age and disability. Yet, as significant as antidiscrimination law has been, the U.S. workforce continues to reflect occupational segregation on these bases. Added to these problems is the growing insecurity of workforce made up increasingly by contingent employees, who are often drawn from the same groups needing protection under employment discrimination laws.

The legislative and judicial agenda, thus, must remain focused on the same fundamental questions that led to initial passage of antidiscrimination laws. What goals should these laws seek to achieve? How should progress toward equality be measured? Should the law be concerned with equal treatment of individuals as well as equal results for protected groups? Can the law provide substantive equality in addition to formal equality?

This paper describes and analyzes U.S. antidiscrimination law. It begins by describing the legal context of labor and employment law in the U.S., set against the background of the doctrine of employment at will. The discussion then focuses on Title VII of the Civil Rights Act of 1964,¹ which has been central to developing discrimination theory that has been applied to subsequent antidiscrimination laws. In addressing Title VII, the Age Discrimination in Employment Act of 1967 (ADEA),² and the Americans With Disabilities Act of 1990 (ADA),³ the paper presents an analysis of the progress achieved by these statutes. As importantly, the paper critiques the limits of the legislation, particularly as interpreted by the courts. Finally, the paper examines the growing contingent workforce and its need for legislative protection. Throughout the paper, the discussion will focus on recent developments in U.S. antidiscrimination law.

The U.S. Equal Employment Opportunity Commission (EEOC), which enforces these statutes, recently reported that employment discrimination charge filings increased dramatically in 2007, which is “the highest volume of incoming charges since 2002 and the largest annual increase (9%) since the early 1990s.”⁴ Race, retaliation, and sex-based

¹ 42 U.S.C. § 2000e et seq., *amended* by Civil Rights Act of 1991, P.L. 102-166, 105 Stat. 1071.

² 29 U.S.C. § 621 et seq.

³ 42 U.S.C. § 12101 et seq.

⁴ EEOC, *Job Bias Charges Rise 9% in 2007*, *EEOC Reports* (Mar. 5, 2008), available at <http://www.eeoc.gov/press/3-5-08.html>

discrimination charges made up the bulk of the charges, “continuing a long-term trend.”⁵ Of particular note, “nearly all major charge categories,” including race, retaliation, pregnancy, age, disability, national origin, and religion, grew by double digit percentages, which the EEOC calls “a rare occurrence.”⁶ As these statistics demonstrate, problems of discrimination still exist in the U.S., requiring continued legal attention and redress.

II. Common Law Background: Employment at Will

Any developments in U.S. labor and employment law must be understood against the legal background of the common law doctrine of “employment at will,” which has influenced the legislatures and courts since at least the 19th century.⁷ Under the familiar litany of employment at will doctrine, an employer may hire or discharge an individual for “a good reason, a bad reason, or no reason at all,” emphasizing employers’ unilateral power to decide whether to initially employ or continue to employ an individual. In other words, the employer has no obligation to make rational hiring decisions or to discharge employees only for “just cause.”⁸ Although most collective bargaining agreements include just cause provisions, less than 8% of the private sector workforce is unionized.⁹ Further, most employees do not have individual contracts on which to base “unjust dismissal” claims. Many public sector employees are protected by a just cause requirement under civil service statutes or collective bargaining agreements. Even in a unionized workforce, however, hiring decisions are usually outside the scope of mandatory subjects of bargaining.

Given the scope of employer power under the employment at will doctrine, statutory limitations on the common law doctrine have been especially important for restricting socially irresponsible employment decisions. These legal limitations have taken the form of federal and state labor and employment legislation prohibiting employers from basing employment decisions on an individual’s union activities, race, sex, national origin, religion, age, or disability. This legislation has its origins in the National Labor Relations Act of 1935¹⁰ and subsequent laws resulting from the 1960s Civil Rights movement, including the federal Equal Pay Act of 1963,¹¹ requiring employers to pay men and women equally for performing substantially similar work, and Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, sex, national origin, or religion. Congress has enacted additional anti-discrimination legislation, including the ADEA, prohibiting employment discrimination against individuals forty years of age or older, the ADA, and the Civil Rights Act of 1991,¹² which amended Title VII, the ADA, and the ADEA. State anti-

⁵ *Id.*

⁶ *Id.*

⁷ Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-At-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 93-98 (1996) (arguing that the employment-at-will doctrine has been part of U.S. common law since the earlier colonial period).

⁸ MACK A. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL, FOURTH EDITION 85-95 (2004). (discussing employment-at-will and common law exceptions).

⁹ The current union membership in the U.S. is at 12.1 percent, including public and private unionization. Union membership is 7.5 percent in the private sector and 35.9 percent in the public sector. See, Bureau of Labor Statistics, *Union Members in 2007*, available at <http://www.bls.gov/news.release/pdf/union2.pdf>

¹⁰ 29 U.S.C. §§ 141 *et. seq.*

¹¹ 29 U.S.C. § 206(d).

¹² Pub. L. 102-166.

discrimination laws provide analogous prohibitions, with some state laws adding other grounds, such as employment decisions on the basis of sexual orientation or marital status.¹³ Since there is no federal preemption in anti-discrimination law, plaintiffs can file claims concurrently under federal and state laws. Unlike federal anti-discrimination law, state laws that do not cap compensatory and punitive damages open the potential for larger awards for plaintiffs in state court.¹⁴

Title VII, the ADEA, and the ADA regulate public and private employers, labor organizations, and employment agencies. Employers are covered if they have more than 15 employees for Title VII¹⁵ and the ADA,¹⁶ and more than 20 employees for the ADEA.¹⁷ An older federal statute with continued relevance for race discrimination claims is 42 U.S.C. Section 1981, which was enacted as part of the federal Civil Rights Act of 1866. Section 1981 prohibits race discrimination in the formation or enforcement of contracts, which includes public and private sector employment. The Equal Protection guarantees of the 5th and 14th Amendments to the U.S. Constitution apply only to public employers, given the requirement of “state action” to trigger these provisions.¹⁸

As significant as anti-discrimination laws are, their scope is limited by the U.S. “negative rights” model, which works in tandem with employment at will doctrine. As a background legal condition, employment at will gives employers almost complete unilateral control over the employment relationship. A negative rights model of anti-discrimination leaves this employer power largely intact by creating discrete restrictions on employer conduct. For example, under Title VII, an employer is prohibited from refusing to hire a woman because of her gender. But Title VII does not require an employer to increase its hiring of women. Nor is the employer required to have just cause to discharge or discipline employees. Title VII and other employment discrimination laws define prohibited bases for employer action, but leave the employer otherwise free to take actions for good or bad, fair or unfair reasons.

In contrast, a positive rights model would make greater incursions on employer unilateral power. For example, “unjust discharge” claims by employees could include claims of sex, race, or other forms of discrimination, but would go beyond anti-discrimination by creating a positive right to fair treatment. A positive rights model could have a significant effect on the judicial interpretation of anti-discrimination laws, leading to greater substantive equality. A positive rights model would also create a stronger foundation for legislating benefits for all employees, including paid vacation, paid sick leave, and health insurance. With a weak

¹³ See Arthur S. Leonard, “Twenty-First Annual Carl Warns Labour & Employment Institute: Sexual Minority Rights in the Workplace,” 43 *Brandeis Law Journal* 145 (2004/2005); WILLIAM N. ESKRIDGE, JR. AND NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 948-50 (1997) (discussing statutes in nine states and the District of Columbia, as well as executive orders in at least thirteen states, and ordinances in more than 150 cities); Arash Jahanian and Alan K. Tannenwald, *Eighth Annual Review of Gender and Sexuality Law: Employment Law Chapter: Sexuality and Transgender Issues In Employment Law*, 8 *Geo. J. Gender & L.* 505, 515-17 (2007) (describing laws in 18 states and D.C., prohibiting sexual orientation discrimination).

¹⁴ See, e.g., *Johnson-Klein v. California State Univ.*, 102 FEP Cases 1227 (Cal. Super. Ct. 2008) (State court finding excessive a jury award of over \$3 million for past non-economic damages and \$11 million for future non-economic losses for sex discrimination, and reducing the non-economic damages to a total of \$1.5 million).

¹⁵ 42 U.S.C. § 2000e (b).

¹⁶ 42 U.S.C. § 12111 (5).

¹⁷ 29 U.S.C. § 630 (b).

¹⁸ See *In re Civil Right Cases*, 109 U.S. 3 (1883).

welfare state, the U.S. leaves such benefits to contract, whether through collective bargaining or individual agreements.¹⁹

III. Title VII Negative Rights Model: Formal Equality

The negative rights model has its strongest expression in disparate treatment theory, which is centered on intentional employment discrimination. Disparate treatment theory is most effective as a means of achieving formal equality for women, racial and ethnic minorities, disabled persons, and older people. Creating conditions of “formal equality” does further the legislative goal of expanding equal opportunity for women and minorities who meet the same employment criteria applied to majority group applicants.²⁰ For example, an employer is prohibited from treating male and female applicants differently on the basis of sex in filling a position of engineer. The judicial focus on formal equality has resulted in an extensive body of disparate treatment cases defining the methods of proving intentional discrimination.

While it seems uncontroversial that intentional discrimination should be unlawful, Title VII’s actual language refers only to the broader concept of causation rather than intent.²¹ Nevertheless, the courts have developed a long history of cases defining disparate treatment in terms of intentional discrimination. Further, although “intent” is not the same as “motive,” the courts often use these terms interchangeably. While intent refers to a conscious state of mind, motive may include unconscious factors, such as stereotypes that cause bias in decision-making.²²

Disparate treatment cases encompass all types of intentional discrimination under Title VII.²³ Depending on the type of case – alleging discrimination against an individual, a group, or in a class action – the method of proving the employer’s intent or motive will vary. The Supreme Court’s development of disparate treatment theory under Title VII has created a template that has been used to interpret other employment discrimination laws. The judicial path in defining intentional discrimination under Title VII, however – particularly in cases of discrimination against an individual – has not been smooth. The current status of judicial doctrine of intent under Title VII is, in fact, in disarray. The co-existence of contradictory Supreme Court cases is responsible for this confusion. Prior to 1991, the Court created two different approaches for proving Title VII disparate treatment violations – a “pretext” approach and a “mixed motives” approach. In the Civil Rights Act of 1991 (CRA of 1991),²⁴ Congress amended Title VII to add Section 703(m), which explicitly incorporated the “mixed motives” approach for proving intentional discrimination. Although the Supreme Court has

¹⁹ See Frank Munger, *The New Economy and the Unraveling Social Safety Net: How Can We Save the Safety Net?*, 69 BROOKLYN L. REV. 543, 550-51 (2004).

²⁰ See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* ch. 6, 8 (2003); KATHERINE T. BARTLETT, *GENDER AND THE LAW: THEORY, DOCTRINE, COMMENTARY* (1993); Christine Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987).

²¹ See Linda Hamilton Krieger and Susan T. Fiske, “Behavioral Realism in Employment Discrimination,” 94 *California Law Review* 997 (2006): 1053 (“The intent requirement itself is a judicial innovation.”)

²² See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

²³ See Risa L. Lieberwitz, “Bad Intentions,” in *TELLING STORIES OUT OF COURT: NARRATIVES ABOUT TITLE VII OF THE CIVIL RIGHTS ACT* (Ruth O’Brien, ed.) (forthcoming, Cornell University Press).

²⁴ Pub. L. 102-166.

interpreted this new provision, the Court still has not answered the question of whether the “pretext” approach has continued viability.

The Supreme Court developed the pretext approach in its 1973 decision of *McDonnell Douglas v. Green*,²⁵ describing what legal scholar Mack Player has called the “three step minuet.”²⁶ In the first step, the plaintiff must prove that he or she was a member of a protected class under Title VII; applied for the position for which the employer was seeking applicants (or held a position with the employer); was qualified for the job in question; was denied the job (or was disciplined or discharged); and the employer continued to seek applicants for the job or filled the job with a person from a different class.²⁷ The plaintiff who proves these elements by a preponderance of the evidence has successfully made a *prima facie* case for inferring the employer’s unlawful intent.²⁸ As the second step of the “minuet,” the defendant may rebut the inference of illegal intent by “articulating” a non-discriminatory reason for his action.²⁹ The defendant – most of the time, an employer – has only a burden of production of admissible evidence, not a burden of persuasion. Finally, in the third step of the dance, plaintiff must carry the burden of persuasion of the element of intent by proving that the defendant’s reason was pretextual – either false or a cover for the real unlawful discriminatory reason.³⁰ Proving pretext, however, does not prove unlawful intent as a matter of law. The Supreme Court, in a closely divided decision, held that the judge or jury could still permissibly conclude that the pretext was a cover for some reason other than race, sex, national origin, or religion.³¹

The Supreme Court’s “mixed motives” approach is more favorable to plaintiffs. Sixteen years after *McDonnell Douglas*, the Court held in *Price Waterhouse v. Hopkins*, that “[i]f an employer allows gender to affect its decision-making process, then it must carry the burden of justifying its ultimate decision.”³² The plaintiff has the initial burden to prove that the employer was motivated, at least in part, by an unlawful basis under Title VII. Having established that the employer was a “wrongdoer,” the employer must carry the burden of persuasion of an affirmative defense that it would have made the same decision in the absence of such discrimination.³³

Most federal courts distinguished the two approaches by finding that *Price Waterhouse* required the plaintiff to present “direct evidence” of the employer’s illegitimate motive.³⁴ Where the plaintiff’s case relied only on circumstantial evidence, the employer had the low burden of “articulating” its defense under *McDonnell Douglas*, leaving it to the plaintiff to meet the difficult burden of proving pretext. Given the hazy line between direct and circumstantial evidence, lower federal courts reached inconsistent and surprising conclusions

²⁵ 411 U.S. 792 (1973).

²⁶ PLAYER, *supra* note 8, at 85-95.

²⁷ *McDonnell Douglas*, 411 U.S. at 802. Proof of other allegations of disparate treatment in employment conditions – such as wage discrimination or layoffs – would entail evidence that the plaintiff was treated differently from other similarly situated employees. PLAYER, *supra* note 8, at 85-91.

²⁸ *McDonnell Douglas*, 411 U.S. at 802. See also, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); St. Mary’s Honor Center v. Hicks, 509 U.S. 502 (1993); Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) (all cases developing the *McDonnell Douglas* approach).

²⁹ *McDonnell Douglas*, 411 U.S. at 802-03.

³⁰ *Id.* at 804-05.

³¹ St. Mary’s Honor Center v. Hicks, 509 U.S. 502 (1993).

³² *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

³³ *Id.* at 249.

³⁴ The lower courts relied on Justice O’Connor’s concurring opinion in *Price Waterhouse*. See William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUSTON L. REV. 1549 (2005).

about whether evidence such as racist or sexist statements were simply “stray remarks,” but not direct evidence of unlawful intent.³⁵

Congress re-entered this terrain through the CRA of 1991, by adding Section 703(m) to Title VII, which explicitly recognizes the existence of mixed motive disparate treatment cases.³⁶ Shortly thereafter, in 2003, the Supreme Court interpreted Section 703(m) in *Desert Palace v. Costa*.³⁷ The Court held that a plaintiff may prove an employer’s illegal intent through direct and/or circumstantial evidence.³⁸ This approach comports more with the reality that intentional discrimination will likely be evidenced through a pattern of treatment and conduct rather than through direct statements of animus toward the plaintiff based on her protected class status.

Since the *Desert Palace* Court did not even mention *McDonnell Douglas*, this leaves lower courts uncertain about which approach to apply in disparate treatment cases. Further, the Supreme Court has continued to cite *McDonnell Douglas* after deciding *Desert Palace*.³⁹ Most courts continue to apply both *McDonnell Douglas* and *Desert Palace*.⁴⁰ The Fifth Circuit Court of Appeals uses *McDonnell Douglas* analysis in “single motive” or “pretext” cases and has also tried “merging” the two cases.⁴¹ A district court in the Eighth Circuit found that all disparate treatment cases should be analyzed only under the *Desert Palace* mixed-motives approach.⁴² Subsequently, the Eighth Circuit Court of Appeals concluded that *McDonnell Douglas* remains relevant at the summary judgment stage. Many legal commentators, in contrast, find nothing more than “nostalgia”⁴³ to support the continued use of *McDonnell Douglas*.⁴⁴

The choice between *McDonnell Douglas* or *Desert Palace* is more than “academic.” In applying *McDonnell Douglas*, federal district court judges raised the bar on plaintiffs by either discounting the power of circumstantial evidence or deferring to the employer’s “honest belief” in its reason for hiring, discharge, or discipline.⁴⁵ This made it very difficult for plaintiffs to prove that the employer’s reasons were pretextual.⁴⁶ Federal judges, under a

³⁵ ROBERT BELTON, DIANNE AVERY, MARIA L. ONTIVEROS, AND ROBERTO L. CORRADA, EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE, SEVENTH EDITION 146-47 (2004).

³⁶ 42 U.S.C. Sec. 2000e-2(m).

³⁷ 539 U.S. 90 (2003).

³⁸ *Id.* at 2153-55.

³⁹ *Raytheon v. Hernandez*, 540 U.S. 44 (2003); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006).

⁴⁰ *See, e.g., McGinest v. GTE Serv. Corp.*, 360 F.3d 1103 (9th Cir. 2004); *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310 (4th Cir. 2005); *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004). *See also* Corbett, *supra* note 34, at n.71.

⁴¹ *Rachid v. Jack in the Box*, 376 F.2d 309 (5th Cir. 2004). *See* Corbett, *supra* note 34, at 1565.

⁴² *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp.2d 987 (D. Minn. 2003); *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004) *See* Corbett, *supra* note 34, at n.72.

⁴³ Corbett, *supra* note 34, at 1551.

⁴⁴ *See id.*; Jeffrey A. Van Detta, “*Le Roi est Mort; Vive le Roi!*”; *An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case after Desert Palace, Inc. v. Costa into a ‘Mixed-Motives’ Case*, 52 DRAKE LAW REVIEW 71, 72 (2003); T. L. Nagy, *The Fall of the False Dichotomy: The Effect of Desert Palace v. Costa on Summary Judgment in Title VII Discrimination Cases*, 46 TEXAS L. REV. 137 (2004); Michael Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?* 53 EMORY L. J. 1887 (2004).

⁴⁵ Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINNESOTA L. REV. 587, 612-28 (2000).

⁴⁶ *Id.*

McDonnell Douglas analysis, granted summary judgments at a high rate to employers,⁴⁷ “transform[ing] the circumstantial evidence case into a ‘toothless tiger.’”⁴⁸

If a plaintiff succeeds in getting to a jury trial, the application of either the *McDonnell Douglas* or *Desert Palace* allocation of burdens of proof can have a significant impact on the outcome. Prior to 1991, all Title VII cases were heard only in bench trials. The 1991 CRA made a major change by compensatory and punitive damages⁴⁹ to the already existing back pay and reinstatement remedies for intentional discrimination. The 1991 Act also created the right to a jury trial in cases where a plaintiff seeks compensatory or punitive damages – in other words, in disparate treatment cases.⁵⁰ The judge could create an advantage for the employer by instructing the jury based on the burdens of proof under *McDonnell Douglas*.⁵¹ Given the low burden of production on the employer, it will be difficult for the plaintiff to win and to receive damages. Instructing the jury under a *Desert Palace* mixed motives approach, by contrast, describes a more evenly distributed allocation of burdens of persuasion.⁵² Even more beneficial to the plaintiff, according to Section 703(m) of the CRA of 1991, once the plaintiff proves that the employer was motivated by an unlawful reason, the plaintiff has established employer liability. The employer’s affirmative defense – that it would have taken the same action anyway – is relevant only to the appropriate remedies awarded to the plaintiff. An employer that successfully proves an affirmative defense will be subject to a cease and desist order and will be obligated to pay the plaintiff’s attorney’s fees.⁵³ If the employer is unsuccessful in its defense, the plaintiff may be awarded the full scope of remedies for intentional discrimination.⁵⁴ The 1991 CRA caps compensatory plus punitive damages at maximums determined by the size of the employer, setting a range that extends from \$50,000 for employers under 101 employees to \$300,000 for employers with more than 500 employees.⁵⁵

⁴⁷ *Id.*

⁴⁸ *Id.* at 661.

⁴⁹ The new 42 U.S.C. Sec. 1981a, created by Section 102 of the CRA of 1991, provides for recovery of “punitive damages” (except against a governmental employer), where the plaintiff proves that the defendant’s actions were made “with malice or reckless indifference to the federally protected rights of an aggrieved individual.”

⁵⁰ CRA of 1991, Section 102 creates the right to a jury trial, in 42 U.S.C. Sec. 1981a (c).

⁵¹ Corbett, *supra* note 34, at 1571-74.

⁵² *Id.*

⁵³ The CRA of 1991 amended Title VII to add Section 706(g)(2)(B), providing that if a plaintiff proves that the defendant was unlawfully motivated under Section 703(m), and if the defendant “demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor,” the court “may grant declaratory relief, injunctive relief...and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under [Section 703(m)].” The provision also instructs that a court “shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or [back pay].”

⁵⁴ CRA of 1991, section 102 amends 42 U.S.C. Sec. 1981 to add provisions for remedies for intentional discrimination claims under Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, and the employment provisions of the Rehabilitation Act of 1973. Under Title VII, after the plaintiff proves that the employer was unlawfully motivated, but the employer fails to prove its affirmative defense, 42 U.S.C. Sec. 1981a provides for recovery of “compensatory damages,” defined as “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.”

⁵⁵ Section 102 of the CRA of 1991 provides that the award of compensatory and punitive damages is made in addition to any back pay or front pay. The cap on compensatory and punitive damage amounts, therefore, does not affect the separate award of back pay or front pay.

IV. Sexual Harassment: Defined as Disparate Treatment

The U.S. courts have been active, if not always clear, in interpreting sexual harassment claims under Title VII.⁵⁶ In *quid pro quo* cases, a supervisor or manager makes sex a condition of employment, for example, by threatening an employee with discharge or other negative consequences for refusing to comply with sexual demands. Or the supervisor might promise to reward the employee for sexual favors.⁵⁷ While the plaintiff must prove that the alleged sexual advances were unwelcome,⁵⁸ a “voluntary” relationship could still be sexual harassment.⁵⁹

Prior to developing case law on hostile environment sexual harassment, the courts had found that creation of racial and national origin hostile environments violated Title VII.⁶⁰ A “hostile environment” sexual harassment claim consists of “unwelcome sexual advances” or “other verbal or physical conduct of a sexual nature” that were “sufficiently severe or pervasive” as to unreasonably interfere with the employee’s work or create “an intimidating, hostile, or offensive working environment.”⁶¹ The determination of “severe or pervasive” conduct depends on a two-part test. First, under an objective test, the plaintiff must prove that a “reasonable person in [her] position” would find the conduct severe or pervasive.⁶² Secondly, under a subjective test, the plaintiff must show that she, personally, found that the conduct created an abusive working environment. The plaintiff need not prove that “tangible psychological injury” resulted.⁶³ The Supreme Court has emphasized, though, that “merely offensive comments” or even “sporadic use of abusive language, gender-related jokes, and occasional teasing” will not create a hostile environment.⁶⁴

Judicial development of sexual harassment law has led to mixed results for plaintiffs. Feminist scholars have criticized federal courts for raising the evidentiary bar so high as to make claims of sexual harassment difficult to prove. Legal scholar Judith Johnson concludes that many judges are defining “severe or pervasive” hostile environment as if it means “severe and pervasive” harassment.⁶⁵ Professor Theresa Beiner’s empirical study of hostile environment cases over an 11-year period, from 1987 to 1998, reveals that the federal courts

⁵⁶ In 2006, the 12,000 sexual harassment charges comprised about one-quarter of all Title VII charges filed with the EEOC (in fiscal year 2006, 45,785 of the total 75,768 discrimination charges against private sector employers were Title VII charges). Equal Employment Opportunity Commission, “Job Bias Charges Edged Up in 2006, EEOC Reports,” <http://www.eeoc.gov/press/2-1-07.html> See Susan K. Hippensteele, *Mediation Ideology: Navigating Space from Myth to Reality in Sexual Harassment Dispute Resolution*, 15 AMER. U. J. GENDER, SOCIAL POL’Y & LAW 43, n. 14 (2006) (citing EEOC statistics).

⁵⁷ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

⁵⁸ *Id.* at 68.

⁵⁹ *Id.* at 61-62.

⁶⁰ See *Meritor*, 477 U.S. at 65-66 (discussing lower federal court decisions).

⁶¹ *Id.* at 65. See Risa L. Lieberwitz, *Sexual Harassment: Gaining Respect and Equality*, in TELLING STORIES OUT OF COURT: NARRATIVES ABOUT TITLE VII OF THE CIVIL RIGHTS ACT (Ruth O’Brien, ed.) (forthcoming, Cornell University Press).

⁶² *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

⁶³ *Id.* at 22.

⁶⁴ *Id.* at 21. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), 788 (quoting BARBARA LINDEMANN AND DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 175 (1992)).

⁶⁵ Judith J. Johnson, *License To Harass Women: Requiring Hostile Environment Sexual Harassment To Be “Severe Or Pervasive” Discriminates Among ‘Terms And Conditions’ Of Employment*, 62 MD. L. REV. 85, 111 (2003).

granted summary judgment in more than half of all cases because of inadequate evidence of severe or pervasive conduct.⁶⁶

A recent positive development in sexual harassment law is the Supreme Court's decision in *Oncale v. Offshore Services*, expanding sexual harassment claims to include same-sex harassment.⁶⁷ The case has also been criticized, however, for emphasizing that sexual harassment is based on disparate treatment theory, which requires evidence of discriminatory treatment. The *Oncale* Court, reiterating analysis from earlier cases, stated: "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."⁶⁸ Judicial insistence on proving that men and women are treated differently, however, seems irrelevant to addressing the harm of sexual harassment.⁶⁹ Such inquiries can lead, as well, to an intrusive and offensive focus on the sexual orientation of the alleged harasser and victim.⁷⁰

The Supreme Court has also been criticized for its recent creation of a unique affirmative defense in hostile environment cases. In its 1998 decisions in *Faragher v. City of Boca Raton*⁷¹ and *Burlington Industries v. Ellerth*,⁷² the Supreme Court held that an employer could defend against hostile environment claims by fulfilling a two-prong test: first, that the employer took reasonable care to prevent or remedy the hostile environment; and second, that the employee claiming harassment was unreasonable in not taking full advantage of employer measures, such as internal complaint processes.⁷³ This affirmative defense is not available, however, where the sexual harassment produces a "tangible employment action," such as a discharge or demotion. An employer remains strictly liable if a sexual harassment victim proves that s/he faced "a significant change in employment status."⁷⁴

In 2004, the Court further defined the affirmative defense in cases where an employee resigns from her job due to sexual harassment. In *Pennsylvania State Police v. Suders*,⁷⁵ the plaintiff alleged that she was the victim of a tangible employment action, consisting of a "constructive discharge"; that is, the sexual harassment was so intolerable that she felt forced to resign. The Court held that a constructive discharge is a tangible employment action only where the employee's resignation results from harassment involving "official action," such as

⁶⁶ Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 101 (1999) (Between 1987 and 1998, employers were granted summary judgment in 175 out of 302 cases, or 58 percent). See also, Anne Lawton, *Tipping the Scale of Justice in Sexual Harassment Law*, 27 OHIO NORTHERN U. L. REV. 517 (2001): 533.

⁶⁷ 523 U.S. 75 (1998).

⁶⁸ *Id.* at 80, quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. at 25-26 (Justice Ginsburg, concurring).

⁶⁹ The so-called "equal opportunity" harasser, who creates an abusive environment for men and women, has not engaged in sex discrimination. For a critique of this defense, as applied in *Holman v. Indiana*, 211 F.3d 399 (2000), see Michelle A. Travis, Arthur S. Leonard, Joan Chalmers Williams, and Miriam A. Cherry, *Gender Stereotyping: Expanding The Boundaries Of Title VII: Proceedings Of The 2006 Annual Meeting, Association Of American Law Schools, Section On Employment Discrimination Law*, 10 EMPL. RTS. & EMPLOY. POL'Y J. 271, 278 (2006) (remarks by Arthur Leonard).

⁷⁰ The Supreme Court does not find it as "easy to draw" an inference that the same-sex harasser's conduct was discriminatory as it does in other cases of sexual harassment. *Oncale*, 523 U.S. at 80.

⁷¹ 524 U.S. 775 (1998).

⁷² 523 U.S. 742 (1998).

⁷³ *Faragher*, 524 U.S. at 807; *Burlington Industries*, 524 U.S. at 765.

⁷⁴ *Burlington Industries v. Ellerth*, 524 U.S. at 765.

⁷⁵ 524 U.S. 129 (2004).

an employee's resignation in response to a humiliating demotion.⁷⁶ If the alleged constructive discharge does not involve official action, the employer may attempt to prove its affirmative defense to a hostile environment claim.⁷⁷

The sexual harassment affirmative defense could encourage employers to take positive measures, such as adopting educational programs and internal complaint processes to investigate and remedy sexual harassment problems. However, the defense may also give employers an easy way to avoid meritorious claims. Empirical studies have found that many employers use these processes as "window dressing"⁷⁸ or "file cabinet compliance."⁷⁹ Further, the affirmative defense in combination with the severe or pervasive standard place employees in a difficult position.⁸⁰ To comply with *Faragher*, an employee may file an internal grievance immediately after an incident of harassment. If she then files a Title VII lawsuit, a judge may conclude that the alleged conduct is too isolated to create a hostile environment. But if she waits too long to file an internal complaint, a judge could later dismiss her lawsuit based on the employer's affirmative defense that the plaintiff did not adequately take advantage of internal complaint processes.⁸¹

V. Further Recent Developments in Disparate Treatment Theory

The Supreme Court decided two recent intentional discrimination cases; one hurts plaintiffs and the other helps.⁸² The first case, *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,⁸³ was decided on procedural grounds with the result of limiting individual plaintiffs' ability to bring Title VII wage discrimination claims. Plaintiff Ledbetter alleged wage discrimination based on evidence that over many years she was paid less than men in similar jobs. The Supreme Court held, however, that Ledbetter's claim was untimely, as it was filed with the EEOC outside the 180 day limitations period. The Court concluded that Ledbetter was required to file her claim within 180 days from her employer's initial decision to pay her less than the men.⁸⁴ The Court rejected plaintiff's argument and the EEOC's position that her claim was timely because each paycheck perpetuated her employer's earlier discriminatory actions in setting her salary. A plaintiff filing outside the limitations period must show that the employer's wage system is discriminatory, which would prove a continuing violation of Title VII. Each time the employer applies its discriminatory system, it would engage in a new

⁷⁶ 524 U.S. at 148-49.

⁷⁷ *Id.*

⁷⁸ Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUMBIA J. GENDER & LAW 197, 235-42, 260-66 (2004); Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671 (2000); Kateri Hernandez, *A Critical Race Feminism Empirical Research Project: Sexual Harassment and the Internal Complaints Black Box*, 39 U. C. DAVIS L. REV. 1235 (2006); Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117 (2001).

⁷⁹ Lawton, *supra* note 78, at 213-16.

⁸⁰ Evan D. H. White, *Hostile Environment: How the 'Severe or Pervasive' Requirement and the Employer's Affirmative Defense Trap Sexual Harassment Plaintiffs in a Catch-22*, 47 B.C. L. REV. 853, 857-63 (2006); Johnson, *supra* note 65, at 134.

⁸¹ White, *supra* note 80, at 857-63; Johnson, *supra* note 65, at 134.

⁸² See Lieberwitz, *supra* note 23.

⁸³ 550 U.S. ___, 127 S. Ct. 2162 (2007).

⁸⁴ *Id.* In states that have state enforcement agencies for state anti-discrimination laws, the limitations period under Title VII is extended to 300 days.

statutory violation. Since Ledbetter relied on evidence of the “discrete act” of her employer’s discrimination in setting her initial wage level, she could not prove systemic discrimination.⁸⁵

Justice Ginsburg, dissenting, objected to the unreasonable nature of the Court’s holding. In the realities of the workplace, it may take years before an employee learns of discriminatory wage disparities. Employers usually keep wage information secret and employees often hesitate to share such information with each other. Even where employees have access to information about other employees’ wages and raises, the cumulative effect of compensation differences may not be apparent immediately. Ginsburg called for Congress to “correct [the] Court’s parsimonious reading of Title VII.”⁸⁶ A bill has already been introduced in the U.S. House of Representatives to amend Title VII to legislatively overrule *Ledbetter*.⁸⁷

In *Burlington Northern & Santa Fe Railway Co. v. White*,⁸⁸ a unanimous Supreme Court recently expanded the scope of plaintiffs’ claims under Section 704(a),⁸⁹ the “anti-retaliation provision” of Title VII. While Section 703(a)⁹⁰ protects employees against prohibited discrimination in employment decisions, Section 704(a) prohibits employers from retaliating against employees for participating in proceedings to enforce Title VII or for opposing employer conduct that the employee reasonably and in good faith believes violates Title VII. Protected employee actions under Section 704(a) encompass employee informal complaints at the workplace and formal employee charges or testimony in the legal realm. Retaliation claims have grown in importance, increasing from 15 percent of all claims filed with the EEOC in 1993 to 29.5 percent in 2006.⁹¹ In *Burlington Northern*, the Court held that prohibited employer conduct under Section 704(a) is not confined to “actions and harms...related to employment or [that] occur at the workplace.”⁹² For example, unlawful retaliation under Section 704(a) might consist of an employer filing false criminal charges against a former employee who complained about discrimination.⁹³ The Court held, further, that employer actions will be found to be unlawful retaliation only if they “would have been materially adverse to a reasonable employee or job applicant,” meaning that “they could well dissuade a reasonable worker from making or supporting a charge of discrimination.”⁹⁴

⁸⁵ See Michael Selmi, *The Supreme Court’s 2006-2007 Term Employment Law Cases: A Quiet But Revealing Term*, 11 EMPL. RTS. & EMPLOY. POL’Y J. 219, 230-32 (2007) (discussing the *Ledbetter* Court’s reasoning distinguishing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), which had found hostile environment racial harassment to be a continuing violation, timely filed as long as one of the hostile environment incidents occurred within the limitations period).

⁸⁶ *Id.* at 2188. Justice Ginsburg was joined in her dissenting opinion by Justices Stevens, Souter, and Breyer.

⁸⁷ Jacqueline Palank, *Democrats Will Try to Counter Ruling on Discrimination Suits*, N.Y. TIMES, Jul. 13, 2007, at A-13.

⁸⁸ 548 U.S. ___, 126 S.Ct. 2405 (2006).

⁸⁹ 42 U.S.C. § 2000e-3(a). The ADEA has a similar provision in Sec. 4(d) (29 U.S.C. § 623(d)), as does the ADA in Sec. 503 (42 U.S.C. § 12203(a)).

⁹⁰ 42 U.S.C. § 2000e-2(a).

⁹¹ Lawrence E. Dube, *Employee Retaliation Claims are on the Rise, But Rules are in Flux*, NYU Conference Told, 108 DAILY LAB. REP. B-1, Jun. 6, 2007.

⁹² 126 S.Ct. at 2409.

⁹³ *Id.* at 2412, citing with approval, *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984 (10th Cir. 1996).

⁹⁴ *Id.* at 2409. The evidence in this case proved that the plaintiff suffered “material adverse employment actions” of work transfer and suspension.

VI. Moving Beyond the Limits of “Formal Equality”

While opening opportunities, the formal equality model of individual disparate treatment claims restricts the potential of anti-discrimination law, as it defines white men as “the norm.” That is, formal equality extends equal rights only where plaintiffs can prove that they are “the same” as the norm – white men – and that the employer intentionally excluded plaintiffs due to their protected group status.⁹⁵ This definition envisions equality in a “formal” sense, seeking to eliminate intentional discrimination against “similarly situated” groups. Formal equality, however, fails to fully counter the historical and social conditions that have caused women and minorities to be “differently situated” from white men. Although some sex-based biological differences exist in reproduction, these physical differences create differences in employment status because gender roles have been socially assigned in the workplace and family. Women’s gender role of primary caretaking in the family has created obstacles to their achievements in education and employment. Women and minority groups are different, as well, because they are disproportionately poor, which limits their ability to gain higher education and employment skills. Under these social conditions, white men have monopolized the best paying and highest status jobs in the workplace, with women and minorities disproportionately represented in part-time, low-paid, and low-status jobs. Redressing these social and economic inequalities takes more than extending formal equality to women and minorities who manage to meet the “white male” norm.⁹⁶

Formal equality is certainly important. But can the law extend beyond comparisons of similarly situated groups? Some judicial interpretation has opened disparate treatment to consider social conditions, gender roles, and unconscious discrimination. In so doing, the courts have added greater substantive equality to Title VII.

A. Required Gender Conformity as Disparate Treatment

Expanding disparate treatment theory beyond formal equality goes hand in hand with recognizing that discrimination results from both conscious and unconscious motivations. In *Price Waterhouse v. Hopkins*, the Supreme Court made important progress by finding that an employer engages in intentional sex discrimination by relying on gender role stereotypes in its employment decisions. Despite Hopkins’ impressive work record, the Price Waterhouse partners turned down her bid for promotion based on her poor “interpersonal skills.” Several of the male partners also criticized her for being “too macho,” for “overcompensating for being a woman,” and for being “a lady using foul language.” They counseled her to “walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁹⁷ The Court concluded that the employer’s reliance on stereotypes about femininity blocked Hopkins from being promoted. From the employer’s viewpoint, Hopkins would never be the same as men. As Justice Brennan explained, an “employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch 22: out of a job if they behave aggressively and out of a job if they

⁹⁵ See Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 32-45 (1987).

⁹⁶ See, e.g., Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL’Y 1, 3-6 (1994); Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

⁹⁷ 490 U.S. at 235.

do not. Title VII lifts women out of this bind.”⁹⁸ Thus, the Court recognized that disparate treatment includes an employer’s evaluation of job performance and qualifications through the lens of socially constructed stereotypes.⁹⁹

The *Price Waterhouse* analysis of the impact of gender role stereotypes on women should logically apply to employment discrimination against men who do not conform to stereotypes about masculinity. Analogous to Hopkins’ claim, a male plaintiff could argue that the employer refused him a promotion for being too “feminine.” This application is especially important to expand Title VII to prohibit sexual orientation discrimination, which the lower federal courts have held is not covered by Title VII.¹⁰⁰ Although the Supreme Court has not addressed the issue of sexual orientation as a protected class, its *Price Waterhouse* gender analysis has been applied by some federal courts to find unlawful discrimination on the basis of nonconformity to gender stereotypes. This approach is bolstered, as well, by the Supreme Court’s 1998 decision of *Oncale v. Sundowner Offshore Services*, where the Court opened the door to broader consideration of gender stereotypes by analyzing same-sex harassment under Title VII.¹⁰¹ In *Nichols v. Azteca Restaurant Enterprises, Inc.*,¹⁰² the Ninth Circuit Court of Appeals held that the male plaintiff was the target of unlawful hostile environment harassment by co-workers and a supervisor, based on their perception of his conduct as overly feminine.¹⁰³ Some federal courts have used similar analysis about gender nonconformity to find discrimination against transgendered individuals.¹⁰⁴ This legal protection of individuals based on their gender identity could also apply to individuals who do not conform to stereotypes through their dress or make up.¹⁰⁵

Despite the theoretical fit between *Price Waterhouse* and other sorts of gender stereotyping, most courts are reluctant to apply the analysis broadly.¹⁰⁶ For example, in *Jespersen v. Harrah’s Operating Co., Inc.*,¹⁰⁷ the Ninth Circuit rejected plaintiff’s sex discrimination claim based on the employer’s policy that required women beverage servers and bartenders to wear make up, but that prohibited men from wearing it. The employer required male bartenders, but not female bartenders, to have hair above collar length. The court concluded that the grooming policy imposed “equal burdens” on both men and women.¹⁰⁸ In cases raising gender nonconformity discrimination based on sexual orientation or gender identity, courts often reject claims by finding that the plaintiffs are trying to expand Title VII beyond Congress’ meaning of sex discrimination.¹⁰⁹ As legal scholar Arthur Leonard notes, in these cases “judges walk a fine line” between finding sexual harassment due

⁹⁸ *Id.* at 251.

⁹⁹ See Lieberwitz, *supra* note 23.

¹⁰⁰ See, e.g., *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327 (9th Cir. 1979).

¹⁰¹ *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

¹⁰² 256 F.3d 864 (9th Cir. 2001). See, Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 Duke J. Gender L. & Pol’y 205, 223-225 (2007) (discussing this and three other federal cases evaluating gender nonconformity).

¹⁰³ 256 F.3d 864.

¹⁰⁴ See, e.g. *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2004) (finding evidence of discrimination on the basis of nonconformity with gender norms against plaintiff who was a pre-operative transsexual). See, discussion in Friedman, *supra* note 102, at 222-23.

¹⁰⁵ Laura D. Francis, *Attorneys Discuss ‘Rapidly Developing’ Law on Gender Identity Discrimination*, 119 DAILY LAB. REP. C-1 (Jun. 21, 2007); Friedman, *supra* note 102, at 209-11, 216-20.

¹⁰⁶ Friedman, *supra* note 102, at 205-06, 209-11, 218-22, 225-27.

¹⁰⁷ 444 F.3d 1104 (9th Cir. 2006).

¹⁰⁸ *Id.* at 1110. See, Friedman, *supra* note 102, at 209-11.

¹⁰⁹ Friedman, *supra* note 102, at 221-22.

to their non-conforming appearance and behavior¹¹⁰ and finding discrimination on the basis of sexual orientation.¹¹¹ Ultimately, legislative reform will be needed to broaden Title VII protection. The proposed federal Employment Non-Discrimination Act should amend Title VII to add prohibitions against sexual orientation and gender identity discrimination.¹¹² State laws increasingly prohibit discrimination on these bases.¹¹³

B. Intersectional Claims of Discrimination

Courts deepen their consideration of social conditions by allowing plaintiffs to bring claims based on the interactive effects of race, sex, national origin, age, and other unlawful bases of discrimination. The courts are divided in their views on the validity of intersectional claims. Some courts use a formalistic interpretation that maintains divisions among categories of discrimination. A federal district court in Missouri held that the plaintiffs could prove a claim that the employer laid them off because they were women or because they were black, or both, but not because they were Black women.¹¹⁴ Other courts have recognized that an intersectional claim alleges a unique form of discrimination. The Fifth Circuit Court of Appeals held that a plaintiff could claim that she was denied a promotion and discharged because of the intersection of race and sex. The court concluded that “discrimination against black females [could] exist even in the absence of discrimination against black men or white women.”¹¹⁵ The Tenth Circuit agreed in a case involving racial and sexual hostile environment.¹¹⁶ The Ninth Circuit has recognized an intersectional race and gender claim in a case alleging discrimination against an Asian woman.¹¹⁷ A federal district court in Pennsylvania permitted a plaintiff to claim discrimination against older women, an intersection of two federal statutes.¹¹⁸

¹¹⁰ For cases applying this theory, *see e.g.*, *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002) (en banc), cert. denied, 538 U.S. 922 (2003); *Centola v. Potter*, 2002 U.S. Dist. LEXIS 1504 (D. Mass. 2002).

¹¹¹ For cases rejecting claims because they were based on sexual orientation discrimination, *see e.g.*, *King v. Super Service, Inc.*, 68 Fed. Appx. 659 (6th Cir. 2003); *Mims v. Carrier Corporation*, 88 F.Supp.2d 706 (E.D. Tex. 2000). *See Leonard, supra* note 55, at 279; *Leonard, supra* note 13, at 152-58.

¹¹² Employment Non-Discrimination Act of 2001, HR 2015, 110th Cong. (2007) *See* Ian Ayres and Jennifer Gerarda Brown, *New Frontiers in Private Ordering: Privatizing Employment Protections*, 49 ARIZ. L. REV. 587 (2007). After three decades of legislative campaigns, on November 7, 2007, the U.S. House of Representatives passed the bill. The bill, as passed, prohibited discrimination against gays, lesbians, and bisexuals, but did not prohibit discrimination against transgender individuals. The bill was not introduced in the Senate. Carolyn Lochhead, *House OKs Contested Rights Bill for Gays*, SAN FRANCISCO CHRON., November 8, 2007, at A1.

¹¹³ *See Francis, supra* note 105 (describing prohibitions against sexual orientation and gender identity discrimination under New Jersey and New York state laws); Arash Jahanian and Alan K. Tannenwald, *supra* note 13, at 515-17 (2007) (describing laws in 18 states and D.C., prohibiting sexual orientation discrimination).

¹¹⁴ *Degraffenreid v. General Motors Assembly Division*, 413 F.Supp. 142 (E.D. Missouri 1976). The judge concluded that intersectional claims “clearly raises the prospect of opening the hackneyed Pandora’s box.” *See also*, Tanya Kateri Hernandez, *A Critical Race Feminism Empirical Research Project: Sexual Harassment and the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235, 1269 (2006) (noting the “scarcity of intersectional analyses of sexual harassment issues”); Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL FORUM 139 (1989).

¹¹⁵ *Jefferies v. Harris Co. Community Action Ass'n*, 615 F.2d 1025, 1032 (5th Cir. 1980).

¹¹⁶ *Hicks v. The Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1991).

¹¹⁷ *Lam v. University of Hawaii*, 40 F.3d 1551 (9th Cir. 1994).

¹¹⁸ *Arnett v. Aspin*, 846 F.Supp. 1234 (E.D. Pa. 1994). *See* Nicole Buoncore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENVER U. L. REV. 79 (2003).

C. Group-Based Claims of Intentional Discrimination

1. Explicit Exclusion of a Protected Group

Group-based disparate treatment cases move intentional discrimination beyond formal equality by shifting the focus from comparing individuals to analyzing systemic discrimination. The most straightforward case of group-based intentional discrimination is an employer's explicit exclusion of a protected group from a particular job. In such cases, the only defense available to employers is proof that the exclusion is a "bona fide occupational qualification" (BFOQ) "reasonably necessary to the normal operation of the business."¹¹⁹ While the BFOQ applies to exclusions based on sex, national origin, religion, and age, Title VII does not permit the BFOQ defense for explicit group-based exclusions on the basis of race.¹²⁰

To guard against broad exclusions based on stereotypes and unsubstantiated generalizations, the Supreme Court has placed a heavy burden of proof on the employer to establish a BFOQ. For example, in *UAW v. Johnson Controls*,¹²¹ the Supreme Court held that a battery manufacturer violated Title VII by excluding women of child bearing capacity from jobs with lead exposure or that were on the job ladder to such positions. The Court rejected Johnson Controls' BFOQ argument that lead exposure could endanger fetuses. This evidence did not prove "that all or substantially all [pregnant or potentially pregnant women] would be unable to perform safely and efficiently the duties of the job involved."¹²² As the Court observed, "Concern for a woman's existing or potential offspring has historically been the excuse for denying women equal employment opportunities."¹²³

2. Pattern or Practice of Group-based Exclusion

Like explicit exclusions of a protected group, pattern or practice cases are group-based claims of intentional discrimination.¹²⁴ Unlike explicit exclusion cases, however, pattern or practice claims are difficult for plaintiffs to prove. Based primarily on statistical evidence, the pattern or practice case is brought by the EEOC or Department of Justice, or as a private class action alleging long-term discrimination.¹²⁵ A successful claim takes intentional discrimination beyond formal equality by inferring intent on the basis of historical patterns of hiring and promotions that result in occupational segregation. This evidence of exclusion reveals discrimination as a systemic problem rather than simply a series of individual discriminatory employment decisions.

¹¹⁹ 42 U.S.C. § 2000e-2(e)(1) (permitting job qualifications on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.")

¹²⁰ *Id.*

¹²¹ 499 U.S. 187 (1991).

¹²² *Id.* at 216.

¹²³ *Id.* at 211. In contrast, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Supreme Court upheld the state of Alabama's exclusion of all women from guard positions in state maximum security prisons. The Court concluded that women's "very womanhood" endangered themselves and others in those prisons. Justice Marshall, in dissent, castigated the Court for treating women unequally based on "old canards" of gentility. *Id.* at 343.

¹²⁴ See Lieberwitz, *supra* note 23.

¹²⁵ 42 U.S.C. § 2000e-6(a) (Title VII); 42 U.S.C. § 12117(a) (ADA). See also, BELTON ET. AL, *supra* note 35, at 170, 175-77 (discussing pattern or practice cases under the ADEA, and private class action employment discrimination suits under Title VII, ADA, and ADEA).

Key to proving a pattern or practice case is demonstrating that the employer disproportionately excluded a protected group as its standard operating procedure.¹²⁶ While the proof is, primarily, based on statistical evidence of discriminatory patterns of hiring, promotions, wages, and job assignments, plaintiffs usually bolster statistics with “anecdotal” evidence of individual instances of discrimination.¹²⁷

Since the mid-1990s, there has been a “sharp rise” in class action suits alleging system-wide race and sex discrimination.¹²⁸ Class actions focused on the low percentage of women in management have been brought against employers in industries as different as securities and grocery store chains. Despite settlements in some cases for millions of dollars, women’s representation in management has not significantly increased.¹²⁹ The recent well publicized class action against Wal-Mart alleges system-wide sex discrimination in wages and promotions to management positions.¹³⁰ As a class action of 1.6 million women suing the largest employer in the world,¹³¹ it has been described as “the largest Title VII sex discrimination class action ever and the largest civil rights class action in U.S. history.”¹³²

Plaintiffs in class action and pattern or practice sex discrimination cases have encountered employer defenses that women are not interested in management positions. This “lack of interest” defense argues that women’s roles as spouse and mother motivate them to choose jobs that enable them to fulfill their family responsibilities.¹³³ From this perspective, women prefer jobs that leave time for caretaking and allow them to move easily in and out of the workforce; that is, part-time positions, jobs with regular day time hours, and non-managerial positions. Legal scholar Vicki Schultz’s study demonstrated that employers made this argument successfully in almost half of the 54 sex discrimination cases between 1972 and 1989 raising the “lack of interest” defense.¹³⁴ Most of these cases alleged class-wide discrimination.¹³⁵ Wal-Mart officials have asserted women’s lack of interest in relation to the

¹²⁶ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

¹²⁷ *Id.* at 338-39.

¹²⁸ Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 *EMPL. RTS & EMPLOY. POL’Y J.* 1, 5 (2005).

¹²⁹ For example, a class action against Publix grocery stores settled for \$81.5 million, and the class action against Lucky’s grocery stores settled for \$107 million. *Id.* at 15-16. Yet, as Selmi concludes: “Despite the bevy of lawsuits, it is equally clear that the pattern of discrimination with the grocery industry remains entrenched today, some twenty years after the initial suits were filed.” *Id.* 18. In the securities industry, Selmi describes the situation: “As of 1996 when many of the cases were filed, approximately 15 percent of the more than 100,000 brokers nationwide were women, and women held fewer than 10 percent of the senior management positions. By 2003, the figures were nearly the same.” *Id.* at 6.

¹³⁰ *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004), *aff’d*, 2007 U.S. App. LEXIS 28558 (9th Cir. 2007) (certifying the class for “all women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have “been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices). See Winnie Chau, *Something Old, Something New, Something Borrowed, Something Blue and a Silver Sixpence for her Shoe: Dukes v. Wal-Mart & Sex Discrimination Class Actions*, 12 *CARDOZO J. LAW AND GENDER* 969, 987, n. 108 (2006).

¹³¹ Chau, *supra* note 130, at 987, n. 108.

¹³² *Id.* at 986.

¹³³ See, e.g. *EEOC v. Sears, Roebuck & Company*, 839 F.2d 302, 320 (7th Cir. 1988) (accepting the defense). See Vicki Schultz, *Telling Stories About Women in Title VII Cases: Raising the Lack of Interest Argument*, 103 *HARV. L. REV.* 1749, 1802-06 (1990).

¹³⁴ Schultz, *supra* note 133, at 1776-77.

¹³⁵ Plaintiffs “prevailed on the interest issue in 57.4% of the claims” where the employer asserted this defense. *Id.* at 1776-77.

pending class action suit alleging systemic sex discrimination.¹³⁶ With the addition of jury trials under the CRA of 1991, perhaps juries will less readily accept the lack of interest defense.

VII. Disparate Impact Theory: Moving Toward Substantive Equality

U.S. anti-discrimination law makes progress toward substantive equality through the “disparate impact” theory of discrimination, which is often referred to as “indirect discrimination” in legal systems outside the U.S. Disparate impact is a judicially created theory that did not appear in the words of Title VII. In its landmark 1971 decision of *Griggs v. Duke Power Co.*,¹³⁷ the Supreme Court read disparate impact into the statute. The Court concluded that this theory met the “objective of Congress...to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”¹³⁸ Under disparate impact theory, neutrally stated employment practices that, in application, have a disproportionately negative effect on a statutorily protected group are unlawful, unless the employer can prove that the practice is job-related and a business necessity.¹³⁹

Like pattern or practice cases, disparate impact theory is essential for addressing the systemic nature of discrimination.¹⁴⁰ Further, similar to pattern or practice cases, disparate impact theory is based primarily on statistical evidence. Disparate impact, though, is potentially a more revolutionary method of analysis because the evidence is not used to infer intentional discrimination. Rather, disparate impact is concerned with the effect of employer practices that exclude protected groups, regardless of intent. In the words of the Supreme Court, “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”¹⁴¹ Eliminating the relevance of intent moves the analysis closer to the original Title VII statutory language of causation.¹⁴² It also moves closer to a goal of equality of results rather than simply equal opportunity.

Under disparate impact theory, the plaintiff must prove that an employment practice, “neutral on its face,” has a disproportionately negative impact on a statutorily protected group. In some cases, like *Griggs*, the effects are so great that the disproportionate impact is obvious. In less clear cases, most courts have applied a “rule of thumb” developed by the EEOC to determine whether the plaintiff’s group has at least an 80 percent success rate of the

¹³⁶ See Selmi, *supra* note 128, at n. 3, citing a Wal-Mart official quoted in the New York Times that “women’s lack of interest in managerial jobs helped explain the lower percentage of women managers.” See Steven Greenhouse, *Wal-Mart Faces Lawsuit Over Sex Discrimination*, NY TIMES, February 16, 2003, A22. Wal-Mart also contends that it has instituted diversity programs to increase the number of women managers.

¹³⁷ 401 U.S. 424 (1971). This was the Supreme Court’s second decision interpreting Title VII. Michael Selmi, *Was the Disparate Impact Theory a Mistake?* 53 UCLA L. REV. 701, 707-16 (2006) (discussing the lower court decisions, legal scholarship, and EEOC positions that influenced the *Griggs* Court).

¹³⁸ *Griggs*, 401 U.S. at 429-30.

¹³⁹ The Court held that employment practices “fair in form, but discriminatory in operation,” violated Title VII. *Id.* at 431. Here, the “neutral” requirements of a high school degree and passing the two written tests froze the status quo of Duke Power’s prior race discrimination.

¹⁴⁰ See Risa L. Lieberwitz, *It’s All in the Numbers: The Toll Discrimination Takes*, in TELLING STORIES OUT OF COURT: NARRATIVES ABOUT TITLE VII OF THE CIVIL RIGHTS ACT (Ruth O’Brien, ed.) (forthcoming, Cornell University Press).

¹⁴¹ *Id.* at 432.

¹⁴² See Krieger and Fiske, *supra* note 21, at 1038.

comparison group. For example, in a Title VII sex discrimination case, if women's success rate on a required test is lower than 80 percent than men's pass rate, the courts will generally find that the employment practice has a disproportionately negative impact on women.¹⁴³

Next, the employer may defend by proving that the employment practice was both job-related and necessary to the business. If an employer carries its burden of proof, the plaintiff may rebut by demonstrating that there is an alternative practice that would fulfill the employer's business needs without the negative impact on the protected group.¹⁴⁴ Disparate impact theory and this allocation of proof were explicitly included in the Civil Rights Act of 1991.¹⁴⁵

Disparate impact theory opens a wide range of employment practices to judicial scrutiny, from objective requirements of educational degrees and written or physical tests to subjective hiring criteria determined through interviews. Its potential has not been realized, however, due to limited legislative and judicial interpretations.

A. Problems of Proving Disparate Impact Claims

Griggs raised expectations for the potential of disparate impact claims, followed by a Supreme Court decision setting a high bar for the employer's burden of proof of job relatedness. In *Albemarle v. Moody*,¹⁴⁶ the Court described the employer's burden as including three important elements. First, the employer must use objectively recognized methods to validate a discriminatory test, which often requires a professional job evaluation study. Secondly, this study must evaluate the actual duties that are important to the job at issue. Third, the employer must show that success on the test is correlated with success in performing these job duties.¹⁴⁷

Later judicial decisions dashed the hope created by these early cases, as the Supreme Court steadily raised the evidentiary burden on the plaintiff, while lowering it on the defense. While expanding disparate impact theory to apply to subjective employment practices, such as interviews,¹⁴⁸ the Court also made it more difficult to prove a *prima facie* case. In *Wards Cove Packing v. Atonio*,¹⁴⁹ the Court held that plaintiffs must identify "the specific employment practice that is challenged" and prove that it caused a disparate impact on a protected group."¹⁵⁰ Further, the Court held that the employer has only a burden of production of a "business justification."¹⁵¹ This decision was a primary reason for enacting the 1991 Civil Rights Act, which reinstated the employer's burden to prove under Title VII, by a preponderance of the evidence, both the job relatedness and business necessity of a challenged practice.¹⁵² Under the 1991 Act, the plaintiff can avoid the requirement to identify a specific employment practice with a disproportionate impact by proving that "the elements

¹⁴³ See PLAYER, *supra* note 8, at 110-18; *EEOC Guidelines*, 29 CFR 1607.3D.

¹⁴⁴ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

¹⁴⁵ 42 U.S.C. Sec. 2000e-2(c).

¹⁴⁶ 422 U.S. 405 (1975).

¹⁴⁷ *Id.* at 431. The EEOC Guidelines provide detailed descriptions of the methods for proving job relatedness through professional validation studies. See 29 CFR Secs. 1607.5(b)(3)(4), which are discussed in *Albemarle*, 422 U.S. at 432-33, n30.

¹⁴⁸ *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988).

¹⁴⁹ 490 U.S. 642 (1989).

¹⁵⁰ *Ibid.* at 656, *quoting* *Watson*, 487 U.S. at 994.

¹⁵¹ *Wards Cove*, 490 U.S. at 659.

¹⁵² 42 USC 2000e(k)(1)(B)(i).

of [an employer's] decisionmaking process are not capable of separation for analysis."¹⁵³

Although the CRA of 1991 restored the pre-*Wards Cove* interpretation of disparate impact, plaintiffs continue to face an uphill battle.¹⁵⁴ Michael Selmi's recent study demonstrates its steady decline. Analyzing 130 federal circuit court of appeals and 171 federal district court disparate impact cases in six years between 1983 and 2002, Selmi finds a low success rate for plaintiffs, who won only 19.2 percent of their cases in the appellate courts and only 25.1 percent of their cases in the district courts.¹⁵⁵ As Selmi notes, even these low success rates may be too high, as they include remands and plaintiffs survivals of employer summary judgment motions.¹⁵⁶ These rates are even lower than the 35 percent success rate for plaintiffs, overall, in employment discrimination cases in federal court. In contrast, defendants won 59 percent of the time in appellate courts' decisions affirming the trial courts' grant of summary judgment motions.¹⁵⁷

Selmi concludes that the more stringent proof requirements for plaintiffs, combined with the greater willingness of courts to defer to employer business necessity defenses, have increased the difficulty of winning disparate impact cases.¹⁵⁸ His study also reports "the waning importance of disparate impact theory after the Civil Rights Act of 1991," demonstrated by the existence of fewer than twelve cases with "any substantial doctrinal discussion."¹⁵⁹ Unlike advocates and commentators calling for broadened use of disparate impact theory, Selmi proposes renewed attention to using statistical evidence to bring pattern or practice disparate treatment cases.¹⁶⁰ Legal scholar Elaine Shoben, on the other hand, calls for more active litigation under disparate impact theory.¹⁶¹ In her view, disparate impact is "underutilized" due to the unavailability of compensatory or punitive damages for disparate impact claims, the difficulty of bringing class-based lawsuits, and employer replacement of clearly discriminatory selection devices with ones that are less easily proven to have a disproportionately negative impact on protected groups.¹⁶²

B. The Limited Scope of Disparate Impact Claims

The potential of disparate impact theory to achieve greater substantive equality has been best realized in cases of clearly defined objective requirements, such as height and weight requirements that have a negative impact on women.¹⁶³ Women plaintiffs have faced an

¹⁵³ *Id.*

¹⁵⁴ See Linda Lye, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMPLOY. & LAB. L. 315, 348-53 (1998); Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479, 504-07 (2003); Selmi, *supra* note 137, at 734-57.

¹⁵⁵ Selmi, *supra* note 137, at 735-38.

¹⁵⁶ *Id.* at 738.

¹⁵⁷ *Id.* at 738-39.

¹⁵⁸ *Id.* at 742-44.

¹⁵⁹ Selmi, *supra* note 112, at 735.

¹⁶⁰ *Id.* at 779-80.

¹⁶¹ Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?*, 42 BRANDEIS L. J. 597 (2004).

¹⁶² *Id.* at 597-99.

¹⁶³ See e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 328-32 (1977) (minimum 5'2" height and 120 pound weight requirements for state prison guard positions had a disproportionately negative impact on women. The qualification of height and weight was neither job related nor a business necessity to determine applicants' strength, which could be measured directly.)

uphill battle, though, in challenging physical ability tests for jobs such as firefighter or police officer.¹⁶⁴

Feminist legal scholars have been particularly interested in the potential of disparate impact theory to challenge the discriminatory effects on women of such “normal” practices as leave policies, work day scheduling, and job evaluation systems.¹⁶⁵ The courts, however, have not interpreted disparate impact doctrine to apply to such accepted practices as inflexible work schedules, long work days, or extensive travel,¹⁶⁶ which disadvantage women due to their gender role as primary caretakers in the family.¹⁶⁷ This burden has a particularly negative impact on women in the United States, given the absence of publicly funded childcare programs. Further, the federal Family Medical Leave Act of 1993 (FMLA) does not provide significant relief, as it provides the right to only unpaid leave of twelve weeks per year for childbirth or serious illness of immediate family members. The FMLA covers only employers with at least 50 employees.¹⁶⁸ The EEOC’s recently issued a guidance on disparate treatment of employees – particularly women – with caregiving responsibilities.¹⁶⁹ The EEOC recognized the problem of “family responsibility discrimination” due to negative attitudes and stereotypes about mothers in the workplace.¹⁷⁰ However, the EEOC guidance did not address disparate impact of employer policies that negatively affect women with children.¹⁷¹

Two categories of employment practices are virtually off limits to disparate impact challenges, despite their negative impact on women and minorities. Plaintiffs can bring Title VII challenges to seniority systems only by proving that they were created with the intent to discriminate.¹⁷² The second category consists of Title VII challenges to compensation systems. The federal courts have rejected Title VII “pay equity” or “comparable worth” claims, which would go beyond the formal equality of the Equal Pay Act.¹⁷³ A comparable worth claim is based on gender or racial disparities resulting from the use of job evaluation systems that place a higher value on occupations held predominately by white men.¹⁷⁴ For sex-based wage discrimination claims under Title VII, it is unclear whether disparate impact theory even applies. Under the “Bennett Amendment” to Title VII, employers may raise the

¹⁶⁴ See, *Berkman v. City of New York*, 536 F.Supp. 177 (E.D.N.Y. 1982); *Berkman v. City of New York*, 705 F.2d 584 (2d Cir. 1982) (women plaintiffs won a class action suit against the city of New York, challenging the physical test portion of the exam for entry level firefighter positions. In a second disparate impact claim challenging the new firefighter physical exam, the Second Circuit Court of Appeals deferred to the city’s validation of business need argument for the test as administered.).

¹⁶⁵ See *Selmi*, *supra* note 137, at 704-05, n.12 (discussing the broad range of issues proposed for disparate impact analysis); *Lieberwitz*, *supra* note 140.

¹⁶⁶ *Id.* at 750.

¹⁶⁷ See Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 BOSTON U. L. REV. 55 (1979).

¹⁶⁸ 29 U.S.C. §§ 2601-2654.

¹⁶⁹ EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (2007), available at, <http://www.eeoc.gov/policy/docs/caregiving.html>

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at n.36.

¹⁷² 42 U.S.C. § 2000e-2(h).

¹⁷³ See, e.g., *AFSCME v. Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985); *American Nurses Ass’n v. Illinois*, 783 F.2d 716 (7th Cir. 1986). Even with the Equal Pay Act, women currently earn 77 percent of the rate of pay for men. Amy Joyce, *Wal-Mart Suit May Force Wider Look at Pay Gap Between Sexes*, WASH. POST, Jun. 24, 2004, sec. E, at 1.

¹⁷⁴ See, *Symposium, The Gender Gap in Compensation: The Theory of Comparable Worth as a Remedy for Discrimination*, 82 GEO. L. J. 139 (1993).

Equal Pay Act defense in such claims that argue the pay difference was based on “a factor other than sex.” This defense may restrict sex-based wage discrimination theory to disparate treatment.¹⁷⁵

With the growth in immigration in the U.S. and the increased political attention, in particular, to immigrants from non-English speaking countries, employer “English-only” rules have become more prevalent. The EEOC has taken the position that “a rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment,” but that an employer might be able to prove business necessity for a rule requiring only English to be spoken some of the time.¹⁷⁶ Plaintiffs bringing disparate impact claims based on English-only rules have had difficulty winning their cases.¹⁷⁷

VIII. Further Legal Issues of Substantive Equality

A. Affirmative Action

Affirmative action plans also have significant potential for achieving substantive equality, as positive measures for increasing the inclusion of women and minorities in occupations in which they are under-represented. The Supreme Court’s interpretation of Title VII provides only partial progress toward this goal. The Court has held that employers may voluntarily adopt temporary affirmative action plans that seek to correct a “manifest imbalance” in the representation of women and minorities, but the plans must not “unduly trammel” the rights of white men by excluding them from consideration for the jobs in question.¹⁷⁸ The courts will not mandate that an employer adopt an affirmative action plan, given the Title VII prohibition of required preferential treatment on the basis of race, sex, national origin, or religion.¹⁷⁹ Voluntary affirmative action plans adopted by public employers are particularly difficult to justify under the Supreme Court’s constitutional equal protection strict scrutiny standard that requires the state or federal employer to prove that the plan is a narrowly tailored means to fulfill a compelling state interest of remedying prior discrimination.¹⁸⁰

B. Mandatory Pre-Employment Arbitration Agreements

In *Circuit City Stores, Inc. v. Adams*,¹⁸¹ the Supreme Court upheld the validity of mandatory pre-employment agreements to arbitrate employment-related disputes in non-union

¹⁷⁵ See Shoben, *supra* note 161, at 599, *citing*, *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir. 1999).

¹⁷⁶ EEOC, *Guidelines on Discrimination Because of National Origin*, 29 C.F.R. § 1606.7(a)(b) (2006), available at, http://a257.g.akamaitech.net/7/257/2422/01jul20061500/edocket.access.gpo.gov/cfr_2006/julqtr/29cfr1606.7.htm English-only rules may also be challenged under disparate treatment, depending on the evidence of intentional discrimination.

¹⁷⁷ The EEOC has described the courts as “divided” on the validity of English-only rules and on the EEOC’s guidelines on the issue. EEOC, *Compliance Manual: National Origin Discrimination*, n. 48 (2002), available at, http://www.eeoc.gov/policy/docs/national-origin.html#N_51

¹⁷⁸ *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987).

¹⁷⁹ 42 U.S.C. sec. 2000e-2 (j).

¹⁸⁰ *City of Richmond v. Croson*, 488 U.S. 469 (1989). The Supreme Court applies strict scrutiny standard to state action based on racial classifications, but a lower intermediate standard for sex-based classifications.

¹⁸¹ 532 U.S. 105 (2001).

workplaces. The broad agreement in that case provided that the employee will submit to final and binding arbitration all employment-related disputes arising under statutory or common law in all jurisdictions, including breaches of contract, torts, and anti-discrimination laws such as Title VII, the ADA, and the ADEA.¹⁸² Under such an agreement, therefore, the employee waives, as a condition of employment, his right to bring employment disputes in court.¹⁸³ In *EEOC v. Waffle House, Inc.*,¹⁸⁴ however, the Supreme Court held that the EEOC has independent government enforcement power to sue an employer for violations of the ADA, even if an employee has agreed to resolve all employment-related disputes through private arbitration. The EEOC could pursue full remedies against the employer, including enjoining the employer from violating the ADA, as well as reinstatement, backpay, and damages for the individual employees. The EEOC, though, files suit in less than one percent of the employment discrimination charges filed with the EEOC each year.¹⁸⁵

In *Circuit City*, the Court sang the praises of private arbitration as an “alternative dispute procedure[] adopted by many of the Nation’s employers” that could enforce statutory rights equivalent to a judicial forum.¹⁸⁶ With the greater use of mandatory arbitration agreements, courts have policed them to ensure due process, including the employee’s right to participate in choosing the arbitrator, to have an attorney, and to have a full hearing where the arbitrator can award full remedies.¹⁸⁷ Some courts also require that the employer pay the arbitrator’s fee.¹⁸⁸ Faced with these developments, some employers have abandoned mandatory arbitration agreements, opting instead to require employees to agree to waive their right to a jury trial.¹⁸⁹

IX. The ADEA and the ADA: Formal Equality or Substantive Equality?

Given the central role of Title VII in U.S. employment discrimination law, judicial interpretation of subsequent legislation has relied heavily on Title VII theories of discrimination. As importantly, the case law has distinguished the ADEA and the ADA from Title VII, either because of explicit statutory differences or based on judicial interpretations of distinctive legislative goals of the statutes.

¹⁸² 532 U.S. at 109-10. The Court interpreted the Federal Arbitration Act (FAA), 9 U.S.C. Secs. 1-16, a 1925 federal statute compelling judicial enforcement of written arbitration agreements. Although the FAA was enacted to overcome judicial hostility to enforcing arbitration agreements in commercial cases, the Court held that the FAA also covers employment contracts, except for transportation workers.

¹⁸³ See also, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (enforcing a mandatory arbitration agreement in the securities industry, while avoiding the need to interpret the FAA’s exclusion provision, due to the unusual facts of the case).

¹⁸⁴ 534 U.S. 279 (2002).

¹⁸⁵ *Id.* at n.7.

¹⁸⁶ 532 U.S. at 123-24.

¹⁸⁷ See Dennis R. Nolan, *Employment Arbitration After Circuit City*, 41 BRANDEIS L. J. 853, 867-80 (2003).

¹⁸⁸ *Id.* at 874-75. See *Cole v. Burns Int’l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997).

¹⁸⁹ See Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, 80 CHI.-KENT L. REV. 933, 945-50 (2005); Chester S. Chuang, *Assigning the Burden of Proof in Contractual Jury Waiver Challenges: How Valuable is Your Right to a Jury Trial?*, EMP. RTS. & EMPLOY. POL’Y J. 10 (2006): 211-23. The few courts that have examined the validity of such pre-dispute jury waivers have evaluated whether they were entered with “knowing and voluntary consent.”

A. The Age Discrimination in Employment Act

A significant difference between the ADEA and Title VII concerns the definition of protected groups. Under Title VII, individuals may bring claims regardless of whether they are in a group that has historically been subject to discrimination. Thus, men as well as women, whites as well as Blacks or other racial groups, and individuals of any national origin or religion are protected under Title VII. Congress, the Supreme Court has held, intended to achieve equality through a society that is “blind” to race, sex, or other Title VII category.¹⁹⁰ The ADEA, in contrast, explicitly limits the protection against age discrimination to employees who are aged 40 or older.¹⁹¹ Further, in *General Dynamics Land Systems, Inc. v. Cline*,¹⁹² the Supreme Court clarified that the ADEA only prohibits discrimination against older workers, but not age discrimination that favors older workers.¹⁹³ The Court has also held that the prohibition on age discrimination is evidenced by the fact that a plaintiff was replaced by a “substantially younger” individual, even if the replacement is aged 40 or older.¹⁹⁴

Disparate treatment theory under the ADEA has been interpreted similarly to Title VII, defining intentional discrimination under the *McDonnell Douglas* steps of analysis in “pretext” cases and using the *Price Waterhouse* approach in mixed motives cases.¹⁹⁵ Conversely, judicial interpretations of the ADEA have been applied to Title VII cases. Notably, the Supreme Court first interpreted the BFOQ in an ADEA case.¹⁹⁶ More recently, the Supreme Court limited an employer’s ability to defend against an ADEA disparate treatment claim by using evidence the employer acquired after discharging the employee.¹⁹⁷ The enactment of the CRA of 1991, however, may have opened significant gaps between Title VII and the ADEA. The CRA of 1991 did not extend to the ADEA important amendments made to Title VII, including imposing liability in mixed motive cases after the plaintiff successfully proves a prima facie case; the defendant’s affirmative defense goes only to remedies. Thus, it is unclear whether all lower federal courts will apply the Supreme Court’s *Desert Palace* decision, interpreting the 1991 CRA, to the ADEA.¹⁹⁸ This issue will affect the federal courts’ use of circumstantial and direct evidence in disparate treatment cases. The 1991 CRA also creates a right to jury trials and additional damage remedies in intentional discrimination cases under Title VII and the ADA. However, Congress had already amended

¹⁹⁰ *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

¹⁹¹ 29 U.S.C. Sec. 623. The ADEA covers public and private employers. The Supreme Court has held, however, that state employers are immune from private ADEA damage claims, under the Eleventh Amendment to the U.S. Constitution. The EEOC may bring ADEA claims for injunctive relief against state employers. *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).

¹⁹² 540 U.S. 581 (2004).

¹⁹³ 540 U.S. at 590-92.

¹⁹⁴ *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) (56 year old plaintiff was replaced by a 40 year old person).

¹⁹⁵ See cases discussed in BELTON, et.al, *supra* note 35, at 669-70.

¹⁹⁶ *Western Air Lines, Inc. v. Criswell*, 472 US 400 (1985). Mandatory retirement is now prohibited under the ADEA, unless the employer can prove a BFOQ. Exceptions for state and local government retirement age for police and firefighters were reinstated by legislation in 1996. See BELTON, et.al, *supra* note 24, at 689.

¹⁹⁷ *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995).

¹⁹⁸ See *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004) (applying *Desert Palace* in an ADEA case and discussing other federal courts’ positions on the issue).

the ADEA to provide the right to a jury trial.¹⁹⁹ Further, the ADEA provides for compensatory damages, as well as liquidated damages in cases of willful violations.²⁰⁰

Another important difference concerns disparate impact theory. It was not until 2005, in *Smith v. City of Jackson*,²⁰¹ that the Supreme Court extended the disparate impact theory to the ADEA. An earlier decision, in *Hazen Paper v. Biggins*,²⁰² had cast doubt on whether the Court would apply *Griggs* to the ADEA. In *Smith v. City of Jackson*, the municipal employer issued a wage increase to all police officers and dispatchers to bring their salaries up to the regional average of police salaries.²⁰³ Police officers and dispatchers older than 40 and with greater seniority in the department alleged that the city's salary increase plan had a disproportionately negative impact on the basis of age. The wage increases for police officers with less than five years seniority were proportionally larger than for officers with greater seniority.²⁰⁴ The Supreme Court held that the disparate impact theory does apply to the ADEA, but that the scope of the theory's application is narrower than under Title VII, given the provision in Section 4(f)(1) of the ADEA permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age" (RFOA).²⁰⁵ Under this defense, the City of Jackson had acted lawfully, as the wage increase was designed to create parity with the average regional salary, which was a reasonable goal other than age, even though older employees may have received a relatively lower pay increase.²⁰⁶ Thus, in contrast to the "business necessity" defense under Title VII, the ADEA defense to disparate impact requires proof only that the employer's action was reasonable.²⁰⁷

Yet another difference in disparate impact theory under the ADEA concerns the allocation of burdens of proof. The 1991 CRA was passed, in part, to legislatively overrule the Supreme Court's *Wards Cove* decision, which had held that the employer had only a burden of production in disparate impact cases. Under Title VII, as amended, the employer has the burden of persuasion of job relatedness and business necessity. Under the ADEA, the employer only has a burden of production of a RFOA.²⁰⁸

An employer violates the ADEA by providing lower benefits to older workers, unless the employer can fulfill an "equal cost" defense. The employer must prove that the costs of the benefit increase with age, such as the costs of life insurance, health insurance, and long-term disability benefits; that the benefit is part of a *bona fide* employee benefit plan that requires the lower benefits; that the employer's payment or cost on behalf of an older worker is no less than for a younger worker; and that the benefit levels for older workers are reduced only as necessary to equalize the cost for older and younger workers.²⁰⁹ Although the ADEA prohibits an employer from imposing a mandatory retirement age, the employer may offer

¹⁹⁹ 29 U.S.C. § 626(c)(2).

²⁰⁰ 29 U.S.C. § 626(b).

²⁰¹ 544 U.S. 228 (2005).

²⁰² 507 U.S. 604 (1993).

²⁰³ 544 U.S. at 231.

²⁰⁴ *Id.*

²⁰⁵ 29 U.S.C. § 623(f). 544 U.S. at 232, 239-41.

²⁰⁶ 544 U.S. at 242-43.

²⁰⁷ *Id.* at 243. Further, apart from the RFOA defense, the Court concluded that the plaintiffs' *prima facie* case had not been adequately supported, as the plaintiffs' challenge to the salary increase was not directed at a specific employment practice.

²⁰⁸ *Id.* at 267 (O'Connor, Kennedy, Thomas, concurring).

²⁰⁹ The equal cost defense is part of the Older Workers Protection Act of 1990, which amended the ADEA. Pub. L. 101-433, *codified at* 29 U.S.C. § 623(f)(2)(B)(i). See EEOC, *Chapter 3: Employee Benefits*, EEOC Compliance Manual 12-14 (Oct. 3, 2002), available at, <http://www.eeoc.gov/policy/docs/benefits/html>

early retirement incentive plans (ERIs), as long as the ERI is voluntary and provides equal ERI benefits to older employees as it does to similarly situated younger employees.²¹⁰ The ERI can provide lower benefits to older employees if the employer can meet the equal cost defense or another justification for lower benefits.²¹¹

B. The Americans with Disabilities Act

The ADA covers public and private employers, prohibiting “discrimination against a qualified individual with a disability because of the disability...in regard to” employment conditions, including job applications, hiring, promotion, discharge, and compensation.²¹² In *Raytheon Company v. Hernandez*,²¹³ the Court reiterated the viability of both disparate treatment and disparate impact theories under the ADA, while also emphasizing the importance of distinguishing between the elements required to prove each theory.

The ADA defines a “qualified individual with a disability” as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”²¹⁴ The scope of discrimination under the ADA includes an employer’s failure to make “reasonable accommodations to the known physical or mental limitations of a qualified...applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business...”²¹⁵ In setting “qualification standards” for a job, an employer “may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”²¹⁶

Federal law prohibiting employment discrimination on the basis of disability has not lived up to its promise of changing the workplace to accommodate the needs of individuals with disabilities. In interpreting key ADA provisions, the Supreme Court has applied a theory of formal equality in a particularly wooden manner. The Court has defined an “individual with a disability” so narrowly as to exclude large groups of disabled persons from statutory coverage. In several cases, the Court held that individuals whose medication or corrective devices mitigate their physical impairment may be excluded from the definition of individuals with a disability.²¹⁷ A disabled person may be denied a job if he/she is unable to fulfill its

²¹⁰ See EEOC, *Chapter 3: Employee Benefits*, EEOC Compliance Manual 30- 36 (Oct. 3, 2002), available at, <http://www.eeoc.gov/policy/docs/benefits/html>

²¹¹ *Id.*

²¹² 42 U.S.C. § 12112(a). The ADA was preceded by the enactment of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797(b), which prohibits disability-based discrimination by the federal government (in Section 501), federal contractors (Section 503), and entities receiving federal funds (Section 504). Sections 501 and 503 require federal agencies and federal contractors to develop affirmative action plans to increase employment of individuals with disabilities. The Supreme Court has held that the states are immune, under the Eleventh Amendment to the U.S. Constitution, from private suits for money damages brought by state employees under the ADA. The EEOC may bring ADA claims for injunctive relief against state employers. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

²¹³ 540 U.S. 44 (2003).

²¹⁴ 42 U.S.C. § 12111(8).

²¹⁵ 42 U.S.C. § 12112(b)(1), (3), (5).

²¹⁶ 42 U.S.C. § 12113(b).

²¹⁷ See, *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999). See, Cynthia L. Estlund, *The Supreme Court’s Labor and Employment Cases of the 2001-2002 Term*, ABA NETWORK <<http://www.abanet.org/labor/annsecript.pdf>> at 7, 21 (2002).

essential requirements. However, a disabled individual who is able to perform the job due to medication or other corrective devices may be found not disabled enough to be protected under the ADA.

The Supreme Court has also defined the term “disability” in a way that creates problems for plaintiffs. The ADA defines a “disability” as “a physical or mental impairment that substantially limits one or more major life activities of [an] individual,” or as having “a record of” or “being regarded as having” such an impairment.²¹⁸ EEOC regulations define “major life activities” to include activities “such as caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning and working.”²¹⁹ In *Toyota Motor Manufacturing v. Williams*,²²⁰ the lower court had found that plaintiff’s carpal tunnel syndrome and tendonitis substantially limited her performance of manual tasks on the job. The Court held, though, that the limits on manual tasks must “prevent[] or severely restrict[] the individual from doing activities that are of central importance to most people’s daily lives,” such as brushing her teeth and doing laundry. Further, the impact of the impairment must be “permanent or long-term.”²²¹

The Court, in *Toyota*, did not define other major life activities, such as lifting or working. Significantly, the Court has yet to hold that “working” is a major life activity under the ADA. In an earlier case, *Sutton v. United Air Lines, Inc.*, the Court had held that, assuming that “working” is a major life activity, “a claimant would be required to show an inability to work in a ‘broad range of jobs,’ rather than a specific job.”²²²

The greatest potential for implementing a model of substantive equality is found in the ADA’s requirement that employers provide reasonable accommodations to enable individuals with disabilities to meet job requirements. An employer must make a reasonable and good faith effort to find an appropriate accommodation, such as a job reassignment or a job modification. This process contemplates an interactive process between the employer and employee.²²³ The employer has the burden of proving that the accommodation would be an “undue hardship,” which is defined as an action requiring “significant difficulty or expense.”²²⁴ An employer is not required, however, to accommodate a disability by eliminating an essential function of the position or by reallocating essential functions to other workers.²²⁵

In *US Airways, Inc. v. Barnett*,²²⁶ the Supreme Court held that seniority systems generally override a disabled employee’s claim for “reasonable accommodation,” such as job assignments.²²⁷ This holding applies to seniority systems that are part of an enforceable collective bargaining agreement in a unionized workplace, as well as to seniority systems that are unilaterally adopted and controlled by non-union employers, as in *US Airways*. Where a

²¹⁸ 42 U.S.C. § 12102(2)(A) (B) (C).

²¹⁹ 29 CFR 1630.2(i)

²²⁰ 534 U.S. 184 (2002).

²²¹ *Id.* at 198.

²²² *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), as discussed in *Toyota*, 534 U.S. at 198-200.

²²³ See, *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (including discussions of federal court decisions), available at, http://www.eeoc.gov/policy/docs/accommodation.html#N_16_

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ 535 U.S. 391 (2002).

²²⁷ When plaintiff’s mailroom job became open to bidding by more senior employees, the employer refused plaintiff’s request to retain the job, as an exception to the seniority rules, in order to accommodate his disability.

workplace seniority system exists, the plaintiff may show that the requested accommodation is “reasonable” by proving “special circumstances,” such as an employer’s regular practice of unilaterally changing the seniority system.

An employer is prohibited from providing unequal benefits to employees based on their disability, unless the employer can prove that it has a *bona fide* benefit plan and that the disability-based distinction in the plan is “not a subterfuge to evade the purposes” of the ADA.²²⁸ For example, an employer could rely on the increased insurance cost of coverage related to a particular disability based on legitimate actuarial data, although the employer must also show its equal treatment of other disabilities or conditions.²²⁹

X. Employees Left Out in the Cold: The Contingent Workforce

The term “contingent employee” has been used to identify a variety of employment arrangements, including part-time employees, temporary employees, and employees hired as independent contractors.²³⁰ Although there is no agreed upon definition of the scope of employees within the category of contingent employees, there is consensus that the rate of contingent employment increased dramatically since the 1990’s.²³¹

Given the continued force of the employment at will doctrine in the U.S., most employees are vulnerable to being discharged at any moment. Therefore, the term “contingent employee” signifies an even greater degree of employment instability than the “regular” workforce. Further, contingent employees often have lower wage rates and lack benefits given to regular employees.²³² The growth in the temporary workforce has taken place most significantly through contracts between a “user” employer and a third party temporary employment agency (TEA) that acts as the “supplier” of temporary employees

²²⁸ 42 U.S.C. § 12112(b)(2). See EEOC, *Chapter 3: Employee Benefits*, EEOC Compliance Manual 39-40 (Oct. 3, 2002), available at, <http://www.eeoc.gov/policy/docs/benefits/html>

²²⁹ *Id.*

²³⁰ See, *Id.* at 526; Leah F. Vosko, *Leased Workers and the Law: Legitimizing the Triangular Employment Relationship: Emerging International Labor Standards From a Comparative Perspective*, 19 COMP. LAB. L. & POL’Y J. 43, 46 (1997).

²³¹ There was some slowing of the growth of contingent employment in the latter part of the late 1990s. See JARED BERNSTEIN, LAWRENCE MISHEL, AND SCHMITT, JOHN, STATE OF WORKING AMERICA 2000-01 (Economic Policy Institute 2000), <<http://epinet.org/books/swa2000/swa2000intro.html>> at 3. (In the United States, “the share of workers employed by temporary agencies grew 60% from 1991 to 1995 but by just 26% from 1995-1999....In terms of all types of nonstandard work - including regular part-time, temporary help agency, on-call, independent contracting, and contract firm work - the share of workers in these arrangements fell from 26.4% to 24.8% of total employment during 1995-99.”); Renate M. de Haas, *Business Law: Employee Benefits: Vizcaino v. Microsoft*, 13 BERKLEY TECH. L. J. 483 (1998) (Citing estimates of temporary workers as 20-30% of the United States workforce and placing the growth rate of contingent employment in the United States at “at least 40% greater than that of the workforce as a whole during 1998.”); Reinhold Fahlbeck, *Flexibility: Potentials and Challenges for Labor Law*, 19 COMP. LAB. L. & POL’Y J. 515, 526 (1998) (describing “atypical” workers, who “represent an important and increasing proportion of the workforce, anywhere from 15-20 to some 35-40% of the entire working population.”); Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L. J. 170, 176 (2006) (citing estimates from 16% to 29% of the U.S. workforce).

²³² See Melissa A. Childs, *The Changing Face of Unions: What Women Want From Employers*, 12 DEPAUL BUS. L. J. 381, 413-14 (2000); Frances Raday, *The Insider-Outside Politics of Labor-Only Contractors*, 20 COMP. LAB. L. & POL’Y J. 413, 416 (1999).

through the TEA.²³³ In addition creating a “second tier” of wages and benefits for temporary employees,²³⁴ the user employer also shifts the costs of employer statutory obligations, such as paying workers’ compensation premiums, to the TEA as the direct employer.²³⁵ Similarly, employers may hire employees as independent contractors to save costs of paying benefits and of fulfilling statutory obligations such as paying workers’ compensation premiums, payroll taxes, or Fair Labor Standards Act overtime premiums.²³⁶

The growth of the contingent workforce has affected a broad spectrum of employees, ranging from low-wage workers to higher-paid professional and technical employees.²³⁷ Generally, stratifications exist along gender and racial lines, with women and minorities heavily represented in the temporary employee category and white men represented more predominant in the independent contractor category.²³⁸ There are some exceptions. Although independent contractor status has gained the most recent attention in the high technology industry, employers have also attempted to classify low-wage workers as independent contractors. One well-publicized example comes from the poultry processing industry, with Perdue Farms’ denial of overtime pay to “chicken catchers,” arguing that they were exempt from the Fair Labor Standards Act as independent contractors. In February 2000, a federal district court rejected Perdue’s argument and held that the chicken catchers and their crew leaders came within the common law definition of employees, given Perdue’s control over their work.²³⁹ Other trends in labeling low-wage employees as independent contractors include the increase in home work, performed primarily by women paid on an hourly or piece-rate basis.²⁴⁰

The growth of the contingent workforce can also be analyzed as an employer union-avoidance tactic. Independent contractors are excluded from the protection of the NLRA. Although temporary employees are covered by the NLRA, unionization is difficult, given the multiple employment relationships and the inherent instability of the user employer’s contract with the TEA.²⁴¹ Another roadblock that particularly affects organizing efforts immigrant workers, who often have low-wage precarious employment, is the Supreme Court’s recent decision holding that undocumented workers are ineligible for awards of remedies under the

²³³ Fahlbeck, *supra* note 231, at 524, stating that “the single biggest - or one of the biggest - employer in many countries in terms of the number of employees is the leading temporary work agency, Manpower. Significant is also that the number of temporary work firms has mushroomed in recent years.”

²³⁴ Childs, *supra* note 232, at n.130 (describing the addition of the contingent workforce as creating “a two-tiered workforce.”). See, generally, Risa L. Lieberwitz, *Contingent Labor: Ideology in Practice*, in FEMINISM CONFRONTS HOMO ECONOMICUS 324 (Martha Fineman and Terence Dougherty, eds.) (Cornell University Press, 2005).

²³⁵ The Building and Construction Trades Department of the AFL-CIO released a report alleging that Labor Ready, a major temporary employment agency, has been “systemically misclassifying” employees’ work to lower workers’ compensation premiums. See, “Temporary Agencies: Union Report Asks Whether Labor Ready Is Purposely Misclassifying Temp Workers,” ISSN 1521-4680, Vol. 11, No. 22, p. 583 (Nov. 6, 2000).

²³⁶ Childs, *supra* note 232, at n.124.

²³⁷ *Id.* at n. 141; Fahlbeck, *supra* note 231, at 523, 537.

²³⁸ *Contingent and Alternative Employment Arrangements*, Bureau of Labor Statistics News Release (Dec. 21, 1999) <<http://stats.bls.gov.newsrels/conemp.nws.htm>>; Childs, *supra* note 232, at 411-414.

²³⁹ See Elizabeth Walpole-Hofmeister, *Court Finds Chicken Catchers Are Employees Covered by FLSA for Overtime*, 41 DAILY LAB. REP. A-5 (Mar. 1, 2000); de Haas, *supra* note 191, at 490-493 (discussing cases from other industries). In May 2001, Perdue Farms entered into a \$2.4 million settlement of the suit, which covered 100 chicken catchers at three Perdue poultry processing plants. Elizabeth Walpole-Hofmeister, *FLSA: Perdue Farms Settles Overtime Suit, Will Pay Chicken Catchers \$1.7 Million*, 92 DAILY LAB. REP. A-1 (May 11, 2001).

²⁴⁰ Childs, *supra* note 232, at 414-415.

²⁴¹ *Id.* at 416, 418-420 (employers use leased workers to undermine the position of unionized employees).

NLRA.²⁴² Although undocumented workers are “employees” with rights to unionize, their immigration status makes them ineligible for reinstatement or back pay if the employer discriminates against them for their union activities.²⁴³

The U.S. lacks effective regulations of contingent employment. Thus far, such questions have been addressed primarily through administrative and judicial interpretations of existing legislation, such as decisions defining whether employees are actually independent contractors or fit a common law definition of employee.²⁴⁴ Contingent employees, with the exception of independent contractors, are protected under anti-discrimination laws.²⁴⁵ The U.S., however, lags far behind other countries that have legislative protections of contingent employees. Various countries are at different starting points in creating restrictions on contingent employment, with a spectrum including: prohibitions on temporary employment beyond a defined time period;²⁴⁶ requirements of equal wages and benefits to be paid to regular employees and contingent employees performing similar work;²⁴⁷ regulating both the supplier and user employers to ensure health and safety protections and payment of social security contributions;²⁴⁸ and limits on contract labor that undermines the status and conditions of unionized employees.²⁴⁹ While providing protections, such legislation does accept the legitimacy of the triangular employment relationship.²⁵⁰

Given the lack of protective legislation for contingent employees, unionization and collective bargaining are especially important as a means to resist employer tactics to increase contingent work. For example, the Service Employees International Union’s (SEIU), in its Justice for Janitors organizational campaign, targeted the creation of more full-time jobs, with

²⁴² Hoffman Plastic Compounds, Inc., 535 U.S. 137 (2002).

²⁴³ *Id.*

²⁴⁴ See e.g., *Vizcaino v. Microsoft*, 97 F.3d 1187 (9th Cir. 1996), modified en banc, *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997), cert. denied, 118 S.Ct. 899 (1998), enf’d by mandamus, *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713 (9th Cir. 1999) The federal circuit court held that Microsoft’s “permatemps,” hired in technical employee positions, met a “common law” definition of employee in relation to Microsoft and were, therefore, entitled to a stock purchase plan offered to the regular Microsoft employees. Microsoft agreed to a \$96.9 million settlement agreement in this litigation, which was given approval by a federal district court. See, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002); Mark Cutler, “Microsoft to Pay \$97 Million to Settle Temporary Workers’ Class Action Lawsuits,” 240 Daily Labor Report AA-1 (Dec. 13, 2000).

²⁴⁵ See Tarantolo, *supra* note 231, at 174 (discussing the fact that “contingent workers have the demographic characteristics of those who most need antidiscrimination protection,” and the exclusion of independent contractors from antidiscrimination statutes, with the exception of 42 U.S.C. § 1981); *EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, available at, <http://www.eeoc.gov/policy/docs/conting.html>

²⁴⁶ Raday, *supra* note 232, at 423 (citing legislation in the Philippines, India, Malaysia, Belgium, Spain, Luxembourg, France, Germany, and Italy regarding the use of temporary labor-only contracting).

²⁴⁷ *Id.* at 424-425 (citing legislation in Belgium, France, Austria, Denmark, Portugal, Mexico, Italy, and the Netherlands).

²⁴⁸ Vosko, *supra* note 230, at 67-69 (1997) (citing legislation in Japan, Norway, Sweden, France, Spain, and by Directive in the European Parliament).

²⁴⁹ See, Raday, *supra* note 232, at 425-426 (citing legislation and interpretation of legislation in the United States, Canada, France, Italy, Japan, Finland, and Sweden).

²⁵⁰ See, Vosko, *supra* note 230, at 70-73; Raday, *supra* note 232, at 420-422 (both sources criticizing the ILO’s change in policy, shifting from a policy against labor-only contracts to the 1997 adoption of Convention 181, the “Private Employment Agencies Convention,” which accepts the role of employment agencies. Convention 181 provides some protections of employees, but does not have a provision for equal treatment of the agency employees and the user’s regular employees doing similar work. The ILO Draft Convention on Contract Labor does include such an equality provision, but the Draft Convention excludes private employment agency employees.).

corresponding benefits, as one of its current goals in collective bargaining.²⁵¹ In 1999, the SEIU won a union organizational campaign among 75,000 home health care workers in Los Angeles County.²⁵² The home health care workers would have been virtually impossible to organize if the workers, who were usually paid directly by the State, were defined as independent contractors. SEIU became actively involved in changing California state legislation to make it possible for the workers to organize. This legislative campaign resulted in a California statute requiring counties to designate an employer of record, such as a public authority or a contracting provider agency, for home health care employees working in the state's program.²⁵³ Following their win in federal district court, the "chicken catchers" who brought the overtime pay lawsuit against Perdue Farms unionized in all three poultry processing plants involved in the litigation.²⁵⁴

It is particularly difficult to unionize temporary employees hired by a "user employer" through a temporary employment agency (TEA). The NLRB has decided that unions must obtain the consent of the user employer and TEA to a mixed bargaining unit of temporary employees (supplied by a TEA) and regular employees of a business (the "user employer"). If the user employer and TEA refuse to consent to a mixed bargaining unit, the union is left to organize the temporary employees in a separate unit, with the TEA as the employer.²⁵⁵ These options, however, fail to recognize the economic realities of the user employer's control over the temporary employees and the common interests of the temporary and regular employees.

XI. Conclusion

U.S. antidiscrimination law is a complex body of statutes, which becomes increasingly vast and complicated with each legislative amendment and with ongoing judicial interpretations. From the standpoint of "formal equality," this body of law has contributed to the goal of inclusion of women and minorities in the workplace. As this paper has discussed, however, there is still much ground to cover to achieve "substantive equality." As has always been the case, the law evolves and responds to social movements – like the Civil Rights Movement that won this legislation. And so, in the future, social movements will continue to hold a central place in the ongoing struggle for equality.

²⁵¹ See Elizabeth Walpole-Hofmeister, *100,000 Janitors Covered in SEIU Pacts Bargained During 2000 in Two Dozen Cities*, 229 DAILY LAB. REP. C-1 (Nov. 28, 2000). See also, Karl E. Klare, *New Approaches to Poverty Law, Teaching, and Practice: Toward New Strategies For Low-Wage Workers*, 4 B. U. PUB. INT. L. J. 245, 269-272 (1995).

²⁵² *Los Angeles Home Care Workers Vote to Organize by Huge Majority*, 39 DAILY LAB. REP. A-4 (Mar. 1, 1999).

²⁵³ See Peggie R. Smith, *Laboring for Child Care: A Consideration of New Approaches to Represent Low-Income Service Workers*, 8 U. Pa. J. Lab. & Emp. L. 583, 605-08 (2006); "Los Angeles Home Care Workers Vote to Organize by Huge Majority," 39 Daily Labor Report A-4 (Mar. 1, 1999).

²⁵⁴ Walpole-Hofmeister, *supra* note 239.

²⁵⁵ See *H.S. Care L.L.C., d/b/a Oakwood Care Ctr.*, 343 NLRB No. 76 (2004). 331 NLRB No. 173 (2000).

New Developments in Employment Discrimination Law

The UK Report

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A. Introduction

The UK now has over thirty years of experience of anti-discrimination legislation. The volume of cases continues to rise and the body of statutory rules continues to proliferate. The UK has probably had more influence than almost any other state in shaping EC anti-discrimination law. In this respect it has been involved in a significant dialogue with both the EC institutions, through the legislative process, and the European Court of Justice, often through references funded by the (former) Equal Opportunities Commission.¹ This chapter will begin by outlining the key legislative measures in this field, followed by a discussion of the main principles and remedies available before examining the context in which significant problems are not arising: equal pay.

B. General Description of Employment Discrimination Law

1. Historic Overview

1.1 The Legislation

“An employer may refuse to employ [a worker] for the most mistaken, capricious, malicious or morally reprehensible motives that can be conceived, but [the worker] has no right of action against him”. So said Lord Davey in *Allen v Flood* in 1898.² This was the original common law position, one unmitigated by any constitutional right to equality since, as is well known, the UK does not have a written Constitution. The common law position has gradually been modified, starting with the Sex Disqualification (Removal) Act 1919 which removed restrictions on women (by reason of sex or marriage) from being, for example, solicitors, civil servants, university students, as well as from holding other civil or judicial office. This Act was eventually repealed by the seminal piece of anti-discrimination legislation, the **Sex Discrimination Act (SDA) 1975**.

The SDA 1975 prohibited discrimination on grounds of sex and marital status³ in employment matters not covered by the Equal Pay Act 1970 (see below) (e.g. in respect of recruitment, promotion, non-contractual pay matters, dismissal and other detriment). It therefore adopted the traditional ‘negative’ rights model to achieve equality.

The SDA gave aggrieved individuals the right to complain to employment tribunals, backed up by protection against victimization. Strategic enforcement was entrusted to the

¹ Barnard, ‘A European Litigation Strategy: the Case of the Equal Opportunities Commission’, in: Shaw and Moore (eds) *Dynamics of European Integration*, (Clarendon, Oxford, 1996).

² [1898] A.C. 1 at p.172.

³ S.251 of The Civil Partnerships Act 2004 extends this protection to civil partners.

Equal Opportunities Commission (EOC), now replaced by the Equality and Human Rights Commission (EHRC). Employers are vicariously liable⁴ subject to the defence that the employer took ‘such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description’.⁵

The SDA also introduced the concepts of indirect discrimination and positive action. In this way, the legislation went beyond a pure formal equality model and introduced elements of substantive equality, not in the extended notion of equality of results, but rather in its narrower version of equal opportunities: the Act aims to create a level playing field on which everyone can compete on the grounds of merit.

The SDA has been amended a number of times, usually to bring aspects of its provision into line with EC Law.⁶ Most notably it was amended by the Sex Discrimination (Gender Reassignment) Regulations⁷ to give effect to the Court of Justice’s ruling in *P v S*,⁸ extending the protection against discrimination to those who have undergone or are undergoing gender reassignment.⁹ The **Equality Act 1996** imposed a positive duty on public authorities not to discriminate on the grounds of sex and to promote equal opportunities. This positive duty has the potential to achieve much in the gender equality fields (and race and disability– see below) – but to date there is suspicion that there is little more than ‘filing cabinet’ compliance.

The TUC campaigned for over 100 years for equal pay for men and women, but only called for legislation in 1963. Eventually, the **EqPA 1970** was introduced. It required equality in respect of contractual pay matters for men and women in the same employment in two situations: (a) when employed on “like work”, or (b) when employed on “work rated as equivalent” under a job evaluation study (JES) (although there was no obligation to undertake such a study). Although the original Act contained no general right to equal pay for work of equal value, infringement proceedings brought by the EC Commission,¹⁰ resulted in a statutory amendment introduced by the Equal Pay (Amendment) Regulations 1983.¹¹ The EqPA, as re-enacted with amendments in Sched.1 to SDA 1975, came into force on 29 December 1975. It was amended by the **Equal Pay Act 1970 (Amendment) Regulations 2003** to extend the time limit for bringing claims to 6 months and to allow backdated claims for 6 years.

Also relevant for women, although not exclusively, are the EC Part-Time Work Directive 97/81/EC (implemented by the Part-Time Workers (Prevention of Less Favourable Treatment)

⁴ S.41(1) SDA 1975.

⁵ S41(3) SDA 1975.

⁶ The Act was amended by **SDA 1986** as a result of infringement proceedings, *Commission v United Kingdom* Case 165/82 [1984] ICR 192, ECJ, inter alia so as to remove the exclusion in respect of small employers and to amend provisions concerning discriminatory terms in collective agreements, works rules and contracts. SDA 1986, ss.2 and 3, gave effect to *Marshall v Southampton & Southwest Hampshire AHA (No.1)* [1986] IRLR 140, ECJ so as to require equal retirement ages for men and women. The SDA 1986 and the Employment Act (EA) 1989 repealed nearly all legislation which treated men and women differently in employment, and allows sex discrimination only where it necessary to comply with statutory requirements to protect women in relation to pregnancy and confinement and specific health risks. It was amended again by **The Sex Discrimination Act 1975 (Amendment) Regulations 2003** SI 2003/1657 to amend the coverage of the police and to extend the reach of the law to post-termination dismissals.

⁷ SI 1999/1102.

⁸ Case C-13/94 *P v S and Cornwall County Council* [1996] IRLR 347.

⁹ See also the **Gender Recognition Act 2004** which enables transgendered people to apply for a Gender recognition certificate and thereafter a new birth certificate in their reassigned gender.

¹⁰ Case 61/81 *Commission v United Kingdom* [1982] ECR 2601.

¹¹ SI 1983/1794.

Regulations 2000¹²), and the Fixed-Term Work Directive 99/70/EC (implemented by The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002¹³), which apply the principle of equal treatment – subject to objective justification - to part-time and fixed-term contract workers. Agency workers currently find themselves in an invidious position. The EC has not so far been able to agree a Directive on the equal treatment of agency workers. These workers have therefore been forced to fall back on the (very limited) protection laid down by domestic law. There is no Constitutional right to equal treatment which will help them. Often they find that they do not enjoy even the most basic employment protection rights because, in a ‘triangulated’ situation where control lies with the user but mutuality of obligation (if it exists) lies with the agency, there is no employment relationship for the agency worker with either the user of the agency.¹⁴

Race discrimination was gradually outlawed by a series of statutes in the 1960s culminating in the **Race Relations Act (RRA) 1976** which followed almost exactly the approach, structure and wording of the SDA 1975. It outlawed discrimination on racial grounds, defined to mean colour, race, ethnic or national origins, or nationality. The RRA also created the Commission for Racial Equality (CRE) as well as allowing an individual to complain to employment tribunals. The Race Relations (Amendment) Act 2000 extended the protection of the 1976 Act to the police and other public authorities, and placed a duty on public authorities to have due regard to need to promote equality of opportunity and good relations between persons of different racial groups.

The Disabled Persons (Employment) Act 1944 required employers of a substantial number of employees to employ a quota (normally 3 %) of registered disabled persons, but this was generally thought to have been a failure, either because employers did not comply with it in practice or because the definition of disability was stretched too broadly. The Act was therefore repealed by the **Disability Discrimination Act 1995** which in turn has been significantly amended by The Disability Act 1995 (Amendment) Regulations 2003,¹⁵ implementing the EC Framework Directive 2000/78. **The Disability Rights Commission (DRC) Act 1999** set up the DRC with somewhat more extensive powers than the CRE and EOC. **The Disability Discrimination Act 2005** created a positive duty for disability equality, requiring public authorities to produce a disability equality scheme by December 2006,¹⁶ along the lines of the race equality duty. It also extended the definition of disability.

The **Fair Employment Act 1976** applied the RRA and SDA model to discrimination on grounds of religion or political opinion between the Roman Catholic and Protestant communities in Northern Ireland. There were substantial amendments, and the current legislation imposes positive duties on employers to monitor and review the composition of the workforce and to take affirmative action. In addition, s.75 of the Northern Ireland Act 1998 imposes a positive duty on public authorities to promote equality of opportunity, not only between the Protestant and Roman Catholic communities but also between persons of different racial group, age, marital status or sexual orientation, between men and women generally, between persons with a disability and without, and between persons with dependants and without. The three separate commissions dealing with religion, race and sex were merged, from October 1999, into a single Equality Commission for Northern Ireland

¹² SI 2000/1551.

¹³ SI 2002/2034.

¹⁴ See eg *James v. Greenwich* [2007] IRLR 168 (EAT); [2008] EWCA 35.

¹⁵ SI 2003/1673.

¹⁶ SI 2005/2966 The Disability Discrimination (Public Authorities)(Statutory Duties) Regulations 2005.

(ECNI).

There was no prohibition against discrimination on the grounds of religion and belief in the rest of the UK until the EC's Framework Directive 2000/78 - one of two¹⁷ so-called 'Article 13 Directives' (in reference to the legal basis in the EC Treaty on which they were adopted) - required this situation to be changed. The Employment Equality (Religion or Belief) Regulations 2003 (in force 2 Dec 2003) were implemented as a result. These largely follow the pattern of the SDA 1975 except they contain a wider range of genuine occupational requirements (see below). According to Reg. 2(1) 'religion or belief' means 'any religion, religious belief, or similar philosophical belief'. The Equality Act 2006 extended the prohibition against discrimination on the grounds of religion or belief, to include non-belief.

Directive 2000/78 also outlawed discrimination on the grounds of sexual orientation and age. Both of these obligations have now been incorporated into British law by the Employment Equality (Sexual Orientation) Regulations 2003 (in force 1 December 2003)¹⁸ and the Employment Equality (Age) Regulations 2006 (in force 1 October 2006)¹⁹ respectively. Sexual orientation covers discrimination against heterosexuals, homosexuals and bisexuals. The Regulations also covers discrimination on the grounds of *perceived* as well as actual sexual orientation (ie assuming someone – correctly or incorrectly - is gay/lesbian/heterosexual/bisexual), as well as discrimination on the grounds of the sexual orientation of those with whom a persons associates. However, British law is not consistent across the strands on this point. Some strands cover actual, perceived and associative discrimination (eg race and religion); others do not (eg sex and disability). The fact that disability does not include associative discrimination is currently being challenged before the European Court of Justice in *Coleman v Attridge Law*.

The Equality Act 2006 set up a single equality commission, the Commission for Equality and Human Rights (EHRC), which replaced the CRE, EOC and DRC. The EHRC's remit includes sex, race and disability discrimination as well as the new strands introduced by the Article 13 Directives. It has new powers to intervene in cases 'if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function'.²⁰

Finally, the **Human Rights Act 1998** (HRA) 'brings home' rights under the European Convention on Human Rights [ECHR] including Art.14. In fact, because Article 14 does not confer any free-standing right to equal treatment it has been much less influential in shaping the evolution of UK anti-discrimination law than EC law.

1.2 Review

As can be seen, the UK has a complex web of (over 100 pieces of) legislation outlawing discrimination. The reason for this can be found in the gradual accretion of obligations under EC law as well as the fine tuning of rights laid down by domestic law. The SDA and the RRA were, in fact, modeled on the US Civil Rights Act 1964 and the UK legislation, in its turn, provided the inspiration for the EC Directives on Race (2000/43) and religion, belief, sexual orientation, disability and age (2000/78). The government, conscious of the difficulties this plethora of legislation has caused, especially when read in conjunction with the case law of the British and European courts, launched the Discrimination Law Review in February 2005

¹⁷ The other Directive was Dir. 2000/43 on race and ethnic origin.

¹⁸ These Regs were unsuccessfully challenged in *R (Amicus – MSF Section) v. Secretary of State for trade and Industry* [2004] IRLR 430.

¹⁹ See www.dti.gov.uk/er/equality for explanatory notes on the religion and sexual orientation regs.

²⁰ S.31 Equality Act 2006.

with a view to achieving a 'a clearer and more streamlined discrimination legislative framework which produces better outcomes for those who currently experience disadvantage'.²¹ In other words, it is proposing a Single Equality Bill which the Labour government committed itself to in its 2005 manifesto. A consultation paper was published in June 2007. In parallel with the Discrimination Law Review, the Equalities Review, chaired by Trevor Philips, now chair of the EHRC, looked at the broader issues leading to an unequal society. This reported to the Prime Minister in February 2007.²²

2. Typical cases of employment discrimination

It is hard to describe a typical case of discrimination; cases – or at least the reporting of them – seem to go in phases. At present, as can be seen from the statistics (table 1), there are serious issues with equal pay; these are discussed below. There is also an increasing amount of litigation in respect of the new strands of discrimination and this is what we shall discuss. For example, in *Glasgow City Council v McNab*²³ the question was raised whether an atheist teacher employed by a Catholic school maintained by the Council had suffered direct discrimination under the Religion or Belief Regulations 2003 when he was refused an interview for the post of Principal Teacher of Pastoral Care. The EAT upheld the ET's decision that the post was not on the list of posts for which the Roman Catholic Church required a teacher to be Catholic and therefore the Council should not have assumed that the Church would not have approved the appointment. The EAT also upheld the tribunal's finding that there was no genuine occupational requirement (GOR). In particular, it held that a local authority has no religious ethos and therefore could not take advantage of the GOR in regulation 7(3), even in respect of employment in a religious school.

More controversial was the case of *Azmi v Kirkless MBC*²⁴ which concerned a British Muslim classroom assistant who gave maths and literacy lessons to primary school children. She insisted on keeping her face fully veiled when male colleagues were present. The school initially agreed she could wear the veil when a man was present, but the agreement broke down when it was found that the presence of the veil interfered with her ability to be able to communicate effectively with the children.²⁵ She was eventually suspended. She alleged that she had suffered both direct and indirect discrimination on the grounds of her religion, as well as harassment. She lost these claims but the Employment Tribunal did award her £1,100 for victimisation due to the way the dispute was handled.

This was a highly political case which attracted widespread public interest. The employment tribunal amended its judgment at the last minute to rebuke government ministers, including the prime minister, for commenting on the highly controversial issue while it was still sub judice. The EAT upheld the ET's decision. It said there was no direct discrimination since Azmi had not been treated less favourably than another person, not of the Muslim religion, who covered her face for whatever reason. It also said that while the requirement not to teach with her face covered was indirectly discriminatory it could be justified and the steps

²¹ *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*, Communities and Local Government, June 2007, 3. This is discussed by C.McCrudden, 'Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review's Consultative Paper' (2007) 36 ILJ 255.

²² <http://archive.cabinetoffice.gov.uk/equalitiesreview/>.

²³ [2007] IRLR 476.

²⁴ [2007] IRLR 484.

²⁵ M.Wainwright, *The Guardian*, 20 October 2006.

taken were proportionate because (1) the requirement had not been imposed immediately; (2) the instruction to remove the veil had been confined to those occasions when she had been teaching children; and (3) that the instruction had been given only after her teaching had been observed.

*Reaney v Hereford Diocesan Board of Finance*²⁶ concerns discrimination on the grounds of sexual orientation. In that case the employment tribunal held that where a homosexual was committed to working for the Church of England, he should expect to discuss the perceptions of homosexuality within the Church during a job interview, and that this did not constitute harassment. However, as he had been the preferred candidate after competitive interview, the failure to offer him the job was an act of direct sexual orientation discrimination. The GOR defence was not made out on the facts.

There is also a burgeoning case law on age discrimination. For example, in *Thomas v Eight Members Club and Killip*,²⁷ an employment tribunal awarded £1500 in damages for injury to feelings to an employee who had been discriminated against on the grounds of her age. The employee had been told that she was too young to perform her job and dismissed in breach of contract. In *McCoy v McGregor and Sons Limited and others*,²⁸ a Northern Ireland Industrial Tribunal found that a timber merchant had discriminated against a job applicant on the grounds of his age. Having advertised for a sales representative with 'youthful enthusiasm', the employer rejected the 58 year old claimant with over 30 years' relevant experience and appointed two significantly less experienced applicants, both 15 years younger than the claimant, instead.

The cases we have just considered have, of course, raised some of the fundamental principles of anti-discrimination law. We shall now examine those principles in more detail.

C. The Main Principles of Anti-discrimination Law: Direct and Indirect Discrimination

1. Direct Discrimination

1.1 Defining direct discrimination

Direct discrimination is prohibited under all the strands. For example, s.1(2)(a) SDA provides:

In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if –

(a) on the ground of her sex, he treats her less favourably than he treats or would treat a man,

The 'but for' test, laid down by *James v Eastleigh Borough Council*,²⁹ is now the standard test for determining direct discrimination. Eastleigh BC charged 75p admission to its swimming pool but admitted those over 'state pensionable age' for free. Mr and Mrs James were both 61. Due to the discriminatory state pension age, she got into the swimming pool for free; he had to pay. Lord Bridge said that the expression 'pensionable' age was no more than a convenient shorthand for the age of 60 in a woman, 65 in a man. He said the correct test was an objective one: 'would the complainant have received the same treatment from the defendant but for his or her sex' (ie 'would the plaintiff, a man of 61 have received the same treatment as his wife

²⁶ ITS/1602844/2006.

²⁷ ET/2202603/2007.

²⁸ 00237/07IT.

²⁹ [1990] IRLR 288.

but for his sex’). He said that an affirmative answer is inescapable. Therefore, when a gender-based criterion (e.g. state pensionable ages) is used, this is unlawful even if applied with a benign motive. The only *intention* required is to perform the act of less favourable treatment.

Direct discrimination, by definition, involves a comparator who is similarly situated. This has led to problems in the dress code cases, as can be seen in *Smith v Safeway plc*.³⁰ S was employed as a delicatessen assistant in a Safeway supermarket. He was dismissed when his ponytail grew too long to be kept under his hat. Safeway’s dress code for men provided for tidy hair, not below collar-length; women, by contrast, were allowed shoulder length hair but it had to be kept clipped back. Reversing the EAT’s decision that the distinction between men and women’s hair length was self-evidently less favourable and sex-discriminatory, the Court of Appeal said that discrimination is not failing to treat men and women the same. If discrimination is to be established, it is necessary to show not merely that the sexes were treated differently but that the treatment accorded to one is less favourable than that accorded to the other. Philips LJ said that an appearance code which applies a standard of what is conventional adopts an even-handed approach between men and women and not one that is discriminatory. Appearance codes are not discriminatory provided they enforce a common principle of smartness or conventionality, and taken as a whole (and not garment for garment – the so-called ‘package approach’), neither gender is treated less favourably.

But what has happened to the rule in *James v Eastleigh*? The EAT tried to answer that question in *Department of Work and Pensions v. Thompson*³¹ where Jobcentre Plus had a policy of requiring all staff to dress ‘in a professional and businesslike way’ which meant a collar and tie for men with women being required to dress appropriately and to a similar standard. Thompson, an administrative assistant with no contact with the public, refused to wear a collar and tie and received a formal warning. The ET found direct discrimination: men were required to wear clothing of a particular kind; women had a greater choice. The EAT said that the ET had misunderstood *James*: the ‘but for’ test applied only once less favourable treatment has been established. Otherwise, the EAT said, differences in treatment between men and women will always be regarded as less favourable treatment. It said that the issue which the employment tribunal should have addressed was whether the requirement for male members of staff to wear a collar and a tie, while no particular form of dress was required for female members of staff, meant that male members of staff were being treated less favourably than female members of staff.

1.2 GOQs/GORs

According to the orthodoxy while indirect discrimination can be saved by an open-ended defence of justification, direct discrimination can be saved only by a specific provision of the Act (i.e. a genuine occupational qualification (GOQs), or an explicit statutory exception from the coverage of the equal treatment principle). GOQs are an exhaustive list of exceptions found in the SDA and RRA 1976. For example, s.7 SDA lists a number of GOQs in which discrimination is lawful provided that the employer has taken *reasonable steps* to avoid imposing the GOQ. Eight grounds are covered including authenticity (eg in dramatic performance), privacy and decency.

The EC Directives originally intended to follow the structure found in the British law. However, the final version of the Directives used the language of genuine occupational *requirements* (GORs) rather than qualification. They also differ in an important respect from

³⁰ [1996] IRLR 456.

³¹ [2004] IRLR 348.

GOQs: although they are narrowly construed, they are in fact potentially open-ended. For example, Reg. 7(2) of the Sexual Orientation Regulations provides:

- (2) *This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out-*
- (a) *being of a particular sexual orientation is a **genuine and determining occupational requirement**;*
 - (b) *it is proportionate to apply that requirement in the particular case; and*
 - (c) *either*
 - (i) *the person to whom that requirement is applied does not meet it, or*
 - (ii) *the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it,*
- and this paragraph applies **whether or not the employment is for purposes of an organised religion.***

Thus, the employer needs to show a ‘genuine and determining occupational requirement’ but the statute does not spell out what that requirement might be. There is one further striking feature about Regulation 7(2): it gives priority to the Religion and Belief Regulations priority over the sexual orientation regulations.

The Religion and Belief Regulations contain two forms of GORs:

- the general GOR in Regulation 7(2) which applies whether or not the employer has an ethos based on religion or belief. This follows the model laid down in the Sexual Orientation Regulations;
- the broader GOR in Reg 7(3) which is available to an employer which does have an ethos.³² This GOR could not be invoked in *McNab* (considered above) because the employer was, in fact the local authority, not the school, and the local authority did not have an ‘ethos’.

The Age Discrimination Regulations also contain a GOR drafted in similar terms to the sexual orientation GOR. However, it is anticipated that it will be little used because the Age Regulations, consistent with the Directive but unlike all other strands, allow both direct *and* indirect discrimination to be objectively justified. This can be seen in *Seldon v Clarkson Wright and Jakes*³³ where an employment tribunal held that the compulsory retirement of a partner in a law firm was direct age discrimination. However, the tribunal said that the discrimination could be objectively justified in that a compulsory retirement age was a proportionate means of achieving a legitimate aim. The tribunal accepted the firm’s argument that it needed a compulsory retirement age for partners in order to ensure that associates stayed with the firm and were given the opportunity of partnership after a reasonable period. It also said that a compulsory retirement age was necessary for the maintenance of a congenial and supportive culture within the firm by avoiding confrontation with underperforming partners who are close to retirement.

³² (3) *This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out -*

(a) *being of a particular religion or belief is a genuine occupational requirement for the job;*
(b) *it is proportionate to apply that requirement in the particular case; and*
(c) *either -*

(i) *the person to whom that requirement is applied does not meet it, or*

(ii) *the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.*

³³ ET/1100275/2007.

1.3 Positive Action

Nothing in British law either requires or permits “reverse discrimination” in favour of the protected groups.³⁴ However, *positive action* is allowed. It can be used to encourage people from particular age/sex/racial groups to take advantage of opportunities for training or work experience schemes, or encourage them to apply for particular employment. It can only be done when a particular group has been identified as under-represented in a certain area of employment. Positive action may include introducing fair selection procedures, training programmes or targeting job advertisements at a particular group.³⁵ Positive action is not the same as positive discrimination, and does not involve treating particular groups more favourably when recruiting; employers must make sure that employees are hired or promoted on merit alone.³⁶ EC Law may well allow states to go further - and possibly engage in some very limited positive discrimination - but the UK has not taken advantage of this possibility in respect of, for example, sex, race and ethnic origin, colour and nationality, sexual orientation, religion and belief.

Disability does, however, deserve special attention in this context. All the other strands are drafted symmetrically (eg discrimination against women applies equally to men). Disability is different because it is drafted asymmetrically (i.e. the rights can be enforced only by the disabled; not by the able-bodied). Therefore, while the disabled can always argue that they are being treated less favourably than the able bodied, the able bodied cannot argue they are being treated less favourably than the disabled. This means that there is, in fact, scope in UK law for positive discrimination in favour of the disabled. Similarly, because direct age discrimination can be objectively justified there may well be scope under the Age Regulations to engage in positive discrimination.

1.4 Harassment

Prior to the EC Directives of 2000, it used to be the case that unwanted sexual attentions and racial insults only fell within the SDA and RRA if they constituted a “detriment”.³⁷ This approach was much criticized because it depended on the woman showing that she had been treated less favourably than a man. If she could not show this, she lost her claim. The damaging effect of this approach can be seen in *Stewart v Cleveland & Guest Engineering Ltd*³⁸ where the Court ruled that a display of female pin-ups did not constitute less favourable treatment of a woman since she had not shown that a hypothetical male would have been differently treated had he complained. These problems have now been eased by the fact that, as a result of EC Law, harassment is a not a form of discrimination but a separate, freestanding unlawful act. This can be seen, for example, in s.3A RRA 1976 in respect of race and ethnic origin (the old rules still apply to harassment on the grounds of colour or nationality):

3A.(1) A person subjects another to harassment in any circumstances relevant for the purposes of any provision referred to in section 1(1B) where, on grounds of race or ethnic or national origins, he engages in unwanted conduct which has the purpose or

³⁴ e.g. *Jepson v The Labour Party* [1996] IRLR 116 but now see Sex Discrimination (Election Candidates) Act 2002 which excludes political parties from Parts II and III of the SDA and enable them to reduce inequality by women-only lists.

³⁵ See eg s.47 and 48, RRA. ss.37 and 38, and the EOC Code of Practice paras.37-40 and CRE Code of Practice paras.1.33 to 1.37.

³⁶ <http://www.equalityhumanrights.com/en/yourrights/equalityanddiscrimination/age/pages/age.aspx>.

³⁷ SDA s.6(2)(c); RRA, s.4(2)(c).

³⁸ [1994] IRLR 440.

effect of –

(a) violating that other person's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(2) Conduct shall be regarded as having the effect specified in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of that other person, it should **reasonably** be considered as having that effect.

The definition has a subjective and an objective element: subjective in that it takes account, for example, the ‘offensive environment for him (ie the complainant); objective by virtue of the reference to ‘reasonably’.

2. Indirect discrimination

Indirect discrimination has had a long and turbulent history in English law. The original test was strict and often depended on the use of statistics to show disparate impact.³⁹ This original test still applies to all areas of discrimination with the exception of employment matters. The Article 13 directives introduced a more relaxed test for indirect discrimination and this has now been extended to sex discrimination as well. The test is:

(b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but –

(i) which puts or would put women at a particular disadvantage when compared with men,

(ii) which puts her at that disadvantage, and

(iii) which he cannot show to be a proportionate means of achieving a legitimate aim.

Breaking this test down into its component parts, the first limb is to show that the employer has applied to the woman a provision, criterion or practice (PCP) which he applies or would apply to a man. This is much broader than the original criteria of ‘requirement or condition’. In *British Airways v Stamer*⁴⁰ a BA pilot challenged BA’s decision to reject her request to work 50% of full time hours. This ad hoc management decision was deemed to be a PCP but probably would not have been a ‘requirement or condition’.

The second limb is to show that the PCP applies or would apply equally to a man but which puts the woman at a *particular disadvantage*. The language of ‘particular disadvantage’ is intended to be broader than the original statutory language of a requirement or condition ‘which is such that the proportion of women who can comply with it is *considerably smaller* than the proportion of men who can comply with it’. Nevertheless, the language of ‘particularly disadvantage’ still implies some comparative element. Therefore, there is still a need to define the pool of people in which the woman is particularly disadvantaged and then

³⁹ 1. - (1) In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which subsection (2) applies, a person discriminates against a woman if –

(b) he applies to her a requirement or condition which he applies or would apply equally to a man but –

(i) which is such that the proportion of women who can comply with it is **considerably smaller** than the proportion of men who can comply with it, and

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment because she cannot comply with it.

⁴⁰ [2005] IRLR 862.

to show her disadvantage in that pool. The consultation document says that the ‘particular disadvantage’ provision recognises that ‘it is not always possible or necessary to use detailed statistical calculations. However, ETs will still need to consider whether a PCP causes disadvantage to a particular group of people. Statistics could be helpful in establishing evidence of particular disadvantage, however such evidence could also come from experts or other witnesses’.

The problems of defining the pool and disadvantage in that pool can be seen in *Rutherford (No.2) v. Secretary of State for Trade and Industry*.⁴¹ Rutherford was dismissed on the grounds of redundancy but, at 67, could not claim unfair dismissal/redundancy because the Employment Rights Act 1996 prevented employees who had reached the age of 65 from bringing a claim. This statutory bar was, he argued, indirectly discriminatory against men on the grounds of *sex* contrary to Article 141 EC on equal pay. (He could not argue age discrimination - which this case more naturally concerned - because the prohibition against age discrimination, introduced by Directive 2000/78, did not come into force until 2006.)

In the House of Lords, Lord Walker adopted the most conventional discrimination law analysis. He accepted the pool advocated by the Secretary of State ie those aged between 16 and 79 with one year’s continuous service. On the question of disparate impact, he embarked on a careful analysis of the thorny question of whether this can be shown through the ‘advantage-led’ or ‘disadvantage-led’ approach. The advantage-led or ‘success rates’ approach considers whether the proportion of one group who *can* comply with the requirement is considerably smaller than the proportion of the other group, while the disadvantage-led or ‘failure rates’ approach focuses on the question whether the proportion of one group who *cannot* comply with the requirement is considerably larger than the proportion of the other group. The disadvantage-led approach tends to favour the applicant.

While not ruling out the disadvantage-led approach, Lord Walker did say that the more extreme the majority of the advantaged in both pools - here 13.5 million men to 12.5 million women, a gender ratio of 1.08:1 (or 1:1.004 if taken as a proportion of the whole pool) - the more difficult it was to pay much attention to the result of the disadvantage-led approach - here 195,200 men to 124,9000 women, a ratio of 1.56:1 (or 1.44:1 as a proportion of the whole pool). Thus, even though he admitted that the disadvantage ratio did, arguably, constitute a ‘considerable difference’, he said that it was irrelevant on the facts of *Rutherford* since the advantage-led ratio was the only relevant figure and that did not constitute a considerable difference. Since no disparate impact was found, he did not need to consider the question of objective justification.

Lord Nicholls, while claiming that he agreed with Lord Walker in fact appeared to apply the disadvantage-led approach. He held that a ratio of women and men who were adversely affected of 1:1.4 was not sufficient to establish the necessary degree of disparate impact as between men and women and so he too, in a short speech, found no disparate impact.

The speeches of the other three Law Lords (Scott, Rodger and Baroness Hale) were less clear. It seems that it was the choice of pool - to include those under 65 – that particularly stuck in the majority’s craw: according to Baroness Hale ‘one should not be bringing into the comparison people who have no interest in the advantage in question’. Beyond that, as Lord Walker curtly noted, it is not ‘easy to extract from their opinions a single, easily-stated principle’. The essence of the majority’s view seemed to be that since everyone over 65 was treated in the same way there was no discrimination, despite the fact that the Secretary of

⁴¹ [2006] UKHL 19, [2006] IRLR 551.

State had conceded that ‘a considerably higher proportion of men over 65 than of women over 65 work’.

This case shows just how hard it can be to show disparate impact. Assuming, the claimant overcomes this hurdle, she must then show that she has indeed put at a disadvantage. Assuming that she can do this, the burden then shifts to the employer to show that the PCP is a ‘proportionate means of achieving a legitimate aim’. This new version of the justification contrasts with the earlier test requiring the employer to show that the provision, criterion or practice was justifiable *irrespective of the sex* of the person to whom it is applied. There is a dispute as to how different the two tests are in practice. The classic formula used by the Court of Justice in *Bilka-Kaufhaus*⁴² has been incorporated into British case law. For example, Sedley LJ said in *Allonby v. Accrington & Rosendale College*⁴³ that:

Once a finding of a condition having a disparate and adverse impact on women has been made, what was required was at the minimum a critical evaluation of whether the college’s reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.

If the British courts continue to apply this formula, the differences between the two tests may not be as great as would first appear.

3. Disability Related Discrimination

There is no prohibition against indirect discrimination as such in the DDA 1995. Instead, the more difficult concept of ‘disability related discrimination’ (DRD) is used in its place. S.3A(1) provides:

.. a person discriminates against a disabled person if:

(a) *for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and*

(b) *he cannot show that the treatment in question is justified*

Thus, an employer’s treatment of a disabled person amounts to discrimination if (1) it is for a reason related to his disability but is not the disability itself; (2) the treatment is less favourable than the way in which the employer treats or would treat others to whom that reason does not apply (ie the comparator for DRD is a person to whom the disability related reason does not apply whereas the comparator in direct discrimination is a person without the disability but whose relevant circumstances are the same); and (3) the employer cannot show that the treatment is justified.

DRD can best be understood through an example taken from the DRC’s code of practice. A disabled man is dismissed for taking six months’ sick leave which is disability-related. The employer’s policy, which has been applied equally to all staff (whether disabled or not), is to dismiss all employees who have taken this amount of sick leave. The disability-related reason for the less favourable treatment of the disabled person is the fact of having taken six months’ sick leave, and the correct comparator is a person to whom that reason does not apply – that is, someone who has not taken six months’ sick leave. Consequently, unless the employer can show that the treatment is justified, it will amount to disability-related discrimination because

⁴² Case 170/84 *Bilka-Kaufhaus* [1986] ECR1607.

⁴³ [2001] IRLR 364.

the comparator would not have been dismissed. However, the reason for the treatment is not the disability itself (it is only a matter related to it, namely the amount of sick leave taken). So there is no direct discrimination.

There is an additional, unique feature of disability law: the duty of reasonable accommodation. This is a free standing claim found in s.3A(2) DDA which says that ‘a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.’⁴⁴ There is no possibility of the employer objectively justifying its failure but the adjustments have to be reasonable only (ie not unreasonable – an objective test).

4. Equal Pay

Under Article 141 EC, the European Court of Justice tends to focus on the question of whether the national rule directly or indirectly discriminates against the woman, applying principles similar to those outlined above. While indirect discrimination can be objectively justified, the absence of any express derogation to the principle of equal pay in Article 141 has generated difficulties. This problem has been overcome in the British Equal Pay Act 1970 due to its different structure.

Under the Equal Pay Act, the complainants have to establish three conditions: there must be (1) a comparator of the opposite sex who is, or has been, (2) engaged in equal work or work of equal value and (3) that the comparator had to be employed in the same establishment or service) and then the burden shifts to the employer to show objective reasons for the pay differential unrelated to sex (the so-called genuine material factor defence). In *Rainey*⁴⁵ the House of Lords applied the *Bilka* test to the GMF defence. Thus, all pay differentials between men and women can be objectively justified. No account is taken of whether those differentials are directly or indirectly discriminatory; no reference is made in the statute to discrimination.

However, in *Strathclyde v. Wallace*⁴⁶ Lord Browne-Wilkinson tried to reconcile the Equal Pay Act model with the Article 141 approach – and ended up with a highly convoluted result. However, he did make clear that when the reason for the difference in pay is not ‘sex tainted’ then the high *Bilka* test did not need to be satisfied; it was enough that the reason given was significant and material in a causative sense rather than in a justificatory sense.⁴⁷ This can be seen on the facts of the case itself. Nine teachers carried out the duties of a principal teacher but none of them received the higher grade salary. They were among a group of 134 unpromoted teachers, 81 were men and 53 women. Lord Browne-Wilkinson therefore noted that the disparity in pay had nothing to do with gender.

⁴⁴ See also *s.4A(1)* which details when the duty of reasonable accommodation arises: *Where-(a) a provision, criterion or practice applied by or on behalf of an employer; or (b) any physical feature of premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.*

⁴⁵ *Rainey v Glasgow Health Board* [1987] IRLR 26.

⁴⁶ [1998] IRLR 146.

⁴⁷ See also *Glasgow City Council v Marshall* [2000] IRLR 272, HL.

D. Structure of Proof and Remedy of Employment Discrimination

1. Proof of discrimination

The burden of proof is essentially reversed in discrimination cases. In the field of sex discrimination this was achieved by The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001,⁴⁸ implementing the EC Burden of Proof Directive. The same has been achieved through the Article 13 Directives. Section 63A(2) SDA now provides that-

Where on the hearing of the claim, the claimant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent-

(a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part 2 [discrimination in the employment field], or

(b) is by virtue of section 41 or 42 to be treated as having been committed such an act of discrimination against the complainant,

the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act.

The case law has fleshed out the application of these tests.⁴⁹ In *Igen* the Court of Appeal, noting that the change in the burden of proof altered the pre-existing position in respect of the burden of proof, envisaged a two stage approach. Once the claimant has proved facts from which the tribunal can conclude, in the absence of a proper explanation, that the respondent has committed an unlawful act of discrimination, the second stage requires the respondent to prove that it did not commit the unlawful act.⁵⁰

⁴⁸ SI 2001/2660.

⁴⁹ *Barton v Investec Henderson Crosthwaite Securities* [2003] IRLR 332 (the so-called *Barton guidelines* as revised by the Court of Appeal in *Igen v Wong* [2005] IRLR 258.

⁵⁰ The Court said:

STAGE ONE (1) Pursuant to section 63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.

2. Enforcement and Remedies

Two principal methods of enforcement are utilized: first, strategic enforcement by the EHRC which deals with discriminatory practices by industries, firms and institutions combined with the power to fund individual cases, intervene in other cases and hold investigations, although compliance is generally encouraged by voluntary means. Secondly, individuals can bring complaints to an employment tribunal.

2.1 Remedies under the anti-discrimination legislation

Where a tribunal finds that a complaint of unlawful discrimination is well-founded it must make such of the following orders as it considers just and equitable:

- a declaration of the rights of the parties;
- recommendation: this may be made only in respect of the individual complainant and cannot be a general one that a discriminatory practice should cease. Nor can the tribunal recommend promotion to the next suitable vacancy.⁵¹
- compensation. As a result of the ECJ's decision in *Marshall (No.2)*,⁵² implemented in the UK by the Sex Discrimination and Equal Pay (Remedies) Regulations 1993,⁵³ there is no longer any upper limit on awards for sex discrimination, and the tribunal is allowed to award interest. The upper limit on awards of compensation under the RRA was removed by the Race Relations (Remedies) Act 1994, and there are regulations allowing the award of interest. In fact, levels of compensation are remarkably low (see tables 2-4).

The compensation is awarded on a tortious - not contractual - basis.⁵⁴ The following is an outline of the principles which apply:

- financial compensation must be adequate to enable the loss sustained to be made good;
- this includes an award for injury to feelings; this should not be based on a deterrent basis but should be just to both parties with some similarity to general damages in

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to section 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

STAGE TWO (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

If the second stage is reached and the respondent's explanation is inadequate, it is 'necessary' for the tribunal to conclude that the complaint must be upheld.

⁵¹ *British Gas v Sharma* [1991] IRLR 101.

⁵² [1993] IRLR 445.

⁵³ SI 1993/2798.

⁵⁴ See eg SDA s.65(1)(b), RRA s.56(1)(b), DDA s.8.

personal injury cases ; see *Vento (No.2) v. Chief Constable of West Yorkshire Police* indicating a lower category of £500-£5,000 for less serious cases where the act of discrimination was an isolated or one off occurrence, a middle band of £5-15,000 for serious cases, a higher category of £15,000-£20,000 in severe cases eg where there has been a lengthy campaign of discriminatory harassment; only exceptionally should the award exceed £25,000);

- the award for injury to feelings may include aggravated damages where the respondent has acted in a high-handed, malicious or insulting or oppressive way;⁵⁵
- exemplary damages may be awarded where servants of the government act unconstitutionally or oppressively or the respondent's conduct has been calculated to make a profit;⁵⁶
- past and future loss of earnings are based on an evaluation of loss of a chance;
- the complainant is under duty to mitigate her loss, but burden of proving failure to mitigate is on party alleging it;
- the ordinary principles of causation and remoteness apply;
- where there is a discriminatory unfair dismissal the award should be made under the discrimination legislation (no limit) .

The Sex Discrimination and Equal Pay (Miscellaneous Amendment) Regulations amended SDA s.66(3) so as to allow an Employment Tribunal to award damages for unintentional indirect discrimination (thus giving effect to EC law).⁵⁷ No similar amendment has been made to RRA s.57(3).

Finally, a term of a contract which provides for unlawful discrimination is void, except that as against the person who is the subject of the discrimination it is merely unenforceable.⁵⁸ In the case of sex discrimination, this applies to collective agreements, employers' rules and the rules of professional bodies in the same way as it applies to contracts.⁵⁹ However, the SDA 1986 took away the jurisdiction of the Central Arbitration Committee (CAC) under the EqPA, s.3 to revise (directly) discriminatory collective agreements. This is considered further below.

2.2 Equal Pay Act

Every contract of employment is deemed to include an "equality clause".⁶⁰ In practice this means that that each *term* in the woman's contract must be not less favourable than the equivalent term in the male comparator's contract where the man is employed in like work, work rated as equivalent or work of equal value to the woman.⁶¹ In *Murphy v Bord Telecom Eirean*⁶² the Court ruled that if a woman's work is worth more than the man's in an equal value claim she is entitled to the same pay as the man.

⁵⁵ *Alexander v Home Office* [1988] IRLR 190.

⁵⁶ *Kuddus v Chief Constable of Leicestershire* [2001] 3 All ER 193.

⁵⁷ SI 1996/438.

⁵⁸ See g SDA s.77, RRA s.72.

⁵⁹ SDA 1986, s.6.

⁶⁰ EqPA s.1(1).

⁶¹ *Hayward v Cammell Laird Shipbuilders (No.2)* [1988] IRLR 464. In *Barber v Guardian Royal Exchange Assurance Group* Case C-262-88 [1990] IRLR 240 the ECJ held that "the principle of equal pay [under Art.141 EC] applies to each of the elements of remuneration granted to men and women".

⁶² Case C-157/86 [1988] ECR 673.

Tribunals may also make a declaration of rights as well as an award for payment of arrears of remuneration or damages. The original EqPA imposed certain procedural limitations in particular that the award may not be in respect of a time earlier than two years before the date on which proceedings were instituted. However in *Levez*⁶³ the European Court of Justice held that this was contrary to the principle of effectiveness under EC law. When applying the ECJ's decision, the EAT held that the 6-year limitation period for breach of contract had to be applied under the EqPA 1970.⁶⁴ The Equal Pay Act (Amendment) Regulations 2003 gave effect to this ruling. Women can now claim arrears back six years.⁶⁵ This has contributed to some of the many problems currently facing local authorities in respect of north-east equal pay litigation which is considered in the final section.

E. Relationship between Employment Discrimination Law and Employment Policy

The link between anti-discrimination law and employment policy has not always been clearly articulated. The moral case for anti-discrimination legislation was made in the *Discrimination Law Review*:⁶⁶

Our aim is for every single individual to have the chance to realise their potential – to be able to bridge the gap between what they are and what they have it in themselves to become. Equality is a fundamental part of a fair society in which everyone can have the best possible chance to succeed in life. There is a clear moral imperative for this – there is no place in twenty-first century Britain for homophobia, racism and other aspects of discrimination which can destroy lives, poison communities and weaken the fabric of our national life. We all want to live in a society where everyone's rights are properly respected. These are basic decent values in our democratic society.

Yet even the moral case for non-discrimination is tied up with macroeconomic benefits: the chance for all to fulfil their potential and be able to succeed in life with the social and economic consequences this might entail. However, the government is acutely aware of the need to make an economic case for equality. It therefore continues that:

But there is also a clear business case for equality. In a rapidly changing world we cannot as a nation afford to waste potential talent and skills of all individuals in our increasingly diverse society. We want a flourishing economy in which all have equal opportunities to thrive and contribute. The Confederation of British Industry has argued: "Employers recognise the benefits of effective diversity and inclusion policies, and the business community supports positive action. The one resource that in today's knowledge economy gives sustainable competitive advantage is the skills, understanding and experience of people. Discrimination in employment, wherever it exists, squanders effort, ideas and, ultimately, business sales. It leads to wasted potential, wasted labour and wasted revenues".

The government also points to the wider package of measures it has put in place to create a fairer and more equal society. Included in this list is:

- The introduction of the National Minimum Wage which has contributed to a 2% drop

⁶³ C-326/96 *Levez v. T.H. Jennings (Harlow Pools) Ltd.* [1998] ECR I-7835.

⁶⁴ *Levez (No. 2)* [1999] IRLR 764.

⁶⁵ s.2ZB(3).

⁶⁶ P.8.

in the pay gap since 1997;

- Over 2 million more people are in work than in 1997, with lone parent employment at a record high.
- Nearly 2 million pensioners have been lifted out of absolute poverty, and the government says it is spending £11bn extra each year in real terms on pensioners;
- The introduction of ‘the biggest ever package of support for working families, including a doubling of paid maternity leave and pay, paid paternity leave for new fathers, and the right to request flexible working for parents of young and disabled children and for carers of adults’.
- The government also says that it has ‘joined up action across government on key issues such as equality for ethnic minorities, disability equality, domestic violence, and the pay gap between women and men.’

The government also notes that it has ‘begun to think in terms not just of prohibiting unfair discrimination, but also of promoting equality and cohesion in more positive ways, especially in how we design and deliver our public services.’⁶⁷ Here the racial, disability and gender equality duties have a significant role to play. Take, for example, the case of the gender equality duty (GED) introduced into the SDA by the Equality Act 2006. This places a statutory duty on all public authorities to eliminate unlawful discrimination and harassment and promote equality of opportunity between men and women. It applies to all government departments, county, borough and district councils, local education authorities, state school governing bodies, higher education establishments, police authorities, probation boards, NHS trusts and the armed forces. The GED requires public authorities to draw up a gender equality scheme setting out how the authority intends to meet its obligations under the general gender duty. This scheme must be implemented following consultation with employees, service users and others (including trade unions) who appear to have an interest in the way it carries out its functions. The listed authority must report annually on the steps it has taken to implement the scheme, and must revise the scheme every three years.

Talking of the race equality duty, Arden LJ said in *R (Elias) v. Secretary of State for Defence*⁶⁸ that the clear purpose of the duty is to require public bodies to give ‘advance consideration to issues of race discrimination before making any policy decision that may be affected by the decision. This is a salutary requirement and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfillment of the aims of anti-discrimination legislation’.

F. The Important Issues Facing Employment Discrimination Law Today

1. Introduction

The gravest problem currently facing the government and the tribunal service is equal pay. As table 1 shows, cases lodged before the tribunals have risen significantly (from 8,000 in 2004-5 to over 44,000 in 2006-7). Some predict that this figure could spiral to 150,000 this year, arguing that a situation ‘already described as a “crisis” is in danger of reaching a meltdown’.⁶⁹ This is largely attributable to one man: Stefan Cross who has single handedly

⁶⁷ P.9.

⁶⁸ [2006] IRLR 934.

⁶⁹ Trevor Philips, ‘Present day Jarndyce’, *The Guardian*, 15 January 2008.

launched thousands of equal pay claims against local councils, primarily in the North East of England.⁷⁰

The background to the many disputes is as follows. Traditionally there were three groups of workers employed by local authorities: manual workers employed in accordance with White Book terms and conditions; administrative, professional, technical and clerical (APTC) employed in accordance with purple book terms and conditions; and craft workers employed in accordance with red book terms and conditions. Each group had separate collective bargaining. There was concern that this collective bargaining, as well as long established pay practices led to discrimination against women. As a result, in 1997 a so-called 'single status agreement' was concluded nationally (the 'Green Book') under which all manual and APTC jobs were to be placed on a single spine following job evaluation studies (j.e.s) which were to be carried out locally with agreement between the local authority and the trade unions. Prior to the j.e.s being conducted, the white and purple books were to remain in force.

A number of local authorities started to negotiate with trade unions and concluded agreements which aimed to strike a balance between (1) recompensing the women who had historically not received equal pay for work of equal value. Under EC - and now national law – they can claim 6 years of back pay; (2) phasing in the principle of equality so that (usually) the men on the higher pay had their wages protected for a number of years before it was reduced (so-called protected pay); and (3) protecting the council taxpayer from excessively high increases in council tax to pay for this settlement and/or cutting jobs.

Redcar and Cleveland (R&C) was the first council to implement an equal pay agreement in January 2004.⁷¹ It undertook a job evaluation process and single status was put into effect in accordance with the Green Book terms from 1 April 2004. The agreement cost £1.8 million, leading to a 4.5% increase in council tax. In addition £3.5 million was paid ex gratia out of council funds which R&C had already set aside for the purpose. This covered hurt feelings over perceived sex discrimination and compensation for employees' patience in not making claims against the council. 1600 jobs had their pay reduced but over a period of three years where a tapering pay protection scheme applied.

140 staff (cleaners, care assistants and dinner ladies) had already brought equal pay claims against the Council, using gardeners and refuse collectors as a comparator. The ET ruled in February 2004 that these women were entitled to bonuses of 40% a week paid to gardeners and attendance allowance of £34.88 a week paid to refuse workers.⁷² The effect of this decision was that the women were now being paid more than the men which the EAT in *R & C v. Degnan*⁷³ said was 'on no view' the aim of the Equal Pay Act or of Article 141'. The remedy issue fudged and this decision was upheld by Court of Appeal.⁷⁴ The council estimated that this judgment saved it £2 million.⁷⁵

Redcar v Bainbridge (No.1),⁷⁶ a case affecting 1,440 applicants, presented further problems. It concerned two groups of claimants, manual workers and white collar workers. In

⁷⁰ See his own take on the cases, see Cross, 'What good are no-win, no-fee lawyers?' (2008) 174 *Equal Opportunities Review* 18.

⁷¹ Press Release issued by Redcar and Cleveland Borough Council 'First fair deal for Town Hall workers', 29 January 2004.

⁷² 'Council workers win equal pay battle', *BBC news online*, 7 Feb 2004.

⁷³ [2005] IRLR 179.

⁷⁴ [2005] EWCA 726.

⁷⁵ Press release, 'Second landmark decision for Council's equal pay strategy', 17 June 2005.

⁷⁶ [2007] IRLR 91.

the first group, female manual workers (caterers and care workers) compared themselves with male manual workers (street sweepers, gardeners and refuse collectors). Both groups received the same basic pay but different bonuses (as in *Degnan*, the gardeners received a fixed bonus of 40%, refuse workers received a 36% bonus each week and an attendance allowance of approximately £34.00). In the second group, female white collar workers (teaching assistants and youth workers) compared themselves with male manual workers who were placed on a lower grade in the job but nevertheless received more pay.

Considering the white collar workers first, the Court of Appeal⁷⁷ extended the ECJ's decision in *Murphy v Bord Telecom Eireann* and said that equal pay claims include claims for the same pay where the work has been rated of higher value. The women therefore won their case because the council had conceded that there was no genuine material factor (GMF) defence.

In the second case, the Employment Tribunal (ET) found that the GMF defence failed in the case of gardeners because the incentive bonuses had become wholly unrelated to any genuine productivity benefits to the employer. This was not subject to appeal. By contrast, the ET found that the bonuses paid to the refuse collectors did genuinely reflect increased productivity. The EAT said that once the ET had reached this conclusion this was sufficient. The fact that the disparity had existed for some time did not affect the GMF defence. On the other hand, the ET found that the employers had failed to establish a GMF defence in respect of the attendance allowances paid to the refuse collectors. The allowances could not be objectively justified because they operated as an addition to salaries without any corresponding benefit to the employers, and there were other ways of managing absenteeism which did not involve favouring a male dominated group over a female dominated group. The EAT upheld this aspect of the decision.

The EAT also had to consider the pay protection arrangements. It ruled that although budgetary considerations could not be the sole justification for failing to give effect to equal pay they could be a factor weighed with other considerations in determining whether the difference in pay could be objectively justified. The Court said that transitional arrangements to cushion the pay of those moving to lower pay would sometimes be appropriate. However, the EAT upheld the ET's finding that, on the facts, the employers had not shown that it was objectively justified to provide pay protection to the comparators while not providing the benefits pay protection would have conferred to the claimants once they had established a right to equal pay.

The issue of pay protection arrangements for those whose pay was to be reduced under the job was also raised in *Middlesborough v Suretees*.⁷⁸ In that case there was full protection in year one; 75% of the difference in year 2; and 50% in year 3. In year 4 there was pay protection but only if there was a loss over £2000. There was no protection after that. The women claimed that they suffered on going pay discrimination. The EAT ruled that proof of a non-sex-based reason would be a complete answer to any discrimination claim direct or indirect. It said that the arguments on justification were very finely balanced. It noted that it was legitimate to protect the salary stream of employees from the potentially disastrous effects of a sudden drop in pay and to distinguish between two employees on that basis. It was also legitimate to have as an objective the introduction of a job which would eliminate discriminatory pay for the future.

⁷⁷ [2007] EWCA Civ 929.

⁷⁸ [2007] IRLR 869.

Suretees has been joined with *Redcar v Bainbridge* and they are both on appeal to the Court of Appeal (see below). In a further strand of the case law, the EAT held in *Bainbridge v Redcar & Cleveland*⁷⁹ that the six year backdated pay rule applied only to like work and equal value claims; it did not apply to work rated as equivalent claims. The EAT said that ‘It is simply wrong to say that somebody in the period prior to the job evaluation study coming into effect has had their job rated as equivalent under a job evaluation study. Plainly they did not.’⁸⁰ In reaching this conclusion, the EAT pointed out that jobs rated as equivalent were not necessarily of equal value because a job evaluation exercise might fix wide grade boundaries covering jobs of different value. So women who have had their jobs rated as equivalent can bring equal value claims in respect of earlier periods and the j.e.s may be given in evidence, but it is not conclusive.

The trade unions had troubles of their own. When negotiating agreements with the council they were also struggling to balance the competing interests of (1) the women, (2) the men whose pay was likely to be reduced; (3) the need to improve pay for future of all of its members; and (4) recognising that the council did not have unlimited resources. The trade unions decided to prioritise (2) and (3). Therefore in some agreements they settled for only 25% of back pay; 75% less than the women might otherwise have received. The women therefore sued the trade union and won before ET. However, in *GMB v Allen*⁸¹ the EAT said that there was indirect discrimination against the women but that it could be objectively justified: the legitimacy of policy was not disputed; the trade unions were entitled to determine their own priorities. The question was whether the union’s action were proportionate. The EAT said that once it was accepted that the objective or aim was legitimate, then it was difficult to see how it could be alleged that the means were inappropriate. Even though some women might have been misled, that did not suggest that other more proportionate means could have been used to achieve the same objective. Nevertheless, 3,000 negligence claims have now been brought against Unison, GMB, Unite T&G and Royal College of Nurses by Stefan Cross.⁸²

The volume of these cases are rising exponentially. So how is all this going to be resolved? As we have seen *Redcar and Cleveland v Bainbridge (No.1)* went to the Court of Appeal in January on the question of transitional arrangements: to what extent can men’s pay be protected while employers put their house in order. On the eve of the hearing, the EHRC withdrew its backing for the women’s case. According to the *Times*,⁸³ ‘The Commission’s sudden change of position is because of the “mess” on equal pay caused by the deluge of discrimination cases pursued by no-win, no-fee lawyers – even though it is accepted that many town halls have dragged their heels on equality’. Trevor Philips, chair of the EHRC, is reported as saying that to continue backing the case would be like ‘pouring petrol on to this legal forest fire’. The Commission requested to act as an intervenor instead in order to argue for a limited transitional period of two to three years so that women’s pay can be raised in a negotiated settlement with employers without leading to job cuts or savage pay cuts for men. The EHRC recognises that ‘it is not possible to deliver equal pay in government over night.

⁷⁹ [2007] IRLR 494.

⁸⁰ Para. 36.

⁸¹ [2007] IRLR 752.

⁸² J.Robins, ‘Who’s best at getting equal pay for women?’, *Observer*, 12 August 2007.

⁸³ ‘Equality watchdog drops its backing for low-paid women’s legal challenge’, *The Times*, 14 January 2008.

The total bill to councils will, it is thought, come to £3bn'.⁸⁴ Trevor Philips is therefore arguing that the EqPA 1970 should be replaced. In particular, the EHRC is advocating the introduction of representative actions which could reduce the number of equal pay claims by 90%.

Others have suggested that consideration should be given to reviving and strengthening the original s.3 EqPA 1970 jurisdiction of the CAC as a more cost-effective route to the implementation of the equality principle than individual claims.⁸⁵ They have also argued that further thought should also be given to prioritising implementation of the equality principle through collective or, where applicable, workforce agreements. The model used in the context of parental leave rights, for example, which allows collective and workforce agreements to 'adjust' the terms of statutory labour standards (so-called 'bargained statutory adjustments'), could be used in the equal pay context to provide a 'safe harbour' for agreements negotiated between employers and trade unions, as long as they satisfied certain requirements which safeguarded the interests of the workers affected.

The government's *Discrimination Law Review* did consider the possibility of an equal pay moratorium. This would mean that 'where an employer carries out an equal pay review and identifies gender inequalities in their pay systems, they would have a set period free from legal challenge, within which to rectify discriminatory pay policies and practices.' However, the government notes that while this would have the advantage of encouraging employers to address the issue of equal pay, in practice there may be considerable drawbacks. 'Protection from legal challenge for the employer could restrict an individual's access to adequate compensation or reparation. As such, it is not clear whether such an arrangement could meet European legal requirements. Also, there remain questions about what would happen to an individual's rights if any pay inequality was not properly addressed during the moratorium.' The debate is live and ongoing.

⁸⁴ 'Present day Jarndyce', *The Guardian*, Tuesday 15 January 2008.

⁸⁵ Barnard and Deakin, Response to the *Discrimination Law Review*.

Table 1: Claims accepted/ rejected by Employment Tribunals

Apr 06 to Mar 07			
	2004/05	2005/06	2006/07
Total Claims Accepted	86,181	115,039	132,577
Total Claims Initially Rejected		12,258	10,762
Of the total, those that were resubmitted and subsequently accepted		4,897	3,861
Of the total, those that were resubmitted and not accepted or never resubmitted		7,361	6,901
JURISDICTION MIX OF CLAIMS ACCEPTED			
NATURE OF CLAIM	2004/05	2005/06	2006/07
Unfair dismissal	39,727	41,832	44,491
Unauthorised deductions (Formerly Wages Act)	37,470	32,330	34,857
Breach of contract	22,788	26,230	27,298
Sex discrimination	11,726	14,250	28,153
Working Time Directive	3,223	35,474	21,127
Redundancy pay	6,877	7,214	7,692
Disability discrimination	4,942	4,585	5,533
Redundancy - failure to inform and consult	3,664	4,056	4,802
Equal pay	8,229	17,268	44,013
Race discrimination	3,317	4,103	3,780
Written statement of terms and conditions	1,992	3,078	3,429
Written statement of reasons for dismissal	1,401	955	1,064
Written pay statement	1,076	794	990
Transfer of an undertaking - failure to inform and consult	1,031	899	1,108
Suffered a detriment / Unfair dismissal – pregnancy	1,345	1,504	1,465
Part Time Workers Regulations	561	402	776
National minimum wage	597	440	806
Discrimination on grounds of Religion or Belief	307	486	648
Discrimination on grounds of Sexual Orientation	349	395	470
Age Discrimination	n/a	n/a	972
Others	5,459	5,219	5,072
Total	156,081	201,514	238,546

Source: Employment Tribunal Service Annual Report 2006-7.

Table 2: Compensation awarded by tribunals – cases with race discrimination jurisdictions

No.	%	No.	%		
<£500	1	1.05	£10000-£12499	10	10.53
£500-£999	6	6.32	£12500-£14999	2	2.11
£1000-£1999	11	11.58	£15000-£19999	9	9.47
£2000-£2999	9	9.47	£20000-£29999	6	6.32
£3000-£3999	7	7.37	£30000-£39999	4	4.21
£4000-£4999	6	6.32	£40000-£49999	0	0
£5000-£5999	5	5.26	£50000+	6	6.32
£6000-£6999	2	2.11	All	95	100
£7000-£7999	6	6.32	Maximum award	£123,898	
£8000-£8999	2	2.11	Median award	£7,000	
£9000-£9999	3	3.16	Average award	£14,049	

Source: Employment Tribunal Service Annual Report 2006-7.

Table 3: Compensation awarded by tribunals –cases with sex discrimination jurisdictions

No.	%	No.	%		
<£500	4	2.06	£10000-£12499	17	8.76
£500-£999	5	2.58	£12500-£14999	7	3.61
£1000-£1999	12	6.19	£15000-£19999	17	8.76
£2000-£2999	16	8.25	£20000-£29999	15	7.73
£3000-£3999	19	9.79	£30000-£39999	6	3.09
£4000-£4999	15	7.73	£40000-£49999	3	1.55
£5000-£5999	15	7.73	£50000+	2	1.03
£6000-£6999	15	7.73	All	194	100
£7000-£7999	11	5.67	Maximum award	£64,862	
£8000-£8999	6	3.09	Median award	£6,724	
£9000-£9999	9	4.64	Average award	£10,052	

Source: Employment Tribunal Service Annual Report 2006-7.

New Developments in Employment Discrimination Law Country Report: Germany

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A. Introduction

German law on employment discrimination has changed fundamentally as a consequence of relatively recent EC-legislation in this area.¹ The concept of discrimination as such is not new in Germany. But due to the European influence on the German legal system, discrimination law has taken a completely different shape and, in addition to that, has gained far more importance. This paper will give a brief historic overview of the development of employment discrimination law (B.). It will then describe the sources of discrimination law in Germany and give an outline of their content (C.). Subsequently, a couple of general questions of employment discrimination law will be addressed (D.) before arriving at a couple of conclusive remarks (E.).

B. Historic Overview

As already said, EC-law has immensely influenced German law regarding the prevention of job discrimination. Because of this influence, a short historical retrospect will first aim at the European level, before having a closer look at the legal developments in Germany themselves.

I. Employment discrimination law at the European level

From the very start the idea of equal treatment formed one of the basic concepts of EC-law. Most national laws traditionally have their focus on protecting the interests of employees (who are typically regarded as being the weaker party to a contract of employment). The EC on the other hand is based on the fundamental idea of establishing a common market. And this means, almost logically, that all employees must be integrated in this market equally. This is why the freedom of movements of workers, as guaranteed in Article 39 EC-Treaty contains the principle of non-discrimination which forms one of the basic elements of the Treaty. Apart from that, the principle of equal treatment between men and women played a major role in EC-labour law right from the start. It must be said, however, that this was largely due to the fact that the French law at that time already provided

¹ Job discrimination law in all Member States of the EC is largely based on according Directives. As a consequence all national legal orders share many features. Still, many differences exist; see *Bell/Chopin/Palmer*, Developing anti-discrimination law in Europe – The 25 EU Members States compared, Brussels, 2007. This report, in any event, will try to highlight the aspects which may be characteristic for Germany.

for equal pay between men and women² and the French simply did not want to face competition from countries which did not know that principle. The prevention of employment discrimination formed not only part of primary law, but was an important element of secondary law as well.³ In particular, a Directive concerning the principle of equal pay for men and women was adopted in 1975.⁴ The Directive transferred the principle of equal pay as enshrined in the EC Treaty into European secondary law. In 1976 a Directive on the implementation of the principle of equal treatment for men and women followed suit.⁵ That Directive aimed at access to employment, working conditions, vocational training and promotion. In the recent past, however, employment discrimination law of the EC has been extending its scope considerably. This is largely due to two Directives: Directive 2000/43/EC,⁶ which aims at prohibiting any discrimination because of race or ethnic origin by an employer (Art. 1 of that Directive). And Directive 2000/78/EC,⁷ which is even more important and establishes a general framework for equal treatment in employment and occupation. The Directive aims at prohibiting any discrimination on the grounds of religion or belief, disability, age, and sexual orientation (Art. 1 of that Directive). Both Directives work in a similar way. They contain grounds on which discrimination must in principle not be based and they establish a coherent set of rules in the area of employment discrimination.

II. German employment discrimination law

German law has been providing for a certain prevention of discriminatory practises in employment even before the more recent developments on the EC-level took shape. For instance, provisions of the German Civil Code (*Bürgerliches Gesetzbuch*), which on their part implemented according EC-law, banned employers from discriminating against employees on the ground of their gender.⁸ Apart from that the so-called labour law principle of equal treatment (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*) exists. This principle, which was developed by the courts and has deep roots in German law,⁹ puts every employer under an obligation not to differentiate between comparable employees for reasons that must be regarded as not being appropriate.

Only after the coming into force of Directives 2000/43/EC and 2000/78/EC, however, the idea of employment discrimination has been starting to play a more central role. In this context it is worth noting that at the time a political consensus had been reached on the two Directives in Brussels, quite a few observers were of the opinion that the duty to implement those Directives on the national level did at least in some areas not require an amendment of the pre-existing

² Article 141 EC Treaty demands that each member state shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

³ Primary law within this meaning is essentially composed of the EU-Treaty and the EC-Treaty. The secondary law, on the other hand, has its roots in the treaties and contains all kinds of feasible acts, in particular Regulations (whose provisions are immediately binding for all citizens) and Directives (which, in principle, are binding on Member States only). The European employment discrimination law so far has been regulated by the latter, which means that member states are bound as to the result to be achieved, but are in principle free to choose the forms and methods it takes to achieve those results.

⁴ Council Directive 75/117/EEC of 10 February 1975, Official Journal L 045, 19/02/1975, p. 19.

⁵ Council Directive 76/207/EEC of 9 February 1976, Official Journal L 039, 14/02/1976, p. 40.

⁶ Council Directive 2000/43/EC of 29 June 2000, Official Journal L 180, 19/07/2000, p. 26.

⁷ Council Directive 2000/78/EC of 27 November 2000, Official Journal L 303, 02/12/2000, p. 16.

⁸ Those provisions were abolished with the General Equal Treatment Act coming into effect; see in this context Federal Labour Court (*Bundesarbeitsgericht*) 14.8.2007, *Neue Zeitschrift für Arbeitsrecht* 2008, 99.

⁹ It was 'invented' not later than in 1938; see Reich Labour Court (*Reichsarbeitsgericht*) 19.1.1938 ARS 33, 172.

rules.¹⁰ This early assessment has been proven wrong by subsequent events. After a long and often agonising process the so-called General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*)¹¹ was enacted on 18 August 2006.¹² And there is still a debate among scholars, whether or not the provisions of that Directive are fully in line with the requirements fixed by European law. The result of all this is an ever increasing uncertainty among employees and, in particular, employers with regard to this area of the law.

C. Current Law on Discrimination

I. German Constitution

The principle of non-discrimination forms an essential element of the legal order in Germany and is even enshrined in the German Constitution, the so-called Basic Act (*Grundgesetz*). Article 3 (1) of the Basic Act provides that ‘all persons are equal before the law.’ Article 3 (2) sentence 1 states, that ‘men and women enjoy equal rights.’ Article 3 (3) sentence 1 adds to this, that ‘no one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith or his religious or political opinions.’ In addition to that Art. 3 (3) provides in sentence 2 that ‘nobody may be put at a disadvantage on the ground that he or she is disabled.’ Though the constitutional principle of non-discrimination is far-reaching, it must immediately be said that its impact on individual employment relationships is limited. Article 3 of the Basic Act is applicable on the relationship between an individual and the state (so-called defensive function, *Abwehrfunktion*). Moreover, it contains a certain obligation of the legislator not to discriminate unlawfully (so-called protective function, *Schutzfunktion*). Article 3 of the Basic Act is, however, not immediately applicable on the relationship between employer and employee.¹³ This limited effect of Article 3 of the Basic Act¹⁴ may explain why the labour law principle of equal treatment (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*) is so important: While the former cannot be applied to individual employment relationships, the latter is fully applicable in this regard.

II. Prohibitions of discrimination on the statutory level¹⁵

¹⁰ Some observers referred in this regard to provisions like section 138 of the Civil Code (according to which a legal transaction that violates public policy is invalid) and provisions of the German law of tort.

¹¹ See *Thüsing*, Following the US Example: European Employment Discrimination Law and the Impact of the Council Directives 2000/43/EC and 2000/78/EC, *International Journal for Comparative Labour Law and Industrial Relations* 2003, 187.

¹² The Act had to be amended only a few months after its coming into force, however.

¹³ The legal situation is different with regard to discrimination between trade union members and persons who do not belong to a trade union: According to Article 9 (3) of the Basic Act ‘the right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades and professions. Agreements which restrict or seek to hinder this right are null and void; measures directed to this end are illegal.’ That is understood to mean that Article 9 (3) has direct, ‘horizontal’ effect on the relationship between employer and employee.

¹⁴ Another matter is the indirect effect Article 3 of the Basic Act can have by means of influencing how a provision of statutory law is to be understood. This effect of Article 3 is important when it comes to the interpretation of ‘general clauses’ like section 242 of the Civil Code which enshrines the principle of good faith.

¹⁵ There are additional non-discrimination provisions on the statutory level that will not be discussed in this paper in more detail. One of those provisions is section 1 of the Federal Equal Opportunities Act (*Bundesgleichstellungsgesetz*) according to which men and women are to be treated equal. Another is section 75 and in particular 75 (1) sentence 1 of the Works Constitution Act (*Betriebsverfassungsgesetz*). According to section 71 (1) ‘the employer and the works council shall ensure that every person employed in the establishment is

There are a number of statutory provisions in Germany on the basis of which employers are prevented from discriminating against employees.

1. Prohibition of discrimination with regard to part-time workers and workers employed under a fixed-term contract

Section 4 of the Part-Time and Fixed-Term Employment Act (*Teilzeit- und Befristungsgesetz*) of 2000 enshrines a far-reaching principle of non-discrimination in the area of atypical employment.

According to section 4 (1) sentence 1 of the Act, ‘a part-time employee may not be treated worse due to his part-time work than a comparable fulltime employee, unless there are objective grounds justifying different treatment.’ In particular, according to section 4 (1) sentence 2 of the Act, ‘a part time employee shall be paid remuneration for work ... at least to a degree corresponding to the proportion of his working time to the working time of a comparable fulltime-employee’ (so-called pro rata-principle).

Essentially the same applies to fixed-term contracts. According to section 4 (2) sentence 1 of the Act ‘an employee employed under a fixed-term contract may not be treated worse due to his limited term than a comparable employee employed for an unlimited term unless there are objective reasons justifying different treatment.’ Section 4 (2) sentence 2 of the Act establishes a pro rata-principle along the lines of the according principle applying to part-time workers. Section 4 (2) sentence 3, finally, states that ‘if certain employment conditions are dependant on the seniority of the employee in the same establishment or company, then for employees employed under a fixed-term contract the same time periods shall be taken into consideration as for employees employed for an unlimited term, unless there are objective reasons justifying different treatment.’

Both prohibitions of discrimination originate from European law. To be more concrete about it, section 4 implements according provisions of a Directive on part-time work¹⁶ and another Directive on fixed-term contracts.¹⁷ In addition to that, section 4 must be seen in the light of rulings of the European Court of Justice in Luxemburg. According to this court, a discrimination of part-time workers may constitute unlawful (indirect) discrimination of women on the ground that, because part-timers are mostly women, a differentiation between part-timers and employees working full time regularly amounts to a differentiation between women and men.¹⁸ Discrimination between part-time workers and full-time workers therefore

treated in accordance with the principles of law and equity and in particular that there is no discrimination against persons on account of their race, creed, nationality, origin, political or trade union activity or convictions, gender or sexual identity. They shall make sure that employees do not suffer any prejudice because they have exceeded a certain age.’ According to section 73 (2) of the Act ‘the employer and the works council shall safeguard and promote the untrammelled development of the personality of the employees of the establishment. They shall promote the independence and personal initiative of the employees and working groups.’ Apart from that, section 80 (1) No. 2a of the Act in fixing general duties of the works council states that the works council is obliged ‘to promote the implementation of actual equality between women and men, in particular, as regards recruitment, employment, training, further training and additional training and vocational advancement.’ According to section 3 (3) sentence 1 of the General Equal Treatment Act, whose provisions will be discussed later, those provisions will not be affected by the General Equal Treatment Act.

¹⁶ Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work, Official Journal L 14 of 20.1.1998, p. 9.

¹⁷ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, Official Journal L 175 of 10.7.1999, p. 43.

¹⁸ See, in particular, ECJ 31.3.1981, Case 96/80, Official Journal 1981, 911 – Jenkins.

does not only violate a specific statutory provision of non-discrimination with regard to part-timers, but is regularly contrary to the principle of non-discrimination between men and women as well.¹⁹

2. Principles of equal pay and equal treatment with regard to hired-out workers

So-called principles of equal pay and equal treatment can be found in the area of labour only-subcontracting. According to section 9 no. 2 of the Act regulating the Commercial Hiring-out of Employees (*Arbeitnehmerüberlassungsgesetz*), agreements shall be invalid ‘under which the essential working conditions for the hired-out employee during the period of the lease are worse than those applying to a comparable employee in that clients’ establishment, including with respect to remuneration.’ Section 9 no. 2 is obviously based on the idea that hired-out employees must in principle enjoy the same working conditions as regular employees of the hirer-out and must, in particular, be paid the same wages as permanent employees. Deviations from equal pay are possible only through the provisions of collective agreements.²⁰

The enactment of the equal pay and equal treatment principles in 2002 was at that time sort of a legislative quid pro quo. On the one hand, the German legislator made the use of agency workers easier by, for instance, abolishing the 24-months limit on placements that formerly had to be obeyed. On the other hand, the legislator made the law more protective and, by doing so, tried to make agency work more attractive for employees.²¹

3. Principle of non-discrimination with regard to disabled persons

A specific non discrimination-provision is applicable in Germany to severely disabled persons. According to section 81 (2) sentence 1 of the Social Security Code IX (*Sozialgesetzbuch IX*) ‘employers may not discriminate against severely disabled persons on the grounds of their disability.’ In addition, section 81 (2) sentence 2 of the Act expressly states that the provisions of the General Equal Treatment Act shall apply to those persons.

4. The so-called labour law principle of equal treatment

Aside from prohibitions of discrimination that form part of statutes, the so-called labour law principle of equal treatment (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*) has always to be taken into account in Germany when dealing with issues of discrimination. As already

¹⁹ By way of illustration see, for instance, ECJ 27.5.2004, Case 285/02 – Elsner, in which case the Court made it clear that a national rule which provides that both full-time and part-time teachers do not receive any remuneration for additional hours worked when this work does not exceed three hours per calendar month, is potentially indirectly discriminatory. See also the more recent case ECJ 10.3.2005, Case 196/02 – Nikoloudi, where it was held, that a rule under which only women could be taken on for particular part-time work, did not of itself constitute direct discrimination on grounds of sex against women, but that it could be indirect sex discrimination against women that part time workers were excluded from benefits for which only full time staff are eligible, if by definition the part timers were women. The significance of the difference is that discrimination in indirect discrimination cases is capable of being objectively justified more easily than in direct discrimination cases.

²⁰ Apart from that a deviation from the principle of equal pay is allowed for workers during their first six weeks of temporary employment. During this time, hired-out workers must be paid a net wage which is at least equivalent to what they would receive in unemployment benefits. The purpose of this legal measure is to improve the labour market entry prospects of unemployed people who have difficulties finding job placements. It is applicable to all formerly unemployed people irrespective of the length of their unemployment and their qualifications.

²¹ See *Waas*, Temporary Agency Work in Germany: Reflections on Recent Developments, in: The International Journal of Comparative Labour Law and Industrial Relations 2003, 387.

pointed out, this principle is one of the most important principles of German labour law. And though it is an example for judge-made law, it fully enjoys the legal dignity of a statute. According to that principle an employer is prevented from treating comparable employees in his establishment differently without an objective reason for doing so. If, for example, an employer grants general benefits on a voluntary basis and if employees (or groups of employees) are treated unequally in comparison to other employees with no objective reason, they can claim the withheld benefit under the principle of equal treatment. Only if the benefit in question is based on a separate agreement with an individual employee, other employees are not in a position to make a claim to the benefit.

III. In Particular: The new General Equal Treatment Act

Though the provisions that were outlined above, will remain important, the so-called General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*) forms the centre-piece of legislation in the area of employment discrimination law in Germany by now. When it came to implementing Directives 2000/43 and 2000/78, the German legislator had a difficult choice to make. One option was, to tackle the problems where they arise. By way of illustration: EC-law prevents employers from discriminating against employees with regard to dismissals. An obvious approach of transposing this prohibition would have been to amend the German Act on Dismissal Protection (*Kündigungsschutzgesetz*). EC-law also makes provisions for certain powers of employees' representatives regarding the enforcement of employment discrimination rights and duties. The German legislator could have dealt with them by amending the Works Constitution Act (*Betriebsverfassungsgesetz*). Instead of doing so, the German parliament, though in the face of strong criticism from many labour lawyers,²² opted for implementing essentially all provisions of the Directives on the basis of one single statute. What is even more, the German legislator chose for the most part for a 'word-by-word-implementation' of the Directives. By using often almost the language employed in the underlying Directives the legislator obviously tried to escape criticism over either having been too 'narrow-minded' (and as a consequence falling short of the demands of EC-law) or too 'generous' (and as a consequence granting employees more than is foreseen in EC-legislation).

1. Purpose of the Act

According to section 1 of the General Equal Treatment Act the purpose of the Act is 'to prevent or eliminate discrimination on the grounds of race or ethnic origin,²³ gender, religion²⁴ or secular belief, disability,²⁵ age or sexual identity.'²⁶ By describing the legal purpose the legislator clearly wanted to fix guidelines for the construction of the substantial provisions of the Act. In order to achieve this purpose, the Act establishes several specific

²² Many of whom argued that labour discrimination law did not constitute a separate area of law in the first place, but consisted of provisions which could better dealt with by amending existing statutes; see in this regard, for instance, *Reichold, Hahn, Heinrich*: Neuer Anlauf zur Umsetzung der Antidiskriminierungs-Richtlinien: Plädoyer für ein Artikelgesetz, in: *Neue Zeitschrift für Arbeitsrecht* 2005, 1270.

²³ As to the question of whether the requirement of speaking proper German may constitute discrimination on the ground of ethnic origin see Labour Court (*Arbeitsgericht*) Berlin 26.9.2007, *Betriebs-Berater* 2008, 115.

²⁴ The manifestation of religious beliefs through dress is likely to become an important issue all over Europe.

²⁵ See ECJ 11.7.2006, Case C-13/05 – *Chacón Navas*, in which case the Court provided its first decision on the meaning of 'disability.'

²⁶ This is understood to reach beyond sexual orientation and also encompasses protection from discrimination for transsexual people.

prohibitions to discriminate. It has to be noted that this is a different approach from what is common practice with regard to the labour law principle of equal treatment (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*) according to which an employer is prevented from treating any employee worse than another without good cause. While the General Equal Treatment Act establishes specific prohibitions of discrimination in the sense that these prohibitions are expressly fixed in a statute, the labour law principle of equal treatment establishes a general duty not to differentiate between employees at will. While the former has a strong relationship to human dignity, the latter is essentially related to the idea of distributive justice.²⁷

2. Personal and material area of application

1) General questions

According to section 6 (1) of the General Equal Treatment Act the law is applicable on employees,²⁸ apprentices and so-called ‘employee-like’ persons, the latter including persons working at home (so-called *Heimarbeitnehmer*).²⁹ While an ‘employee’ under German law is a person who is subordinated to another person and subdued to the power of that person to direct (so-called *Direktionsrecht*), an ‘employee-like’ person is economically dependant on another person only. Though ‘employee-like’ persons do not have to obey the orders of another person and as a consequence do not qualify as ‘employees,’ some labour law statutes are applicable to them on the ground that the ‘economic dependency’ of those persons justifies making labour law protection partially available to them.³⁰

Adverse treatment on one of the grounds fixed in section 1 of the Act (race or ethnic origin, gender, religion or secular belief, a disability, age or sexual identity) is not permissible, inter alia, with respect to ‘conditions for access to employment ... , including selection criteria and recruitment conditions’ (section 2 (1) no. 1); ‘employment and working conditions, including pay and dismissals, in particular in individual and collective (bargaining) agreements and measures for the execution and termination of an employment relationship as well as with respect to promotions’ (no. 2); ‘access to all forms and all levels of vocational training’ (no. 3) and ‘membership of or involvement in an organisation of employees or employers’ (no. 4). The provision in section 2 (1) no. 1 makes it clear that the application of the principle of non-discrimination does not require an existing employment relationship. Instead the principle is applicable to a mere pre-contractual relationship, a fact that leads to considerable restrictions of the freedom of the employer to conclude a contract of employment. As for section 2 (1) no. 2, the area of application of this provision is conceivably wide. The provision, for instance, covers not only the terms of an existing employment relationship but is also applicable to rights that originate from a former contract of

²⁷ See in this context also Federal Labour Court (*Bundesarbeitsgericht*) 18.9.2007, *Neue Zeitschrift für Arbeitsrecht* 2008, 56.

²⁸ The Act is equally applicable to employers (section 6 (2) sentence 1 of the Act). According to section 6 (2) sentence 2 ‘if employees are being leased to a third party for the performance of work, such third party shall also be deemed to be an employer within the meaning of the Act.’ It has to be noted that the General Equal Treatment Act applies to all employers with no exceptions established for, for example, small employers.

²⁹ That means that, in particular, civil servants (*Beamte*), judges and soldiers are not within the area of application of the Act. With regard to civil servants and judges the Act applies, *mutatis mutandis*, however (see section 24 no. 1 and 2).

³⁰ As far as the conditions for access to employment and promotion are concerned, the major provisions of the Act are essentially also applicable to self-employed persons and members of organs of companies, in particular managing directors and members of the management board (6 (3) of the Act). It is doubtful, however, whether this means that in terms of the examination of a possible discrimination less rigid criteria apply to such persons.

employment.

2) Job interviews and discrimination

With regard to the provisions of the Act that apply to ‘access to employment’ the problem arises to which extent an employer is prevented from certain inquiries. Regarding pregnancy it has long been settled that the employer is not allowed to ask an employee during a job interview whether she is pregnant.³¹ In the future this will apply not only to pregnancy but to all other possible grounds of discrimination. This means that even if an employer in principle has a legitimate interest in learning about certain facts he is prevented from asking the employee if the answer could provide him with the possibility of discriminating against that employee.

3) Discriminatory dismissals

With regard to dismissal protection, specific provision has been made. According to section 2 (4) of the General Equal Treatment Act, ‘dismissals shall be governed exclusively by the provisions on general and specific protection against unfair dismissals.’³² Dismissal protection in Germany, in particular regarding dismissals that are within the area of application of the Act on Protection against Unfair Dismissals (*Kündigungsschutzgesetz*), is relatively rigid. This holds good both to the requirements an employer has to fulfil and to the sanctions that are applicable in case that a dismissal is unlawful. If a dismissal is illegal, it is null and void. And because such dismissal did not affect the employment relationship, the employee can claim full pay from the day when the employer stopped paying him. This high level of protection may have prompted the German legislator to try to ensure that dismissal protection is not duplicated by the General Equal Treatment Act.

Section 2 (4), however, raises serious doubts as to its conformity with European law.³³ Dismissals clearly form part of the underlying Directive.³⁴ Therefore it is highly problematic to put them outside the scope of application of a statute which aims at implementing the provisions of the Directive into national law. It would be different if the legislator could claim that the mere application of the Act on Protection against Unfair Dismissals leads to sufficient protection of employees even from the perspective of employment discrimination law. This case, however, would be very hard to make. First, a dismissal can be discriminatory without being unlawful under the Act on Protection against Unfair Dismissals. Second, the Directive may require damages to be awarded as an effective sanction of discriminatory treatment. Such sanction, however, is not foreseen under the Act on Protection against Unfair Dismissals.³⁵ In

³¹ ECJ 3.2.2000, Case C-207/98 – Mahlborg. In that case it was confirmed that an employer discriminates against a job applicant even if the applicant concerned could not perform the job initially because she is pregnant. The ruling also illustrates the fact that an employer cannot justify treating a pregnant woman less favourably by claiming that he acted with the purpose of protecting the health and safety of the woman concerned; Federal Labour Court (*Bundesarbeitsgericht*) 6.2.2003, *Neue Zeitschrift für Arbeitsrecht* 2003, 848. Similar questions arise in the context of inquiries with respect to a possible disablement of an employee.

³² According to an earlier draft version of the Act, which was heavily criticised, the Act on Protection against Unfair Dismissals should *primarily* (?) apply to discriminatory dismissals.

³³ On 31 January 2008, the European Commission the Commission sent a letter of formal notice to Germany such letter forming the first step of an infringement procedure. Germany has two months to respond. Among the concerns of the Commission are that national legislation does not cover the area of dismissal protection. Apart from that the Commission is of the opinion that people with disabilities are not sufficiently protected and that the deadline of two months to file a complaint is too short.

³⁴ ECJ of 11.7.2006, Case 13/05 – Chacon Navas.

³⁵ The matter is even more complicated because general statutory dismissal protection in Germany is dependant

order to bring section 2 (4) into line with European law, that provision therefore must at least be interpreted in the light of the underlying Directive. The upshot of all this is that the courts, in applying the principle of good faith in particular, must ensure that discriminatory dismissals are sanctioned sufficiently (meaning in conformity with European law).

3. Possible grounds of discrimination

Section 1 of the General Equal Treatment Act contains a list of grounds on which a differentiation between employees must not be based. The list must be understood to be exhaustive. This means that, if a differentiation is based on another ground than the ones mentioned in section 1 (if, for instance, a job applicant is refused for the simple reason that the employer does not find him or her sympathetic), the Act does not apply. The same would go, for instance, for an employer who prevents employees from smoking. A different treatment of smokers and non-smokers may lead to various legal questions. But such treatment is in any event not forbidden under the General Equal Treatment Act.³⁶

The criterion that triggered the most heated debates so far is ‘age.’ It is important to note that the word ‘age’ in this context means any age and not only old age. In other words: A young employee may invoke the legal protection afforded by him by the General Equal Treatment Act quite in the same way as an older worker.

4. Forms of discrimination

Discrimination may arise in different forms.

1) Direct discrimination

According to section 3 (1) sentence 1 of the General Equal Treatment Act direct discrimination exists ‘if, based on one of the grounds set forth in section 1,³⁷ a person is treated less favourable than another is, has been or would be treated in a comparable situation.’³⁸ It becomes immediately clear from this wording that a mere hypothetical discrimination is sufficient. In addition to that it equally constitutes discrimination if one of two employees at the time of the treatment of the other already had left the firm.

2) Indirect discrimination

Indirect discrimination exists according to section 3 (2) of the General Equal Treatment Act ‘if on the basis of one of the grounds set forth in section 1, an apparently neutral provision, criterion or practice may put certain persons at a particular disadvantage compared

on, first, the employment relationship with the employee lasting at least six months and, second, the employer employing a certain number of employees. Against this background the problem arises whether employees outside the scope of application of statutory dismissal protection are treated more favourable than others because only the former may be in a position to claim compensation under the General Equal Treatment Act in the case of a discriminatory dismissal.

³⁶ Though the General Equal Treatment Act prohibits unequal treatment on the ground of race or ethnic origin, it is not applicable with regard to the nationality. This, however, is in line with European law because Articles 3(2) of both Directives provide that ‘the Directive does not cover difference of treatment based on nationality.’ Irrespective of that, unequal treatment which is based on nationality, almost certainly violates the labour law principle of equal treatment (*arbeitsrechtlicher Gleichbehandlungsgrundsatz*).

³⁷ If an employer treats employees unequally for various grounds, it is sufficient, that one of those grounds is prohibited.

³⁸ According to section 3 (1) sentence 2 direct discrimination on grounds of gender ‘also exists ... where a woman is treated less favourably due to her pregnancy or maternity’; see Art. 2 (3) of Directive 76/207/EEC and ECJ 8.11.1990, Case 177/88 – Dekker.

with other persons, unless such provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.’ This definition mirrors the according provision of the underlying Directive (Art. 2 (2) of the Directive). It essentially aims at preventing employers from discriminating employees behind the smoke-screen of what at first sight may look as non-discriminatory treatment. By way of illustration: If an employer treats part-time workers in his establishment differently from full time employees and if the former group consists predominantly of female employees, such behaviour may constitute indirect (sex-) discrimination.³⁹ It must be stressed, however, that there is no indirect discrimination in the first place, if the unequal treatment serves a legitimate aim and must be judged as appropriate and necessary.⁴⁰ The point can be illustrated by referring to a recent ruling of the European Court of Justice. In the underlying case an employer had used continuity of service as a criterion for treating employees differently. A female employee took him to the court claiming indirect discrimination on the ground of sex, for women regularly did not have the same length of service. The Court held that employers are allowed to pay male workers more than female workers purely on the ground of length of their service without being obliged to take into account absences for having and bringing up children. In some cases, however, discrimination based on experience would not be permitted without a detailed justification from employers.⁴¹

Apart from direct and indirect discrimination the Act contains so-called harassment as a separate form of discrimination (section 3 (3) of the Act)⁴² and states furthermore that ‘instructions to treat a person adversely on the basis of one of the grounds set forth in section 1 shall be deemed to constitute discrimination’ as well (section 3 (5) sentence 1 of the Act).⁴³

5. Prohibition of discrimination

The key provision of the General Equal Treatment Act is section 7. According to section 7 (1) employees may not be discriminated against on the basis of one of the grounds set forth in section 1 (race or ethnic origin, gender, religion or secular belief, a disability, age or sexual identity). According to section 7 (2) provisions in agreements that violate the prohibition of discrimination shall be invalid. Section 7 (1) applies not only to employers but to all persons who are in a position to discriminate, including line managers, colleagues and third parties (for instance, clients of the employer). Even parties to collective agreements (including trade unions as well as works councils) are addressees of the provision. That means that if a collective agreement contains a discriminatory provision such provision is null and void.⁴⁴ In

³⁹ It should be noted, however, that there may be other than statistical means to assess indirect discrimination.

⁴⁰ See in this regard, in particular, ECJ 26.6.2001, Case C-381/99 – Brunnhofer; 13.5.1986, Case 170/84 – Bilka; 1.7.1986, Case 237/85 – Rummler.

⁴¹ ECJ 3.10.2006, Case C-17/05 – Cadman; see also ECJ 6.12.2007, Case 300/06 – Voß.

⁴² According to that provision harassment constitutes discrimination ‘where unwanted conduct related to one of the grounds set forth in section 1 occurs with the purpose or effect of violating the dignity of the affected person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.’ Section 3 (4) contains a specific definition of ‘sexual harassment’ which is a bit more extensive. Without going into the details here it should be said that realising protection against harassment by means of an equal treatment requirement is a relatively recent feature of European law. The Directives on discrimination against women, in any event, originally contained no such provisions.

⁴³ The latter provision essentially aims at cases where the employer orders line managers or other employees to discriminate against another employee.

⁴⁴ It should be noted in this regard that, in principle, trade unions and employers or employers associations who conclude a collective agreement are regarded in Germany as enjoying a certain amount of discretionary power on the ground that the power to bargain collectively is part of the freedom of association which is a fundamental

case that either a collective agreement or the individual contract is partially invalid the difficult problem arises how to fill the according lacuna. Though the matter is far from entirely clear, it can be said that, at least in principle, the employee who was discriminated against must be put on an equal footing with employees who were treated more favourably.⁴⁵

6. Justification

One of the most important questions to be answered when examining a possible case of discrimination is the question of whether or not the unequal treatment of employees is justified.

1) Justification of direct discrimination

Section 8 (1) of the General Equal Treatment Act deals with a possible justification of direct discrimination. According to section 8 (1) a difference of treatment based on race, ethnic origin etc. shall be permissible, if ‘due to the nature of the activity to be performed or the conditions of the performance, such grounds constitute a material and determining occupational requirement, when the objective is legitimate and the requirement proportionate.’⁴⁶ The key words are ‘material and determining occupational requirement.’ Unequal treatment can by no means be justified on the ground that it may be appropriate or practical only. If, however, a black actor is required in a movie for reasons of authenticity, the employer may legitimately choose a black applicant. And a Chinese restaurant may legally insist that its waiters are of Asian origin.⁴⁷ To be sure, ‘borderline-cases’ exist which are difficult to decide upon. For instance, it may be due to a certain entrepreneurial concept that employees are employed in a given undertaking. The owner of a shop that offers trendy fashion may prefer taking young people into employment. Such preferences are likely to be legitimate if the entrepreneurial success is clearly dependant on employing certain employees and the performance of the job duties of the employee is closely related to certain characteristics of the employee. This may be so with regard to selling clothes. It might, however, not be the case with regard to the employment of a cabin crew by an airline. In such case the airline might therefore be prevented from not hiring people who have surpassed a certain age. To sum it all up, it can be said, that unequal treatment can regularly not be justified by referring to ‘public taste.’

2) Exceptions to the principle of equal pay

With regard to the principle of equal pay section 8 (2) of the General equal Treatment Act contains a specific provision. According to section 8 (2) an agreement on lower remuneration for equal or equivalent work shall not be justified by the fact that special

right, protected by Article 9 (1) of the German Constitution. Regarding grounds for discrimination as race, ethnic origin etc., however, such discretionary power, as far as it is acknowledged, can only be a limited one.

⁴⁵ ECJ 13.12.1989, Case 102/88 – Ruzius-Wilbrink; 7.2.1991, Case 84/89 – Nimz; 27.6.1990, Case 33/89 – Kowalska.

⁴⁶ Article 8 (1) implements Article 4 (1) of Directive 2000/78/EC which reads: ‘Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.’

⁴⁷ According to the Federal Labour Court (*Bundesarbeitsgericht*) 15.2.2005, *Neue Zeitschrift für Arbeitsrecht* 2005, 870, the ability to type at a certain speed is a genuine and determining occupational requirement for a secretary and justifies not recruiting a disabled person who does not have this ability.

protective provisions are applicable to the persons in question. It has to be noted that this provision, by applying to all possible grounds of discrimination, far exceeds the principle of equal pay between men and women, fixed in Article 141 (1) of the EC-Treaty. Essentially, it aims at preventing employers from justifying unequal treatment of employees on the ground that some of them (for instance, disabled persons) are the subject of specific legislative protective measures that make their employment more expensive than the employment of others.

Section 8 (2) may serve as an illustration of the problems caused by the fact that the principle of non-discrimination has been extended to new grounds for discrimination. The main purpose of Article 141 (1) of the EC-Treaty is to ensure that women who are employed in ‘typical women occupations’ are not paid less than men whose occupations are comparable. The extension of this concept to discrimination based on other grounds, however, is problematic because there are no ‘typical occupations’ of, for instance, members of a certain church, youngsters or homosexual persons.

3) Justification of discrimination in the area of unequal treatment based on age

Justification of unequal treatment in the area of age discrimination has been specifically provided for.⁴⁸

a) Content of section 10 General Equal Treatment Act

According to section 10 sentence 1 of the Act ‘apart from the cases set forth in section 8 differences in treatment on grounds of age shall also be admissible if they are objectively and reasonably justified by a legitimate aim.’ According to sentence 2 ‘the means of achieving that aim must be proportionate and necessary.’ In addition to that, sentence 3 states that ‘such differences in treatment’ may, for instance, include ‘fixing minimum requirements of age, professional experience or seniority for access to employment or to certain advantages linked to employment.’

Section 10 takes into account the specific structure of a discrimination based on age—which is that everybody has a certain age and every employee in the course of his life is at a certain stage at a ‘critical age’ (for instance, a youngster who is about to enter the labour market, or an older person who is approaching retirement). As regards section 10 of the General Equal Treatment Act the major problem is that it is phrased in quite general terms. This makes it difficult in an individual case to decide whether unequal treatment is justified or not. What, for instance, is a ‘legitimate aim’? Does it refer to a public interest only or is it sufficient that, for example, an individual employer has a legitimate interest in treating older and younger employees unequally?⁴⁹ Because the provision is so extensively framed, there are doubts as to the conformity with EU-law. In addition to being quite general, however, it is criticised that the legislator abstained from deciding which aspects may justify a possible discrimination and authorised others (in particular, individual employers and partners to collective agreements) to do so instead. Again the question is whether that is in conformity

⁴⁸ The same holds good for Directive 2000/78/EC. Article 6 of the Directive reads: ‘Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.’

⁴⁹ See in this regard Article 6 (2) no. 1 of the Directive, according to which differences of treatment may include, among others, ‘the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.’

with the demands of EU-law.

b) Recent Rulings of the European Court of Justice

It will be the task of the European Court of Justice to further shape to concept of justification in the context of age discrimination. With regard to seniority rules the Court recently held that a pay system under which employees with long service and more experience get higher pay than those with short service and less experience does not, save in 'inappropriate cases' infringe the equal pay principle (even though most of the shorter service, less experienced, employees are female and most of the longer service, more experienced, employees are male).⁵⁰ In addition to that the court⁵¹ held that a provision of the German law, according to which it was made easier for employers to enter into fixed-term contracts with older workers, was not in conformity with EU-law on the ground that it did not meet the requirements of the principle of proportionality.⁵² Finally, in respect of statutory age limits, the Court ruled in a Spanish case, that the Spanish law allowing mandatory retirement ages to be set as part of collective bargaining agreements could be justified and was therefore not incompatible with EU-law.⁵³ Apparently retreating a bit from the more 'offensive' stance taken in the German case, the Court was of the opinion, that the Spanish law in its context was an appropriate and necessary way of achieving the legitimate aim of regulating the national labour market and in particular fighting unemployment among younger workers.⁵⁴

c) Major 'problem areas' in German law with regard to age-discrimination

In the context of the German law the possible justification of discrimination based on age poses specific problems.⁵⁵ Though it may be relatively clear by now that statutory mandatory retirement age limits and age limits based on collective agreements are in conformity with EU-law, it is in doubt whether the same can be said about age limits an employer may

⁵⁰ ECJ 3.10.2006, Case 17/05 – Cadman.

⁵¹ ECJ 22.11.2005, Case 144/04 – Mangold. The ruling of the ECJ has given rise in Germany to a heated debate about the power of the Court and its limits; see *Schiek*, The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation, *Industrial Law Journal* 2006, p 329; see also *Schmidt*, The Principle of Non-Discrimination in Respect of Age – Dimensions of the ECJ's Mangold decision, *German Law Journal* 2006, 505. Most German scholars are highly critical of the judgment. There are essentially two reasons for that. First, the Court, in the eyes of many, did not more than pay lip service to the discretionary power of the national legislator. Even if a piece of legislation is intended to make it easier for older employees to be retained in the workplace, the means used to achieve that objective must always be appropriate and necessary with the Court itself deciding upon the fulfilment of those requirements at the end of day. Second and even more important, the Court declared that it could deal with age discrimination claims even before the obligation to implement the Directive became effective. The reason according to the Court was that the principle of non-discrimination did form part of the EC-Treaty itself, the result being that it had to be obeyed independent of the coming into force of the Directive.

⁵² By responding to the ruling of the ECJ and an according ruling of the Federal Labour Court (*Bundesarbeitsgericht*), *Neue Zeitschrift für Arbeitsrecht* 2006, 1162, the German legislator recently amended section 14 (3) sentence 1 of the Part-Time and Limited Term Employment Act, the provision in question. It now reads: 'The limitation of the term of a contract of employment to up to five years where no objective reasons exists is admissible if the employee is 52 years of age and was unemployed ... for at least four months prior to the commencement of the fixed-term contract.' Thus age does not form the sole criterion anymore. Instead, the fact that the person concerned has been unemployed for some time has gotten equal relevance.

⁵³ Another question is whether fixing a maximum age for recruitment is lawful; see in this regard Higher Administrative Court (*Oberverwaltungsgericht*) Münster 19.12.2007 – 6 A 406/05 and Higher Administrative Court (*Oberverwaltungsgericht*) Koblenz 10.8.2007, *Neue Zeitschrift für Arbeitsrecht*, both regarding section 10 sentence 3 no. 3 of the General Equal Treatment Act.

⁵⁴ ECJ 8.12.2007, Case C-411/05 – Palacios de la Villa.

⁵⁵ See *Hanau*, Neues vom Alter im Arbeitsverhältnis, *Zeitschrift für Wirtschaftsrecht (ZIP)*, 2007, 2381.

individually agree on with his employee. Even more doubtful is the legal situation in respect of agreements that come in the form of, what is called in Germany, a *Bezugnahme Klausel* (meaning that the parties do not more than referring in their contract to a provision of a collective agreement which fixes an age limit).

Another major problem in Germany regards so-called ‘social selection.’⁵⁶ If an employee is dismissed due to compelling business reasons the dismissal is null and void under German law if, in selecting the employee, the employer has either not, or not sufficiently considered the employee’s seniority, age, duties to support dependant persons and severe disability (section 1 (3) sentence 1 of the Protection against Unfair Dismissals Act, *Kündigungsschutzgesetz*). Though the provision of the German law as such might be in line with the requirements of Community law, it is not entirely clear what the requirements are for an individual employer who in a concrete case has to make a selection among employees for dismissal. Most lawyers in Germany advise employers, in any event, not to be too schematic when selecting employees for dismissal in the case of redundancy. In particular, they are of the opinion that employers should, if any possible, abstain from simply applying a scheme according to which the selection is made by awarding each employee one point for one year of age (so-called *Punkteschema*).⁵⁷ All in all, there is a widespread consensus that employers in the future should be reluctant in using the criterion of age.⁵⁸

Another area of concern is the German law on notice periods in the case of dismissals. According to section 622 (1) of the Civil Code an employment relationship can be terminated unilaterally by observing a four-week period of notice. According to section 622 (2) sentence 1 of the Civil Code the notice period is gradually extended in proportion of the length of the employment relationship. However, a period preceding the employee’s 25th is not be taken into account when determining the duration of employment (section 622 (2) sentence 2). This latter provision is likely not to be in line with EU-law because it lacks a purpose being strong enough to bear up against the prohibition of discrimination based on age.⁵⁹

As those examples illustrate,⁶⁰ the implementation of the prohibition of age discrimination is a major challenge for the national legislator (as well as to the partners to collective agreements⁶¹) and has potentially a lot of repercussions in the national legal

⁵⁶ See in this regard State Labour Court (*Landesarbeitsgericht*) Niedersachsen 13.7.2007, *Zeitschrift für Wirtschaftsrecht* (ZIP) 2008, 132 and Federal Labour Court (*Bundesarbeitsgericht*) 19.6.2007, *Neue Zeitschrift für Arbeitsrecht* 2008, 103.

⁵⁷ Such schemes up till now have been widely in use in Germany; see in this context Labour Court (*Arbeitsgericht*) Osnabrück 3.7.2007, *Neue Zeitschrift für Arbeitsrecht* 2007, 17.

⁵⁸ See also the recent decisions of State Labour Court (*Landesarbeitsgericht*) Berlin-Brandenburg 24.7.2007, *Neue Zeitschrift für Arbeitsrecht – Rechtsprechungsreport* 2008, 17 and Labour Court (*Arbeitsgericht*) Osnabrück 5.2.2007 – 3 Ca 724/06.

⁵⁹ According to a judgement of the State Labour Court (*Landesarbeitsgericht*) Berlin LAG 24.7.2007 – 7 Sa 561/07 the provision is not in conformity with EC-law and must therefore not be applied. The State Labour Court Düsseldorf 21.11.2007 has recently asked the ECJ for a preliminary ruling in this regard.

⁶⁰ Another example would be the treatment of older workers in respect to so-called social plans (*Sozialpläne*) in the case of, for instance, the closing down of an establishment; see in this regard Federal Labour Court (*Bundesarbeitsgericht*) 2.10.2007, *Neue Juristische Wochenschrift* 2008, 50.

⁶¹ Many collective agreements in Germany have been providing for seniority rules with regard to pay, extra holidays for older workers and the like. Many of those provisions will come under close scrutiny in the light of possible age discrimination. The same holds good for provisions according to which employers are prevented under the collective agreement to dismiss employees of a certain age; see in this regard State Labour Court (*Landesarbeitsgericht*) Baden-Württemberg 30.7.2007 – 15 Sa 29/07.

orders.⁶²

4) Positive Action

Irrespective of sections 8 and 10 of the General Equal Treatment Act,⁶³ unequal treatment may constitute a so-called positive action⁶⁴ and may for that reason be regarded as being legal. According to section 5 ‘a difference in treatment shall ... be admissible, if suitable and appropriate measures are taken to prevent or compensate for existing disadvantages resulting from race, ethnic origin’ etc.⁶⁵ The concept of ‘positive action’ raises the question, under which circumstances a certain measure can be regarded as trying to aid certain disadvantaged groups and therefore as legally treating such employees differently from others. There is little doubt that it must be lawful to boost the chances of people who are disadvantaged. The key question, however, is to which extent such positive (or affirmative) action justifies leaving the principle of non-discrimination aside. The concept of affirmative action is certainly far more developed in, for instance, the US than in Germany.⁶⁶ At least the European Court of Justice has been trying to make it more manageable.⁶⁷ In particular, the Court underlined the importance of advancing certain groups to be proportional to putting others on a disadvantage.⁶⁸

7. Obligations of the employer

By section 12 of the General Equal Treatment Act a number of obligations are established that the employer has to fulfil.⁶⁹ In particular, the employer is obliged to take the

⁶² See *Schmidt*, in: Sargeant (ed.), *The Law on Age Discrimination in the EU*, 2007, 29.

⁶³ In addition to them section 9 makes specific provision for religious communities and institutions on the ground that they enjoy more freedom with regard to unequal treatment and can refer to specific protection under the German Constitution. It is, however, subject to doubt whether section 9 of the Act is fully covered by the underlying Directive.

⁶⁴ Article 7 (1) of Directive 2000/78/EC states with regard to such action: ‘With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.’

⁶⁵ The provision illustrates that the General Equal Treatment Act really is no piece of art: How can it be that *existing* disadvantages still can be *prevented*?

⁶⁶ See also *Hoentzsch*, *Discrimination in Individual-Related Employment – A View from Europe and Germany to Canada*, *German Law Journal* 2006, 795.

⁶⁷ See, in particular ECJ 19.3.2002, Case 476/99 – Lommers; 29.6.2004, Case 319/03 – Briheche. Particularly instructive, with regard to the latter case, is the Advocate General's opinion (because it explains in detail the principles under which positive discrimination is admissible). In the Briheche-case the Court held that a provision, under which an age limit for obtaining access to public-sector employment is not applicable to certain categories of women while it is to men in the same situation as those women, is not admissible under Article 2(4) of Directive 76/207. It further held that the measures could not be justified under Article 141 (4) EC-Treaty either as they were disproportionate. Interestingly, the Court stressed that the aim of Article 2 (4) is to achieve substantive, rather than formal, equality; see in this regard also ECJ 6.7.2000, Case 407/98 – Abrahamsson.

⁶⁸ For a more detailed discussion of the concept see *de Vos*, *Beyond formal Equality – Network of legal experts in the fields of employment, social affairs and equality between men and women*, Brussels, 2007.

⁶⁹ According to section 12 (3), if employees discriminate against colleagues, ‘the employer shall take the measures that are necessary, appropriate and suitable for the individual case’ including a warning, transfer, relocation or dismissal of the employee. According to section 12 (4), if employees are discriminated against by third parties in the context of their employment, ‘the employer shall take the measures that are necessary, appropriate and suitable for the individual case in order to protect the employees.’ It is unclear, however, what the duties exactly comprise in the latter case. Related to this is another problem: Is the employer obliged to address his measures primarily to the third party or is he allowed, for instance, to move the employee who was discriminated against to another job?

necessary steps to protect employees from discrimination and to take, if necessary, preventive measures (section 12 (1) of the Act). If the employer has trained the employees appropriately for the purpose of preventing discrimination, he shall be deemed to have met his obligation to protect employees from discrimination (section 12 (2) sentence 2 of the Act). In practice, the latter provision is double-edged. On the one hand, if the employer can refer to appropriate training measures, he does not have to bother too much about the risk of being liable of violating the provisions of the General Equal Treatment Act. Section 12 (2) sentence 2 can therefore be described as being sort of an insurance policy for employers. On the other hand, because the provision establishes a clear incentive for training, it has triggered a whole industry consisting of firms who offer seminars on non-discrimination and is partly responsible for the fact that compliance with the General Equal Treatment Act has become a costly affair for employers. According to a recent study⁷⁰ the costs of complying with the provisions of the General Equal Treatment Act so far amount to more than 1.7 billion Euro.

8. Legal consequences of discrimination

An employee who was discriminated against can claim damages or compensation⁷¹ from his employer⁷² on the basis of section 15 (1) and (2) of the General Equal Treatment Act.⁷³ According to section 15 (1) an employer, who has discriminated against an employee unlawfully, 'shall be obliged to pay damages for the resulting loss.' Where the damage does not involve financial loss, the employee may demand an appropriate monetary compensation. If it was a failure to hire a certain person which constituted unlawful discrimination, the compensation must not exceed three months' pay if the employee would not be hired had the selection been free of adverse treatment.⁷⁴ If the employee suffers economic loss, he or she can claim damages only if the employer has acted on purpose or at least negligently. Only in case of immaterial loss no such requirement exists. Though the underlying Directive leaves it essentially to the Member States to decide upon the available sanctions in case of infringements of the principle of non-discrimination,⁷⁵ it is debatable whether section 15 of the General Equal Treatment Act fully conforms to Community law. There are, in any event, a considerable number of lawyers in Germany,⁷⁶ who are of the opinion that the basic requirement of the employer being guilty contravenes EU-law and that the unrestricted availability of a claim for compensation in the case of immaterial loss cannot change this assessment.

⁷⁰ *University of Dortmund*, Kurzbericht des Lehrstuhlprojekts im Auftrag der Initiative Neue Soziale Marktwirtschaft GmbH zum Thema: Erhebung der Gesetzesfolgekosten aus dem Allgemeinen Gleichbehandlungsgesetz (AGG), 2007. The findings of that study, however, are criticised in some quarters for being influenced by a bias towards employers. In any event, it should be taken with a pinch of salt.

⁷¹ According to section 15 (6) a violation of the prohibition of discrimination shall in any event not create a claim to the formation of an employment relationship, unless such claim arises on other grounds.

⁷² The General Equal Treatment Act is silent on sanctions in case that one employee discriminates against the other. In such case a claim may be based on general civil (contract or tort) law.

⁷³ Apart from the sanctions mentioned by section 15, the employee has a right to complain (section 13) and is under certain circumstances entitled to stop working if made the subject of discrimination.

⁷⁴ The latter provision tries to avoid legal uncertainty but is criticised by some lawyers on the ground that the extent of immaterial loss is not dependant of the workers pay.

⁷⁵ Article 17 of Directive 2000/43/EC states in this regard that 'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.'

⁷⁶ See, for instance, *Thüsing*, Arbeitsrechtlicher Diskriminierungsschutz, 2007, 223.

Many more legal problems with regard to the sanctioning of discrimination exist, however. One of those problems arises in the context of section 15 (3) of the General Equal Treatment Act. According to this provision an employer who does not more than implementing collective bargaining agreements shall only be obliged to pay compensation if he acted ‘with intent or gross negligence.’ Obviously, that provision tries to solve a dilemma an employer may face, for he may feel to be legally bound to a discriminatory provision in a collective agreement. Though this rationale seems convincing at first sight, it becomes far less so, when thinking twice: As far as a collective agreement contains discriminatory provisions that are not in line with Community law, they do not form a viable part of the national legal order with the consequence that the employer is not obliged to obey it. Against this background the conformity of section 15 (3) with Community law is at least doubtful.

9. Burden of proof

The existence of unlawful discrimination is often extremely difficult to prove. For that reason Directive 2000/43/EC tries to make the task easier for employees suffering from discriminatory practices.⁷⁷ In terms of German law the division of the burden of proof between the parties concerned is dealt with in section 22 of the General Equal Treatment Act.⁷⁸ According to section 22 ‘if one party to a dispute proves the existence of indications that would give rise to assuming discrimination based on one of the grounds set forth in section 1, it shall be for the other party to prove that no violation of the provisions for the protection against adverse treatment occurred.’ In other words: If an employee feels that he or she was discriminated against by the employer, it is sufficient to show for that person that facts exist on the basis of which discrimination can be presumed. In this case the burden of proof shifts to the employer. It is now he who has to prove that no discrimination has taken place. What all this comes down to is the following: It is up to the employee to prove that he was treated unequally. In addition to that, the employee has at least to prove the existence of facts that strongly point to a causal link between the unequal treatment on the one hand and his or her belonging to a certain group (for instance, being disabled). If the employee has succeeded in proving such facts, the employer has to prove that he did not discriminate.

The key question obviously is which facts can form the basis of a presumption as to the occurrence of discrimination. The fact that an employee belongs to a certain group of employees as such is in any event no viable basis for such presumption. Additional facts must exist. The most prominent example might be that a job applicant was discriminated against and the job advertisement already pointed to the existence of unlawful motives on the part of the employer.⁷⁹

⁷⁷ Article 10 (1) of the Directive: ‘Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.’

⁷⁸ See in this regard the recent decision of the Labour Court (*Arbeitsgericht*) Berlin 12.11.2007 – 86 Ca 4035/07.

⁷⁹ According to section 11 of the General Equal Treatment Act a job position may not be advertised in violation of section 7 (1) of the Act. That means, for instance, that the employer is prevented from addressing only employees of a certain sex. If he does so, a job applicant who belongs to the other sex, can point to the existence of facts according to which a discrimination can be presumed; see Federal Labour Court (*Bundesarbeitsgericht*) 5.2.2004, *Neue Zeitschrift für Arbeitsrecht* 2004, 540 (regarding section 611 a of the Civil Code, a provision that preceded the according provision of the General Equal Treatment Act); see also Federal Constitutional Court (*Bundesverfassungsgericht*) 16.11.1993, *Neue Zeitschrift für Arbeitsrecht* 1994, 745, according to which an

10. Procedural requirements and legal protection

A claim on the basis of section 15 (1) or (2) of the General Equal Treatment Act must be brought before the court in writing within a (relatively short) period of two months (Art. 15 (4) sentence 1).⁸⁰ Parties to a collective agreement may agree otherwise.

Apart from that it should be noted that the General Equal Treatment Act in section 23 provides for the establishment of so-called anti-discrimination organisations whose task is to represent the special interests of victims of discrimination or groups of such persons. Such organisations are, within the scope of their purpose, authorised to appear in court proceedings as a legal advisor to victims of discrimination where representation by an attorney is not legally required (section 23 (2) sentence 1).

D. General Questions

I. Merits and demerits of the legal concept of 'discrimination'

A full discussion of the merits and demerits of the legal concept of 'discrimination' would take this paper outside its possible boundaries. Instead of trying to enter into such discussion, the focus will be on shedding light on along which lines the question is perceived by German lawyers who are by necessity judging them against the backdrop of German law.

Labour law in Germany has in essence always been based on the idea that the employee must be protected from the employer, who is typically superior to him and whose powers should therefore be restricted. This idea has not only influenced legislation but also the courts which have extended workers' protection on a step-by-step basis. A case in point is dismissal protection. The German Act on Dismissal Protection (*Kündigungsschutzgesetz*) contains considerable limitations of the power of employers to dismiss employees. In addition to that, however, the courts have developed principles which restrict the prerogative of employers even more: According to those principles, dismissals must not be based on facts of the past (sickness of an employee or faulty performance) but are legitimate only, if the underlying circumstances may repeat themselves (so-called prognosis principle);⁸¹ unilateral termination by way of dismissal is only allowed as a means of last resort (so-called ultima ratio-principle);⁸² each and every dismissal must be based on an all-embracing weighing of the interests of both parties concerned. The stance taken by the legislator and the courts could be described as being vertical: looking at a quasi-hierarchical relationship between employer and employee and trying to safeguard the latter by bestowing certain rights to him.

To this the principle of non-discrimination in employment adds a completely new perspective. Instead of looking exclusively at the relationship between employer and employee the question is asked, whether the employer treats one employee different from another. It should be emphasised again that this 'horizontal' perspective is not completely new in German labour law. It has, however, become immensely more important due to the fact that so much emphasis is laid on this aspect in EC-law. The fear now shared by many in Germany

employer is precluded from claiming that a job applicant did not meet certain requirements if those requirements did not play any role during the selection process and were put forward by the employer only afterwards.

⁸⁰ The conformity of that provision with Community law is doubtful.

⁸¹ A dismissal due to sickness, for instance, is legal only in so far as a past sickness indicates that the employee will be sick in the future as well.

⁸² This is why the employer, for instance, always has to examine whether there are employment opportunities in another part of the undertaking before dismissing an employee for redundancy.

is that the far-reaching concept of employment discrimination might lead to shifting the balance too much in favour of employees, putting employers under too much pressure to comply and making German labour law even more complicated than it already is. Employers, in particular, refer in this context to the fact that the existing body of German labour law is already be characterised by various protective layers: Individual employment law rights (partly being statutory or judge-made, partly being based on collective agreements); co-determination at the level of the individual undertaking (works councils); and, finally, co-determination at enterprise level (employees' representatives as members of the supervisory board).

Whether the critics are right is not here to decide. One thing, however, is difficult to deny: The import of an extensive prevention of non-discrimination in the area of employment has added a fair amount of complexity to German labour law. A case in point is the problem of age discrimination. The according prohibition has triggered a wide debate in Germany whether German law is still in line with the requirements of European law. As already pointed out, this debate affects, *inter alia*, statutory and collectively agreed age-limits; the rules of selecting employees for dismissal in case that the decision to dismiss is based on business reasons which apply to more than one employee; periods of notice; and the possibility to make it easier for employers to offer fixed-term employment if the prospective employee has surpassed a certain age. In almost all of those areas the prohibition of discrimination on the ground of age meets with pre-existing rules of German law which already are fairly sophisticated and complex. It only adds to the problems which arise in this context that the concept of non-discrimination itself is (necessarily) a relatively vague one. A legislator can by no means determine whether discrimination between employees of different ages is justified in an individual case. Instead the legislator has to employ general clauses that must be substantiated further by the courts. Against this background it becomes clear why the judgements of the European Court of Justice are being watched so carefully in Germany. Only in light of those rulings it can be said with some certainty to which extent the German legislator still has to bring parts of the German law in line with the requirements of EC-law.

Though the introduction of a far-reaching principle of non-discrimination raises a number of questions and is not fully embraced in some quarters of German labour law, it is difficult to argue with the fact that a horizontal perspective on employment relationships adds important value.⁸³ This is all the more so in light of German constitutional law. As pointed out earlier, the German constitution expressly states in Article 3 (1) of the Basic Act that 'all persons shall be equal before the law.' Apart from that, Article 1 (1) of the Basic Act expressly mentions that 'human dignity shall be inviolable' and immediately adds, that 'to respect and protect it shall be the duty of all state authority.' If the prohibition of unlawful discrimination is closely related to human dignity—which certainly is the case—there is basically no way of not applying this principle to employment relationships.

II. Discrimination law and the promotion of employment of specific groups of employees

There is a potential conflict between the promotion of employment of specific groups of employees and discrimination law. Legislative measures that aim at such promotion may fall foul of the prohibition of non-discrimination. However, the promotion of employment may constitute positive action which is lawful under the principle of non-discrimination if the measures taken are proportional.

⁸³ And may even make some employment decisions 'more rational.'

Another question is whether the purpose of promoting employment of specific groups of employees as such justifies discrimination. Can a mandatory retirement age be justified on the ground that it improves the chances of youngsters of getting access to the labour market? In the light of a recent judgement of the European Court of Justice the answer seems to be yes.⁸⁴ Can the partial abolishing of labour law protection with regard to specific groups of employees be justified on the ground that such a measure makes it more attractive to offer employment to employees belonging to that group? In the light of another relatively recent judgement of the European Court of Justice the answer seems to be no.⁸⁵ It will clearly take time for the courts to develop reliable guidelines in this regard. The only thing that can be said with certainty is that there is very little certainty at present.

It should be added in this context, finally, that the application of the principle of non-discrimination as such may promote the labour market chances of certain groups of employees. For instance, the prohibition of age discrimination will certainly oblige partners to collective agreements to do away with some privileges that older workers have been enjoying in the past. As a consequence, employing such workers (who are often, though by no means necessarily, less productive than younger ones) may become less expensive for employers and thus the chances are that employers are more willing to offer them (further) employment.⁸⁶

III. Practical questions and the future direction of discrimination law

Though the prohibition of discrimination is not completely new in Germany, it is clearly a concept that has deeper roots in other legal orders, in particular in the UK and the US: One of the most important questions therefore is which effect it will have in practice. At present empirical studies point to a rather limited effect of the General Equal Treatment Act.⁸⁷ Because the Act is fairly new it remains to be seen, however, how things will work out in the longer run. Apart from that another quantity should not be left aside, namely the quantity of damages which are available under the new Act. With regard to this question at least some anecdotic evidence exists: Recently, a German employer has been taken to the court on the ground that he discriminated against an employee on various grounds with the employee claiming no less than 500.000 Euro in damages.⁸⁸ Such sums may not trigger much interest in the US. In German terms, however, they are astronomic. It remains still to be seen, however, whether claims like this will be successful, for German law does not know punitive damages and, though employee in principle can claim compensation for pain and suffering, the courts regularly are reluctant in this regard.

Trying to look into the future of discrimination law in Germany it seems highly likely that the issue of age discrimination will have the strongest impact. This is due partly to demographics and partly to the fact that many provisions of labour law directly or indirectly refer to the age of the employer. To solve the problems that arise in this context will not be easy, however. One of the major reasons for that is, that age is a criterion which is quite specific when compared to others. Every employee is of a certain age. And every employee is according to the 'European concept' of age discrimination potentially subject to the legal protection which originates from the prohibition of age discrimination.

⁸⁴ ECJ 8.12.2007, Case C-411/05 – Palacios de la Villa.

⁸⁵ ECJ 22.11.2005, Case 144/04 – Mangold.

⁸⁶ For a more detailed discussion *Waas*, Die Beschäftigungssituation älterer Arbeitnehmer als Herausforderung für den arbeitsrechtlichen Gesetzgeber, Zeitschrift für Rechtspolitik 2006, 118.

⁸⁷ According to one of the most recent studies, only 400 cases out of a total number of 30.000 that were looked into related to the General Equal Treatment Act; see Frankfurter Allgemeine Zeitung 21.1.2008, 13.

⁸⁸ See Frankfurter Allgemeine Zeitung 28.1.2008, 13.

E. Conclusion

The prohibition of discrimination is a concept that still has to be elaborated. This will predominantly be the task of the courts. The legislator can do not more than fixing some rough guidelines. Because the principle of non-discrimination is for a big part based on European law, it will be the European Court of Justice instead of the national courts that will play the leading role in this regard. It will depend largely on the Court in Luxemburg which distant-effects the principle of non-discrimination will have on the German legal order.

Discrimination Law In France

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The principle of non discrimination is a core aspect of French labour law. The sources of discrimination law are diverse. The first is constituted of EC law, that has largely determined the French law of discrimination. The second comes from the French constitution. The principle of non discrimination has constitutional value, by virtue of the Preamble to the Constitution of 1946 that prohibits discrimination with regard to criteria of sex, race, belief and trade union activity, and of the current Constitution (1958) that contains a provision according to which "the nation ensures equality before the law of all citizens, whatever their ethnic origin, race or religion (article 2). Moving from the Constitution to statute law, the labour code contains several provisions on discrimination, especially a provision that lists all grounds of prohibited discrimination: article L 122-45.

Two preliminary remarks are necessary. First, French labour law has largely been influenced by EC law relative to discrimination, and the case law of the European Court of Justice is at least as important as that of the Cour de cassation to understand the law of discrimination applicable in France. Second, although discrimination law has considerably increased in importance in French law, due to the influence of the European Union, French labour law is not built around discrimination law. And the focus on discrimination is regularly criticised in the name of workers protections. For instance, an attempt has been made to see harassment as an issue of sex discrimination, which would certainly have weakened the law of harassment, especially the possibility to rule against psychological harassment which is not at first a problem of discrimination. Again, it has been suggested that, for certain contracts, the control of the fair ground of dismissal should be limited to discrimination; the current requirement of a fair ground for dismissal goes far beyond mere discrimination. More fundamentally, it is feared that discrimination law might lead to focusing on individual rights of employees rather than on the collective architecture of labour law, which is a core aspect of French labour law.

I. The Prohibition of Discrimination

A. The Main Discriminatory Grounds

According to article L 122-45, "No one can be excluded from a procedure of recruitment or from access to a training course or a period of training in a company, no employee can be sanctioned, dismissed or be the subject of a discriminatory, direct or indirect measure, in particular as regards to remuneration, within the meaning of the article L. 140-2, to profit-sharing or distribution of actions, to training, reclassification, assignment, qualification, classification, professional promotion, change or renewal of contract because of its origin, its

sex, its manners, its sexual orientation, its age, its family circumstances or pregnancy, its genetic characteristic, its belonging or not, true or supposed, to an ethnic group, a nation or a race, its political opinions, its trade-union or mutualist activities, its religious convictions, its physical appearance, or because of its handicap or health.

No employee can be sanctioned, dismissed or be the subject of a discriminatory decision provided for at the preceding subparagraph because of the normal exercise of the right to strike.

No employee can be sanctioned, dismissed or be the subject of a discriminatory measure for having testified to the intrigues defined in the preceding subparagraphs or having reported them.

In the event of litigation relating to the application of the preceding subparagraphs, the employee concerned or the candidate for a recruitment, a training course or a period of training in a company presents elements in fact letting suppose the existence of a direct or indirect discrimination. Within sight of these elements, it falls on the defendant part to prove that its decision is justified by foreign objective elements irrelevant to any discrimination. The judge forms his conviction after having ordered, where necessary, all measurements of instruction which he considers useful. Any provision or any contrary act with regard to an employee is null and void.”

Approximately all types of decisions are covered by this provision: hiring, training period, trial period, dismissal, disciplinary measures, retirement and all measures relative to the life of the contract of employment. The list of grounds prohibited by French law is considerable. These do not include employment status (part time, ...) that is essentially an issue of indirect discrimination on the basis of sex (See the case law of the EC¹). The main grounds will be exposed in the following developments. In proportion with the discrimination that exists in companies, the number of actions before the courts is quite limited, especially with regard to equality between men and women which appears as the main discriminatory ground. The only ground that is frequently invoked is trade union discrimination, especially since the extension of the rules of burden of proof to trade union discrimination².

1) Sex

Discrimination between men and women traditionally constitutes the main issue of discrimination law. The influence of EC law has been essential.

a. Contributions of EC Law to French law

The principle of equality between men and women at work was enacted by the Rome Treaty; several directives have completed its enactment : the 1975 directive concerning remuneration³, the 1976 directive concerning equality between men et women in access to employment, training and work conditions⁴, the 1992 directive relative to pregnant women, the 1996 directive that concerns parental leave, the 1997 directive relative to the burden of proof in case of discrimination on the basis of sex⁵, the 2002 directive that modifies that of

¹ Bilka, CJCE, 13 May 1986, aff 170/84); ., December 6th, 2007, aff. C-300/06, Voß c/ Land Berlin.

² Premier bilan de la loi du 16 novembre 2001 relative à la lutte contre les discriminations, rapport de M T Lanquetin et M Grevy, pour la Direction de la Population et des Migrations (DPM) du ministère de l'Emploi et de la Solidarité, 2005.

³ Directive of 10 February 1975, JOCE n°L45 du 19 February 1975.

⁴ Directive of 9 February 1976, JOCE n° L 39 du 14 February 1976.

⁵ Directive of 15 December 1997, 97/80/CE, JOCE of 20 January 1998.

1976⁶, the 2006 directive that modifies, clarifies and completes existing directives concerning equality between men and women"⁷. The main contributions of EC law to French law relative to sex discrimination have been the following:

- **Equality of remuneration:** the determination of the remuneration of employees should be the same for men and women. Any discrimination resulting from collective agreements should be eliminated, which means that a bonus based on sex should be bilateralised.
- **Indirect discrimination:** for the same work all discrimination, including indirect discrimination, should be eliminated. Indirect discrimination plays an essential role, notably with regard to part-time work, considering far more women work part-time than men⁸. The 1997 Directive defined indirect discrimination as follows: it is sufficient that the decision (neutral in appearance) affects in fact far more persons of one sex than the other, for there to be a presumption of indirect discrimination. Nevertheless, objective elements, independent of sex; can justify the decision, that must be "appropriate and necessary" (art 2,2).
- **Proof :** the employee has to prove facts that, in appearance at least, let believe that a discrimination exists. Then, the employer must prove that the difference of treatment is justified. (directive 1997)
- **Positive action:** EC law admits positive actions that are temporary, in favour of a sex under-represented. According to the European Court of Justice, these positive actions must be strictly interpreted. Nevertheless, EC law, through the case law of the European Court of Justice, is more and more open to positive action. Under the Kalanke case law⁹, directives promoting equality of chances (which can implicate positive action) had to be strictly interpreted, and not be "absolute nor unconditional". According to more recent case law, the ECJ tends to balance equality of treatment and equality of chances, through a control of proportionality¹⁰.

Although EC law is essentially targeted towards sex discrimination, it contains a wider principle of discrimination. Directive June 29th 2000 concerns the principle of equality of treatment between persons, without any distinction on the basis of race or ethnic origin¹¹. Directive November 20th 2000 covers a wide range of discriminatory grounds (those provided for in the Amsterdam Treaty) that go beyond work. As a consequence, EC discrimination law is not limited to sex discrimination.

b. In French law

French provisions on discrimination are directly influenced by EC law. Two periods may be isolated: the pre 2001 directive, and the post 2001 directive period. This directive has indeed considerably developed discrimination law.

b.1. equality between men and women : first period

Concerning equality between men and women in general, the first statute law of implementation of EC law relative to sex discrimination is the law of July 13rd 1983, that

⁶ Directive of 23 September 2002, JOCE, 5 October 2002.

⁷ Directive of 5 July 2006, n° 2000/54, JOCE 25 July 2006.

⁸ CJCE March 7, 1996 ; 2 oct 1997.

⁹ CJCE October 17, 1995, aff C-450/93, Eckhard Kalanke.

¹⁰ CJCE September 30, 2004, aff C-319/03, Briheche.

¹¹ Directive, June 29, 2000, JO L 180, July 19, 2000.

constitutes a chapter of the labour Code called "professional equality between women and men". It lays down the principle of non discrimination, the possibility to carry out "positive discrimination" through temporary measures, in order to favour equality of chances for women (art L 123-3 Labour code). All discriminatory provisions, even indirect, inserted in a collective agreement, are void (Art L 123-2 Labour code; Cass. soc. April 9th 1996, CSB 1996, A44, 203);

Concerning remuneration, the title of the labour Code relative to remuneration contains a preliminary chapter entitled "equality of remuneration between men and women". As a result of these provisions, a provision that would create a disparity of remuneration between men and women is void; the highest remuneration of the two will be substituted¹². For example, if a contribution for the payment of a day-care centre is granted exclusively to women, it shall be also given to men¹³;

Concerning proof, it is stated that "the employer must provide the judge with the elements likely to justify the inequality of remuneration ...; doubt shall be interpreted in favour of the employee". On the basis of the EC directive, the French Cour de cassation considered that the reasoning should be the following: the employee has to prove facts that, in appearance at least, let believe that a discrimination exists. Then, the employer must prove that the difference of treatment is justified.

The same reasoning has been applied by the French court to trade union discrimination, although no legal basis existed in French law¹⁴.

b.2. Generalisation of the system : second step

The statute law of November 16th 2001, that has also been enacted to implement EC law has considerably enriched French law relative to non discrimination. Its main contributions are the following:

- widening of the scope of discrimination law to other grounds of discrimination, in particular age
- adoption of the rules of the 1997 directive relative to proof. The Cour de cassation had already applied similar rules, before the implementation of the directive (see above).

2) Race

Race discrimination is prohibited and litigation essentially concerns hiring in private companies. Most of the cases interest the criminal judge, and proof is mostly brought through testing¹⁵.

3) Trade union membership

Trade union membership was the first prohibited discrimination, considering the important degree of exposure of trade union members to discrimination. Any person who is involved in trade-unions is protected, even those who have no mandate for a union¹⁶. The most current examples of trade union discrimination are:

- disparity of remuneration in favour of non unionists

¹² Art L 140-4 Labour code.

¹³ Cass. soc. February 17, 1971, CSB 1991, n°29, A 3.

¹⁴ Cass. soc. March 28, 2000, Droit social 2000, 593.

¹⁵ L. Collet-Askri, Testing or not testing?, D. 2003, n°20, chron.

¹⁶ Cass. soc., sept.28,2005, no 04-40.048.

- substantial change in the evaluation of the employee since he has been unionised.
- refusal of a promotion without justification

The judge will have to verify that the employer invokes objective elements, unrelated to union discrimination.

4) Sexual orientation

Article L 122-45 prohibits discrimination on the basis of sexual orientation, essentially homosexuality. Yet, the issue is not always treated as one of discrimination but more often as one of privacy.

5) Origin, nation

Case law is rare relative to origin or nation. A recent case has been given much publicity: the Cour de cassation has admitted that a bonus can be given exclusively to foreign workers without any discrimination. Indeed, by facilitating the hiring of foreign workers, this bonus enables the creation of areas of scientific excellence¹⁷.

6) Handicap

The law n°2005-102 of February 11th 2005 states new rules in order to favour access to employment for handicapped people. Is considered as a handicapped worker, any person whose possibilities to obtain or keep a job are effectively reduced following poor or diminished physical and mental capacities. (art L 323-10 Labour Code).

Handicapped persons can ask for specific working hours to facilitate their access to employment. Those in charge of helping these people have the same advantages. Wages of handicapped people cannot be lower than the minimum wage. No diminishing of wages is admitted due to the possible weaker efficiency of the work of handicapped persons. However, the employer, after approval by the administration, can benefit from state aids.

Employers must take all proportionate measures to adapt the worker and his working environment to the handicap, the absence of appropriate measures being likely to constitute discrimination (art L 323-9-1 Labour code).

Moreover, all companies of 20 employees or more are obliged by the law to hire handicapped people, in a proportion of 6 % of the total workforce. Employers can however replace this obligation by paying a contribution to an association, which most companies choose to do.

The French body in charge of discrimination (HALDE) has adopted a series of recommendations concerning handicap:

- the breach of the trial period because of the incapacity of the employee (recognised by doctors) to accomplish most of the tasks of the job offered is not a discrimination on the basis of handicap (Délib. Halde n° 2007-294, 13 nov. 2007)
- the non recognition by the employer of diploma delivered to handicapped persons constitutes an indirect discrimination based on handicap (Délib. Halde n° 2007-239, 1er oct. 2007)
- the decision of the employer not to reinstate a handicapped employee who has been declared invalid, without taking the appropriate measures to enable him to continue his job, constitutes a discrimination (Délib. Halde n° 2006-226, 23 oct. 2006).

¹⁷ Cass. soc., nov.9, 2005, no 03-47.720, Bull. civ. V, no 312.

7) Health

Discrimination on the basis of health is prohibited since a statute law of July 12th 1990. An employee cannot be dismissed because of his sickness. But, through recent case law, he can be dismissed if long or repeated absences from work have caused trouble to the functioning of the company and make his permanent replacement necessary¹⁸.

8) Family situation

Discrimination is prohibited where it concerns the family situation of the employee (married, divorced ...), including the child/parent relationship. In a case of June 1st 1999, the employer had announced that he would not accept to hire children of employees of the companies. In that case, it was proved that the true reason for the dismissal of an employee was that it was discovered that she was the daughter of a company employee¹⁹.

9) Age

a. Prohibition of age discrimination

Article 13 of the Amsterdam Treaty includes age among the prohibited discriminations. Age discrimination is recognised since 2001 in France. But before, the courts were not indifferent to it, as proves a famous case concerning the "Folies Bergères". Article 35 of the company agreement of the Folies Bergères provided that 39 was the maximum age for dancers. Although age was not, even before 2001, a fair ground for dismissal, the Court of Appeal of Paris considered that the dismissal of a dancer who had reached 39 was justified for reason of the specificity of the job, of the consequences of age on the job of dancer. The decision of the Court of appeal was quashed by the Cour de cassation on the ground that "the dismissal could only be justified by a ground independent of the age of the employee"²⁰.

Today, age discrimination interests several provisions of the labour Code. A statute law of November 16th 2001, that implements the EC directive of November 27th 2000, has added age to article L 122-45 of the labour Code that contains a list of prohibited discriminations, and declares void any decision in violation of anti discrimination rules. This modification of the provision has had direct impact on the case law.

What happens if an employer puts out to pasture an employee in violation of the rules on retirement? On the basis of French statute law, the retirement becomes a dismissal in such case, which raises the question of the nature of the dismissal. In French law, illegality of the grounds for dismissal gives rise to damages (unfair dismissal: "licenciement sans cause réelle et sérieuse"), and in very specific cases that include discrimination and more generally violation of fundamental rights, nullity of dismissal. Before the 2001 statute law, the sanction of such dismissals (putting out to pasture someone in breach of the rules on retirement) was the payment of damages (unfair dismissal). The Court of cassation changed its position in a case of December 21st 2006, deciding that the dismissal was void. This case is a direct consequence of the 2001 statute law that includes age among discriminations²¹. Why is this decision an age discrimination case? Because once it is considered that the decision of the employer cannot be based on retirement, there only remains age, which is a prohibited ground for dismissal.

¹⁸ Cass. soc. July 16, 1998, Droit social 1998, p. 950, A. Mazeaud.

¹⁹ Cass soc June 1, 1999, Bull. Civ. V n°249.

²⁰ Cass. soc. December 6, 1995, Bull V n°331.

²¹ Cass. soc., 21 déc. 2006 : D. 2007, p. 4, obs. J. Cortot.

By virtue of Article L 122-14-2 Labour code, the prohibition to dismiss someone on the ground of age is completed by the prohibition of provisions in contracts of employment or collective agreements that define an age at which the contract will end ("clauses couperet"). All provisions that would put an end to the contract of employment on the ground of age are void.

By virtue of article L 321-13 of the labour Code, an employer who would dismiss an employee of 50 or more has to pay a contribution to the national employment organisms, which can deter employers to dismiss elderly employees: the contribution sometimes reaches a year of wages.

b. Prevention of age discrimination

Proof of age discrimination is so difficult, despite the rules on the burden of proof, that prevention is essential. According to art. L. 132-27 of the labour Code (as modified following the reform of the law of retirement in 2003), age as well as race and sex, must be taken into account in the works of the national commission for collective bargaining.

B. The Justification of Differences of Treatment²²

1) Justification of indirect discrimination

The issue of justification mainly concerns indirect discrimination. Indirect discrimination is expressly prohibited by French law, since 2001, under article L 122-45 Labour code. But, French courts have traditionally been reluctant towards acknowledging the existence of indirect discrimination, which has had the effects that most cases lead to the conclusion that the difference was objectively justified. A case decided by the Cour de cassation in January 2007 ruled, for the first time, in favour of indirect discrimination. The provision of a collective agreement, that instituted a complex mechanism of bonus, was considered "apparently neutral, but as constituting indirect discrimination on the basis of the health of the employee"²³. This decision opens a new era in the fight against discrimination in collective agreements, since numerous provisions of such agreements might be scrutinised on the basis of indirect discrimination. Provisions, that were not intended to be discriminatory, may be considered as such²⁴.

According to case law (essentially decisions from the ECJ considering the limited application of indirect discrimination before French courts) several elements constitute a justification of indirect discrimination: qualification, seniority, professional skills, diploma, experience, responsibilities.

First, the legal situation of the employee or applicable norms within the company can justify differences of wages. For example, a collective agreement can organise differences of wages due to the experience of the employee in the type of job accomplished²⁵.

Second, the difference of treatment can result from criteria based on the person of the employee. Seniority and diploma can justify differences of treatment. An employer can hire a

²² (with regard to EC law) : M. A. Moreau, *Les justifications des discriminations*, Dr. soc. 2002, p. 1112; (with regard to French law) : *La Semaine Juridique Social* n° 12, 20 Mars 2007, 1179 ; F. Héas, *Discrimination et admission de différences de traitement entre salariés*, JCP S 2007, 1179.

²³ Cass. soc. 9 janv 2007, n° 05-43.962, RDT 2007, p. 245, obs. Miné.

²⁴ M. Miné, *préc.*

²⁵ Cass. soc., May 3, 2006, n° 03-42.920 : *Juris-Data* n° 2006-033329 ; *Bull. civ.* 2006, V, n° 160 ; *JCP S* 2006, 1496.

candidate with more diploma and who occupied similar functions in his former company, rather than promoting someone from the company²⁶. As to seniority, the ECJ has limited its scope in the Cadman case (CJCE, 3 octobre 2006, aff. C-17-05): the claimant was paid, for equal work, less than four male employees, the difference being justified by their length of service. The employer accepted that the salary scale had a disparate impact on female employees but maintained it was necessary to reward increased expertise arising from experience on the job. The ECJ, approving Danfoss²⁷, held that an employer does not have to provide specific justification for using length of service as a criterion in a pay system unless an employee can raise serious doubts about whether greater length of service enables a job holder to perform better.

Third, the difference of treatment can also be justified with regard to the working conditions and the working environment. A difference of remuneration is thus non discriminatory if it is justified by a promotion decided through an objective procedure before an independent jury²⁸.

2) Justification of direct discrimination

Justification of direct discrimination is exceptional. It originates essentially from case law. The Conseil d'Etat (the highest administrative court in France) has refused to consider as discriminatory the provisions of the decree of December 23rd 2004 concerning the maximum age to be a pilot in air transport. It said that the age restriction (55) responds to a legitimate and proportionate objective of the good functioning of air transport and protection of workers. It adds that pilots may be offered, then, a job that would not involve flying²⁹.

Another example is offered by the possibility to favour foreign workers that apply for a job in France, the justification being the creation of areas of scientific excellence³⁰. This case is nevertheless very criticised with regard to EC law (articles 12 and 39 of the Treaty) that prohibits "all discrimination for reason of nationality".

C. The Principle: Equal Work, Equal Pay

The principle of equality goes further than the only prohibition of discriminations, in the field of remuneration, by requiring effective equality of treatment. In a famous case Ponsolle (October 29th1996), the Cour de cassation gave birth to the principle "equal work, equal pay". Since then, this principle is frequently repeated by the French court. It requires equality of treatment, not only between persons of different sex, but also between workers of the same sex: it requires, as a consequence, equality between two men, or between two women. As soon as it was recognised by the courts, the principle "equal work, equal pay" was largely invoked by employees before the courts.

It rapidly appeared too broad, and too restrictive of the power of the employer, who was about to loose his power of individualisation of the remuneration of workers. As a consequence, the Cour de cassation introduced possible justifications. Differentiation is thus possible on the basis of seniority, efficiency or quality of work, or any element that shows

²⁶ Cass. soc., October 25., 2006, n° 04-45.536.

²⁷ CJCE October 17, 1989, aff. 109/88.

²⁸ Cass. soc., October 17, 2006, n° 05-40.393

²⁹ CE, Apr. 25, 2006, Assoc. « Avenir navigant » et a. : JCP S 2006, act. 191 ; Europe 2006, comm. 239.

³⁰ Cass. soc., Nov. 9, 2005, no 03-47.720, Bull. civ. V, no 312.

disparity in the value of the work of two employees. These limits are broadly interpreted, as proved by a case decided on June 21st 2005. An employee, back from sickness leave, required the same wages as the employee who had been hired to replace her. The employer succeeded before the court by arguing that the employee had to be hired in urgency (the administrative authorities had threatened to close the establishment) and that finding an employee of the required skill was difficult (head of a day-care centre³¹).

D. Positive Action

A recent decision of the Constitutional council proves its reluctance towards positive action. A statute law had required a move to parity within boards with private and public companies, through positive action. The statute law was intended to give more decision-making power to women within companies. The Council states that the consideration of sex should not prevail the merits and talent of workers³².

II. Proof and Remedies

The right to appeal before a court is protected both by French law and by EC law (Concerning discrimination, see Directive 2006, art 17). Nevertheless, it is proved that the judge cannot be the sole actor in the fight against discrimination. Notably, social partners have an essential role to play, through the conclusion of collective agreements concerning equality and non discrimination.

A. Proof

The rules relative to proof, introduced in French law in 2001, have been adopted through the implementation of EC Law. The system, considered favourable to employees, does not consist of putting the burden of proof on the employer, but shares the burden of proof between both employee and employer. The employee, the applicant for a job, or the trainee, has to prove facts that, in appearance at least, let believe that a discrimination exists. For example, an employee, from Cameroon, will establish that he is the only employee of the establishment who has not been given a bonus in December. If the judge considers that it establishes an appearance of discrimination, it will be to the employer to prove that the difference of treatment is not discriminatory, but based on objective grounds.

The rules relative to proof apply to all forms of discrimination, even if they were conceived concerning sex discrimination.

B. Remedies

The legislator has chosen the most radical sanction for discriminations: the decision taken by the employer is void. This sanction concerns decisions adopted by the employer (notably dismissals) but also provisions of collective agreements, works rules. If a dismissal is void, the employee will be reinstated, eventually through an urgency procedure (*référés*). He will be granted compensation equivalent to the wages he would have earned between his

³¹ Cass . soc. June 21, 2005, n° 02-42658.

³² Déc. n° 2006-533 DC, 16 mars 2006, AJDA 2006, p. 632); Revue de droit du travail 2006 p. 72.

dismissal and the day of reinstatement. If the employee chooses not to be reinstated, he will have the indemnities applicable to all dismissals (should they be fair or unfair) as well as an indemnity covering the irregularity of the dismissal; the latter indemnity should repair the whole damages suffered by the employee.

If the discriminatory measure is not a dismissal, the sanction may be different. If an employee has not been granted a bonus, or a leave, he can ask to be given this bonus or leave.

C. Measures of protection of victims of discrimination

The law relative to discrimination is completed by specific rules of protection of workers in a context of discrimination.

1) Collective protection

a. Right of alert

It was created by a statute law of December 31st 1992, and codified at article L 422-1-1 Labour code. It can be used by the *Délégués du personnel* who are Employee representatives within the company. In case of breach of rights of the person or individual freedoms within the company, resulting from discriminatory measure relative to hiring, remuneration, training,disciplinary measure, dismissal, staff delegates can require the employer to investigate and put an end to the situation. If the employer remains silent, an action can be brought before the judge by the employee, or the staff delegate if he has the approval of the employee.

b. Substitutive action

In certain situations, including discrimination, statute law authorises trade unions to sue the employer instead of the employee, without having to prove any mandate by that employee.

2) Individual protection

a. Protection of witnesses

Article L 122-45 indented line 3 protects the workers who testify in favour of an employee who makes a complaint of discrimination. It applies even if the complaint turned out to be unjustified.

b. Protection of the victim of discrimination

A dismissal following an action of the employee against his employer is void, should the action of the employee reveal unjustified (Cass. soc., Nov. 28 th 2000, no 97-43.715, Bull. civ. V, no 395).

c. Work inspectors

Work inspectors have access to all document useful to detect discrimination, and can issue a charge sheet if they observe discriminatory facts.

d. The HALDE

Since 2004, a special body has been created, that has an essential role in the fight against discrimination: HALDE. Any discrimination case, direct or indirect, prohibited by statute law or by an international convention to which France is a party, can be brought before the

HALDE. The main task of the HALDE is to ensure the efficacy of the legal mechanisms prohibiting discrimination.

Any person who considers to be victim of discrimination can submit a case to the HALDE, as well as any association officially declared for at least five years before the occurrence of the facts.

The HALDE has been given four main tasks:

- Investigation, which authorizes the members of the HALDE to require informations, explanations and the necessary documents.
- Assistance (consists of advising the victim as to a possible action before the courts) and mediation (the HALDE can itself carry out mediation)
- Issue recommendations to put an end to practices: the author of such practices is obliged to inform the HALDE of his compliance to such recommendations. If not, there will be an official report which will be harmful to the reputation of the company.
- Promotion of equality through various actions (training, meetings...)

Due to the success of the HALDE, the legislator has reinforced the attributes of the HALDE by granting it a power to conclude with the employee and the employer a transaction, which will notably include damages.

III. Discrimination and Employment

A. Legal Provisions

Age discrimination has been recognised as the principle source of discrimination in French companies. According to a recent study by the French Observatory of discriminations, age constitutes the first cause of discrimination in hiring, very closed to ethnic discrimination that comes second. According to this study, a candidate aged 50 will receive three times less positive answers for a hiring meeting than a male aged 30. The same study shows that an Arabic candidate has only 36% chances to be asked to attend an interview for the job.³³ The method adopted to reach such results was "testing". Six candidates were selected for the test: a man aged 30, whose name suggests that he is of French origin (his curriculum vitae contains no photo); a man aged 50 ; a mother of three children ; a man whose name is from Arabic origin; a candidate registered as handicapped, a candidate with an ill-favoured face. These candidates have answered to 1340 job offers of all types, in enterprises of all sizes, in all regions of France and all sectors.

1) Age and hiring of workers

For a long time, the link between age and employment policy was limited to a provision of the labour code that prohibits a maximum age, as a criteria for hiring workers³⁴. The problems encountered by elderly persons to find a job has led to new provisions, in the statute law of November 16th 2001, that allow exceptions to the prohibition of discrimination on the basis of age.

"Differences of treatment on the basis of age do not constitute discrimination where they are objectively and reasonably justified by a legitimate objective and that the means to reach this objective are appropriate and necessary.

³³ Les Cahiers Lamy du CE - 2007 - n°56 01-2007.

³⁴ Art L 311-4 C. trav.

These differences can notably consist of:

- prohibiting access to employment or to introduce specific work conditions in order to protect young and workers of a certain age.
- stating a maximum age for hiring, based on the training required for the proposed job or on the necessity of reasonable training period before retirement " (art L 122-45-3).

2) Age and dismissal

Age is an element the employer is obliged to take into account in case of Economic dismissal. In selecting the employees who will be dismissed, the employer must take into consideration, notably the "situation of employees with social characteristics that make their reinsertion difficult, notably handicapped persons and elderly people" (Art L 321-1 Labour Code).

B. Contracts of Employment

1) Favours the employment of the elderly :

There exists since a statute (decret) of August 29th 2006 a fixed term contract exclusively intended to aged workers: the "CDD Seniors". It is limited to senior workers of 57 at least, and cannot be longer than 36 months. Any employer can have recourse to this specific contract. This mechanism is intended to promote the employment of aged workers, and has been conceptualised by the social partners in a national collective agreement in 2005. A recent study shows that, after one year of application, about twenty employees were offered such a contract, which is evidently an indication that the CDD senior failed.

This mechanisms was feared to be contrary to EC law, in the light of the Mangold case that concerned a German statute law on the employment of senior people. German law intended to authorise, without restrictions, the conclusion of successive fixed term contracts where workers were at least 52. The only exception was that the fixed term contract was in close connection with an unfixed term contract previously concluded with the same employer. This statute law was considered contrary to EC law (CJCE, Nov. 22nd 2005, aff. C-144/04, Mangold c. Rüdiger Helm).

In that case, the ECJ agrees with the German government that the contract intends to help access to employment for people of a certain age, which is considered as a legitimate purpose. But for the ECJ, the breach of EC law did not concern the purposes of the regulation, but the means utilised to reach that purpose : age was the sole criterion to allow an employer to conclude such contracts, which is considered by the European court as insufficient.

In its reasoning, the ECJ demonstrates that three elements should be taken into account when appraising a device, likely to be criticised in terms of discrimination: equality, professional integration, and stability of employment (point 64 of the Mangold case). The latter point should raise attention: to what extent should access to employment prevail over precariousness of the employment offered? It is an essential point in the current French debate on employment law. The French government has enacted new contracts (Contrat nouvelle embauche, Contrat première embauche) that can be terminated at will (which means a lack of stability for the employee) but are supposed to encourage companies to hire workers. One of these contracts, the CPE, requires attention since it focuses on young workers.

2) Favoring the employment of the young

The Contrat Première embauche, called CPE, was restricted to applicants to a job aged

under 26. Under this contract, the employer could terminate at will during the first two years, in derogation to French labour law which requires a fair ground of dismissal. This new contract was clearly aimed at favouring the hiring of young persons, with limited experience. It never entered into force due to massive demonstrations against it, notably within French universities. The main criticism against the CPE concerned the derogation to the requirement of a fair ground for dismissal, but age discrimination was another issue about this contract. Even if the issue was not raised before the ECJ, is such a device possible, since the Mangold case?³⁵

With regard to the 2000/78 directive, the CPE raises questions as to its compliance with EC law. The criticism does not concern the objective pursued by the French legislator. It is not in doubt that the French legislator intended, considering the precarious situation of young people in France with regard to employment, to facilitate their access to employment, notably for those with low qualifications. Indeed, this constituted a "legitimate", "appropriate and necessary" difference of treatment. Moreover, the directive endorses this objective and the ECJ has confirmed in the Mangold case the possibility to enact a derogation to EC law on the basis of this objective. Again, the difficulty would concern, not the objectives, but the means: are they appropriate and necessary? Is the CPE not too rigid with regard to the objective of helping young people to find employment, and inappropriate to the objective pursued? In the Mangold case, the ECJ condemned a regulation whose application exclusively depended on age, without taking account of the structure of the labour market and the personal situation of the person, notably his situation with regard to unemployment.

Could French law base itself exclusively on the age of the worker, without taking account of the difficulties he may have encountered to find previous employment, his absence of experience in the proposed job, his lack of competence or the inadequacy of his competence? It is not clear that a legislation that favours dismissal is adequate to fight against unemployment. If the CPE had survived, such questions would have probably been raised before national French courts that are competent to judge the conformity of statute law to EC law.

Yet, any device aimed at favouring young or older employees will have to be confronted to EC law, and is subject to scrutiny as to both its objectives and its means.

IV. Current Issues

A. Points of Focus

1) The position of the HALDE

a. 2007 Report ³⁶

The report shows an improvement: numerous companies have shown willingness to move towards diversity, by signing documents such as codes of ethics; some of them have created a body or designated a person in charge of these problems. Reasons appear to be frequently the image of the company. Despite this improvement, there appears that companies,

³⁵ P. Rodière, *Semaine Sociale Lamy* - 2006 - n°1266 19-06-2006.

³⁶ C. Sachs-Durand, *Analyse rapide du dernier rapport de la HALDE : « Des pratiques pour l'égalité des chances : que répondent les entreprises à la Halde ? »*, *Revue de droit du travail* 2007 p. 659.

as a whole, have not developed a global policy of promoting diversity. According to the HALDE, such a politics should contain an organization dedicated to the objective of diversity, agreements with trade unions.

- yet, whistle-blowing, that has been introduced in some companies, seems not to succeed due to the lack of acculturation of workers to this mechanism
- companies, in their policy in favour of diversity, tend to favour sex and handicap. People originating from certain urban areas (with social difficulties) have given rise to specific actions. On the opposite, companies are reluctant towards mores and sexual orientation.

It is said in the report that these policies in favour of diversity and non discrimination are nearly exclusively developed by large companies, involved in the world market and who have developed, in a way or the other, a policy of "social responsibility".

b. Proposals of the HALDE for 2008 (17 December 2007), concerning employment

- promote the access of young people to work experience schemes and season work
- promote the employment of seniors and their access to professional training
- suppress all form of discrimination as to the family situation of employees, notably with regard to employees who are "Pacsés". The PACS is a contract concluded between 2 persons of different sex, or of the same sex (it was mainly created to enable gays to have an official situation) that organises their personal life (notably with regard to capital)
- give an institutional basis to social dialogue relative to non discrimination, including subjects such as seniors, social orientation, or minorities. More precisely, the objective to develop discrimination as a normal topic for collective bargaining at both sector and company level.
- improve transparency and efficiency of the process of hiring (in the private sector, adoption of the decree enabling the entry into force of the anonymous CV; in the public sector, reflection on the contents of exams and the composition of the panels that select the applicants)
- promoting whistle-blowing in the field of moral harassment

2) The anonymous CV

A statute law of March 31st 2006 has introduced the anonymous CV in the Labour code. According to the law, " in companies of 50 employees or more, the information referred to article L 121-6 and communicated by a written document by the applicant for the job have to be examined in a way that protects anonymity. The modalities of application of the current provision will be laid down by a decree". For now, the decree has not been passed.

Certain companies have adopted the anonymous CV, even before the coming to force of the statute law. A famous insurance company has introduced the anonymous CV since June 1st 2005. The CVs received through internet have been made anonymous before being transmitted to the recruiters. The pieces of information not transmitted to recruiters are: name, age, sex, place of birth, nationality, address and e-mail address. The anonymisation is carried out automatically through computer programs and supervised by an independent administrator.

3) Fighting new forms of discrimination

New forms of discretion have raised some focus: they concern social practices and relations within the company: prejudices towards certain employees, not invited to some meetings, informed later than the others of jobs that may be opened in the company These practices, that can in particular affect elderly employees, cannot be fought against on the basis of classical discriminatory grounds³⁷.

4) The role of collective actors

Each year, in all companies of 50 employees at least, the employer is bound to present to worker representatives a report on the compared situation of men and women in the company, on the basis of appropriate criteria³⁸. The report indicates the measures taken to ensure equality and the aims for the coming year, and if necessary the reasons why the actions that had been announced in the name of equality have not been realised. This report is transmitted to the work inspector, which proves the importance attached by the law to this document. The works council can, in companies of more than 200 employees, constitute a commission for equality.

Alongside this report, collective bargaining is encouraged in the field of non discrimination, and national³⁹ as well as company agreements have been signed for this purpose⁴⁰. The legislator included, in 2005, equality among the subjects of the duty to bargain⁴¹.

B. General Issue : Fundamental Rights and the Control of Power within the Company

The employment relationship has a two-tiered nature: it is both a contractual and a power relationship. Discrimination is not essentially an issue of contract, but of power. Individuals who are subject to power, should it be public (that of the State) or private (that of the employer for example) should be treated equally. The control of power is indeed one of the main issues for labour law, and an essential evolution of French labour law consists of an increase in the control of the power of the employer. The most topic aspect of this evolution concerns the insertion of fundamental rights within the employment relationship. The employee is not seen as a mere contracting party, but most of all as a person with all the attributes of a person: a sex, a race, a family, an age ... Contrary to contract law or company law that has a very limited vision of the individual, labour law approaches the individual as a true person, with all its attributes. Discrimination law has played an essential role in this mutation.

The counterpart is the duty of the employer to take account of the fundamental rights of the person in his decisions. More precisely, power must be exercised according to two series of values: on the one side, the fundamental rights of employees, on the other the interest of the enterprise. This combination is realised through a principle of proportionality provided for by article L 120-2 Labour code: "no one can limit the rights of persons, the individual and

³⁷ M. Mercat-Bruns, La discrimination fondée sur l'âge : un exemple d'une nouvelle génération de critères discriminatoires, *Revue de droit du travail* 2007 p. 360.

³⁸ Art L 432-3-1 , D 432-1 Labour code;

³⁹ ANI, 1 March 2004; M Miné, L'accord sur l'égalité professionnelle au regard du droit européen, *Liaisons soc. europe*, n°101, 14 April 2004.

⁴⁰ At Peugeot, EDF ...

⁴¹ Art L 132-27-2 Labour code.

collective freedoms in a way that would not be justified by the nature of the task to accomplish nor proportionate to the aim pursued". This provision has followed a report by Gerard Lyon-Caen aimed at improving the respect for civil liberties inside the company, especially at the moment of hiring. Article L 120-2 is now, alongside article L 122-45 relative to discrimination, the most essential tool of protection of fundamental rights in the employment relationship.

This provision has introduced a general duty of justification of employer decisions, in other words a duty to justify the exercise of power in the company for all types of decisions (should it concern dismissal, hiring or any other aspect or period of the employment relationship). For example, an employee may oppose the application of a mobility clause, because the change of place of work has consequences on her or his family life. The right to a normal family life, as laid down by article 8 of the European Convention on Human Rights has been recognised by the Court of cassation as a limit to the power of the employer concerning changes in the employment relationship⁴².

On the other side, article L 120-2 also means that restrictions to fundamental rights are legitimate if they are justified and proportionate. Indeed, it is accepted that the employer can limit fundamental rights if it is justified and proportionate with regard to the interest of the enterprise. This reasoning extends to discrimination cases. Two examples may be given. The first concerns discrimination based on health. The dismissal of a sick employee may be justified where the absence of an employee due to sickness objectively affects the good functioning of the company and renders necessary the replacement of the sick employee. Here, we can see a shift from a prohibited personal ground (health) to an objective ground (the interest of the enterprise) : the dismissal is not grounded on health (discriminatory) but on the functioning of the company, and is thus valid if the principle of proportionality is satisfied. The second example concerns discrimination on the basis of religion, with the specific issue of the Islamic veil. How should courts deal with the issue of the veil? Several courts of appeal have dealt with the issue; the Cour de cassation has not yet. First, it is likely that the question of the veil will be dealt with as a religious issue, and not only as an issue of clothing (the Cour de cassation recognises the "freedom to dress as one wishes" as an individual liberty protected by article L 120-2). Second, the issue is that of the justification of the prohibition of wearing the veil: the existing decisions develop a test of proportionality, taking account of the consequences of the veil on the image and reputation of the company⁴³.

⁴² Cass. soc. January 12, 1999, Bull civ V n°7.

⁴³ Paris; June 19, 2003, D. 2004, somm. 174; Cons. prud'h Lyon, January 19, 2004 and Conseil prud'h Paris, December 17, 2002, Dr. Soc. 2007, p. 358, obs Savatier.

Australian Anti-Discrimination Laws – Framework, Developments and Issues

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Abstract

Australian anti-discrimination laws reflect an individual complaints-based model of anti-discrimination laws, seeking to address discrimination and inequality by providing individual victims with the right to take legal action against the individual discriminator for compensation. Under this fault-based system, employers are prohibited from discriminating and, in the event of transgression, liable to the victim but otherwise not specifically required to be proactive in eliminating discrimination or promoting equality.

While they were radical at the time of their introduction, over thirty years ago, the significant limitations of Australian anti-discrimination laws in addressing the many different forms of discrimination have since surfaced, signalling the need for development. While the objective of these laws is ‘to eliminate discrimination,’ the regulatory mechanisms in the legislation are largely ineffective at achieving this goal.

In this paper, I provide an outline of the current anti-discrimination laws in Australia (II), an analysis of the regulatory framework established by this legislation (III), and a closer look at the elements and difficulties relating to proof of direct and indirect discrimination within this framework (IV). Following a brief outline of affirmative action legislation (V), I note three recent developments in the final part: the introduction in 2004 of a federal *Age Discrimination Act*; the introduction of ‘Disability Standards’; and the push to establish wider anti-discrimination law protection for workers with family responsibilities. The disability standards are innovative, introducing an obligation to provide reasonable adjustments, but they are only applicable in respect of education, not employment. The new developments in respect of age and family responsibilities discrimination do little more than extend the old framework to cover new grounds, providing a limited right of redress and a symbolic statement, but failing to acknowledge and address the regulatory limitations of the system at large.

I. Introduction

When introduced in Australia in the 1970s, anti-discrimination laws were radical. Now, more than 30 years later, they have changed little and their progressive potential has largely been exhausted. They have played a significant role in raising awareness of discrimination and harassment and reducing the more blatant manifestations of these. However, they have not evolved to reflect new ideas about how to regulate effectively and to address the forms of discrimination that the original regulatory model fails to reach.

Anti-discrimination laws have been introduced in Australia at both the Federal and State/Territory levels, covering a wide range of grounds, generally prohibiting both direct and indirect discrimination across a variety of public fields, including work. For a variety of reasons, these laws were established separately to the primary employment relations laws and institutions. They were designed as general equality rights to apply not only to work but also to other public spheres such as education and the provision of goods and services.

In 2006, Sandra Fredman asserted that '[t]wo different models are emerging for the achievement of gender equality: an individual complaints led model based on a traditional view of human rights; and a proactive model, aiming at institutional change.'¹ Australian anti-discrimination laws certainly constitute the former model, seeking to address discrimination and inequality by providing individual victims with the right to take legal action against the individual discriminator for compensation. Under this fault-based system, employers are prohibited from discriminating and, in the event of transgression, liable to the victim but otherwise not specifically required to be proactive in eliminating discrimination or promoting equality.

In my research, I have been exploring how these anti-discrimination laws operate² and how they might be reformed³ to address inequality at work more effectively. My primary conclusion in respect of the Australian laws is that whilst the objective of these laws is 'to eliminate discrimination,' the regulatory mechanisms in the legislation are largely ineffective at achieving this goal. The regulatory framework characterises discrimination predominantly as a private dispute between individuals, providing mechanisms only for resolving these disputes privately and redressing the individual victim's harm. Other than an impact on the most blatant kinds of discrimination,⁴ the laws do little to enable redress for systemic or structural discrimination, and little to *prevent* discrimination or promote equality more generally. The most recent developments or proposals in Australia – namely, in respect of age and family responsibilities discrimination – do little more than extend the existing framework to new grounds, providing a limited right of redress and a symbolic statement, but failing to acknowledge and address the regulatory limitations of system at large.

¹ Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369, 369.

² Belinda Smith (2006), 'A Regulatory Analysis of the *Sex Discrimination Act 1984* (Cth): Can it Effect Equality or Only Redress Harm?' in C Arup *et al.* (eds), *Labour Law and Labour Market Regulation*, Federation Press; Belinda Smith, 'From *Wardley to Purvis* – How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (2008) 21 *Australian Journal of Labour Law* (forthcoming).

³ Belinda Smith (2006), 'Not the Baby and the Bathwater – Regulatory Reform for Equality Laws to Address Work-Family Conflict'. *Sydney Law Review*, 28(4): 689-732; Belinda Smith, 'It's About Time – For a New Approach to Equality' (2008) (Working Paper, Social Science Research Network at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101187).

⁴ See comments on the effectiveness of the *Sex Discrimination Act 1984* (Cth) in 'Forum: Sex Discrimination Act: A Twenty Year Review' (2004) 27 *University of New South Wales Law Journal*.

In this paper, I provide an outline of the current anti-discrimination laws in Australia (II), an analysis of the regulatory framework established by this legislation (III), and a closer look at the elements and difficulties relating to proof of direct and indirect discrimination within this framework (IV). Following a brief outline of affirmative action legislation (V), I note three recent developments in the final part that illustrate both innovation and limitation: the introduction in 2004 of a federal *Age Discrimination Act*; the introduction of ‘Disability Standards’ in respect of public transport and education; and the push to establish wider anti-discrimination law protection for workers with family responsibilities.

II. Australian Anti-Discrimination Laws – An Outline

Anti-discrimination laws across Australia reflect a relatively uniform regulatory model; federal and state laws vary mostly in respect of which grounds or traits are covered. In outlining this model, I will focus on the Federal laws which apply throughout Australia to both the public and private sectors and which operate in addition to the State and Territory laws.⁵

Without a charter or bill of rights, Australian equality laws have no constitutional force (and few constitutional limitations). The Federal Parliament’s competence to enact anti-discrimination laws arises from its power to enact laws with respect to ‘external affairs’⁶ which includes the content of international treaties and conventions entered into by the Federal Government. For example, the ratification of the *International Convention on the Elimination of all Forms of Racial Discrimination* enabled the federal parliament to enact the *Racial Discrimination Act* in 1975. These laws have no special status and are interpreted and applied by the federal courts as ordinary legislation.

The federal anti-discrimination laws are found in five separate but connected statutes. There are four substantive Acts –

- *Racial Discrimination Act* 1975 (Cth);
- *Sex Discrimination Act* 1984 (Cth);
- *Disability Discrimination Act* 1992 (Cth); and
- *Age Discrimination Act* 2004 (Cth).

These are supplemented by the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) (*HREOC Act*) which establishes the Human Rights and Equal Opportunity Commission (HREOC) as an independent statutory agency charged with the powers and functions to administer the substantive Acts. The *HREOC Act* also sets out the processes for resolving claims made under those Acts.

The coverage of these Acts is summarised below (and more fully in Appendix A):⁷

Act	Ground	Comment on definition of ground
<i>Racial Discrimination Act</i> 1975	‘race, colour, descent or national or ethnic	Not defined; adopts words of the convention.

⁵ The State and territories laws are: *Anti-Discrimination Act* 1977 (NSW); *Equal Opportunity Act* 1995 (Vic); *Anti-Discrimination Act* 1991 (Qld); *Equal Opportunity Act* 1984 (WA); *Anti-Discrimination Act* 1998 (Tas); *Equal Opportunity Act* 1984 (SA); *Discrimination Act* 1991 (ACT); *Anti-Discrimination Act* 1992 (NT).

⁶ *Commonwealth of Australia Constitution Act* (Cth), s 51(xxix).

⁷ See Chris Ronalds & Rachel Pepper, *Discrimination: Law and Practice* (2nd ed, 2004) for a useful summary of all grounds, areas, and exceptions in Australian anti-discrimination laws.

	origin'	
<i>Sex Discrimination Act 1984</i>	Sex	Men and women.
	Marital Status	Symmetrical; covers all heterosexual statuses.
	Pregnancy	Includes potential pregnancy.
	Family Responsibilities	Broad definition of 'family', but does not extend to non-familial caring responsibilities and does not appear to cover same-sex couples and their families. Note: Prohibition limited.
	Sexual harassment	A separate right of action
<i>Disability Discrimination Act 1992</i>	Disability	Very wide definition, covering sensory, physical, and intellectual disabilities as well as mental illness; actual and imputed, temporary and permanent, past, present and future. Also covers associates of those with a disability.
	Disability harassment	A separate right of action
<i>Age Discrimination Act 2004</i>	Age	Applies to all ages and age groups.

There are some notable omissions from this list, such as religious belief and sexuality. These two grounds only have some very limited federal protection against termination of employment in the *Workplace Relations Act*,⁸ and protection under state legislation⁹ which varies across the country.

All federal Acts prohibit discrimination in employment¹⁰ and generally also apply to other work related fields, such as membership of trade unions, partnerships, and independent contractors. In respect of each field, the prohibition applies to every stage including hiring, terms, conditions and benefits, and termination, and also covers retaliation or victimisation for exercising rights under the legislation.

As noted above, a relatively uniform regulatory model has been adopted across all anti-discrimination legislation in Australia. Under this model:

- Discrimination on particular grounds, such as sex or race, is prohibited in particular fields, such as work, at particular stages, such as hiring or firing, subject to specific exceptions. Discrimination is categorised as either direct or indirect, and there is no positive duty to accommodate.
- *Only victims* of prohibited discrimination are given the right to take action against perpetrators to seek remedies for the harm caused. This contrasts with models in other jurisdictions in which the agency has some powers to undertake investigations on behalf of claimants in order to enforce compliance. Federal claims cannot proceed directly to court but must first be lodged with HREOC.
- HREOC, the state agency charged with administering the federal legislation, upon

⁸ 'Sexual preference' and religion are prohibited grounds for termination under section 659(2)(f) *Workplace Relations Act 1996*.

⁹ See ss 6(j) and 6(l) of the Victorian *Equal Opportunity Act 1995* for discrimination prohibitions on the grounds of 'religious belief or activity' and 'sexual orientation' respectively. See also s 49ZG of the New South Wales *Anti-Discrimination Act 1977* for the protection against discrimination 'on the ground of homosexuality'.

¹⁰ *Racial Discrimination Act 1975* (Cth) s 15; *Sex Discrimination Act 1984* (Cth) s 14; *Disability Discrimination Act 1992* (Cth) s 15; *Age Discrimination Act 2004* (Cth) s 18.

lodgement of a complaint, has the power to undertake a very limited investigation to ascertain whether the claim is covered by the federal legislation, and is then empowered to confidentially conciliate complaints. HREOC also has powers to undertake general inquiries into human rights issues in Australia and generally promote the goals of the legislation through education and guidelines.

Complaints that are not resolved through conciliation by the agency may then proceed to be determined by a court or, at state level, an administrative tribunal. The court or tribunal can generally only make orders that are compensatory, requiring the perpetrator to redress the victim for the harm caused. Generally, no sanctions of punitive damages or penalties can be ordered, nor corrective or preventative remedies.

It is worth noting that in addition to the anti-discrimination Acts, there is federal legislation – the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) – which imposes a very limited affirmative action obligation on large employers in respect of women, discussed further in part V below. There is no formal link between this Act and the *Sex Discrimination Act* or their respective agencies.

Commencing with the *Racial Discrimination Act* in 1975, federal anti-discrimination laws in Australia were established separately to industrial or labour laws.¹¹ This historical separation might have undermined the utilisation of equality rights in the workplace (especially by unions who traditionally have used the industrial arena to resolve workplace disputes and bargain for improvements in worker conditions¹²). However, this separation may also be the key reason why the laws fell outside the substantial reduction in worker rights (Work Choices) introduced by the Howard Government.¹³ The Work Choices amendments, which came into effect in March 2006, constituted a very substantial overhaul of Australian industrial relations and constituted a decisive issue in the recent Federal election with the new Australian Labor Party government promising to eliminate many of the more drastic changes.¹⁴ Equality laws were not on the election agenda and the new Federal government has not proposed to make any significant changes (apart from a particular initiative in respect of workers with family responsibilities, discussed in part VI, below).

III. Regulatory Framework – Discrimination Law Rights and Their Limits

Australian anti-discrimination laws are loosely modelled on those adopted in the United States and, at least originally, in the United Kingdom. They could clearly be characterised, using Fredman's expression, as an 'individual complaints led model based on a traditional view of human rights'¹⁵ and as such, the limitations identified in this model apply to

¹¹ One more recent overlap is the prohibition in the *Workplace Relations Act 1996* on discriminatory (unlawful) termination of employment. Section 659 prohibits termination of employment on the ground of 'race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin' and other grounds, subject to some exceptions.

¹² Sara Charlesworth, 'The Overlap of the Federal Sex Discrimination and Industrial Relations Jurisdictions: Intersections and Demarcations in Conciliation' (2003) 6(4) *Australian Journal of Labour Economics* 559-577.

¹³ The *Workplace Relations (Work Choices) Act 2005* (Cth) amended the *Workplace Relations Act 1996* (Cth) (WRA).

¹⁴ Australian Labor Party, *Forward with Fairness – Labor's Plan for Fairer and More Productive Australian Workplaces* (2007) <<http://www.alp.org.au/download/now/forwardwithfairness.pdf>> (accessed 7 March 2008).

¹⁵ Fredman, above n 1.

Australian laws. In some ways, the Australian model is even more individualised than its international counterparts, causing the identified limitations to be magnified.

Being a rights-based model, the Australian laws are designed to eliminate discrimination by placing a prohibition on certain conduct and then, in the event of transgression, giving the victim a right to take legal action against the perpetrator. The limitations of this model can be identified by considering each element: how the standard of behaviour is set, who gets to enforce compliance with the standard, what process is used for enforcement and what consequences flow from transgression. In brief, the key limitations of the model are:

- **The standard is limited to a general and negative or *proscriptive* duty.** The generality provides flexibility but creates compliance uncertainty, and the proscriptive nature of the duty means the system is fault-based, requiring employer action *only* in the event of transgression having been proven and thus only after the occurrence of wrongdoing.
- **There is no enforcement agency.** The enforcement of compliance is limited to victims as no power is given to the administering agency or other public prosecutor to investigate possible breaches, take action against apparent perpetrators, or even support individual claimants in their actions.
- **The sanctions are limited to individual compensation.** The orders that can be made against perpetrators are limited to orders for compensation or redress, not punishment or, more importantly, preventative or corrective orders.
- **The enforcement process is largely private.** Commencing with compulsory, confidential conciliation, beyond which few claims proceed, the process mostly keeps breaches out of public view which limits both the educative and deterrent effect of claims.

The stated objectives of each federal anti-discrimination statute include the normative, public goal of eliminating discrimination.¹⁶ The *Sex Discrimination Act*, for example, states it is designed ‘to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work’ (s 3(b)). However, the formal regulatory mechanisms – providing only an individual right to litigate for individual redress – clearly prioritise an implicit remedial objective of resolving discrimination claims as individual, interpersonal disputes. Victims may get redress in individual cases, but this is often limited to the more blatant, sensational (‘news-worthy’) cases, leaving systemic or structural discrimination largely untouched.

Standard

The central regulatory mechanism of Australian anti-discrimination laws is a general statutory standard that prohibits discrimination.¹⁷ Being a negative or proscriptive duty, employers are simply put on notice that if they do, or continue to, behave in a particular (discriminatory) way, they bear the risk of having to pay for the harm done to victims who can prove discrimination and that the perpetrator caused the harm. This fault-based system means that an employer is not required to do anything unless fault can be identified and attributed to

¹⁶ See the *Disability Discrimination Act 1992* (Cth) s 3, *Sex Discrimination Act 1984* (Cth) s 3, and *Age Discrimination Act 2004* (Cth) s 3. See also the preamble to the *Racial Discrimination Act 1975* (Cth), which states that the Act makes provision for giving effect to the *International Convention on the Elimination of all Forms of Racial Discrimination*.

¹⁷ In a comparative study, Jean Sternlight notes that the US, UK and Australian anti-discrimination laws are very similar in their prohibitions, but they differ significantly in their enforcement procedures. Sternlight J, ‘In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis’ (2004) 78 *Tulane Law Review* 1401 at 1404.

the employer. If there are other causes of inequality and it cannot be proven that an employer contributes to the inequality in the specifically prohibited way, then it will bear no responsibility for addressing the inequality.

Moreover, there is no positive substantive or process duty to identify and eliminate discrimination or promote equality. More specifically, there is no legal duty to identify potential or actual discrimination in the workplace, no duty to educate workplace participants about the prohibition, no duty to establish a policy against discrimination in order to translate the legislation into workplace regulation, and no duty to establish internal grievance procedures to assist anyone who feels they have experienced a breach of the legislation.¹⁸

Of course, many employers have developed workplace discrimination policies and it is arguable that even though the legal rule is a negative one, it has played a role in prompting such action. However, because the legislation does not mandate such behaviour it has no mechanism for monitoring or evaluating it, so employer initiatives are patchy and their effectiveness untested. Whilst corporate policies might be triggered by the legislation, it is not clear the extent to which they reflect business needs at the cost of human rights, fairness and the wider needs of society.

General duties provide for flexible and innovative responses, but pose compliance difficulties – without elaboration through regulations or evidentiary standards, compliance is only certain when adjudicated after the fact. The Australian legislation enables the administering agencies to create guidelines, but these are not statutory and are not recognised as evidentiary standards. Thus the formal mechanism for elaborating on the general duty is through litigation. In this way, the courts are left to provide guidance on the content of the general duty, but can only do so in the context of resolving a particular dispute, leaving other employees and organisations to ponder the applicability of the precedent to their circumstances.

For a number of reasons only a very small proportion of claims made to HREOC proceed beyond confidential conciliation to a public hearing. This means that judges decide few matters - approximately 100 federal matters in 2006-07¹⁹ - with a number of implications. Firstly, court judgments can have an educative or normative effect, informing employers and employees of what is acceptable and what is not, and changing the cultural norms in respect of such behaviour. However, if the courts get to decide only a small number of cases, only a proportion of these get public attention, this educative and normative effect is undermined. This is particularly problematic in a system that provides for no other formal mechanisms for elaborating upon the general rule.

The second concern is that with limited guidance and limited experience in resolving questions of discrimination, judges have often struggled to understand the legislation and articulate clear principles about its scope and operation that accord with the normative objective of the legislation. Many provisions have been interpreted in very limited and technical ways, making the burden of proving a claim even more onerous for applicants, as

¹⁸ Cf part V Affirmative Action, below, for limited positive duties in respect of women.

¹⁹ In 2006-07 only 98 unlawful discrimination claims were filed in the Federal Magistrates Court (which hears nearly all federal claims). Federal Magistrates Court, *Annual Report 2006-2007* (2007). At state level, in the most populous state of New South Wales in 2006-07 the relevant tribunal finalised 140 matters (123 discrimination complaints and 17 applications for leave to proceed) NSW Administrative Decisions Tribunal, *Annual Report 2006-2007* (2007) <[http://www.lawlink.nsw.gov.au/lawlink/adt/ll_adt.nsf/vwFiles/ADT_AnnualReport_2007_FINAL.pdf/\\$file/ADT_AnnualReport_2007_FINAL.pdf](http://www.lawlink.nsw.gov.au/lawlink/adt/ll_adt.nsf/vwFiles/ADT_AnnualReport_2007_FINAL.pdf/$file/ADT_AnnualReport_2007_FINAL.pdf)> [27] (accessed 6 March 2008).

explored in detail by many commentators already.²⁰

The normative effect is also undermined by the limited scope of the federal Acts and a lack of commitment to equality shown by the Howard Coalition government. Being only statutory and not entrenched in any way, the federal government is free to legislatively discriminate, ignore and even override anti-discrimination legislation. So, for example, in order to avoid a judicial finding of breach of the *Racial Discrimination Act* 1975 (Cth) in respect of a 2007 federal intervention into Aboriginal communities, the federal government overrode the *Racial Discrimination Act* by expressly legislating that it did not apply to the intervention.²¹ Further, a recent HREOC inquiry and report,²² listing 58 federal statutes that were found to discriminate against same-sex couples and their families, failed to be acted upon by the Coalition government.²³

Enforcement rights and dispute resolution processes

The power to enforce compliance with the federal prohibition on discrimination is limited to victims, who are granted a right to sue for redress. HREOC has no power to initiate investigations of non-compliance, no explicit power to support claimants in breach proceedings, and no power to enforce judgements or settlement agreements that have been made. The absence of an agency with such enforcement powers distinguishes the anti-discrimination regulatory scheme from both other Australian workplace regulatory frameworks – eg, award compliance and occupational health and safety – and from US and UK anti-discrimination schemes.²⁴

In respect of compliance, HREOC's powers are limited to responding to each claim of breach with a preliminary investigation and attempting to resolve each complaint, using confidential conciliation. The conciliation is confidential, with a strict non-disclosure duty on HREOC which means the agency cannot use publicity of specific claims to raise awareness of the Act or to apply public pressure to corporations to prevent or settle disputes. In conducting conciliation, HREOC has taken a neutral or impartial position in helping to resolve claims.²⁵ Ultimately, if conciliation fails, the claimant can then pursue the claim through a federal court with all the formality and legal trappings this entails.

There are a number of problems associated with victim-only prosecution. Firstly, those

²⁰ See, e.g., Thornton M, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, (Oxford University Press, Melbourne, 1990); Hunter R, *Indirect Discrimination in the Workplace*, (Federation Press, Annandale, 1992); Gaze B, 'Context and Interpretation in Anti-Discrimination Law' [2002] *MelLRev* 18; Hunyor J, "Skin-deep: Proof and Inferences of Racial Discrimination in Employment" [2003] *SydLRev* 24. See also Justice Kirby's comments at n 64 below.

²¹ Section 132(1) of the *Northern Territory National Emergency Response Act 2007* (Cth) provides that any acts done pursuant to its provisions are, for the purposes of the *Racial Discrimination Act 1975* (Cth), 'special measures', whilst s 132(2) of the Act deems such acts to be excluded from the operation of Part II of the *RDA*.

²² Human Rights and Equal Opportunity Commission, *Same-Sex Same Entitlements* (2007) <http://www.hreoc.gov.au/human_rights/samesex/index.html> (accessed 7 March 2008).

²³ Further, it is yet to be seen whether the new ALP government will act upon its previous support for equal treatment of same-sex couples in work-related and financial areas. See *The Canberra Times*, *Rudd's Same-Sex Stand a Positive* (2007) <<http://canberra.yourguide.com.au/news/opinion/opinion/rudds-samesex-stand-a-positive/1101133.html>> at (accessed 7 March 2008).

²⁴ Sternlight, above n 17 at 1413; Baker A, 'Access vs Process in Employment Discrimination: Why ADR suits the US but not the UK' (2002) 31 *Industrial Law Journal* 113 at 118.

²⁵ Raymond T and Ball J, *Alternative Dispute Resolution in the Context of Anti-Discrimination and Human Rights Law: Some Comparisons and Considerations*, HREOC, <http://www.hreoc.gov.au/complaints_information/publications/alternative.html> (accessed 6 March 2008).

who experience discrimination do not necessarily identify it as discrimination. In appointing victims as prosecutors, the system relies upon the victim to ‘name,’ ‘blame’ and ‘claim,’ that is, identify that behaviour is wrong and unlawful, identify a perpetrator who should be held responsible, and articulate and pursue a legal claim for a remedy.²⁶ Sara Charlesworth’s research demonstrates that prevailing norms have a strong impact on the capacity of victims to identify discrimination and to recognise the conduct as wrong.²⁷

Claimants under anti-discrimination legislation are, by the very nature of the legislation, members of traditionally disempowered groups. Expecting members of such groups to have the time, security and resources to alone identify breaches, press claims, and enforce outcomes without any public assistance represents a fundamental regulatory weakness even when the initial dispute resolution system is relatively informal and accessible. Further, by limiting enforcement to the victim, HREOC is limited in doing what it might be in the best position to do – identifying systemic discrimination and, through the strategic use of investigation and regulatory sanctions, compelling the worst offenders to change and helping to ratchet up the standards of the mild offenders or reluctant compliers.

Ultimately, HREOC’s regulatory power is largely limited to the soft tools of education and raising public awareness. It carries out these functions in a plethora of ways, including inquiry reports, court interventions, media releases, national consultations and forums, classroom education resources, and human rights awards.²⁸ HREOC has worked hard, on a very limited budget, to prompt corporate responsibility by using these educative tools to bolster, translate and leverage the otherwise weak formal mechanisms under equality laws. It has utilised a combination of arguments about the business case, moral case and litigation risk of inequality to prompt or reinforce commitment to a non-discrimination norm. However, to be effective, human rights information and arguments must compete with wider business imperatives and other competing discourses, such as freedom of contract, labour market flexibility, and the separation of work and family.

Sanction

The sanctions available for breach of the Australian anti-discrimination laws are generally limited to compensatory remedies.²⁹ Publicity cannot be used by HREOC because of its confidentiality obligations, and the reputational risk of litigation is minimised by private conciliation being the primary dispute resolution process. If a matter does make it to court, the remedy ordered is usually damages – primarily for economic and non-economic loss, with aggravated damages available but rarely awarded. Importantly, penalties and punitive damages are not available.³⁰ Again, the regulatory scheme can be contrasted with both other

²⁶ Sara Charlesworth, ‘Managing Work and Family in the ‘Shadow’ of Anti-Discrimination Law’ in Jill Murray (ed), *Work, Family and the Law* (2005) 88, 93, drawing on the work of William L F Festiner, Richard L Abel and Austin Sarat, ‘The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...’ (1980-81) 15 *Law and Society Review* 631.

²⁷ *Ibid.*

²⁸ Human Rights and Equal Opportunity Commission, *About the Commission* (2008) <<http://www.humanrights.gov.au/about/index.html>> (accessed 6 March 2008).

²⁹ Section 46PO(4)(d) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) permits ‘an order [for unlawful discrimination] requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered.’ There are a few penalty provisions, but these generally relate to dispute resolution powers of HREOC or victimisation.

³⁰ *Hughes (formerly De Jager) v Car Buyers Pty Ltd and Ors* [2004] FMCA 526 at [69] to [71]; Cf the decision of Raphael FM in *Font v Paspaley Pearls* (2002) FMCA 142 at [158] to [167]. See also Jonathon Hunyor, ‘Human Rights Remedies for Unlawful Discrimination’ (2005) 43(7) *Law Society Journal* 40.

Australian workplace regulation and US anti-discrimination laws.³¹

Limiting remedies to compensation has a number of implications. Firstly, the focus of the remedy is the individual claimant, restricting remedial orders to the harm that the victim has suffered and, importantly, not extending them to require systemic changes to prevent harm to others. This limits the capacity for change to be ordered and reinforces the notion of discrimination being merely an interpersonal dispute rather than a public wrong.

Further, compensatory remedies focus attention on the impact of the wrongful act on the applicant, while punitive damages or corrective orders focus on the wrongdoer and what needs to be done to improve behaviour. Without a range of sanctions the court has no capacity to tailor the remedy according to the level of wrong-doing or efforts of the respondent. Once liability is found, the flagrant, egregious or repeated wrongdoer is not distinguished from the respondent who instituted compliance programs and training that simply failed to prevent the discrimination. In a compensatory scheme a reduction in damages could only be a deduction from the victim's compensation.

Finally, being only compensatory, the damages are generally very low, and thus have minimal deterrent effect. Pain and suffering are often under-estimated by judges³² (who likely have not experienced discrimination in their lives³³) and awards for economic loss are generally low often because claimants are from low paying jobs and also struggle to show the economic impact of the particular discriminatory action. The Australian legislative scheme certainly does not have a "big stick" that, according to Ayres and Braithwaite, is needed to regulate responsively and most effectively use the more persuasive or lower level enforcement mechanisms.³⁴

IV. Conceptions of Equality, Definitions of Discrimination

While anti-discrimination laws are directed at promoting equality, the particular notion or notions of equality they are designed to promote is often not clear or questioned. The notion of equality that has popular appeal and appears conceptually straightforward is that of 'formal equality'. This Aristotlean notion of equality (merely) requires likes to be treated alike and says that justice inheres in consistency.³⁵ It means ignoring differences, judging 'blindly' and focussing instead on the relevant criteria for the job, position, etc.³⁶ Such a notion of equality is powerful for opening doors that have been closed to whole groups, such as women, and compelling individuals to be treated according to their merits rather than their group status or stereotyping. However, it suffers many limitations.³⁷ The mandate to treat likes alike immediately prompts the difficult question of 'who is like whom?' (and the related question of who gets to decide this). Then there is the problem of the relative nature of this notion, entitling likes to be treated alike, whether that treatment is good or bad. Finally, while it requires that individuals be treated according to their 'merits,' it does not enable any challenge

³¹ Baker, above n.24, at 115.

³² Awards for non-economic loss may be nominal and generally fail to exceed \$10,000: Human Rights and Equal Opportunity Commission, *Federal Discrimination Law 2005: Supplement 1 March 2005 – 1 July 2007 (2007)* <http://www.hreoc.gov.au/word/legal/fdl/fdl_supplement07.doc> [59-66] (accessed 7 March 2008).

³³ Gaze, above n 20.

³⁴ Ayres I and Braithwaite J, *Responsive Regulation: Transcending the Deregulation Debate*, (Oxford University Press, New York, 1992).

³⁵ Sandra Fredman, *Discrimination Law* (2002) 2.

³⁶ Regina Graycar and Jenny Morgan, *Hidden Gender of Law*, (2nd Ed.) 2002, 28-29.

³⁷ Fredman, above n 35 at 7-11.

to the criteria that are used, only the consistency of their application. This means that the notion and bias of ‘merit’ or the criteria used may go unquestioned.

Substantive equality alternatively requires differences to be acknowledged and accommodated rather than ignored.³⁸ Substantive equality is about equality of *outcome* or equality of *opportunity*, not merely same treatment. When there are relevant differences, simply ignoring them will not promote equality of opportunity or outcome and can, in fact, exacerbate inequality.³⁹ In practice, substantive equality means doing more than merely allowing all to apply; it requires a review of the criteria to see if their effect is exclusionary and an assessment as to whether different treatment, facilitation or services are required to *enable* equal participation.

It is clear from court judgments, media reports and other public debates that the notion of substantive equality is not well understood or accepted in Australia. Formal equality or same treatment is well entrenched as the ultimate goal. Often any special measures or different treatment proposed to achieve substantive equality are depicted as a breach of (formal) equality principles. The slipperiness of determining formal equality – especially the question of who is like whom and who gets to decide this – also feeds into this confusion. For example, HREOC's proposal for paid maternity leave to be provided to enable female workers to participate equally with male workers in the workforce⁴⁰ was immediately challenged as discriminatory against mothers who were not in the paid workforce and against fathers in the paid workforce, both of whom were characterised as being ‘like’ new mothers in the workforce.

It is the formal notion of equality that features most strongly in Australian anti-discrimination laws, although there are elements which are clearly designed to achieve more than this.

Under Australian legislation direct discrimination prohibits different treatment of persons who are in like circumstances based on a protected trait (such as sex or race). The focus is on treatment and, more importantly, the reason for that treatment. At its most simple, direct discrimination is about rejecting someone for a job or promotion *because of* their race, sex, religion etc. Indirect discrimination prohibits the requirements or conditions that disparately impact on protected groups, unless the requirement or condition is ‘reasonable’ in all the circumstances.

It is generally understood that both direct and indirect discrimination are proscribed by our legislation in order to promote both formal and substantive equality. The direct discrimination prohibition reflects a same treatment notion of equality and has been interpreted as being confined to the promotion of formal equality, leaving only indirect discrimination to promote substantive equality. To date, most claims have been framed as direct discrimination, with indirect discrimination often being characterised as conceptually difficult to understand and extremely difficult to prove.⁴¹

The exceptions available under the legislation play an important role in demarcating what is ‘unacceptable’ discrimination and what is permissible. It is important to note that in

³⁸ Ibid 11-14.

³⁹ Reg Graycar & Jenny Morgan ‘Thinking About Equality’ (2004) 27 *UNSW Law Journal* 833, 834.

⁴⁰ Human Rights and Equal Opportunity Commission, *A Time to Value: Proposal for a National Paid Maternity Leave Scheme* (2002) <http://www.humanrights.gov.au/sex_discrimination/paid_maternity/pml2/index.html> (accessed 7 March 2008).

⁴¹ E Hastings, “FoundDDAtions: Reflections on the First Five Years of the Disability Discrimination Act in Australia”, (1997) <http://www.hreoc.gov.au/disability_rights/hr_disab/found.html> at 28 January 2008. Cf Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992).

the definition of *direct* discrimination in Australian legislation there is no justification or reasonableness element. For the most part, the legislation simply says that the particular grounds or traits must not be used to distinguish between candidates in the provision of jobs, services, etc. In order to prevent absurdities arising from this general prohibition, exceptions have been set out rather than a general ‘justification’ defence.

There are various kinds of exceptions in the legislation. Firstly, there are those that allow employers to choose by trait for particular positions. For example, sex discrimination legislation enables theatre groups to choose women for female roles and lingerie sellers to employ women to fit bras using a ‘genuine occupational qualification’ exception.⁴²

A second kind is called a ‘special measures’ or positive discrimination exception. Most grounds of discrimination protection are framed in a way that is symmetrical (eg, sex) rather than asymmetrical (eg, women). However, in respect of these grounds, each of the federal Acts provide an exception that allows for positive discrimination whereby the trait can be used to identify disadvantaged groups and offer ‘special measures’⁴³ in order to promote substantive equality.⁴⁴ For example, the *Sex Discrimination Act* provides that special measures taken ‘for the purpose of achieving substantive equality between ... men and women’ do not constitute unlawful discrimination, ‘whether or not that purpose is the dominant or substantial’ purpose.⁴⁵

Conversely, another exception permits employers to exclude protected groups if their traits prevent them from performing the job. So, for example, disability discrimination legislation allows bus companies to exclude blind people from bus-driving jobs by identifying sight as an ‘inherent requirement’ of the job.⁴⁶ However, the scope of this statutory exception is quite narrow. Under federal law, it is limited to the *Disability Discrimination Act* and the *Age Discrimination Act*. Further, in the *Disability Discrimination Act* it is limited to hiring and dismissal from employment, not applying to all employer requirements but only ‘inherent’ requirements or essential aspects of the job.

Australian anti-discrimination laws have a patchwork of such exceptions designed to make the general prohibition on direct discrimination workable and to enable substantive equality or affirmative action measures to be taken. If different treatment (direct discrimination) is found, each exception, in effect, allows for a consideration of whether the use of the ground or trait is ‘justified’ or permitted for some policy reason. In this way, the legislation and specifically the exceptions provide some concession to a strict formal equality approach which says that such grounds or traits may *never* be used as a basis for decision making. There are a number of other exceptions – some practical, some political – that apply to both direct and indirect discrimination under the federal Acts.⁴⁷

⁴² *Sex Discrimination Act* 1984 (Cth), s 30.

⁴³ For example, s 7D *Sex Discrimination Act* 1984 (Cth).

⁴⁴ Other exceptions suggest political compromises, such as exempting small businesses and private educational authorities from such discrimination prohibitions in New South Wales. See, eg, *Anti-discrimination Act* 1977 (NSW) s 49D(3).

⁴⁵ *Sex Discrimination Act* 1984 (Cth) ss 7D.

⁴⁶ See, eg, *Disability Discrimination Act* 1992 (Cth), s 15(4); *Anti-Discrimination Act* 1977 (NSW) s 49D(4).

⁴⁷ For example, the *Sex Discrimination Act* 1984 (Cth) contains exceptions to liability for unlawful discrimination for charities (s 36) and voluntary bodies (s 39), religious bodies (s 37) and educational institutions established for religious purposes (s 38). The *Racial Discrimination Act* 1975 (Cth) contains an exception to liability for unlawful discrimination for instruments conferring charitable benefits (s 8(2)).

Direct Discrimination

To prove direct discrimination, a claimant needs to establish three related elements:

- That the claimant has suffered some detriment, such as not getting hired or promoted, receiving poorer terms and conditions of employment, being harassed at work, or having their employment terminated (the **detriment** or prohibition element);
- that the detriment was the result of being treated less favourably in comparison to someone who is not of the same class (sex, race, disability, etc) but is otherwise in the same material circumstances (the **'comparator'** element); and
- that the different treatment was because of the trait of gender, race, disability, etc. (the **'causation'** element).⁴⁸

The respondent may then try to prove that the case falls into one of the exceptions and thus is 'justified.'

Generally, the first element is not the issue in any claim, as it is usually obvious. The issue is whether the detriment was caused by discriminator treatment, which relates to the last two elements, both of which pose challenges for claimants to prove.

The comparator element is difficult to prove when there is no actual person without the trait who is in like circumstances. In respect of sex this is particularly acute because of Australia's highly gender-segregated workforce. For instance, child care work is overwhelmingly a female occupation, which would make it difficult for a female child care worker to find a male child care worker to show that she had been treated less favourably than someone not of her sex in like circumstances. Despite courts being permitted to consider a hypothetical rather than actual comparator, the highly gendered nature of the work makes the imagination of such a figure difficult.

There is also significant controversy over what constitutes 'like circumstances.'⁴⁹ This issue arose in the first sex discrimination case decided in Australia, *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1984) EOC 92-002. Mrs Wardley had applied to Ansett Airlines to become a commercial pilot. She scored better than or as well as all the other applicants, all of whom were male, but was ultimately refused a job. Mrs Wardley was young and recently married and, in response to an interview question, said that she did intend to have children at some stage (although would not let this interrupt her career). Ansett had a policy of not employing women as pilots and the admission of this policy was enough to find that it had directly discriminated against her. However, in any event, it also tried to argue that it had not rejected Wardley because she was a woman but because she was likely to take (maternity) leave. In this way, it argued, it had not treated her any differently than any other (male) applicant in similar circumstances of intending to take a substantial period of leave in the early stages of their career. The tribunal rejected the inclusion of potential pregnancy or potential taking of maternity leave as merely a circumstance that could be attributed to the comparator, concluding that the taking of (maternity) leave was integrally connected with being female and thus a decision based on this criteria amounted to a decision based on sex.

⁴⁸ See, eg, s 5(1) *Disability Discrimination Act* 1992 (Cth) 'For the purposes of this Act, a person (discriminator) discriminates against another person (aggrieved person) on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability.'

⁴⁹ Smith, 'From *Wardley* to *Purvis*', above n 2.

The appropriate comparators were all the male applicants and similar circumstances were qualifications, flying hours, test results and interview scores.

However, the High Court of Australia in a recent and leading judgement on this point has decided otherwise.⁵⁰ In the case of *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92, a student with multiple disabilities was admitted into school but, upon exhibiting various disruptive behaviours as a result of his disabilities, was expelled. The student claimed that he was directly discriminated against on the basis of his disability because he was treated less favourably than a student without a disability. However, while the Court accepted that the student's behaviour was a manifestation of his disability, it ultimately held that the behaviour was to be attributed to the comparator. So, the question for the Court was whether the school had treated the student less favourably than it would have treated a non-disabled student *who behaved that way*. On this test, the Court found there had been no less favourable treatment and thus no direct discrimination.

This demonstrates key limitations of using an anti-discrimination approach to the promotion of equality and the progressive improvement in benefits. There is great uncertainty or flexibility in the characterisation of who is like whom, and a struggle over who gets to decide this. Further, the formal equality model underpinning the direct discrimination prohibition only requires the disabled student to be treated the same as the non-disabled student. Without a 'reasonable accommodation' duty on the school (employer, etc) to enable or facilitate the disadvantaged student's participation, the same treatment will continue to exclude and marginalise, and entrench the disadvantage.

The role and purpose of the comparator element has been criticised at the highest level. In their *Purvis* minority judgment, Justices McHugh and Kirby noted with approval scholarly attempts to 'reformulate the notion of direct discrimination so as to free it of the shackles of the comparator.'⁵¹ Until issues of equality get onto the political agenda, such technical reform suggestions will not be given much attention or support.

To prove the third element, causation, the claimant must provide evidence of the reasons for the decision or conduct, and prove that the ground was a reason for the conduct. Evidence can include statements disclosing the reason for conduct or statements disclosing a prejudice or animus from which it can be inferred that the trait was at least one of the reasons for the decision or conduct. For all federal Acts, except the *Age Discrimination Act* (discussed below), the reason need not be the sole or even dominant reason, merely a reason.⁵² It is often said that intention or motive need not be proven, although the courts often still seek to establish that the ground was the 'true basis' for the decision.⁵³

It appears that prohibitions on direct discrimination have had an effect on reducing blatant and intentional discrimination; there are fewer smoking guns. This may be attributable to the normative effect of legislation, acting to educate and deter people and changing the norm of what is acceptable criteria and language in the workplace. The blatant and intentional conduct would be most susceptible to such effects because it is the easiest to prove. However, the legislation is not well designed to address the less intentional or less conscious, subtle and

⁵⁰ For further analysis of this case, see Smith, 'From *Wardley* to *Purvis*', above n 2.

⁵¹ *Purvis* (2003) 217 CLR 92, [114] per McHugh and Kirby JJ, citing to Fredman above n 35, 96 and to *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] 2 All ER 26.

⁵² For the *Age Discrimination Act 2004* (Cth), the claimant has to prove that age was 'dominant' reason. See Part VI below.

⁵³ *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 176-177 per Deane and Gaudron JJ, 184 per Dawson J, 208 per McHugh J; *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 per Mason CJ and Gaudron J, 400 per McHugh J.

structural forms of discrimination.⁵⁴ It is significantly more difficult, even impossible, to prove these kinds of discrimination and thus they remain poorly addressed by rights based anti-discrimination legislation.

Indirect Discrimination

Indirect discrimination is prohibited in respect of all grounds under Federal legislation, except family responsibilities⁵⁵ (as discussed in part VI, below). The definition, however, differs between the Acts. In essence, the claimant must show that a requirement or condition imposed by an employer disparately impacts upon their class and the requirement or condition is not reasonable in all the circumstances. There are essentially two formulations of this definition, differing in respect of how disparate impact is to be shown and which party has to show that the requirement is (not) reasonable.

The elements that a claimant must prove under the *Disability Discrimination Act* (with a similar test in the *Racial Discrimination Act*) are:

- a **requirement** or condition has been imposed by an employer (contractor, partner, education provider, etc);
- with which the claimant cannot or **does not comply** (a practical, not theoretical test);
- with which a substantially higher proportion of the those without the claimant's disability (or race) can comply (**disparate impact**); and
- the requirement or condition is **not reasonable** in all the circumstances.

This was originally also the test in the *Sex Discrimination Act* and, from the beginning it proved to be complex, technical and interpreted in a legalistic way. Claimants, respondents and courts grappled with understanding and articulating how disparate impact was to be proven,⁵⁶ struggling to fill the gap Parliament had left in using such an open-textured term as 'reasonable' and not providing any definition or guidance on this.⁵⁷ Few indirect discrimination cases were brought and even fewer were won, although notably two were won in the High Court.⁵⁸

After a federal inquiry into gender equality⁵⁹ and much lobbying, the federal Government amended the *Sex Discrimination Act* in 1995, inserting a simpler definition of indirect discrimination. The *Racial Discrimination Act* and *Disability Discrimination Act* remain unchanged, although the recent *Age Discrimination Act* 2004 uses this revised definition.⁶⁰ Under the *Sex Discrimination Act* a claimant only needs to prove that an employer 'imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, *the effect of disadvantaging persons of the same sex*' as the claimant.⁶¹ The

⁵⁴ Susan Sturm analyses these limitations of anti-discrimination legislation at length in Susan Sturm, 'Second Generation Employment Discrimination: A Structural Approach' (2001) 101 *Columbia Law Review* 458.

⁵⁵ Note that state legislation does prohibit indirect discrimination in respect of carer's responsibilities. See, eg, *Anti-Discrimination Act* 1977 (NSW).

⁵⁶ *Australian Iron & Steel v Banovic* (1989) 168 CLR 165.

⁵⁷ *Waters v Public Transport Corporation* (1991) 173 CLR 349.

⁵⁸ *Australian Iron & Steel v Banovic* (1989) 168 CLR 165; *Waters v Public Transport Corporation* (1991) 173 CLR 349.

⁵⁹ *Halfway to Equal* (1992), House of Representatives, Standing committee on Legal and Constitutional Affairs.

⁶⁰ *Age Discrimination Act* 2004 (Cth) s 15. Subsection 15(2) places the burden of proving that the condition, requirement or practice is reasonable in the circumstances on the respondent.

⁶¹ *Sex Discrimination Act* 1984 (Cth) s 5(2).

respondent now bears the onus of proving as a defence that the condition or requirement was reasonable in all the circumstances,⁶² with some guidance provided about such circumstances.⁶³ The impact of this revision has not been substantial. While potentially easier to prove, indirect discrimination is still difficult to understand, identify and articulate.

While designed as the key mechanism in the legislation for enabling substantive equality, the progressive capacity of the indirect discrimination prohibition is weakened by the open-texture of its elements, such as 'reasonableness.' Such terms are vulnerable to highly conservative interpretations that are made to appear objective. Importantly, many observers of the High Court have noted an increasingly conservative trend in its jurisprudence. It was demonstrated in the most recent direct discrimination case before the Court, *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92, noted above, in which the majority of the Court took a very technical, legal rather than purposive approach to interpreting the definition of direct discrimination.

The Court's conservative approach was further demonstrated in its most recent indirect discrimination case, *State of New South Wales v Amery* [2006] HCA 14 which concerned two separate pay scales. In that case, female teachers claimed indirect sex discrimination arguing that they were paid less than equivalently qualified and experienced teachers because a higher pay scale was afforded to those teachers employed on a 'permanent' or on-going basis than those who were employed as 'casuals.' The permanency requirement disparately impacted upon women because in order to gain permanency teachers had to agree to be transferable to any school in the State and women, who disproportionately bear family caring responsibilities, were not able to accept this condition and hence remained casual. The women ultimately lost the claim in the High Court. In the hearing and two appeals leading up to the High Court the issue was over whether there was a disparate impact and, ultimately, whether the permanency requirement was reasonable in all the circumstances. What is particularly significant though is that the majority of the High Court essentially chose to avoid the difficult, value-laden industrial question of whether it was reasonable to have two different pay scales and instead focused on whether the permanency condition was imposed on the casual teachers. The majority took a new and an extraordinarily technical and conservative approach to this question and found against the teachers. In dissent again, Justice Kirby was led to make the following comments:⁶⁴

This case joins a series, unbroken in the past decade, in which this Court has decided appeals unfavourably to claimants for relief under anti-discrimination and equal opportunity legislation. It was not always so. In the early days of State and federal anti-discrimination legislation, this Court, by its approach to questions of validity and application, upheld those laws and gave them a meaning that rendered them effective. ... The Court's successive conclusions in these cases reflected the beneficial interpretation of the laws in question, ensuring they would achieve their large social objectives. In *Mabo v Queensland [No 2]*, the general approach which the Court took to discrimination (in that case on the ground of race) was stated clearly. The Court there acknowledged the need to ensure that the law "in today's world" should "neither be nor be seen to be frozen in an age of ... discrimination". The wheel has turned.

V. Affirmative Action

Unfortunately, one attempt at an alternative approach to the rights-based anti-discrimination laws outlined above has a similar array of weaknesses and possibly even

⁶² *Sex Discrimination Act 1984* (Cth), s 7C.

⁶³ *Sex Discrimination Act 1984* (Cth) s 7B.

⁶⁴ *New South Wales v Amery* [2006] HCA 14 at [86]-[88] per Kirby J (footnotes omitted).

less support. The *Affirmative Action Act* 1986 (Cth) was enacted soon after the *Sex Discrimination Act* 1984 was introduced. In contrast to the complaints-based model of the anti-discrimination law, the *Affirmative Action Act* was designed to promote equality for women by embedding gender equality into management processes. It required employers⁶⁵ to audit their organizations, identify barriers to women's equal participation and reward, and develop a plan for addressing the inequality. These requirements were not onerous, nor were breaches the subject of any significant legal sanction, being limited to naming in Parliament.

However, the notion of affirmative action was highly controversial, with the Act characterized as a threat to management prerogative, merit, the family and society!⁶⁶ There was some initial success in establishing compliance with affirmative action laws as a mark of good management, but this soon abated.⁶⁷ While the Act never imposed hard or even soft quotas, it was often misrepresented as requiring this and depicted as a threat to quality and the use of merit in selection processes. Gradually responsibility for compliance was relegated further down the management line, or over to the human resource managers, and with the growth of neo-liberalism the *Affirmative Action Act* slowly lost what little support it had. In a review of the legislation held less than 15 years after its introduction, the 'de-regulation' supporters won ground. With the repeal of the Act and enactment of the *Equal Opportunity for Women in the Workplace Act* 1999 (*EOWW Act*), the legislative requirements were significantly watered down and, importantly, the language of 'affirmative action' was removed.⁶⁸

The *EOWW Act* imposes a very limited process duty on employers to analyse their workplaces and workforces and develop plans for the elimination of barriers to equality for women. It only applies to large employers, only in respect of women, and essentially only requires the organisation to provide a report to the administering agency for a stamp of compliance. The agency has virtually no enforcement powers, and the sanction is very limited: a corporation that fails to report may be named in parliament as non-compliant⁶⁹ and, although this has never been used, may be excluded from federal government contracting.⁷⁰

Drawing on Christopher McCrudden's summary of essential elements of reflexive regulation,⁷¹ a number of key regulatory limitations are evident in respect of the *EOWW Act*. Firstly, there is no obligation on the employer to produce comparable data or to publicly disclose findings of its audit and analysis, nor even the plan and report it provides to the agency. This absence of any disclosure obligation significantly limits the capacity of the law to effect change as it denies stakeholders access to the information necessary to evaluate and compare organisations. Secondly, there is no requirement to ensure that any consultation with stakeholders is meaningful and capable of challenging existing assumptions and practices.

⁶⁵ Limited to employers of 100 or more employees, and tertiary education institutions.

⁶⁶ Braithwaite, V. & Bush, J. 'Affirmative action in Australia: A consensus-based dialogic approach' (1998) 10 *National Women's Studies Association Journal* 115-134.; Margaret Thornton, 'EEO in a Neo-Liberal Climate' (2001) 6(1) *Journal of Interdisciplinary Gender Studies* 77.

⁶⁷ Braithwaite and Bush, above n 66.

⁶⁸ Thornton, above n 66.

⁶⁹ *Equal Opportunity for Women in the Workplace Act* 1999 (Cth) s 19.

⁷⁰ See EOWA website – sanctions for not complying – Equal Opportunity for Women in the Workplace Agency (EOWA) website, *Contract Compliance Policy* <http://www.eowa.gov.au/Reporting_And_Compliance/Complying_with_the_Act/Sanctions_for_not_Complying/Contract_Compliance_Policy.asp> at 28 January 2008.

⁷¹ Christopher McCrudden, 'Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review's Consultative Paper' (2007) 36(3) *Industrial Law Journal* 255.

Finally, while the Act requires an organisation to take a look at itself and design a plan for promoting equality, it does not require the organisation to act upon and implement the plan. In this way, there is no effective requirement to change existing practices. Two particular changes to the regulatory framework under the new Act significantly undermine its effectiveness: organisations no longer need to report using a standard form, thus diminishing the capacity for even the agency to compare performance between organisations and across time; and the agency no longer has power to evaluate and grade the equality plans and publicly disclose these results. Today, the EOWW Agency, lacking in any significant regulatory powers, focuses on building the business case for diversity and marketing it to employers.

VI. Recent Developments - Innovations and Limitations

It is worth noting a few recent developments in Australian anti-discrimination laws in order to illustrate innovations, limitations and current issues. The first, the introduction of a federal *Age Discrimination Act*, is notable as an apparently significant legislative step that is likely to have little substantial impact. The second, the introduction of Disability Standards, may have gone largely unnoticed in Australia but represents regulatory innovation that has the potential to bring about real change. Finally, the recent report of HREOC into work and family balance and its recommendation of expanding federal protection against family responsibilities discrimination reflect the growing debate about work-family balance but also a lack of support for significant regulatory reform.

Age Discrimination

Australia, like many other countries around the world, is experiencing an aging of the population and expects a consequential pressure on government revenue. The enactment of age discrimination legislation is consistent with government policy, including social security and superannuation changes, designed to encourage higher workforce participation of older workers to help address this problem. However, when the *Age Discrimination Act 2004* (Cth) came into effect, in June 2004, there was little fanfare, no surprises, and some disappointment.⁷²

The Act prohibits both direct and indirect discrimination on the ground of age,⁷³ across work and other areas, with work defined broadly to include employment (s.18), contract workers (s.20), commission agents (s.19), partnerships (of 6 or more) (s.21), qualifying bodies (s.22), registered organisations under the *Workplace Relations Act* (s.23), and employment agencies (s.24). It covers all ages and permits positive discrimination (s.33) to enable special measures to be taken to promote age equality.

The Act had been a long time coming, emerging after almost a decade of political party promises, human rights commission inquiries, numerous government consultations, a Senate Committee inquiry, and much public debate. While almost universally welcomed, it was a disappointment to some for a number of reasons. Firstly, while the Act largely replicates the model of the *Sex Discrimination Act*, it has a unique and particularly onerous proof requirement for direct discrimination. In respect of direct discrimination the Act departs from all other Australian anti-discrimination statutes by requiring the claimant to prove that age is

⁷² This summary draws upon Smith, B, Riley, J & Sarina, T, 'Industrial Legislation in 2004' (2005) 47(2) *Journal of Industrial Relations* 171-185.

⁷³ *Age Discrimination Act 2004* (Cth) ss 14 and 15, respectively.

not merely one of any number of reasons for their less favourable treatment but the ‘dominant reason’ (s.16). The other federal Acts all provide that if an act is done for two or more reasons and a discriminatory ground is one of those reasons, the act is taken to be done for the discriminatory reason whether or not it is the dominant or substantial reason. This proof requirement of the *Age Discrimination Act* is thus inconsistent with the other Acts, extremely onerous for claimants, and was criticised strongly by many commentators. Its inclusion represents a significant barrier to all but the most blatant and intentional cases of age discrimination.⁷⁴

Secondly, the Act has been criticised for both the number and breadth of its exceptions.⁷⁵ The Act contains the ‘inherent requirements’ exception which is found in the *Disability Discrimination Act* and the unlawful termination provisions of the *Workplace Relations Act*. This exception has been interpreted widely,⁷⁶ allowing organisations great freedom to establish and define positions to meet their organisation’s needs. While not yet tested, it is relatively clear, however, that neither this exception or other exceptions under the legislation would permit compulsory age retirement.

Two other notable exceptions are youth wages and compliance with legislation and industrial instruments. Section 25 specifically exempts youth wages, thereby permitting employers to provide lower rates of pay for those under 21 and to choose to employ someone under 21 in order to pay youth wages. This specific exception is in addition to section 39 which provides that the Act does not make unlawful anything that is done in direct compliance with specified Acts, an agreement made under the *Workplace Relations Act* or an industrial award. The stated rationale for the youth wages exception is the protection of youth employment, but HREOC has argued that the evidence that their retention is justified is equivocal and should be reviewed further.

Finally, by the time the Act came into effect, age was already a prohibited ground of discrimination in all states and territories. It was also a ground of complaint under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (which provides for investigation but no enforceable rights), and a proscribed reason for termination of employment under the *Workplace Relations Act*.⁷⁷ Compulsory age retirement, for instance, has been unlawful under this state legislation for many years. The new legislation does fill some gaps – federal public servants, for instance – and provides a national dimension.

In addition to handling complaints in respect of the prohibition, the *Age Discrimination Act* gives HREOC the usual raft of powers to ‘promote an understanding and acceptance of the Act,’ ‘undertake research and educational programs’ and prepare and publish guidelines for avoiding age discrimination (s.53). As for the other federally protected grounds, this legislation might be most successful in changing attitudes and bringing about change through these roles of HREOC, leveraging off the limited prohibition.

Disability Standards & Action Plans

In many ways the *Disability Discrimination Act* does not differ from the model of

⁷⁴ The 98 discrimination law decisions made by the Federal Magistrates Court during 2006-07 involved cases of sex, race and disability discrimination, with very few applications alleging age discrimination filed. FMC annual report, above n 19 at 32.

⁷⁵ For a more extensive outline of the Act, including its extensive exceptions, see Joanna Hemingway, Roadmap to ADA: The *Age Discrimination Act 2004* (2007) <http://www.hreoc.gov.au/age/roadmap_ADA.html> at 28 January 2008.

⁷⁶ *Qantas Airways v Christie* (1998) 152 ALR 365.

⁷⁷ Now section 659(2)(f) *Workplace Relations Act* 1996.

anti-discrimination regulation used for the other federal Acts. The Act proscribes direct and indirect discrimination in work, education, and other fields and, like the other federal Acts, contains no general obligation on duty holders to provide reasonable accommodation or adjustments. So, for the most part, victims of disability discrimination are required, without public assistance, to recognise discrimination, identify an individual perpetrator, and pursue relief through conciliation or ultimately court litigation. It is probably unsurprising then that the impact of the Act has been very mixed, being least helpful for those who have intellectual impairment and mental illness, and those who have multiple disabilities or intersecting disadvantages.⁷⁸

However, the Act does contain two regulatory mechanisms that are different and worth highlighting: disability standards;⁷⁹ and action plans.⁸⁰ The Act provides for the development by the government of disability standards in respect of employment, education, accommodation and transport services. It took a decade of consultation and negotiation before the first standards were introduced (public transport),⁸¹ another few years to see Disability Education Standards, and there is general acknowledgment that employment standards will never be finalised. To the extent that they apply to a situation, the Transport and Education standards operate to override the general direct and indirect discrimination provisions.

The two standards are significant in different ways. The Public Transport standards essentially represent an industry wide agreement of a timetable for the introduction of services, equipment and facilities that will gradually make public transport accessible for users with disability. For instance, the Standards mandate that by 2012, bus providers must ensure that at least 55% of buses are wheelchair accessible.⁸² The standards still reflect a rights-based framework but operate to ease the burden on claimants by specifying precisely what each operator needs to do and by when. Instead of a claimant having to prove that a practice or requirement that disparately impacts upon those with their disability is 'not reasonable,' they merely need to show breach of the specific standard. In this way it is an industry-wide agreement of what is reasonable.

The Education Standards are not prescription standards, but are significant because they have introduced an obligation on education providers to undertake consultation with students (and applicants) and provide 'reasonable adjustments' to enable the student's equal participation. In this way, the Education Standards provide a unique and limited accommodation duty and thereby shift some of the burden for promoting equality off the victims and onto providers of education.

The second mechanism, action plans, is even more modest. The Act provides simply that '[a] service provider may prepare and implement an action plan.' (s.60) 'Service providers' are government departments and instrumentalities and persons who provide goods or services. There is no obligation on service providers to develop or provide an action plan to HREOC, but if they choose to do so, the plan must conform to specific requirements. It must include provisions relating to: the development of policies and programs to achieve the Act's objectives; communication of these; review of its practices to identify discriminatory practices; setting of goals and targets (where reasonable) against which the success of the plan may be assessed; means of evaluating the policies and programs; and the appointment of

⁷⁸ Productivity Commission, *Review of the Disability Discrimination Act 1992*, Report No. 30, 30 April 2004.

⁷⁹ *Disability Discrimination Act 1992* (Cth) ss 31-34.

⁸⁰ *Disability Discrimination Act 1992* (Cth) ss 59-65.

⁸¹ *Disability Standards for Accessible Public Transport 2002* (Cth).

⁸² *Disability Standards for Accessible Public Transport 2002* (Cth) s 3.2; Schedule 1, s 2.3.

persons responsible for implementation (s.61).

What is interesting is that these action plans are entirely voluntary, have no express link to any of the prohibitions in the rest of the Act, and yet have been provided by a growing number of companies across Australia, across a range of industries. HREOC provides a register of providers on its website, with a link to each action plan.⁸³ The site expressly asserts that '[r]egistration of an action plan does not imply that it is endorsed by the Commission.' However, it appears by the provision and increasing number of these plans that organisations are seeking to gain some sort of public recognition or acknowledgement of their diversity efforts through this mechanism. The Act imposes no obligation in respect of action plans, but might be indirectly prompting their development by creating a public expectation that companies take action (or at least must be seen to be taking action) to promote participation and equality for workers with disability.

Family Responsibilities

Given the limitations of the regulatory framework of Australian anti-discrimination laws, it is probably unsurprising that gender inequality is still very prevalent. I would argue that one very clear indication that there is insufficient support for women as citizens entitled to participate equally in public life, such as employment, is the lack of paid maternity leave.⁸⁴ The absence of paid maternity leave significantly undermines women's capacity to participate in paid employment and also enjoy the freedom to bear and care for children.

After Australia ratified *ILO Convention (No 156) Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* in 1990, it introduced into the *Sex Discrimination Act* an amendment designed to give effect to the obligations of the convention. The Act was amended to make discrimination on the basis of 'family responsibilities' unlawful, but it was limited to direct discrimination (s.7A) and employment termination (s.14(3A)). (Given these limits, claimants generally frame their claims alternatively as direct or indirect sex discrimination,⁸⁵ or, in some cases, pregnancy discrimination.⁸⁶ However, each of these actions is limited, as I have explored elsewhere.⁸⁷) While there was some suggestion that the limited federal protection was to be expanded in the future, no further provisions were introduced. (In the meantime, States have progressively introduced an equivalent ground, such as 'parental status or status as a carer'⁸⁸ or

⁸³ See Human Rights and Equal Opportunity Commission, *Register of Disability Discrimination Act Action Plans* (2008) <http://www.hreoc.gov.au/disability_rights/action_plans/Register/register.html> at 28 January 2008. At 2 January 2008, the site notes that over 400 plans have been provided.

⁸⁴ Australia is noted as one of two OECD countries (the other being the US) which does not have any national paid maternity leave scheme: Human Rights and Equal Opportunity Commission, *Valuing Parenthood – Options for Paid Maternity Leave: Interim Paper* (2002) [4.1] <http://www.humanrights.gov.au/sex_discrimination/paid_maternity/pml/valuing_parenthood.pdf> at 28 January 2007.

⁸⁵ See, eg, *Escobar v Rainbow Printing Pty Ltd* (No.2) [2002] FMCA 122; *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209; *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584.

⁸⁶ See, eg, *Thomson v Orica Australia Pty Ltd* [2002] FCA 939; *Rispoli v Merck Sharpe and Dohme and Ors* [2003] FMCA 160.

⁸⁷ Smith B and Riley J, 'Family-friendly Work Practices and The Law' (2004) 26 *Sydney Law Review* 395 for an analysis of recent cases that have used anti-discrimination laws and contract law to seek redress for family-unfriendly practices; Smith B, 'Maternity Leave: Still Unpaid and Still Uncertain' (2002) 15 *Australian Journal of Labour Law* 291.

⁸⁸ *Equal Opportunity Act 1995* (Vic) s 6(ea).

‘responsibilities as a carer’.⁸⁹)

The lack of response to an inquiry into paid maternity leave⁹⁰ and the ongoing prevalence of disadvantages experienced by workers with family responsibilities (predominantly women) trying to participate in the workforce prompted HREOC to undertake a wide-ranging inquiry into work and family. The aim of the inquiry was to ‘broaden the work and family debate to better include men’s role in family life, include forms of care other than child care (such as elder care and care for people with disability) and to highlight the relationship between paid work and unpaid work.’⁹¹

In March 2007, HREOC reported on the inquiry issuing a final paper – *It’s About Time: Women, Men, Work and Family*.⁹² In concluding that the federal government could do more to address the difficulties faced by workers trying to satisfy both their work and family responsibilities, it recommended a wide array of new initiatives. The central recommendation was the enactment of a new federal anti-discrimination Act to promote cultural change through greater protection and support for workers with family responsibilities.⁹³ The *Family Responsibilities and Carers’ Rights Act*⁹⁴ would (a) expand the prohibition of discrimination on the basis of family responsibilities and (b) provide employees with a right to request flexible working arrangements.

The introduction of such an Act would be supported by advocates of gender equality because it could help to further enable the participation of carers in paid work and workers in family care-giving. The introduction of an express right for carers to request flexible working arrangements would be of particular significance, representing a shift toward a presumption of flexibility rather than such requests being characterised as pleading for special treatment. While the new Labor government has not committed to new discrimination protections, its industrial relations election policy included a promise to introduce a right to request flexible work arrangements at least for new parents.⁹⁵

While acknowledging its merits, I would suggest that the proposal reflects the limited support in Australia for creative and robust regulatory thinking in respect of equality. The recommendation is merely for an expansion of the existing regulatory framework, which means relying upon victim enforcement of remedial rights to achieve cultural change. As outlined above, Australia’s rights-based regulatory system assumes that victims have the capacity to identify discrimination, that an adequate norm will exist for the conduct to be understood as a legal wrong, and that the victims have the time, security and resources to pursue litigation in the event of breach. Yet the report emphatically identified a deeply entrenched dichotomisation of work and family, supporting an idealisation of the worker who is unencumbered by family responsibilities. Further, a central finding of the inquiry is that workers with family responsibilities are extremely time poor and thus not ideally placed to undertake the additional job of reforming workplaces through litigation.

⁸⁹ *Anti-Discrimination Act 1977* (NSW) Part 4B.

⁹⁰ HREOC, ‘Valuing Parenthood’, above n 84.

⁹¹ Human Rights and Equal Opportunity Commission, *It’s About Time: Women, Men, Work and Family – Final Paper* (2007) <http://www.hreoc.gov.au/sex_discrimination/its_about_time/docs/its_about_time_2007.pdf> [xi] at 28 January 2008.

⁹² *Ibid.*

⁹³ For a critique of this proposal see Smith, ‘It’s About Time’ above n 3.

⁹⁴ *Ibid.* xvii.

⁹⁵ Australian Labor Party, *Forward with Fairness – Labor’s Plan for Fairer and More Productive Australian Workplaces* (2007) [8] <<http://www.alp.org.au/download/now/forwardwithfairness.pdf>> at 14 December 2007.

VII. Conclusion

The progressive introduction of anti-discrimination laws over the past thirty years has arguably had an effect on reducing at least some of the more blatant and intentional discrimination in Australia. The prohibition on discrimination has had a normative effect of raising awareness of and support for equality. However, since the introduction of these laws the regulatory framework has changed little, leaving victims of discrimination and equality advocates to rely upon an individualised, victim driven approach to promote equality.

Australian anti-discrimination legislation is limited by the proscriptive and general nature of the prohibition, the individual and civil nature of enforcement, the narrow range of sanctions and the limited role the State has played in building incentives and capacity for employers to address inequality.⁹⁶ There is little in the existing regulatory model to ensure that equality even makes it onto the employer agenda, that responses are genuine and effective, that information about employer initiatives is developed and shared to create a standard or norm of better practice or that such information can be used to pressure laggards and encourage leaders. A conservative trend observable in the highest courts further limits the progressive potential of Australian equality laws which are almost entirely dependent upon judicial interpretation for elaboration of the general legislative rules.

The enactment of anti-discrimination laws gave to the Human Rights and Equal Opportunity Commission and equality advocates the language of human rights and a public policy of equality, which they have used to leverage the limited legal rights provided by these laws. I suggest, however, that the absence of a national bill of rights or constitutional equality laws, and the dearth of discrimination cases before the courts has severely limited the development of a sophisticated public understanding and debate about the meaning of equality in Australia.

⁹⁶ Smith, 'Baby and Bathwater' above n 3.

Appendix A – Protected grounds under Australian Federal Anti-discrimination Laws

Act	Ground	Section	Comment
<i>Racial Discrimination Act 1975 (Cth)</i>	Race, colour, descent or national or ethnic origin.	9, 12, 13, 14, 15	Uses words of the convention.
<i>Sex Discrimination Act 1984 (Cth)</i>	Sex	5	Women and men, girls and boys.
	<p>Marital status means the status or condition of being:</p> <ul style="list-style-type: none"> (a) single; (b) married; (c) married but living separately and apart from one's spouse; (d) divorced; (e) widowed; or (f) the <u>de facto spouse</u> of another person. <p>De facto spouse, in relation to a person, means a person of the <i>opposite sex</i> to the first mentioned person who lives with the first mentioned person as the husband or wife of that person on a bona fide domestic basis although not legally married to that person.</p>	4, 6	Restricted to heterosexual relationships.
	<p>Pregnancy or potential pregnancy</p> <p>Potential pregnancy of a woman includes a reference to:</p> <ul style="list-style-type: none"> (a) the fact that the woman is or may be capable of bearing children; <i>or</i> (b) the fact that the woman has expressed a desire to become pregnant; <i>or</i> (c) the fact that the woman is likely, or is perceived as being likely, to become pregnant. <p>Woman means a member of the female sex irrespective of age.</p>	4, 4B, 7	
	<p>Family responsibilities, in relation to an employee, means responsibilities of the employee to care for or support:</p> <ul style="list-style-type: none"> (a) a <u>dependent child</u> of the employee; <i>or</i> (b) any other <u>immediate family member</u> who is in need of care and support. <p>Child includes an adopted child, a step child or an ex nuptial child.</p> <p>Dependent child means a child who is wholly or substantially dependent on the employee.</p> <p>Immediate family member includes:</p>	4, 4A, 7A	Prohibition limited to direct discrimination in termination of employment.

Act	Ground	Section	Comment
	<p>(a) a <u>spouse</u> of the employee; <i>and</i></p> <p>(b) an adult child, parent, grandparent, grandchild or sibling of the employee or of a <u>spouse</u> of the employee.</p> <p>Spouse includes a former spouse, a <u>de facto spouse</u> and a former de facto spouse.</p> <p>De facto spouse, in relation to a person, means a person of the <i>opposite sex</i> to the first mentioned person who lives with the first mentioned person as the husband or wife of that person on a bona fide domestic basis although not legally married to that person.</p>		
<p><i>Disability Discrimination Act 1992 (Cth)</i></p>	<p>Disability, in relation to a person, means:</p> <p>(a) total or partial loss of the person’s bodily or mental functions; <i>or</i></p> <p>(b) total or partial loss of a part of the body; <i>or</i></p> <p>(c) the presence in the body of organisms causing disease or illness; <i>or</i></p> <p>(d) the presence in the body of organisms capable of causing disease or illness; <i>or</i></p> <p>(e) the malfunction, malformation or disfigurement of a part of the person’s body; <i>or</i></p> <p>(f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; <i>or</i></p> <p>(g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;</p> <p>and includes a disability that:</p> <p>(h) presently exists; <i>or</i></p> <p>(i) previously existed but no longer exists; <i>or</i></p> <p>(j) may exist in the future; <i>or</i></p> <p>(k) is imputed to a person.</p> <p>The ground extends to persons accompanied by, or possessing:</p> <p>(a) a palliative or therapeutic device; <i>or</i></p> <p>(b) an auxiliary aid; <i>or</i></p> <p>(c) an interpreter; <i>or</i></p> <p>(d) a reader; <i>or</i></p> <p>(e) an assistant; <i>or</i></p> <p>(f) a carer; <i>or</i></p> <p>The ground also extends to those persons with a visual,</p>	<p>4, 7, 8, 9</p>	<p>Very wide definition, covering sensory, physical, and intellectual disabilities as well as mental illness; actual and imputed; temporary and permanent; past, present and future.</p>

Act	Ground	Section	Comment
	hearing or other disability who possess or are accompanied by: <ul style="list-style-type: none"><li data-bbox="448 389 663 423">(a) a guide dog; <i>or</i><li data-bbox="448 439 1007 528">(b) a dog trained to assist the aggrieved person in activities where hearing is required, or because of any matter related to that fact; <i>or</i><li data-bbox="448 544 1015 633">(c) any other animal trained to assist the aggrieved person to alleviate the effect of the disability, or because of any matter related to that fact.		
<i>Age Discrimination Act 2004 (Cth)</i>	<i>Age</i> includes age group.	5, 14	Applies to all ages and age groups.

New Developments in Employment Discrimination in Korea

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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 soldiers 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 institution⁶ 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 discrimination 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

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 2003²¹, 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).

²⁰The 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 employees²⁴ 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 to 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 employee³³ 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 week³⁴ 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.

Employment Discrimination in Taiwan

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I. Introduction

The issue of employment discrimination is a relatively new development in Taiwan and has become more prominent following the lifting of martial law in 1987.¹ Especially in recent years, as concern for protecting socially disadvantaged groups—ethnic minorities, women, disabled workers and the elderly—has become more pronounced, the issue of employment rights and opportunities has steadily gained public attention. Following recent trends in globalization, freedom from employment discrimination is a fundamental right which should be enjoyed by all workers throughout the world, with the International Labor Organization (ILO) designating two conventions related to the prohibition of employment discrimination as “core” labor standards.² With Taiwan’s increasing assertiveness to rejoin the international community, the government has devoted substantial resources to incorporate these international conventions into its domestic labor laws.

Currently, Taiwan has two separate but closely related legal regimes governing the issue of employment discrimination. The backgrounds, developments and ultimate achievements of these two regimes are markedly different. The first regime was established under the Employment Service Act of 1992, which was originally intended to regulate foreign workers. It states in Article 5 that in order to ensure national workers’ employment opportunity and equality, employers cannot discriminate employees and job applicants on the basis of race, class, language, thought, religion, marital status, party affiliation, age, birthplace, one’s provincial/county origin, gender sexual orientation, facial features, appearance, disabilities, and former membership in labor unions. Article 5 of the implementation regulations of the Act also mandates that municipal cities, county and city governments, form commissions on employment discrimination to enforce the above Act. Currently, the above-mentioned commissions have been established throughout Taiwan, including the outer island counties of Kinmen and Matsu.³

The second regime concerns the Gender Equality in Employment Act of 2002. This law primarily addresses issues of gender discrimination in the workplace. Its enactment was instigated by an active and vocal women’s rights movement in response to the prevalence of gender discrimination in employment in Taiwan. According to this law, the Council of Labor

¹ For a detailed account of the labor scene and labor law reforms before and after the lifting of martial law in 1987 in Taiwan, see Cing-Kae Chiao, *Democratization and the Development of Labor Law in Taiwan: 1987-1999*, 8 JAPAN INT’L LAB. L. FORUM SPECIAL SERIES 11-24 (March 1999).

² See Cing-Kae Chiao, *Globalization and the Protection of Fundamental Workers’ Rights*, 17 THEORY & POL’Y 77, 82-87 (January 2004).

³ See Cing-Kae Chiao, *An Evaluation of Current Situations and Practices of the Prohibition of Employment Discrimination System in Taiwan*, 31 NAT’L TAIWAN U.L.J. 131, 146 (2002).

Affairs of the Executive Yuan (equivalent to the Ministry of Labor), municipal cities, county and city governments are required to form commissions on gender equality in employment to deal with issues of gender discrimination in the workplace. Five years after the implementation of these commissions, there has been marked success in combating gender-based employment discrimination. However, it should be taken into consideration that further reforms are still necessary.⁴ The specificities of these issues will be discussed in later sections of this paper.

The two separate legal regimes to a certain extent address some issues regarding employment discrimination. However, in many ways they neglect other additional and important types of employment discrimination, such as age and sexual orientation. In addition, it has been acknowledged that there are complications involved in utilizing two separate legal regimes to adequately combat existing and additional types of employment discrimination. Thus, in response to these complexities, the government is currently in the process of combining, streamlining and reforming these two existing acts. The drafting of the new Equality in Employment Act also intends to garner insights of several developed countries. The enhanced combined version will likely be enacted and implemented in two years time.⁵

The purpose of this paper is to evaluate the effectiveness of the two anti-discrimination legal regimes, and to discuss their future direction and propose possible areas of reform. In addition to the introductory and concluding remarks, the contents of this paper are divided into five sections: Section One provides general background regarding the phenomenon of various types of employment discrimination in Taiwan in recent years by using statistical data and surveys provided by the government and related research projects. Section Two outlines and introduces the legal frameworks addressing this social problem. Section Three reviews how the legal framework established by the Employment Service Act copes with issues relating to employment discrimination. Section Four assesses the role played by the Gender Equality in Employment Act of 2002 in curtailing gender discrimination in the workplace. Section Five evaluates the merits, shortcomings and controversies of the current legal framework and discusses the prospect for future reforms.

II. General Background about Employment Discrimination Issues in Taiwan

This section will first discuss the prevalence of gender discrimination in the workplace in Taiwan, followed by an outline of other forms of employment discrimination. Finally, it will present several emerging forms of employment discrimination that have become evident in Taiwan in recent years.

(1) Gender Discrimination in Employment

Currently, among the differing forms of employment discrimination, gender discrimination is taken most seriously by the general public. This type of discrimination is also the most extensively researched and documented by researchers. In Taiwan, the most recent female labor participation rate is only 49.20%, compared to the male labor participation

⁴ See Cing-Kae Chiao, *The Enactment of the Gender Equality in Employment Law in Taiwan: Retrospect and Prospect*, 16 JAPAN INT'L LAB. L. FORUM SPECIAL SERIES 34-38 (March 2002).

⁵ The task of drafting this new statute is assigned to the Department of Working Conditions, Council of Labor Affairs, Executive Yuan.

rate of 67.33%.⁶ In further comparison, Taiwan's female labor participation rate also lags behind corresponding female labor participation rates in neighboring countries, such as Japan, South Korea, Singapore and Hong Kong. These statistics reveal that Taiwan's female potential labor resource has not been fully utilized and also shows that institutional barriers and traditional social and familial roles may disadvantage female workers.

In terms of wage equity, despite the norm of equal pay for equal work regardless of gender mandated by Article 25 of the Labor Standards Act, average female wages account for only 81% of wages earned by their male counterparts. The gender segregation phenomenon is also prevalent in both the public and private sectors, with female workers comprising a disproportionate number of workers holding lower end jobs.⁷ These workers also experience difficulty in being promoted toward decision-making positions. These factors provide some indication that the so-called glass-ceiling effect is still a prevalent problem in the Taiwanese labor market. For example, according to the latest figures published by the Ministry of Personnel of the Examination Yuan, which is in charge of civil servant affairs, despite the fact that females represent 45% of total civil servants in Taiwan, only 13% occupy high-ranking positions within government institutions. They account for 35% and 36% respectively, of the mid to lower range positions.⁸

Sexual harassment in the workplace has recently been the subject of considerable public attention in Taiwan. Sensational medial coverage in the early 1990s as well as a battery of studies and surveys have revealed that 15-33% of women have experienced or noticed unwanted sexual conduct in the workplace. There are two major types of sexual harassment: *quip pro quo* and hostile working environment, and both are regarded as gender discrimination in the workplace.⁹ Given that the majority of businesses in Taiwan are family owned small, or medium sized businesses, employers have considerable power in wielding managerial prerogatives. The concept of employment at will is an engrained attitude in Taiwan. In addition, after work social activities are usually mandatory and linked to an employee's performance evaluation. Under these circumstances, it is inevitable that sexual harassment has become a problem. Typically in cases regarding sexual harassment in the workplace, most of the victims are women while perpetrators are usually men in senior positions. Indeed, the government has come under intense pressure by women's advocacy groups to address this issue.¹⁰

Finally, the phenomenon of pregnancy discrimination is widespread. In addition to overt discriminatory practices, such as refusal to hire pregnant women or forced discharge of pregnant employees, "resourceful" employers also resort to subtle means of forcing pregnant workers out of the labor market. One common practice in the past was a labor contract containing a provision requiring a female employee to "voluntarily" resign from her job after assuming responsibilities of marriage, pregnancy and family. Even though such practices were eventually outlawed with the passage of the above-mentioned Gender Equality in Employment Act, there were still ways and incentives for employers to discriminate.¹¹ One

⁶ For this most current statistics, see COUNCIL OF LABOR AFFAIRS, EXECUTIVE YUAN, MONTHLY BULLETIN OF LABOR STATISTICS 11 (April 2007).

⁷ See CHIN-FENG CHANG AND TSAI RUEY-MING, LABOR FORCE AND LABOR MARKET 106-111 (2006).

⁸ See MINISTRY OF PERSONNEL, EXAMINATION YUAN, CURRENT SITUATIONS OF PUBLIC EMPLOYMENT IN TAIWAN AREA 3-4 (2005).

⁹ See Cing-Kae Chiao, *Sexual Harassment in the Workplace in Taiwan*, 1 NAT'L TAIWAN U.L. REV. 97, 111 (March 2006).

¹⁰ *Id.* at 110-111.

¹¹ Chiao, *supra* note 4, at 22-23 .

recent form of pregnancy discrimination goes by the euphemistic “fetal protection policies,” where a number of employers cite occupational safety and health provisions in the Labor Standards Act and Labor Safety and Health Act as a reason to not hire pregnant women.¹²

(2) Other Forms of Employment Discrimination

The fact that Taiwan’s population is predominantly Han-Chinese in ethnic makeup does not preclude the existence of race-based employment discrimination. The existence of a small indigenous aboriginal population of Malay-Polynesian origin and the employment rights of this ethnic minority has been a subject of great debate. Because of social stereotyping and discrimination, aboriginal workers are mainly employed in manual labor occupations. In addition the settlement of aboriginals in predominantly rural mountainous regions has made it difficult for them to adapt to urban lifestyles; consequently, this has caused difficulties for these individuals when attempting to obtain long-term employment. Despite the fact that Taiwan has passed the Protection of Aboriginal Employment Rights Act of 2001 to guarantee work for regions with higher concentration of aboriginals, along with other related measures that have been put into practice by the Council of Labor Affairs to increase their employment opportunities, these efforts have largely failed to improve their plight. According to recent statistical data released by the Council of Aboriginal Affairs of the Executive Yuan, the unemployment rate of the aboriginal population is twice as high as the official national unemployment rate. In addition, the average wage of aboriginal workers makes up only 65% of wages earned by their Han-Chinese counterparts.¹³

Besides forms of racial discrimination, ethnic discrimination in the workplace is also a growing problem in Taiwan. Owing to the fact that Taiwan is an island of immigrants, the different waves of immigration over the last three centuries has shaped diverse “ethnic” identities, an issue which has gained prominence due to a government efforts in promoting policies of “localization.” Despite the fact that the Han-Chinese make up the vast majority on the island, they are often divided into three ethnic groups based upon their “provincial origin” and time in which their ancestors immigrated to Taiwan. These groups are the Hoklo (from Fujian, accounting for about 65% of the ethnic Han majority), Hakka (primarily from Guangdong, accounting for about 15% of the ethnic Han majority) and Mainlanders (wave of immigrants from various regions of China following the Nationalist government’s relocation after the Chinese Civil War, accounting for 14% of the ethnic Han majority). Because each ethnic subgroup uses a different dialect, Mandarin serves as Taiwan’s national language to facilitate linguistic communication. Recently, in an effort to promote “Taiwanese localization” and distinctiveness from China, the government has tried to place more emphasis on the use of local dialects, rather than continue the universal use of Mandarin. These policies have also caused an observable form of ethnic discrimination in the private sector where businesses are predominantly small to medium sized, family owned enterprises. In this sector where business owners often have indisputable power, the preference of using local dialect over Mandarin has created situations in which employees or job applicants who cannot adequately communicate in the dialect of choice are discriminated against.¹⁴

Another form of employment discrimination receiving increasing attention concerns that

¹² *Id.* at 18.

¹³ See COUNCIL OF ABORIGINAL AFFAIRS, EXECUTIVE YUAN, CURRENT EMPLOYMENT SITUATIONS OF ABORIGINES IN TAIWAN AREA 3-4 (2005).

¹⁴ Actually, this discriminatory practice is in direct contravention of Article 5 of the above-mentioned Employment Service Act, which prohibits language discrimination in the workplace.

of disabled persons. According to figures provided by the Ministry of the Interior, 58.5% of disabled persons are unemployed. Not including heavily disabled and persons requiring long-term treatment, that figure drops to approximately 8%, or double the national average. Because of social stereotyping, and the fear that their employment would come at a liability to business, those with disabilities have often been the target of employment discrimination in Taiwan. According to regulations stipulated by the Protection of Disabled Persons Act, employees must provide forms of affirmative action for those with disabilities in the public and private sectors alike. Although these quotas have largely been met by the public sector, some private sector businesses still would rather bear the costs of administrative fines than choose to employ those with disabilities. The Council of Labor Affairs has also promulgated several similar measures to combat this problem, but their overall effectiveness has been limited.¹⁵

Finally, despite the fact that Taiwan is a religiously tolerant society and that discrimination on the basis of religious creed is rare, because of the prevalence of widespread for-profit institutions run by religious organizations (including schools and hospitals) there have been an increasing number of reported cases of employee discrimination. This has come about as these institutions place religious creed and faith as a requirement for employment, or when religious beliefs and practice become enmeshed within the workplace environment.¹⁶ Furthermore, with the lifting of martial law and the increased political liberalization of Taiwanese society after democratization, the role of political ideology and party affiliation has also become a means in which employee discrimination takes place. Employers with traditionally pronounced party affiliations (example Pan-Blue or Pan-Green) will often either choose to limit their employees from debating politics that are contrary to their viewpoints or will choose to make political affiliation or political preferences a criteria in the hiring process.¹⁷ In addition, due to the growth of Taiwan's service sector, person-to-person contacts and customer service have increased out of necessity. These industries often place considerable emphasis on the general physical appearance of their employees, such as the ideal characteristics of beauty, ideal height, weight and even facial features dictated by popular culture and Western influences become criteria for employment. This of course comes to a disadvantage to those with "appearance deficits" or those who do not meet these oftentimes arbitrary "ideal" standards.¹⁸

(3) Emerging New Forms of Employment Discrimination

Despite the fact that Taiwanese traditional society is one that respects seniority and the elderly, it has in the past not seen the so-called "Grey Power" phenomenon as in some Western industrialized nations, nor has age discrimination in employment been a prevalently discussed social issue. This has changed in recent years however, as the proportion of Taiwan's middle aged and elderly population continues to increase along with a successively overall declining birthrate. In 1993, Taiwan became categorized as an "old age society" (with 8% of the population over the age of 65) according to standards established by the

¹⁵ See Chin-Chin Chen, *A Study on Establishing Age Discrimination Legal System to Protect Employment Rights for Middle-and-Old Age Persons*, 12 BULLETIN OF LABOUR RESEARCH 395, 399-401 (2002).

¹⁶ For instance, Tzu-Chi, a very powerful Buddhist sect in Taiwan has required lay employees in its colleges and universities to wear uniforms and attend certain religious ceremonies. These requirements, though voluntary in appearance, have put some pressure on these employees.

¹⁷ For a similar situation in the United States, see Cing-Kae Chiao, *The Current Trend on Workplace Regulations—the American Experience (I)*, 129 FT L. REV. 83, 86 (2003).

¹⁸ Chiao, *supra* note 3, at 171.

United Nations. Age and employment have henceforth become a hotly debated issue. Before the enactment of the 2006 Labor Pension Act, Taiwan lacked a solid worker's retirement program. Employers in the private sector have always found ostensible reasons to layoff their employees who are approaching the age of retirement, in order to avoid paying them enterprise retirement pensions which are required under the Labor Standards Act. Furthermore, when workers have reached their voluntary or mandatory retirement age and have received their old age pensions contained in the Labor Insurance Statute, they are not permitted to rejoin the labor insurance programs established by the Statute. This stipulation also discourages local employers to hire older workers. Finally, an increasing number of so-called "sunset" enterprises are moving abroad and to mainland China to avoid high labor costs in Taiwan. The livelihoods of middle and old-age workers are most adversely affected as a consequence of these relocations and plant closings.¹⁹

From 1989 onwards, due to labor shortages in the manufacturing and construction industries, Taiwan began to import large numbers of foreign blue-collar workers. In a parallel development, due to the rapidly aging Taiwanese society, many families who lack the economic means to hire domestic caretakers have resorted to hiring foreign caretakers, predominantly from Southeast Asia. According to the latest statistics released by the Council of Labor Affairs, Taiwan now has 357,000 foreign workers. Despite the fact that Taiwan's overall conduct toward foreign workers is favorable compared to other countries, foreign workers still face a number of problems, as differences in areas of race, language, culture, and economic standing create situations where employment discrimination has become increasingly common. Moreover, foreign caretakers who are not as visible to the public eye, often face multiple forms of discrimination (i.e. on the basis of gender, race, class, etc.). Furthermore, due to the unique nature of their work, the Labor Standards Act is not applicable to these types of foreign workers. Occasionally, the mistreatment of foreign workers has become the focus of the international media, which has consequently led to U.S. government criticism of Taiwan in its State Department Country Report on Human Rights Practices. This in turn has tarnished the island's image at home and abroad. Fortunately, after the passage of the Gender Equality Employment Law in 2002, the Council of Labor Affairs declared that this law would be applicable to migrant workers. Therefore, the principles of gender equality would also be applicable to foreign workers in Taiwan. Thus, in the event that they were to encounter sexual harassment in the workplace, they too, could use this law as recourse.²⁰

Finally, in recent years, due to the rising educational attainment of Taiwanese women, it has become harder for males with lower social status to get married. As a result, a large number of these single men marry women who are colloquially referred to as "foreign brides" from Southeast Asia (predominantly Vietnam, Indonesia and Thailand) and "Mainland brides" from China. According to recent statistics released by the Ministry of the Interior, there are currently up to 300,000 "foreign and Mainland brides" residing in Taiwan. Since most of these women are married to local men from socially or economically disadvantaged groups, they typically need to work outside of the home in order to concurrently support their families in Taiwan and in their countries of origin. Nevertheless, without adequate linguistic abilities,

¹⁹ Chen, *supra* note 15, at 399.

²⁰ See Cing-Kae Chiao, *The Scope of Employer Liability in the Incident of Sexual Harassment in the Workplace as Provided in the Gender Equality in Employment Act: A Comment on a Related Decision Rendered by the Taipei High Administrative Court*, in ADMINISTRATIVE LAW: PRACTICE AND THEORY 159, 171-174 (Ming-Chan Lin and Mao-In Tsa eds. 2006).

they are inevitably becoming the most vulnerable workers in the local labor market and are consequently the most frequently discriminated against. However, in comparison, brides from mainland China face even more dire circumstances. They must reside in Taiwan for at least eight years to obtain their work permits while their counterparts from other countries need to wait only three years. The same rule also applies to foreign (or mainland) males who marry local Taiwanese women. Although this practice is an obvious violation of Article 5 of the Employment Service Act, which stipulates that employers cannot refuse to hire a worker based upon his or her marital status, to this day no known cases have been brought to the commissions on employment.²¹

III. Legal Regime Governing Employment Discrimination in Taiwan

This section will discuss the legal regime governing employment discrimination issues prior to the passage of the above-mentioned Gender Equality in Employment Act of 2002 (as amended in 2007). It will also cover the major contents of the Act itself, and other related fair employment statutes will be briefly discussed.

(1) Legal Framework before the Passage of the Gender Equality in Employment Act of 2002

Prior to the passage of the Employment Service Act of 1992 and the Gender Equality in Employment Act of 2002, the legal regime addressing issues regarding discrimination in employment was a constellation of constitutional mandates and statutes. Due to several deficiencies, the regime was ineffective since it provided little legal recourse to those victimized by discriminatory practices. For instance, Article 7 of the ROC Constitution proclaims that persons are equal before the law regardless of their gender, religion, race, social class and political affiliations and Article 10 of the Amendments to the Constitution also declares that the state shall uphold personality and dignity of women, protect their personal safety, eliminate gender discrimination and promote gender equality. Furthermore, the same Article also mentions that the government shall actively promote employment opportunities for aboriginals and the physically and mentally disabled. However, these provisions have been interpreted by legal scholars as requiring state action, and therefore cannot be used by an individual aggrieved worker to challenge discriminatory employment practices by a private employer.²²

The Civil Code can provide legal protection to victims of discrimination. Article 72 states that a juristic act that is contrary to public order or sound morals is null and void. A number of court decisions have relied on this broad provision and nullified the practice of mandatory retirement of female workers upon marriage and pregnancy. The shortcoming of this approach is that these decisions could only be applied towards overt acts of discrimination and not the subtler more common forms of discrimination.²³ Another important statute is Article 25 of the Labor Standards Act which stipulates that employers shall pay equal wage to its workers for equal work. However, this provides little legal protection for claimants of gender discrimination because it deals exclusively with

²¹ See Cing-Kae Chiao, *Legal Controversies Arising from Interactions between the Two Sexes in the Workplace*, 3 TAIWAN LABOR 52, 57-58 (2007).

²² Chiao, *supra* note 4, at 18.

²³ *Id.* at 18-19.

remuneration and not other employment practices.²⁴

Perhaps the most effective legal avenue to combat discrimination in employment prior to the passage of the Gender Equality in Employment Act of 2002 was the Employment Service Act of 1992. Article 5 forbids an employer from discriminating against an employee or job applicant on the basis of race, religion, political affiliations, and sex.... etc. Furthermore, municipal and local governments are required to set up commissions on employment discrimination to handle this type of labor disputes. To date, all municipal and county governments have established these commissions and their organizations and functions will be discussed in Section (IV) of the paper.

Finally, Taiwan has ratified two important International Labor Organization conventions concerning employment discrimination, namely No. 100 Equal Remuneration Convention and No. 111 Discrimination in 1958 and 1961, respectively. Although Taiwan has no legal obligation to observe the two conventions due to its expulsion from the United Nations in 1971, they have nevertheless become “core” conventions and universally recognized as basic human rights in recent years. Thus, their influence on developments within Taiwan still merits attention.²⁵

(2) Major Provisions of the Gender Equality in Employment Act of 2002

The current regime utilizes the Gender Equality in Employment Act as the mainstay statute, which is in turn buttressed by several recently revised work discrimination-related laws. The Act’s major provisions can be summarized as follows.

(a) General Provisions

The General Provisions of the Gender Equality in Employment Act contains six articles. This Act declares that it is applicable to both public and private sector employers and employees. It further stipulates that pre-existing arrangements between employers and employees that are superior to those provided by the law shall be respected. Moreover, it mandates that competent authorities establish commissions for the purpose of examining, consulting and promoting matters concerning gender equality in employment. Local government authorities must also provide various occupational training, employment services and re-employment training to enhance employment opportunities for women.²⁶

(b) Prohibition of Gender Discrimination

The five articles in the second chapter “Prohibition of Gender Discrimination” prohibits employers from making disparate treatment to their employees or job applicants in all aspects of employment practices (i.e. recruitment, examination, promotion, severance, retirement, termination, and so on). Employers may be exempt in certain circumstances, such as “the nature of work only suitable to a special sex,” a concept equivalent to the Bona Fide Occupational Qualifications (BFOQs). In addition, the law also eliminates the common practice of “voluntary” resignation upon marriage and pregnancy.²⁷

(c) Prevention and Correction of Sexual Harassment

One of the unique characteristics of the Gender Equality in Employment Act is that it closely follows the U.S. legal model in treating sexual harassment as a form of gender

²⁴ *Id.* at 19.

²⁵ *Id.*

²⁶ *Id.* at 22.

²⁷ *Id.* at 22-23.

discrimination in employment. Firstly, it offers legislative definition for the two major types of sexual harassment, namely hostile working environment and quip pro quo sexual harassment. Hostile working environment sexual harassment refers to the conduct of “anyone” asking for sexual favors or uses verbal or physical conduct of a sexual nature in the workplace to cause an intimidating, hostile or offending work environment for employees. Quip pro quo refers to when an employer explicitly or implicitly asks for sexual favors from employees or applicants, or uses other verbal or physical conduct of a sexual nature as an exchange for the establishment, continuity or alteration of a labor contract. Secondly, the act imposes strict liabilities on employers in order to create incentives to prevent the occurrence of sexual harassment, and in the event of its occurrence, to implement immediate and effective remedial measures. The law also delegates the Council of Labor Affairs to formulate related preventive guidelines, correctional measures, compliance procedures and punitive measures.²⁸

(d) Measures for Promoting Equality in Employment

This chapter mandates various leaves of absences for both male and female workers with the intent on harmonizing working and family lives. One is a provision for female workers to take one day off per month as part of their sick leave if they have difficulties performing their job duties as the result of the menstrual cycle. Secondly, in addition to reiterating the eight week maternity leave that was originally provided for in the Labor Standards Act, there is now a “refined” provision which legally mandates a maternity leave for miscarriages as well as a three-day paternity leave for fathers. Thirdly, an employee working for a firm is now entitled to a non-paid, two-year parental leave with possibility for full reinstatement. Fourthly, the Gender Equality in Employment Act requires employers to allow time for their employees to personally feed their children of less than one year twice a day, at thirty minutes each. This feeding time is deemed as working time and paid accordingly. Employers with over five workers must also reduce the total working day by one hour without pay or readjust working schedules for employees with children who are less than three years old. Fifthly, the Act grants any employee a non-paid leave, at a maximum of seven days per year, in order to allow the worker to take care of his or her family affairs. Finally, it mandates that firms employing over two hundred and fifty employees must provide childcare facilities or arrange for suitable childcare measures.²⁹

(e) Remedies and Appeals Procedures

The Gender Equality in Employment Act incorporates a variety of complex remedial measures for an alleged victim. To settle related disputes, the Act attempts to establish internal and external channels for settlement. First, employers are deemed liable for any damage arising from gender-related discriminatory practices. For cases of sexual harassment, the Gender Equality in Employment Act stipulates that both the offender and the employer are jointly liable in making compensation. Employers are encouraged to adopt all preventive and correctional measures. In the event that an employer is aware of ongoing sexual harassment but failed to take immediate and effective actions, the employer is then liable for any damages arising from those incidents. Aggrieved employees or job applicants can also claim a reasonable amount of non-pecuniary damages, such as damage to their reputations. Secondly, to settle labor disputes arising from gender discrimination, the Gender Equality in

²⁸ *Id.* at 23-24.

²⁹ *Id.* at 24-25.

Employment Act establishes internal and external complaint channels. Employers are encouraged to set up internal complaint systems to handle complaints filed by their employee. Employees are protected from termination or disciplinary action if they are personally involved or assisting another employee in filing complaints. For external procedures, there are two avenues. For appeals concerning various leaves of absences, the local competent authorities should be the first instance and shall investigate within seven days and act as mediators for the interested parties. For appeals that implicate matters concerning gender discrimination in employment, the local competent authorities are the first instance, but interested parties may appeal to the Council of Labor Affairs' Gender Equality in Employment Commission if they are dissatisfied with the decision rendered by the local authorities. If the parties are not satisfied with the decisions of the Committee, they may file administrative appeals or initiate administrative lawsuits. The Gender Equality in Employment Act, for the purpose of recognizing the expertise and prestige of the committees on gender equality in employment, instructs that courts or competent authorities determining the facts of discriminatory treatment. They shall also examine the investigative reports, rulings and decisions rendered by these committees. Thirdly, in order to relieve the burden of proof for claimants of gender discrimination, the Gender Equality in Employment Act stipulates that after the employees or applicants make a prima facie statement of the disparate treatment, the employers shall bear the burden of proof of the non-gender factor of the discriminatory treatment, or the specific sexual factors for the employees or applicants to perform the job. And finally, in order to not deter aggrieved employees or applicants from filing gender discrimination lawsuits in the courts, the Gender Equality in Employment Act also requires the competent authorities to provide necessary legal aid.³⁰

(3) Other Related Fair Employment Statutes

In addition to the foregoing enactment of the Gender Equality in Employment Act, the government is also currently in the progress of initiating other related reform measures in order to lay a solid groundwork for achieving the goal of substantive gender equality in the workplace. The 1996 amendments to the Labor Standards Act considerably expanded the statute's scope of coverage. This expansion extended protection to an additional 5.54 million workers, which will dramatically improve the job security for those previously uncovered, i.e. those working in the service sector (which are predominantly female).³¹ Secondly, several provisions in the Labor Standards Act, deemed to be "overprotective" to female workers are due to be repealed. For instance, the long-standing ban on night-time work by female workers was lifted after suitable security arrangements were made. Mismatched maximum overtime hours per month for male and female workers were also eliminated thus allowing female workers an equal opportunity to earn premium payments.³² Thirdly, a number of new statutes have been enacted to offer affirmative action to socially disadvantaged groups, such as aboriginals, the elderly and disabled persons. For instance, Article 98 of the Government Procurement Act requires that business entities that win the bids for government projects, and have projects that will require them to employ 100 or more workers, must also include a minimum of 2% of aboriginal or disabled persons in that group of workers. In addition, the Protection of Disabled Persons Act also imposes strict employment quotas on the employers

³⁰ *Id.* at 25-27.

³¹ *Id.* at 27.

³² *Id.* at 27-28.

in both public and private sectors.³³ Furthermore, the Protection of Aboriginal Employment Act also stipulates that the Government, at all levels, public schools and nationalized industries shall employ at least one aboriginal person for every one hundred persons employed. For those counties with a substantial aboriginal population, the quotas have been increased to one-third.³⁴ Finally, in the Protection of Workers During Mass Lay-Offs Act, which was promulgated in 2003 to settle labor disputes during plant closure and mass lay-offs, Article 13 stipulates that when a business entity decides to discharge its workers during plant closings or mass lay-offs, it cannot discharge them based on the same categories indicated in Article 5 of the said Employment Service Act.³⁵

IV. Combating Employment Discrimination under the Employment Service Act

In this section, the organizational structure of the commissions on employment discrimination formulated by the Employment Service Act will be briefly discussed. It then proceeds to outline their major functions as mandated by the Act. Their actual operations, i.e. the procedural aspects of the how they handle their cases will be addressed. Finally, this section addresses issues regarding the enforcement of the decisions rendered by these commissions.

(1) Composition and Organizational Structure of the Commissions on Employment Discrimination

According to the statistical data released by the Council of Labor Affairs upon completing its most recent evaluation and performance assessments of these commissions in December 2006, there are currently twenty-eight commissions on employment discrimination established throughout Taiwan. In addition to twenty-five municipal cities, counties and the two offshore islands of Kinmen and Matsu, one economic processing zone and two science parks have also established commissions of this type. According to the data collected by the author, there are a total of 322 members of these commissions. Among them, male members make up 227 of the membership, while females accounted for 95 members. As for their age groups, most of them belong to the 40-49 age bracket, accounting for 47% of total membership. The second largest age group is represented by the 50-59 age bracket, which accounts for 33% of the group. As for educational attainment of these members, around 75% of them have attained bachelor's degrees (23% percent have earned master's degrees). As for their professional backgrounds, thirty-eight percent of them are government officials and eighteen percent of them can be categorized as legal experts and scholars. Thirteen percent are from business communities and eleven percent represent labor unions.³⁶

As for the organizational structure of these commissions, Article 2 of the enforcement

³³ The Act is currently under revision, with the quotas having been raised under the pressure of civil society organizations, especially by those championing disabled persons' rights. For instance, it requires business entities which have over 67 employees in the private sector shall employ at least one disabled person instead of 100. For government departments and public schools, the threshold is reduced from 50 employees to 34.

³⁴ See Article 5 of the Protection of Aboriginal Employment Act.

³⁵ The only exception is that this Act has now instituted physical age as a new category.

³⁶ For a detailed account of this survey, see EMPLOYMENT AND VOCATIONAL TRAINING AGENCY, COUNCIL OF LABOR AFFAIRS, ANNUAL EVALUATION OF THE PERFORMANCE OF THE COMMISSIONS ON EMPLOYMENT DISCRIMINATION 4-5 (2006).

regulations of the Employment Service Act only stipulates that municipal and county governments may establish commissions on employment discrimination composing of members from the government, representatives from employees and employers' organizations, and scholars. Currently, each municipal and county government has promulgated its own set of organizational rules for these commissions. In general, these commissions are *ad-hoc* committees affiliated with the department of labor of each individual municipal and county government. For example, Taipei Municipal Commission on Employment Discrimination is affiliated with Section Two (which is in charge of employer-employee relations) of the Taipei City Department of Labor. The commission has neither a permanent staff nor its own budget. Instead, it must rely on the support of the department in almost all aspects of its operation. With such low legal standing, it is unsurprising that its achievements are also limited. These limitations will be discussed more specifically in Section VI.³⁷

(2) Functions of the Commissions on Employment Discrimination

According to Paragraph 4 to Article 6 of the Act and Article 2 of its Enforcement Regulations, which are the two articles directly concerned with the functions of these commissions, these bodies are authorized to "review and decide" employment discrimination complaints. Since there are almost no legislative and administrative guidelines whatsoever to provide any direction for these commissions to follow, they assume their functions from a very uncertain foundation. For example, when the Taipei Municipal City Commission on Employment Discrimination was created in September 1995, it had to spend considerable time debating its own functions even though seven other municipal cities and counties had already established their own respective commissions. Two months later, the Commission received its first complaint about sexual harassment in the workplace, and had to start from scratch in order to solve the problem, having no previous precedents or examples to follow through on. A considerably lengthy "trail and error" period of almost four months ensued, after which the Commission finally decided that its function was only to "review and decide" the complaint itself and let the Department of Labor to handle the subsequent administrative and judicial matters.³⁸

After almost six years of passively receiving, reviewing and deciding the particular complaint case, the commissions have gradually assumed other additional functions. Following the leadership of the commissions in Taipei City and Taipei County, they began to launch a series of related educational and training programs. When the Legislative Yuan started to put the finishing touches on the enactment of the Gender Equality in Employment Act in 2000, the Council of Labor Affairs was required by the Executive Yuan to hold numerous training sessions, talks, conferences and seminars in order to lay a framework for this landmark legislation. During this time, the commissions in some municipal cities and counties played a active role in promoting the rudimentary concepts of employment discrimination (especially with regard to gender discrimination) to workers, employers, labor and business organizations, and even to the general public. Under the auspices of the Employment and Vocational Training Agency (EVTA) of the Council of Labor Affairs, the major competent authority in charge of overseeing employment discrimination issues, a number of booklets, pamphlets, videotapes and films have been published and issued on the topic of employment discrimination. Therefore, it is not an exaggeration to state that these awareness and empowerment functions are far more important than their official "review and

³⁷ Chiao, *supra* note 3, at 183.

³⁸ *Id.*

decide” capacity.³⁹

(3) The Commissions on Employment Discrimination in Actual Practice

As mentioned earlier, each municipal city and county government has published its own administrative rules concerning the composition and operations of its commission on employment discrimination. Therefore, it is beyond the scope of this paper to make an overall account on how they actually process the complaint cases. However, since the author of this paper has been a founding member of Taipei City’s Commission on Employment Discrimination for thirteen years and has attended all fifty-nine sessions of reviewing and deciding cases, the actual operation of the Commission can be summarized as follows:

First, in terms of the number of complaints processed, from September 1995 to March 2002, when the Gender Equality in Employment Act became effective and all gender discrimination in employment complaint cases were referred to the newly-established Commission on Gender Equality in Employment, the Taipei City Commission on Employment had actually reviewed and decided 136 cases. Among them, almost 96 cases were related to pregnancy discrimination. Sixteen cases were concerned with sexual harassment in the workplace, and another eleven cases were related to other aspects of gender discrimination in employment, as discrimination in promotion (three cases), wage equality (two cases), disparate treatment (one case), recruitment discrimination (five cases), and dress code issues (one case). As for other types of employment discrimination complaints, four cases dealt with disability discrimination, two cases were about former labor membership, and finally one case each concerned race, class, political party affiliation and age. Forty-nine cases decided by the Commission had merit, eight-five cases were turned down while two cases were eventually withdrawn by the complainants. The success rate was only around 37%, with complainants raising grievances concerning pregnancy discrimination faring most poorly.⁴⁰

Secondly, since the employment discrimination issue was a rather new phenomenon in Taiwan, the role played by first-line personnel became very important. Initially, since government officials in charge were quite inexperienced in handling these new types of labor disputes, they tended to treat these complaints as ordinary employee-employer disputes and tried to resolve them through the process stipulated in the Settlement of Labor Dispute Act. Fortunately, the first two executive secretaries of the Commission who were also Directors of the Department of Labor, were also veteran labor unionists and cognizant of the significance of these new types of labor disputes. Therefore, a taskforce on employment discrimination was formed in 1998 to screen and scrutinize the related cases. After the team decided that the particular case had merit, a thorough investigative process would be set in motion.⁴¹

Thirdly, during the investigation period, the staff members would conduct interviews (complainants, employers and witnesses), compile files and try to settle the disputes through various forms of alternative dispute resolutions (ADRs). For those employers who choose to be uncooperative, labor inspection processes might be utilized to gain their compliance. Upon deciding that the particular case was suitable for deliberation, the investigative team would refer the case to the Commission for the formal reviewing and deciding procedure.⁴²

Finally, the formal sessions of the Commission was presided over by the Secretary

³⁹ *Id.* at 156-158.

⁴⁰ *Id.* at 153.

⁴¹ *Id.* at 175-176.

⁴² *Id.*

General of Taipei City, who served as chairperson of the Commission. Two-thirds of all members are required to attend in order to establish a valid quorum. After executive secretary and staff members make their preliminary reports, members of the Commission then begin the deliberation process. Occasionally, complaining employees and employers would be interviewed personally, especially in cases involving sexual harassment in the workplace or when members of the Commission deemed the cases were of significance. Under normal circumstances, a simple and fairly straightforward case can be resolved by one plenary session, but complicated cases could take two to three sessions to settle. Since legal scholars and practicing lawyers have actively participated and played an important role in the process, all cases would be solved through consensus rather than by voting. After the tentative results have been reached, the staff members then prepare a draft report that will be subsequently reviewed by two members and then circulated to all members for approval. Regardless of the Commission's decision, whether the complaints had merits or not, an administrative appeals procedure would ensue.⁴³

(4) Enforcement of the Commissions' Decisions

When the commission renders its decision on a formal complaint of employment discrimination, its contents are divided into three components: the ruling, reasons for the ruling and recommendations. The ruling itself is normally fairly straightforward: the complaint is either sustained or denied. The reasons for the ruling are the most crucial element of the decision-making process. This component is typically written by legal scholars and practicing lawyers. As mentioned earlier, since there are no local precedents that can be referred to, practices and experiences from the United States and the European Union are widely gathered and taken into consideration. For instance, because members of the Taipei City Commission on Employment Discrimination are strongly influenced by the prevailing concept that sexual harassment in the workplace is a form of gender discrimination in employment, the commission itself was deeply involved in the investigation of the complaints and made several important decisions. Whether this approach is valid or not is somewhat questionable, but it is undeniable that this practice has subsequently made a significant impact on the prevention of this kind of incident in the workplace in Taiwan.⁴⁴

The reason for offering recommendations in the decision of the Commission has to do with its status as an *ad hoc* committee without any enforcement authority and functions. Therefore, it can only propose the following recommendations for the Department of Labor to adopt, including: administrative fines for a recalcitrant employer depending on the severity of the violation; no administrative fines imposed on the employer (especially those in the public sector) but reform and correction of his or her practices through some form of administrative guidance issued by the Department; and transfer of the case to other avenues or competent authorities for proper settlement.⁴⁵

After the Department of Labor receives the decision from the Commission, a formal enforcement procedure will begin. If the commission decides against the complainant, the Department will issue a formal administrative decision and inform the claimant. The complainant can file an administrative appeal to the Council of Labor Affairs in accordance with the Administrative Appeals Act. If the appeal is denied by the Council, then the case can be appealed to the High Administrative Court as stipulated in the Administrative

⁴³ *Id.* at 176-177.

⁴⁴ *See* Chiao, *supra* note 9, at 109-110.

⁴⁵ *See* Chiao, *supra* note 3, at 177-179.

Litigation Act. It should be noted that before the extensive amendments of the Employment Service Act in 2002, the administrative fine for the violation of Article 5 of the Act was only N.T. \$3,000 to N.T. \$30,000, which meant dispute resolution could only be handled in the High Administrative Court with a simplified litigation procedure without oral arguments and precluded any motion of appeal to the Supreme Administrative Court for a final judicial solution. If the Commission's decision is for the complainant, then the employer can appeal to the Committee of Administrative Appeals of the Council of Labor Affairs for redress. The subsequent procedures are identical to the ones described above.⁴⁶

Generally, employers in the private sector seldom pursue their cases beyond the administrative appeals stage because the process is free of charge. However, since the Committee of Administrative Appeals of the Council of Labor Affairs is generally supportive of the decisions made by the Departments of Labor, only a few cases have reached the High Administrative Courts and most of them involved disputes concerning pregnancy discrimination and sexual harassment in the workplace. Initially, these administrative courts were uncomfortable hearing these kinds of cases, especially concerning the concept of sexual harassment in the workplace as a form of gender discrimination in employment.⁴⁷ Nevertheless, after a tenuous start and under the influence of the drafting of the Gender Equality in Employment Act, which had devoted a full chapter to the prevention of this kind of conduct at work, the Courts have come to accept and support this concept. As for the disputes over pregnancy discrimination, since they only involved shifting the burden of proof to employers, the Courts were also quite supportive of the decisions rendered by the commissions. Generally speaking, since the administrative fines imposed by the commission on employment discrimination were negligible, employers normally were not overly concerned about the enforcement of the Act. However, after the administrative fines section was extensively amended and increased ten to fifteen times in December 2001, employers have grown increasingly concerned about the outcome of their cases.⁴⁸

V. Combating Gender Discrimination under the Gender Equality in Employment Act

This section discusses the organizational structure, major functions, actual operations and the enforcement authorities of the commissions on gender equality in employment, which was established by the Gender Equality in Employment Act of 2002.

(1) Composition and Organizational Structure of the Commissions on Gender Equality in Employment

Unlike the Commissions on Employment Discrimination, the Commissions on Gender Equality in Employment have a solid statutory foundation for their establishment. Article 5 of the Gender Equality in Employment Act stipulates that these commissions be comprised of five to eleven members, it also clearly mandates that the members be elected from persons with related expertise on labor affairs, gender issues or with legal backgrounds. Among these members, two shall be recommended by workers' and women's organizations

⁴⁶ *Id.*

⁴⁷ See Cing-Kae Chiao, *Is Sexual Harassment in the Workplace a Form of Sex Discrimination in Employment? Comments on a Decision Rendered by the Taipei High Administrative Court and Experience from the United States*, 4 SELECTED COURT DECISIONS ON LABOR LAW 97, 113-116 (2006).

⁴⁸ See Article 65 of the Employment Service Act.

respectively. Most important of all, the Act also requires that the number of female members of the commission to be over one-half of the total membership. In order to avoid overlapping of functions between the commissions on employment discrimination and commissions on gender equality in employment, the Act also stipulates that in the case of local competent authorities which have already set up commissions employment discrimination, may handle the related matters referred to in the Act, provided that the composition of these commissions shall be in accordance with the Gender Equality in Employment Act.⁴⁹

According to the statistical data released by the Council of Labor Affairs in December 2006 following the conclusion of its annual examination and review of the activities of these commissions, in addition to the Commission on Gender Equality in Employment set up by the Council itself at the central government level, there are currently only ten municipal and county governments plus three economic processing zones and science parks that have established these kinds of commissions to handle disputes arising from gender discrimination in employment. The remaining fifteen municipal and county governments still use commissions on employment discrimination to process complaints involving gender discrimination in the workplace. For instance, Taipei City has set up this type of commission in 2002, but several populous local governments such as Kaohsiung City, Taipei County and Taoyuan County still keep their commissions on employment discrimination established by the above-mentioned Employment Service Act. However, these local governments have adjusted their membership in accordance with the requirement of the Gender Equality in Employment Act.⁵⁰

From an organizational perspective, these types of commissions operate on a two-tier system. At the central government level, the Commission on Gender Equality in Employment was established by the Council of Labor Affairs. It consists of eleven members, which is the maximum number allowed by the Gender Equality in Employment Act. Among them, one member serves as chairperson of the Commission and is appointed by the Chairperson of the Council itself. In most situations, the Deputy Chairperson of the Council (with political authority and obligations) presides over this Commission on a part-time basis. The remaining ten members are selected from workers' organizations (2), employers' organizations (2), women's organizations (2), scholars and experts (3), and representatives from the Council (1). Since the Department of Working Conditions of the Council is responsible for handling gender equality in employment affairs, its Director is appointed as executive secretary of the Commission and its (3 to 7) staff members are also supporting staff members of the Commission.⁵¹

As for the Commissions at the local government level, they generally follow the precedent of the Council of Labors in establishing their own commissions. Using Taipei City (which has the most functional system in Taiwan) as an example, its commission also consists of eleven members, but its composition is slightly different from the Commission established by the Council of Labor Affairs. For instance, it has only one representative from employers' organizations and has two members representing other civic groups.

⁴⁹ See Paragraph 4 to Article 5 of the Gender Equality in Employment Act.

⁵⁰ See DEPARTMENT OF WORKING CONDITIONS, COUNCIL OF LABOR AFFAIRS, ANNUAL EVALUATION OF THE PREFERENCE OF THE COMMISSIONS ON GENDER EQUALITY IN MUNICIPAL CITIES AND COUNTIES 2-3 (2006).

⁵¹ See related provisions of the Organizational Rules for the Establishment of the Commission on Gender Equality in Employment for the Council of Labor Affairs of the Executive Yuan which can be found on the Appendix (3) of this paper.

Additionally, the commission also includes one professor and one legal expert. The role of Chairperson of the Commission is taken on by the Secretary General of the City and the executive secretary's role is assumed by the city's Director of the Department of Labor. The Commission also has four to six supporting staff mainly drawn from the Department of Labor. Although the composition of the Commissions at other local governments may vary, they are generally in accordance with the minimum requirements of Article 5 of the Gender Equality and Employment Act, that is, at least one-half of the total membership be composed of female members.⁵²

(2) Functions of the Commissions on Gender Equality in Employment

Article 5 of the Gender Equality in Employment Act only slightly outlines that the functions of the commissions of gender equality in employment at each government level to review, consult and promote matters concerning gender equality in employment, therefore, it is up to related by-laws to delineate their major functions. At the central government level, according to Article 2 of the Organizational Rules for the Establishment of the Commission on Gender Equality for the Council of Labor Affairs, the main tasks of the Commission are as follows: (i) consult and research the Gender Equality in Employment Act and its related statutes and administrative regulations; (ii) investigate and make decisions regarding the complaints concerning gender equality in employment; (iii) review and examine annual working plans (proposed by the Council); (iv) investigate current situations of gender equality in employment; and (v) promote other matters concerning gender equality in employment. At the local government level, the municipal cities and other counties generally follow the Council of Labor Affairs' pattern to give functions to their respective commissions. For example, according to the bylaw of establishing the Commission for Taipei City, its functions as almost mirroring those of the Commission of the Council of Labor Affairs except those related to the review and examination of annual working plans.⁵³

Although the official functions of the commissions on gender equality in employment under the Gender Equality in Employment Act are quite well-defined as compared with those functions assumed and discussed above by the commissions on employment discrimination under the Employment Service Act, their scope of authorities is actually severely limited due to their lack of independent budget and permanent supporting personnel. Utilizing the Commission set by the Council of Labor Affairs as an example, its functions of consulting and researching of the Act itself and the related administrative regulations have not performed adequately. Although five members of the Commission are practicing lawyers and law professors, the Commission itself cannot independently interpret the Act and related administrative regulations itself. Instead, it must rely on the Committee of the Statutes and Administrative Regulations of the Council to render the necessary interpretations which has considerably minimized the Commission's authority as an agency with specialized expertise in this regard.⁵⁴

The Commission also cannot independently perform the duty of investigating current

⁵² DEPARTMENT OF WORKING CONDITIONS, *supra* note 50, at 4.

⁵³ See Article 2 of the Organization Rules for Establishing the Commission on Gender Equality in Employment for Taipei City.

⁵⁴ For instance, the issue involved whether the Gender Equality in Employment Act is a so-called "special law" and shall take precedence of Article 5 of the Employment Service Act whiling dealing with sex discrimination in employment disputes was settled by the Statutes and Administrative Regulations of the Council and not by the Commission itself.

situations of gender equality in employment in Taiwan as required by Article 5 of the Act. It must rely on the Statistics Department of the Council for figures and data every year after the law's passage. Since the Commission has no input on the questionnaires designed by the Department while it conducts large-scale annual surveys, the results do not always accurately represent actual circumstances. In addition, the Commission also must rely on the Department of Working Conditions of the Council to conduct scholarly research programs because it has no other sources of funding for this specific purpose. In actuality, the Department itself normally delegates these projects to local scholars. Due to the strict regulations of the Government Procurement Act and the deep cuts in the government budget in recent years, it is nearly impossible to obtain quality research results. This in turn has almost rendered the Commission's function in this area irrelevant. As for the task of reviewing and examining annual working plans proposed by the Council, they are routinely approved by the Commission itself without any opposition. The members are fully aware and cognizant of the reality that there is little, or no point in questioning these plans since they are definitely required to properly perform the Commission's basic functions, despite receiving woefully inadequate funding.⁵⁵

The remaining functions for the Commission to perform under the Gender Equality in Employment Act are to investigate and decide complaints concerning gender equality in employment, just like those performed by the commissions on employment discrimination under the Employment Service Act discussed above. In addition, the Commission also engages itself actively in the task of training and raising awareness. It is through these two functions that the Commission has gradually laid a solid foundation for the development of employment discrimination law in Taiwan in recent years (to be discussed in depth in a later section).⁵⁶

(3) The Commissions on Gender Equality in Employment in Actual Practice

In the five years since its inception, the Gender Equality in Employment Act has provided a very detailed procedural, while the commissions at all levels of government have gradually developed a consistent approach towards resolving various types of disputes. As mentioned earlier, there are two tiers of complaint procedures: The complainants shall at first instance file their complaints to the commissions on gender equality (or employment discrimination) of the local governments. If they are dissatisfied with the commission-rendered decisions, they can then appeal to the Commission on Gender Equality in Employment of the Council of Labor Affairs. Each commission has its own by-laws to receive, process, deliberate and decide on these complaints. While it is beyond the scope of this paper to present a full account of these procedures, the following subsections provides additional specifics regarding the ways in which the local government's commission on gender equality in employment (or commission on employment discrimination) and Commission on Gender Equality in Employment of the Council of Labor Affairs handle complaints and appeals respectively.

⁵⁵ After the freezing of the budgets for the central government by the opposition KMT Party in the Legislative Yuan, the Commission could not even afford to pay modest honorarium to two members of the Commission, who are assigned to write the final report for the investigation team!

⁵⁶ The drawback and major disappointment of these training programs and seminars is that they are mostly attended by workers, especially by female workers, rather than by those who are most in need of such educational and awareness training.

(a) Operations of the Commissions on Gender Equality in Employment (or Employment Discrimination) of Local Governments

According to Articles 33 and 34 of the Gender Equality in Employment Act, there are two types of complaints that can be filed to the commissions established by local governments. The first type of case involves those related to so-called “non” gender discrimination in employment issues, such as controversies over menstruation leave, maternity leave and parental leave. This type of complaint is settled solely by local governments’ commissions independently. The second type of complaint involves gender discrimination issues for which administrative fines can be imposed; therefore, the complainants are allowed to appeal.⁵⁷

When the staff members of local commissions receive the complaints, they normally will conduct a preliminary hearing. If the cases belong to the “non” discrimination category, they will attempt to settle the matters through mediation or other ADRs, and no administrative fines will be imposed. If the cases are determined to involve gender discrimination issues, they will be investigated and subsequently referred to the commissions for deliberation and decision. Under normal circumstances, the local commissions will follow the procedures adopted by the commissions on employment discrimination mentioned earlier. After the members of the commissions have reached their conclusions, the staff members will draft a tentative report that is then circulated among all members for their approval. The final decisions of the commissions will then be sent to the local governments to make formal administrative decisions. In the event that the complaints are sustained, an administrative fine ranging from N.T. \$10,000 to \$100,000 will be imposed.⁵⁸

(b) Operations of the Commission on Gender Equality in Employment of the Council of Labor Affairs, Executive Yuan

If employees or job applicants are dissatisfied with the decisions made by the local commissions and local governments themselves, they are entitled to appeal to the Commission set up by the Council of Labor Affairs or directly file a formal administrative appeal to the Council’s Committee of Administrative Appeals within ten days upon receipt of the above-mentioned decisions. Because the Commission is generally regarded as more competent in handling disputes of this type, almost all appeals are filed with the Commission instead of the Appeals Committee.⁵⁹

After the Commission receives the appeal, its staff members will gather all the necessary information and forward them to the plenary session of the Commission for consideration. The Commission will then appoint two members to conduct an investigation. Normally, the investigation is processed by examining the documents and written information supplied by the job application, employee, employer and formal responses offered by the local governments which made the administrative decisions. Hearings and interviews are extremely rare unless the investigation team deems them necessary or if the case involved is of extreme importance.⁶⁰

⁵⁷ Chiao, *supra* note 4, at 25-26.

⁵⁸ See Article 38 of the Gender Equality in Employment Act.

⁵⁹ Actually, most of the appeals cases handled by the Appeals Committee of the Council are concerned with labor insurance disputes. The Committee is currently overloaded with pending cases and simply do not have any incentive to hear cases involving sex discrimination in employment.

⁶⁰ Originally, the Commission conducted in-depth interviews when investigating a pregnancy discrimination complaint but decided not to use this method because the Department Working of Conditions simply did not have enough the personnel to adequately carry out such tasks. Therefore, with the exception of cases involving decisions that were rejected by the Committee of Administrative Appeals of the Executive Yuan, normal

Since the majority of the appeal cases involve pregnancy discrimination and sexual harassment in the workplace, the investigations have normally adopted different investigation approaches toward these disputes. In the cases of pregnancy discrimination, the investigators always deem that if a pregnant employee or job applicant has made a *prima facie* statement of the discriminatory treatment (that is, filing a formal complaint to the Commission), then the employer shall shoulder the heavier burden of proof of non-sexual factors of the discriminatory treatment, that is, the employees' poor job performance is the reason for unfavorable treatment and not the pregnancy itself.⁶¹ As for the case involving a claim of sexual harassment, the investigators will generally consider whether the employer has set up a preventative and corrective mechanism in its business entity, or whether it has adopted immediate and effective preventive measures as required by the Gender Equality in Employment Act.⁶²

After two members of the Commission finish their investigation, they will prepare a draft investigative report to the Commission. In that preliminary report, the facts, claims, findings and reasons for them are carefully listed and forwarded to the plenary session of the Commission for deliberation and decision. Normally, members of the Commission are quite deferential to the results of the investigation, but sometimes several additions or corrections will be made. After the Commission has approved the investigation findings, the staff members will draft a final decision and circulate it to all members of the Commission for approval and then forward it to the Council of Labor Affairs. The Council will typically utilize the final decision of the Commission as a basis to render its administrative decision. After the decision has been made, then the enforcement process of the Gender Equality in Employment Act will be set in motion.⁶³

(4) Enforcement of the Commission's Decisions

Since the Commission on Gender Equality in Employment of the Council of Labor Affairs is only an *ad-hoc* or task-force type of committee, it has no power and authority to enforce its decisions independently. After the Council has rendered its administrative decision based upon the findings of the Commission, the whole enforcement process then enters into the procedures detailed by the Administrative Appeals Act and the Administrative Lawsuits Act. According to Article 34 of the Gender Equality in Employment Act, if employers, employees or job applicants are not satisfied with the decisions made by the Commission and Council itself, they may file their appeals to the Committee of Administrative Appeals of the Executive Yuan and subsequently engage in administrative lawsuit procedures.⁶⁴

As previously mentioned, the administrative fines imposed under the Gender Equality in Employment Act are much lighter than the ones imposed under the Employment Service Act. Therefore, most of the employers who have lost their cases before the Council's Commission normally voluntarily pay their fines and seldom appeal their cases. However, appeals are

investigative procedure usually centered on the review of written documents and records.

⁶¹ See Article 31 of the Gender Equality in Employment Act.

⁶² According to Paragraph 1 to Article 27 of the Act, employers are entitled to raise "affirmative defenses" to exempt themselves from joint-liability.

⁶³ See Article 34 of the Gender Equality in Employment Act.

⁶⁴ Generally, since the Committee of Administrative Appeals of the Executive Yuan is very conservative in treating employment discrimination disputes while the High Administrative Courts are deferential to the decisions made by the Commission on Gender Equality of the Council, employers normally prefer to file their appeals with the former rather than the latter.

still filed because an appeal to the Committee of Administrative Appeals is free of charge and some of the Committee's conservative members are sometimes uncomfortable with the Commission's above-mentioned stance on the shifting of the burden of proof in the pregnancy discrimination cases,. In recent years, the Committee has remanded or even overturned and reverted several related cases back to the Commission. This trend has encouraged some determined employers to take their new challenges to the Committee and force the Commission to make further investigations or to abandon its former decision. However, this new development is not detrimental to the authority of the Commission because by reaching its decisions based on sounder legal foundations, the quality of the Commission's work is actually improved.⁶⁵

Finally, Article 35 of the Gender Equality in Employment Act provides that when the courts and related competent authorities review—and decide on the facts of discriminatory treatment, they shall examine and take into account all of the investigatory reports, rulings and decisions made by the commissions on gender equality in employment. Although the wordings of “examine and take into account” is a toned-down version of “defer” as adopted by other Western countries with a similar anti-discrimination system, it did considerably enhance the authority of the commissions. Originally, the High Administrative Courts and the Supreme Administrative Court were quite reluctant to accept the decisions made by the commissions on employment discrimination under the Employment Service Act. However, since members with legal backgrounds have gradually played a much more important role in helping the commission at all levels of government to reach well-based decisions, more and more administrative law judges in the High and Supreme Administrative Courts are agreeable to the fact-finding functions of the Commissions. This trend is an extremely encouraging one which clearly indicates that the qualitative aspects of the decisions made by the commissions have indeed improved considerably in recent years, which, in turn will be instrumental to the development of anti-discrimination law in Taiwan.⁶⁶

VI. A Critical Assessment

In this section, the positive, negative and controversial aspects of the new legal regime and its implementation will be discussed, with an aim to outline and discuss these developments critically in order to provide a balanced view on the merits of current efforts and what work remains to be done. Finally, several policy reforms and recommendations are made to improve the existing framework in hopes of bringing Taiwan's system on par with those of leading industrial nations along with meeting local needs.

(1) Positive Aspects of Developments

By far the most significant development is the emergence of a coherent legal framework for resolving gender-based employment discrimination disputes in Taiwan. Compared with

⁶⁵ For instance, in a case involving pregnancy discrimination, a determined employer had appealed his case twice to the Committee of Administrative Appeals of the Executive Yuan. After the Committee remanded the case back to the Commission on Gender Equality in Employment of the Council for reconsideration twice, the Commission was obliged to reopen the case twice and rendered a decision which was finally approved by the Committee of the Executive Yuan. However, since the employer was still not satisfied with the decision, so the case went through the Higher Administrative Court and is now pending in the Supreme Administrative Court.

⁶⁶ Currently, almost all cases involving disputes over pregnancy discrimination and sexual harassment in the workplace decided by the Commission on Gender Equality in Employment of the Council have been sustained by the Administrative Courts.

other advanced countries, the law and practice in this field are still at a formative stage, but it is undeniable that this body of law has gradually expanded and several important principles governing equality in the workplace have emerged. For instance, although the anti-discrimination provisions in the Employment Service Act provides only basic guidance for the commission on employment discrimination, some of these specialized institutions have borrowed heavily from the experiences of other countries to deal with sex discrimination controversies over pregnancy discrimination and sexual harassment in the workplace. These practices provide a solid foundation for the implementation and enforcement of the Gender Equality in Employment Act which in turn, has provided a number of guidelines for the commissions on employment discrimination to settle other types of employment discrimination disputes. The decisions and rulings of these commissions are generally accepted by the administrative appeals committees and administrative courts. Furthermore, ordinary courts, both civil and criminal, are also increasingly reliant on the fact finding work of these commissions while they are adjudicating other disputes in related lawsuits. This has considerably enhanced the prestige of these commissions and made their enforcement and implementation even more feasible. Supplemented with the passage of a number of other statutes which provide various affirmative action programs for the most disadvantaged and vulnerable groups are other reform measures in the social security system which allows employees of both sexes to balance their work and family responsibilities. Through these developments, Taiwan is ready to set up a much more advanced anti-discrimination system in the workplace in the near future.⁶⁷

A second positive aspect is that a robust framework for addressing gender discrimination in employment, and perhaps the most advanced in Asia, has been forged in Taiwan. After the passage of the Gender Equality in Employment Act, instances of overt gender discrimination have been on the decline. For instance, recruiting advertisements which openly deny employment for one sex or which offer preferential compensation for one sex (normally males) over another are restricted unless employers can provide justifiable reasons.⁶⁸ Several previously acceptable discriminatory practices, such as requiring job applicants to sign an employment contract promising to leave their job after marriage or pregnancy or child-birth are also strictly prohibited by the Act.⁶⁹ Furthermore, there are signs that the Act has already led to some improvements in Taiwan's labor market, as the labor participation rate for women has increased from 46% to 49%, while wage differentials between the two sexes have narrowed from 25% to 19% in the past five years.⁷⁰ The Act also mandates a variety of family and parental leave programs which allow employees to effectively balance their working and family responsibilities. Originally, these forms of leave were unpaid and qualified employees were normally not interested in utilizing them.

⁶⁷ The Government is currently proceeding to reform the Labor Insurance Statute to provide pregnant workers with two months of payment as their salaries while they are taking maternity leave. This reform certainly will reduce local employers' hostility toward their pregnant employees because both the Labor Standards Act and the Gender Equality in Employment Act require that employers shall give their employees taking maternity leave two month of salary from their own pockets. Although this reform measure is not based on the concern of pregnancy discrimination but is mainly because the government is worried about the low birth rate, its "side-effect" is still very helpful in bringing a halt to this kind of most visible practice of sex discrimination in employment in Taiwan.

⁶⁸ See Article 7 of the Gender Equality in Employment Act, which requires employers to give an Bona Fide Employment Qualification (BFEQ) as a defense to this direct or "overt" discriminatory employment practice.

⁶⁹ See Article 11 of the Gender Equality in Employment Act.

⁷⁰ See CHANG & TSAI, *supra* note 7, at 70-72.

Now, the government has amended the Labor Insurance Statutes to provide social security payments and additional stipends for those who apply.⁷¹ These reform measures not only encourage employees to take leave, but also reduce incentives on the part of employers to adopt discriminatory employment practices against pregnant women.⁷²

Another closely related positive development is a growing body of law for combating sexual harassment at work and other places. Among its many priorities, the Gender Equality in Employment Act was supposed to focus on the prevention and correction of sexual harassment in the workplace. After five years of strict enforcement, the results are encouraging. According to the latest evaluation reports published by the Council of Labor Affairs in 2006, 99% of government offices and public corporations have set up internal dispute resolution mechanisms, while 55% of large-scale private enterprises have complied with the requirements of the Act.⁷³ Recently, this framework was extended further to cover sexual harassment in institutions of higher education after the passage of the Gender Equality in Education Act in 2004.⁷⁴ Two years later, the Prevention of Sexual Harassment Act became effective and the protections were extended to incidents occurring in the public, the military, and even in places where general and professional services were provided.⁷⁵ This development came about largely due to the advocacy efforts of local women's rights groups which have championed this cause for years. With effective implementation of these statutes, Taiwan now has the most comprehensive framework in Asia, or perhaps in the world, for dealing with these issues. Only the Philippines and Israel have enacted similar statutes, but their coverage has not been as extensive when compared with Taiwan's efforts.⁷⁶

In the past fifteen years, as Taiwan developed its anti-discrimination in employment system, another positive development is the salient role played by local NGOs in supervising the enforcement and implementation of these fair employment statutes. Their importance is no less significant than the specialized institutions created by the government. In its initial formation, the Commissions on Employment Discrimination of the Employment Service Act, was restricted to government participation only, while NGOs played a passive role. However, during the actual operations of these commissions, representatives of these NGOs having legal background and professional expertise played a crucial role in enhancing the quality of decisions rendered. As with the enactment of the Gender Equality in Employment Act, Taiwan's women's rights organizations contributions were even more substantial, with the actions of the Awakening Foundation and the Modern Women Foundation being especially instrumental.⁷⁷ Both of these groups not only drafted the bills of the Act, they also devoted twelve years of continuous effort in bringing about its eventual

⁷¹ These amendments have passed the second-reading stage in the Legislative Yuan. However, due to the current political impasse in the legislature, it is doubtful that these long-awaited reform measures can be achieved in this legislative session, which will be recess in June 2008.

⁷² However, the maximum period of taking parental leave with stipends lasts only six months and the amount paid per month is the same as minimum wage (N.T. \$ 15,840). Whether this reform program can attract employees to take this leave remains to be seen.

⁷³ See COUNCIL OF LABOR AFFAIRS, INVESTIGATION REPORT ON THE MANAGEMENT OF EMPLOYMENT OF WOMEN 27-29 (2005).

⁷⁴ For a detailed account of this Act, see Cing-Kae Chiao, *The Establishment of the Prevention of Sexual Harassment on Campus Mechanism in Taiwan—An Analysis of Related Provisions of the Gender Equality in Education Act of 2004*, 62 NAT'L TAIPEI U.L REV. 41, 54-65 (2007).

⁷⁵ For a fuller account of this new Act, see Cing-Kae Chiao, *The Establishment of an Anti-Sexual Harassment Legal System in Taiwan*, 57 LAW MONTHLY 460, 472-475 (May 2006).

⁷⁶ *Id.* at 483.

⁷⁷ Chiao, *supra* note 4, at 20-22.

enactment through hard lobbying. More importantly, the effect on the Act's actual implementation and operation was subject to much of their concern. They also provide legal assistance for victims of sex discrimination in employment and offer valuable comments on the annual review published by the Council of Labor Affairs, which evaluates the performance of these commissions. Since Taiwan's labor unions have always been heavily influenced by the practice of national corporatism, they are unable to protect various rights on the behalf of workers.⁷⁸ In turn, they do not know who to turn to when facing disputes over employment discrimination. Therefore, the participation of NGOs as social partners, in lieu of the unions, has allowed more effective mechanisms to be established in solving these types of disputes.⁷⁹

Another positive development after Taiwan's implementation of anti-discrimination in employment statutes is that increasing numbers of business enterprise have established internal complaint systems to handle these types of labor disputes. Since Taiwan's collective industrial relations system is underdeveloped, labor unions do not have enough collective bargaining power to face up to management, resulting in limited coverage through collective bargaining agreements.⁸⁰ Under such circumstances, regular labor-management relations operate under a rather paternalistic system, especially in small to medium sized enterprises, which in turn provide inadequate protection for workers. Despite the stipulations of the Labor Standards Act which require enterprises with over thirty employees to promulgate work rules, these rules are usually unilaterally decided by the employers, without allowing any input and participation on the part of employees.⁸¹ The Gender Equality in Employment Act has made substantial reforms by allowing employees to file complaints not only in the instance of sexual harassment at work, but also in other sex-discrimination related matters.⁸² Because these internal complaint mechanisms always utilize ADRs in resolving disputes between parties, satisfactory resolutions for both sides are much easier to attain. Their results are even more effective than the external means provided by the commissions on gender equality in employment.⁸³

Finally, through the establishment of a legal system governing anti-discrimination in employment, Taiwan not only can "import" related international labor standards to reform its related domestic labor statutes, it also has the ability through international investment and trade activities to influence or "export" its experience to other developing countries. In terms of importation, from 1980s onwards, the United States has used workers' rights provisions contained in its trade and investment legislation to force Taiwan to respect international labor standards in order to protect the human rights of its own workers.⁸⁴ The criteria adopted by the United States are based on the labor standards contained in various

⁷⁸ For a general discussion on how state corporatism plays a role in shaping Taiwan's labor-management relations, see Chyi-Herng Chang and Trevor Bain, *Employment Relations Across the Taiwan Strait: Globalization and State Corporatism*, 44 J. IND. REL. 99, 106 (2005).

⁷⁹ Actually, the ILO has consistently encouraged various social partners to play an active role in dealing with employment discrimination, see ILO, *EQUALITY AT WORK: TACKLING THE CHALLENGES* 85-94 (2007).

⁸⁰ According to the latest statistical information issued by the Council of Labor Affairs, currently in Taiwan, among over 1.2 million business enterprises, only seventy-five have signed collective agreements and most of them are large-scale or enterprises in the public sector, see COUNCIL OF LABOR AFFAIRS, *supra* note 6, at 44-45.

⁸¹ See Articles 70 to 74 of the Labor Standards Act.

⁸² See Paragraph 1 to Article 13 and Article 32 of the Gender Equality in Employment Act.

⁸³ See generally CING-KAE CHIAO, *LEGAL CONTROVERSIES OVER SEXUAL HARASSMENT AT WORK IN TAIWAN* 248-249 (2002).

⁸⁴ See Chiao, *supra* note 2, at 89-91.

Conventions approved by the International Labor Organization, especially with regards to the so-called “core” international labor standards, with the prohibition of employment discrimination as one of its components. Therefore, although Taiwan was expelled from the United Nations in 1971 and is no longer a member of the International Labor Organization, under the pressure of the United States, it has incorporated the above mentioned “core” labor standards into its important labor statutes and put them into practice, linking Taiwan to international trends in this regard.⁸⁵ In terms of “exporting” its own experiences, under the pressure of globalization, Taiwan’s large scale enterprises, especially multi-national corporations (MNCs), have increasingly invested in Southeast Asia and China or sought suppliers in the region. In the past few years, through the efforts of the United Nations, International Labor Organization, Organisation for Economic Cooperation and Development (OECD), these corporations are required to fulfill their corporate social responsibility (CSR). Various corporate codes of conduct have also emerged as a result, which prohibit these companies from practicing discriminatory treatment toward hiring local employees.⁸⁶ Under the pressure of local and international human rights and religious organizations, Taiwanese companies are also responding positively by requiring their local suppliers to observe and adhere to these “core” international labor standards.⁸⁷ Since Taiwan plays a key role in the international division of labor and in the supply chain, these developments, combined with its efforts in reforming its domestic anti-employment discrimination legal system will inevitably enhance its international image and reputation.⁸⁸

(2) Negative Aspects of Developments

After fifteen years of trial and error, the current anti-discrimination in employment framework suffers from the following weaknesses and faults. For example, discrimination labels such as “class” and “thought” are considered too abstract and subjective, therefore making them hard to identify. Moreover, discrimination based on religious creed and political affiliations are inconsistent with the concept of unchangeable, immutable characteristics which represents the essence of defining employment discrimination. This is especially relevant since affiliation in Taiwanese religious and political institutions are not as rigid as those of other countries. Another issue involves the citing of former affiliation with labor unions are a form of discrimination. This actually constitutes a type of unfair labor practice and should be corrected under the purview of the Labor Union Law. With regards to the most recent amendments concerning discrimination based on age and sexual orientation, the lack of extensive deliberations and discussion with the greater public will make enforcement on these issues difficult at best. As for discrimination based on appearance, facial features and marital status, to some extent these listed forms of discrimination normally overlap with some types of gender discrimination in employment. This causes confusions in the legal terminology and will create difficulties in actual enforcement.⁸⁹

Compositional and organizational weaknesses also exist within the commissions on employment discrimination and gender equality. For instance, the United States’ Equal Employment and Opportunity Commission has only five members, but in contrast, Taiwan as

⁸⁵ *Id.* at 92.

⁸⁶ See Cing-Kae Chiao, *Promoting of Core International Labor Standards Through Corporate Codes of Conduct of the Multinational Corporations*, 125 FTL REV. 36 41-42 (October 2002).

⁸⁷ *Id.* at 47-48.

⁸⁸ *Id.* at 48.

⁸⁹ Chiao, *supra* note 3, at 170-171.

a small island nation has over three hundred members in 28 separate commissions. This represents a bloated organizational disadvantage which makes arriving quorums very difficult and also hampers the decision making process. In addition, the majority of members serving on the employment discrimination commissions are government and civil officials. The lack of specialists, scholars and other legal experts on these commissions makes the resolving of these issues on these new and emerging forms of labor disputes (such as employment discrimination) a difficult endeavor. At the same time, since the status of these commissions is quite low, their decisions serve only as a form of consultation to competent authorities and are therefore not legally binding. In addition, the commissions lack full-time supporting staff members and personnel, and must rely on government officials who serve in other capacities. Experience and expertise on these issues is therefore hard to accumulate. Also, despite the fact that the commissions on gender equality have made numerous improvements in its membership composition, the number of these commissions are still excessive. For instance, in thirteen of these commissions there are at least 141 members. Despite of the great number of members in these commissions, they ironically suffer from the same staffing shortages faced by employment discrimination commissions as mentioned above.⁹⁰

The administrative fining system also fails to deter employers from committing employment discrimination. For instance, before the amendment of the Employment Service Act in 2002, employers in violation of the said Act could only be fined NT \$3,000 to NT\$30,000 (equivalent to approximately US \$100 to US \$1,000). This represented at most a slap on the wrist to employers, rendering enforcement ineffective. The fines were later sharply increased to NT \$300,000 to NT\$1,500,000, causing a potentially significant financial burden for small and medium sized businesses. As for the Gender Equality in Employment Act, violators are fined NT\$10,000 to NT\$100,000.⁹¹ The gross disparities between the amounts of these two fines, clearly demonstrates a rather ironic “discrimination against sex discrimination” in employment. At the same time, these fines are only directed toward the employer and do not provide any substantial compensation to the victim unless they find other legal recourses. Furthermore, the lack of equitable relief in these two acts discourages victims to file claims unless they are prepared to leave their current occupation.⁹²

Another noticeable shortcoming of this system is its “one-size fits all” application. Unlike the United States, in which Title VII of the Civil Rights Act of 1964 places enforcement on business entities with fifteen employees or above, in contrast, the anti-discrimination regime in Taiwan is enforceable upon business enterprises of any size, without setting a minimum number of employees in the company. Since 97% of Taiwanese businesses are small or medium-sized enterprise (SMEs), they face a grave dilemma: should they obey the law? And even if they choose to comply, how will they deal with the personnel shortage consequences brought about. Taking the example of age discrimination, in the United States according to the Age Discrimination in Employment Act of 1967, enforcement is placed on business entities with twenty employees or above. Since Taiwan recently added physical age as form of employment discrimination, the additional burdens and hardships placed on the great majority of Taiwanese businesses, and their subsequent resistance to the regime is imaginable. On the other hand, some provisions such as

⁹⁰ *Id.* at 168.

⁹¹ When the Gender Equality in Employment Act was amended in December 2007, the amount of this administrative fine was raised from N.T. \$100,000 to N.T. \$ 500,000. This amount is however still less than the fine imposed by the amended Employment Service Act.

⁹² Chiao, *supra* note 3, at 173-174.

anti-sexual harassment policy and procedure and the establishment of child care facilities have higher thresholds that make them inapplicable to the employees of many SMEs, the very people who are in need of these protections.⁹³

(3) Controversial Aspects of Developments

Because gender discrimination in employment problems has long been neglected in Taiwan, the adoption of such sweeping reform measures will inevitably complicate relations between labor and management. In the past decade, the operation of the above mentioned committees have held hundreds of conferences, seminars and educational programs to promote the understanding and awareness for the different kinds of employment discrimination. However, since the changes made after the passage of the Gender Equality in Employment Act in 2002, several controversial aspects, especially concerning gender discrimination, remain unsettled.

First of all, the Gender Equality in Employment Act adopts a rather primitive approach toward various types of gender discrimination in employment. To this end, it only deals directly with disparate treatment discrimination and provides no remedies for other subtler forms of discriminatory practices. For instance, the Act never mentions disparate impact discrimination, i.e., employment practices that are superficially neutral and fair, but have negative impacts or effects that are particularly adverse towards female (or male) employees. In addition, it also does not provide any guidance in handling mix-motive discrimination, i.e., employment practices of employers that involve both legal and illegal motivations. As employment relationships have become increasingly complex in Taiwan, so too have the discriminatory employment practices adopted by employers. It is therefore imperative to gain insight from the experiences of other nations encountering the same phenomenon. For example, related decisions rendered by the United States Supreme Court and the stipulations of the Civil Rights Act of 1991 are all excellent examples for Taiwan to draw lessons from.⁹⁴

Another controversy concerns the handling of the concept of equality of remuneration. The Act embraces a novel concept of equal pay for equal value as one of its guiding principles to pursue the goal of pay equity between the two sexes. The term was added in the final stages of its enactment at the urging of a member of the drafting group. This addition did not receive thorough and vigorous deliberation or debate and has caused an interpretation problem when disputes arose. It should be noted that the equality of remuneration system is primarily based upon the principle of equal pay for equal work. Its conception is closely modeled after American practices, especially the Equal Pay Act of 1963. Since the concept of comparable worth has fallen into general disfavor in the United States during the 1980s, it is quite incompatible to put these concepts together unless Taiwan is to adopt the European model of comparable worth to solve the problem of wage differentials between the two sexes.⁹⁵

The extraterritorial application of the Gender Equality in Employment Act is also an important issue meriting attention. In recent years, increasing numbers of local business entities are moving abroad and many domestic employees are being hired to work in foreign countries where the branch offices of the mother corporations are located. Under such circumstances, can these expatriates claim protection under this law if they allege that their employment rights are being infringed upon by their home companies? The Act is

⁹³ *Id.* at 169.

⁹⁴ *See* Chiao, *supra* note 4, at 33.

⁹⁵ *Id.* at 33-34.

completely silent on this topic, but some foreign experiences, especially the above mentioned U.S. Civil Rights Act of 1991 affirmatively adopts this stance, which can provide guidance for Taiwan in resolving similar disputes.⁹⁶

(4) New Aspects of Developments

Recently, several new developments and emerging forms of employment discrimination, especially with regards to forms of gender discrimination have started to become widespread in Taiwanese employment practices. One rather unexpected issue which emerged during the drafting and deliberation of the Gender Equality in Employment Act involved the issue of interpersonal relationships between the two sexes in the workplace. As these relationships become increasingly frequent and intimate as a result of the liberalization of society, a number of implications are bound to emerge after the passage of the new law. In addition to the issues of sexual harassment in the workplace discussed above, overzealous employers may also be inclined to impose a variety of codes of conduct to regulate other aspects of the relationships between their male and female employees. If these personnel policies are applied with different standards towards the two sexes or cause disparate impact, then allegations of sex discrimination in employment can be made. For instance, concerned with possible claims of sexual favoritism, some local business entities strictly forbid office romance and extramarital affairs, or even disallow married couples to work in the same unit. Because these anti-fraternization policies normally treat employees working at entry level jobs—mostly women—disadvantageously, issues of sex discrimination are implied. The courts have not yet rendered any rulings concerning these disputes, but a related case ruling by the Taipei District Court in January 2002 may serve as a prelude to this new type of labor dispute. In that case, a male employee of an insurance company was fired for being involved in a consensual extramarital affair with one of his subordinates. The court ruled against the employer on personal privacy grounds and ordered his reinstatement. Although this case was not directly related to sex discrimination in employment, the liberal stance adopted by the judge is indicative of present judicial interpretations in settling this new form of labor dispute.⁹⁷

After the passage of the Gender Equality in Employment Act, several employment practices formally regarded as managerial prerogatives have been readily challenged. For instance, it is very common for local employers to set different hair grooming and dress codes for their male and female workers, or require female employees to be monitored for changes in weight. All of these work rules become the focal points in the near future as women's rights groups are posed to test their legality under the law. A related issue concerning dress codes was decided by the Commission on Employment Discrimination of the Taipei Municipal City when the law was waiting for passage in the Legislative Yuan. That case involved a personal order from the president of a renowned development bank which required female employees to wear skirts in offices, but made no similar requirements for male employees. The Commission unanimously found that practice constituted employment discrimination against female workers and the bank admonished to discontinue this policy. Several other "intrusive" practices, such as requiring female employees to change their names on personnel files after marriage when male employees are not subject to the same requirements.⁹⁸

⁹⁶ *Id.* at 34.

⁹⁷ *Id.* at 36-37.

⁹⁸ *Id.* at 36.

Another issue is the so-called “glass ceiling effect” experienced by female employees in trying to reach higher decision-making positions in their organizational hierarchies. As mentioned earlier, this type of horizontal segregation is extremely hard to overcome in both the public and private sectors in Taiwan. The most commonly cited reason for the barrier, which contributes to the under-representation of professional women in higher positions, is the so-called “mommy track.” Therefore, the ways of establishing suitable family support measures to assist aspiring career-oriented female employees will become an important task as Taiwan builds a foundation for promoting gender equality in employment. In the U.S., the Glass Ceiling Commission was organized under the Civil Rights Act of 1991 to study this phenomenon in American society. This Commission issued its reports and recommendations in 1995, and the results can provide Taiwan with insightful information if it decides to engage in reform programs to combat this difficult issue in the future.⁹⁹

New issues regarding gender discrimination have also expanded to the military and defense sectors. When the Ministry of Defense started to actively recruit women into military service in the late 1990s, the issue of whether they could take part in combat missions was constantly debated. Currently, Taiwan has 7,000 female military personnel in the armed forces, which in total amounts to just under 300,000 soldiers in total. Most women serve in support and auxiliary units, under the capacity of nurses, staff members, aides-de-camp, logistics and maintenance personnel, counselors or instructors. Only a very tiny minority are engaged in active military activities in the strictest sense. As more and more women choose to join the military and treat military service as a professional career, the quest for equal treatment will inevitably bring up the sensitive issue of women in combat duties. Although the Ministry of Defense has yet to pay any serious attention on this issue, several empirical studies undertaken by the Department of Defense of the United States can provide Taiwan with some guidance in solving this dilemma. According to the findings, as modern warfare becomes increasingly sophisticated, the demands of physical capacities for combatants will diminish. Research has proven that in so-called “distanced” combat missions, the performance levels of women soldiers are generally equal to their male counterparts. This offers some hope that the goal of gender equality in the military might not seem so hard to achieve.¹⁰⁰

In addition, employment discrimination issues in so-called “non-traditional” occupations have started to become noticeable. For example, when the two-year grace period for the legal “public prostitutes” in Taipei City expired several years ago, the issue of legalization of the sex industry came into public debate. Local women’s rights groups were torn by a difference in opinion on the issue. Except for those conservative feminists who adamantly oppose prostitution on moral grounds, a majority of these groups were ambivalent towards the issue. Only radical feminists support a total legalization of the sex industry. The debate on prostitution has raised the fundamental issue of sex discrimination in employment and the government has commissioned a series of research programs on this sensitive topic. Several European nations are on the forefront in dealing with the issue of legalizing sex industries and their employees have even organized trade unions to safeguard their rights and improve their working conditions. If Taiwan intends to face this issue pragmatically, such foreign experience will certainly be valuable.¹⁰¹

Another issue that has gained increasing societal interest is the debate over whether

⁹⁹ *Id.* at 35.

¹⁰⁰ *Id.* at 38.

¹⁰¹ *Id.* at 37.

homemakers should receive pay increases due to the increasing recruitment of female workers from Southeast Asian countries to do the same work. These domestic helpers normally can earn over N.T. \$17,280 per month, which is the current minimum wage set by the government pursuant to the Labor Standards Act. Local feminists began advocating that since foreign workers can receive minimum wage, local housework done by over three million housewives should also be given fair pay no lower than that of foreign domestic helpers. Originally, this debate was only of academic significance. However, after the Taiwan High Court ruled that a homemaker injured and hospitalized in a car accident was entitled to claim damages for being physically incapable of doing house chores, women's rights groups were inspired to use the ruling for their own interest. It must be noted that women's unpaid domestic labor does represent tremendous economic value. For instance, in the United States, it is estimated that the economic value of women's unpaid labor ranges from 24 to 60 percent of the nation's GDP.¹⁰² The United Nations concluded in 1995 that women's unpaid work worldwide produces almost half the value of the total world economy.¹⁰³ However, currently, only Switzerland and one federal state within Germany acknowledge that women's unpaid housework has market value. While this issue is too sensitive to be put into actual practice, its underlying meaning is of tremendous importance to the understanding of the essence of female employment. Therefore, its future evolution merits greater attention.¹⁰⁴

(5) Suggestions for Further Reforms

In the short term, Taiwan should aim to combine the basic elements of the two aforementioned, separate but closely related legal regimes into one streamlined system. In the hypothetical new law, which may be called the Equality in Employment Act, the previous sixteen categories of employment discrimination types should be reformed to reflect changing international trends and social realities in Taiwan. Gender, race, religious creed, birthplace, age and disabilities should be included, while the other remaining redundant categories should be eliminated or incorporated into other statutes. For instance, discrimination based upon sexual orientation and whether it should be treated as a separate form should be discussed in further detail in the future. As for age and disability, being so-called "second generation" employment discrimination issues, and whether they in turn should be part of a separate legislation, are also matters that must be considered. As for the specialized institutions handling these types of disputes, their organizational structure and authority should be enhanced considerably, and the past practice of utilizing ad-hoc commissions on employment discrimination or gender equality in employment should be halted. An ideal example is an EEOC-type institutions, with commissioners nominated directly by the President and confirmed by the Legislative Yuan. If the above arrangements cannot be made, the commission can also be formed under the direct jurisdiction of the Executive Yuan, or even become a department or section of the Council of Labor Affairs. Any of these proposed arrangements could bring substantial improvements to the current situation. As for the number of commissioners at the central government level, only five to seven members with legal expertise, or are representatives of disadvantaged groups are required. Drastic cuts in membership at the municipal and county government levels should also be considered. The individual commissions at this level of government do not necessarily have to be eliminated; rather, they can be converted to field offices serving under the central government's

¹⁰² *Id.* at 38.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 38.

commission. The authority of the proposed commission in handling complaints relating to employment discrimination should be upgraded to possess a quasi judicial capacity, while not legally-binding, but nevertheless other government authorities must defer to their fact-finding and final decisions. Since the independence of these institutions are of great importance, their budget and personnel must be arranged accordingly.

In the past, Taiwan's efforts have mainly been the transplanting of the legal practices and experiences of the United States and other European countries. In the mid-term, it is suggested that efforts should be made to refine these imports to meet local needs. In practice, the United States and several European countries have also experienced new challenges with regards to anti-discrimination in employment in recent years, and if Taiwan does not begin an introspective analysis of its own, it might find itself one day, directly facing similar challenges with little or no prior warning. Using the example of Title I of the Americans with Disabilities Act of 1990: despite the fact that this legislation provides many protections to disabled workers and required employers to afford "reasonable accommodation" for this group, it also includes an "undue hardship" clause on the part of businesses in consideration of difficulties they may face in upholding these non-discrimination practices. Federal courts in the United States have in turn attempted to find a balance between meeting both the needs of disabled workers and the businesses that hire and employ them. During the 1999 and 2002 terms of the Supreme Court, six rulings pertaining to disability in employment undoubtedly show efforts on part of the Court to define disability with a strict and conservative review, which have largely been disadvantageous to employees seeking to address grievances under that term. Taiwan should be increasingly wary of what has occurred in the United States when approaching its own legislation regarding workers with disabilities. Furthermore, in closely related forms of discrimination concerning genetics and diseases such as AIDS/HIV, Taiwan should adopt a proactive policy of meeting these emerging forms of employment discrimination, rather than wait in passive reaction to these problems. Finally, with regards to age discrimination and other forms of affirmative action, the side-effects and consequently unforeseen practices that follow such as "reverse-discrimination" requires careful consideration when and if these foreign practices are considered suitable for importation for Taiwan's legal system.

Regarding long term recommendations, Taiwan should aim to support the United States and other European nations, echoing the call for a social agenda which supports the progressive development of fundamental labor rights in the face of a globalized economy. Despite the fact Taiwan's past economic growth and success came largely without the observation of the above mentioned ideals, recent large scale offshore movements of businesses away from Taiwan have caused a structural unemployment problem which has brought tremendous challenges to the country. Under such circumstances, if Taiwan is able to reform its legal system, allowing its workers to enjoy the protection and rights under international standards, not only does such practice benefit its international reputation, future advocacy on part of Taiwan to push for more progressive international standards on labor will be even more convincing. Despite international political realities that make Taiwan's comeback to international organizations such as the International Labor Organization virtually impossible, if it can demonstrate itself as a model state which in practice has adopted international standards, the unreasonableness of its further exclusion will become even more apparent and a loss to the international community. Taking Taiwan's past effort to join the World Health Organization as example, during the SARS pandemic, because Taiwan was not a part of the United Nations or the World Health Organization, it was excluded from the

quarantine zone during the spread of the disease. It clearly shows that despite the fact that Taiwan has an advanced public health system, international political realities created a situation where 23 million lives could not enjoy the same protections enjoyed by member states of the United Nations, which naturally lead to an outpouring of international sympathy. The prohibition of employment discrimination in the past decade has been one of Taiwan's most successful reforms to its labor law system. These efforts must be continually exercised not only to the betterment of local workers allowing them to work in fairer working environments, but also serve as encouragement and the resulting action on the part of the developing world in the improvement of working conditions in their respective countries in the future.

VII. Conclusion

This paper set out to evaluate the effectiveness of Taiwan's current legal framework for addressing the problem of employment discrimination. In an environment where employment discrimination is prevalent and manifests in a variety of overt and subtle forms, there was a further need to curb discrimination given its adverse impact on female labor participation, which in turn lowers Taiwan's global competitiveness. Over the course of fifteen years of policy experimentation, adoption of foreign legal practices and grassroots activism by civil society organizations, Taiwan now boast one of the most comprehensive legal regimes in Asia for combating employment discrimination, with its special emphasis on protecting women, ethnic minorities, the disabled and the elderly. The Employment in Services Act of 1992 and the Gender Equality in Employment Act of 2002 introduced a key institutional innovation—local employment and gender commissions—which play an integral role in providing legal recourse for victims, mediating disputes, raising awareness and are becoming an indispensable for the courts in their provision of fact-finding services. However, there remains ample room for improvement. The paper identified several glaring deficiencies within the current legal framework that weakens its overall effectiveness, such as the overall organizational weaknesses of the commissions, low administrative fines that fail to deter employers that practice discrimination, and the arbitrary, one-size-fits-all approach to compliance that needlessly overburden small and medium-sized businesses essential to Taiwan's economic development. It recommends that in the short term to work towards a streamlined, and comprehensive legal regime, and in the medium term, to reevaluate the legal constructs and experiences imported from Western countries. In the long term, if Taiwan can put into practice while at the same time promote the social agenda of leading progressive nations, it will be able to play an important role in ensuring that its experience can one day become the model for other currently developing countries. The Equality in Employment Act is a promising start that would marry the strengths of the current twin legal regimes. A truly effective legal regime will be one that can anticipate the changing demographics of Taiwan's society, keep pace with new developments and changes in employment practices.

In May 2007, the International Labor Organization published its second global report on employment discrimination. In this report, the ILO emphasized that progress has been made in the elimination of employment discrimination on the part of both developed and developing countries, however, there are many areas that require improvements. Taking the example of gender discrimination in employment, despite the increase of women's labor participation rate, their remuneration is still unequal to their male counterparts. Just by looking at the wage differentials between genders in the progressive European Union, the

difference of remuneration between the sexes is as high as 15%. In other long recognized forms of discrimination such as race, ethnicity, migrant worker status, religious creed and social origin, their occurrence remain prevalent to this day. Moreover, emerging forms of discrimination related to age, disability and sexual orientation, and those infected with AIDS/HIV are harder to overcome. Added to this, “emerging manifestations of discrimination” such as genetics and lifestyle discrimination, show that there are still many new challenges left to face. The details of this report offer Taiwan a blueprint for future improvements in combating employment discrimination. Not only does it provide evidence that Taiwan’s past efforts are on the right track, it also offers a roadmap for further efforts to be made. It is believed that with continual effort and perseverance, Taiwan’s workers can enjoy protections no less extensive than their European and American counterparts.

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Appendix (1)
Related Provisions of the Employment Service Act of 1992

(a) Employment Service Act of 1992

Promulgated by the President on May 8, 1992 and subsequently amended in 1997, 2000, 2002, 2003 and 2007.

Chapter I General Provisions

Article 5

To ensure equal employment opportunities for the nationals, an employer shall not discriminate against a job applicant or an employee he (or she) hires on the grounds of race, class, language, thought, religion, political affiliation, *birth place**, one's provincial / county origin, sex, *marriage** (or marital status), appearance, facial features, *disability, age**, *sexual orientation** and former membership of a labor union.

:
:

Article 6

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:

Competent authorities at the municipal, county (city) level shall have authority to manage the following tasks:

(1) To review and decide employment discrimination

:
:

Chapter VI Penal Provisions

Article 65

For those who violate Paragraph 1 to Article 5 of the Act, a fine of no less than N.T. \$ 300,000 and more than N.T. \$ 1,500,000 will be imposed.*

* marriage (or marital status) was added when the Act was amended in 2002.

* disability replaced the formerly used physical and mental handicap when the Act was amended in 2002.

* birth place, age and sexual orientation were added in May 2007, the latest amendments of the Act

* the amount of the fine originally was set at N.T. \$ 3,000 to N.T. \$ 30,000, but it was increased to N.T. \$ 300,000 to N.T. \$ 1,500,000 when the Act was amended in 2002, the same day when the Gender Equality in Employment Act was passed.

(b) Enforcement Regulations of the Employment Service Act of 1992

Promulgated by the Council of Labor Affairs in 1992 and subsequently amended in 1994, 1996, 1997, 2001 and 2004.

:

Article 2

When competent authorities at the municipal, county (city) level are reviewing and deciding employment discrimination complaints, they may invite government entities, units, labor organizations, employer organizations, scholars and experts to organize commissions on employment discrimination.

:

Appendix (2)
Gender Equality in Employment Act of 2002

Passed by the Legislative Yuan on December 21, 2001.

Promulgated by the President on January 16, 2002 and came into effect on March 8, 2002.

Amended by the Legislative Yuan on December 19, 2007 and promulgated by the President on January 16, 2008.

Chapter I General Provisions

Article 1

To protect equality of right to work between the genders, implement thoroughly the constitutional mandate of eliminating gender discrimination, promote the spirit of substantial equality between the genders, this Act is hereby enacted.

Article 2

Arrangements made by employers and employees that are superior to those provided for by this Act shall be respected.

This Act is applicable to public officials, educational personnel and military personnel, provided that, Articles 33, 34 and 38 shall not be included.

Complaints, remedies and processing procedures for public officials, educational personnel and military personnel shall be handled in accordance with respective statutes and administrative regulations governing personnel matters.

Article 3

The terms used in this Act shall be defined as follows:

1. "employee" means a person who is hired by an employer to do a job for which wage is paid.
2. "applicant" means a person who is applying a job from an employer.
3. "employer" means a person, a public or private entity or authority that hires an employee. A person who represents an employer to exercise managerial authority or who represents an employer in dealing with employee matters is deemed to be an employer.
4. "wage" means compensation which an employee receives for his or her work, including wages, salaries, premiums, fringe benefits and other regular payments under whatever name which are payable in cash or in kind, or computed on an hourly, daily, monthly or on a piece-work basis.

Article 4

The term "competent authority" used in this Act is referred to the Council of Labor Affairs of the Executive Yuan at the central government level, the municipal governments at the municipal government level, and the county/city governments at the county/city level.

Matters prescribed in this Act which are concerned with the competence of other authorities with special purposes shall be handled by those authorities with special purposes.

Article 5

In order to examine, consult and promote matters concerning gender equality in employment, the competent authority at each government level shall set up commissions on gender equality in employment.

The commissions on gender equality in employment referred to in the preceding paragraph shall have five to eleven members with a term of two years. They shall be selected from persons with related expertise on labor affairs, gender issues or with legal backgrounds. Among them, two members shall be recommended by workers' and women's organizations respectively. The number of female members of the commissions shall be over one-half of the total membership.

Matters concerning the organization, meeting and other related issues of the commissions referred to in the preceding paragraph shall be drawn up by the competent authorities at each government level.

In the case of local competent authorities which have already set up commissions on employment discrimination, they may handle the related matters referred to in this law, provided that, the composition of these commissions shall be in accordance with the provisions of the preceding paragraph.

Article 6

For the purpose of promoting employment opportunities for women, competent authorities at the municipal, country (or city) government level shall prepare and earmark necessary budgets to provide various occupational training, employment service and re-employment training programs for them to promote the ideal of gender equality. During these training and service periods, child-care, elder-care and other related welfare facilities shall be set up or provided for.

The central competent authorities may provide financial assistance for those competent authorities at the municipal, country (or city) government level that have provided occupational training, employment service and re-employment training programs, and set up or provide child-care, elder-care and other related welfare facilities during those training and service periods mentioned in the preceding paragraph.

Article 6-1

Competent authorities at all level of governments shall incorporate the matters concerning the prohibition of gender and sexual orientation discrimination, the prevention of sexual harassment and the promotion of gender equality in employment into the items of labor inspection.

Chapter II Prohibition of Sex Discrimination

Article 7

An employer shall not treat an applicant or an employee discriminatorily because of gender or sexual orientation in the course of recruitment, examination, appointment, assignment, designation, evaluation and promotion. However, if the nature of work only suitable to a special sex, the above restriction shall not apply.

Article 8

An employer shall not treat an employee discriminatorily because of gender or sexual orientation in the case of holding or providing education, training or other related activities.

Article 9

An employer shall not treat an employee discriminatorily because of gender or sexual orientation in the case of holding or providing

various welfare benefit measures.

Article 10

An employer shall not treat an employee discriminatorily because of gender or sexual orientation in the case of paying remuneration. An employee shall receive equal pay for equal work or equal value. However, if such differentials are the result of a seniority system, a reward and punishment system, a merit system or other justifiable reasons of non-sexual factors, the above restriction shall not apply.

An employer may not adopt a method of reducing the remuneration of other employees in order to evade the provision of the preceding paragraph.

Article 11

An employer shall not treat an employee discriminatorily because of gender or sexual orientation in the case of retirement, severance, job leaving and termination.

Work rules, labor contracts and collective bargaining agreements shall not prescribe or arrange in advance that when an employee marries, becomes pregnant, engages in child-birth or child-raising activities, he or she has to leave his or her job or apply for leave without payment. An employer also shall not use the above-mentioned factors as reasons for termination.

Any prescription or arrangement that contravenes the provisions of the two preceding paragraphs shall be deemed as null and void. The termination of the labor contract shall also be deemed as null and void.

Chapter III Prevention and Correction of Sexual Harassment

Article 12

Sexual harassment referred to in this Act shall mean one of the following circumstances:

- (1) in the course of an employee executing his or her employment duties, any one makes a sexual request, uses verbal or physical conduct of a sexual nature or with an intent of sex discrimination, causes him or her a hostile, intimidating and offensive working environment and infringes on or interferes with his or her personal dignity, physical liberty or affects his or her job performance.
- (2) an employer explicitly or implicitly makes a sexual request toward an employee or an applicant, uses verbal or physical conduct of a sexual nature or with an intent of sex discrimination as an exchange for the establishment, continuance, modification or assignment of a labor contract or as a condition to his or her designation, remuneration, personal evaluation, promotion, demotion, reward and punishment.

Article 13

An employer shall prevent and correct sexual harassment from occurrence. For an employer hiring over thirty employees, measures for preventing and correcting sexual harassment, related complaint procedures and punishment measures shall be established. All these measures mentioned above shall be openly displayed in the workplace.

When an employer knows of the occurrence of sexual harassment mentioned in the preceding article, immediate and effective correctional and remedial measures shall be implemented.

Related guidelines concerning preventive and correctional measures, complaint procedures, and punishment measures mentioned in the preceding paragraph shall be drawn up by the central competent authority.

Chapter IV Measures for Promoting Equality in Employment

Article 14

When a female employee encounters job difficulty because of menstruation, she may request a menstruation leave for one day in one month. The number of this leave shall be incorporated into sickness leave.

The computation of wage of a menstruation leave shall be made pursuant to the related statutes and administrative regulations governing sickness leave.

Article 15

An employer shall stop a female employee from working and grant her a maternity leave before and after childbirth for a combined period of eight weeks. In the case of a miscarriage after being pregnant for more than three months, the female employee shall be permitted to discontinue work and shall be granted a maternity leave for four weeks. In the case of a miscarriage after being pregnant for over two months and less than three months, the female employee shall be permitted to discontinue work and shall be granted a maternity leave for one week. In the case of a miscarriage after being pregnant for less than two months, the female employee shall be permitted to discontinue work and shall be granted a maternity leave for five days.

The computation of wage during maternity period shall be made pursuant to the related statutes and administrative regulations.

While an employee's spouse is in labor, his employer shall grant him two days off as a fraternity leave.

During the preceding fraternity leave period, wage shall be paid.

Article 16

After being in service for one year, an employee may apply for parental leave without payment before any of his or her child reaches the age of three years old. The period of this leave is until his or her child reaches the age of three years old but cannot exceed two years. When an employee is raising over two children at the same time, the period of his or her parental leave shall be computed aggregately, provided that, the maximum period shall be limited to two years the youngest one has received raising.

During the period of parental leave without payment, an employee may participate in the original social insurance programs continuously. Premiums originally paid by the employer shall be exempted and premiums originally paid by the employee may be postponed consecutively for three years.

Payment of subsidies for parental leave shall be prescribed by other statutes.

The measures for implementing matters concerning parental leave shall be drawn up by the central competent authority.

Article 17

After the expiration of the parental leave referred to in the preceding article, an employee may apply for reinstatement. Unless one of the following conditions exists and after receiving permission from a competent authority, an employer may not reject such application:

- (1) Where the employer's business is suspended, or there is an operating loss, or a business contraction.
- (2) Where the employer changes the organization of his or her business, disbands or transfers his or her ownership to others

pursuant to other statutes.

- (3) Where *force majeure* necessitates the suspension of business for more than one month.
- (4) Where the change of the nature of business necessitates the reduction of workforce and the terminated employee cannot be reassigned to other suitable position.

In the case of an employer cannot reinstate an employee due to the causes referred to in the preceding paragraph, he or she shall give notice to the affected employee thirty days in advance and offer severance or retirement payment in accordance with legal standards.

Article 18

Where an employee is required to feed his or her baby of less than one year of age in person, in addition to the rest period prescribed, his or her employer shall permit him or her to do so twice a day, each for thirty minutes.

The feeding time referred to in the preceding paragraph shall be deemed as working time.

Article 19

For the purpose of raising child(ren) of less than three years of age, an employee hired by an employer with more than thirty employees may request one of the following from his or her employer:

- (1) to reduce working time one hour per day; and for the reduced working time, no remuneration shall be paid.
- (2) To adjust working time.

Article 20

For the purpose of taking personal care for a family member who needs inoculation, who suffers serious illness or who must handle other major events, an employee hired by an employer with more than five employees may request a family leave. The number of this leave shall be incorporated into normal leave and not exceed seven days in one year.

The computation of wage during family leave period shall be made pursuant to the related statutes and administrative regulations governing normal leave.

Article 21

When an employee makes a request pursuant to the provisions of the preceding seven articles, an employer may not reject.

When an employee makes a request pursuant to the preceding paragraph, an employer may not treat it as a non-attendance and affect adversely the employee's full-attendance bonus payments, personal evaluation or take any disciplinary action that is adverse to the employee.

Article 22

In the case of a spouse of an employee who is not engaged in any gainful employment, the provisions of Articles 16 to 20 of this Act shall not apply, provided that, the employee has a justifiable reason.

Article 23

An employer hiring more than two hundred and fifty employees shall set up child care facilities or provide suitable child care measures.

Competent authorities shall provide financial assistance for those employers who have set up child-care facilities or provide suitable child care measures for their employees.

The standards of setting up child care facilities, providing child care measures and matters related to financial assistance shall be drawn up by the central competent authority after consulting with other related public authorities.

Article 24

For the purpose of assisting those employees who have left their jobs due to the reasons of marriage, pregnancy, child-birth, child-care or taking personal care of their families, competent authorities at each government level shall adopt employment service, occupational training and other necessary measures for them.

Article 25

For those employers who hire the employees who have left their jobs due to the reasons of marriage, pregnancy, child-birth, child-care or taking personal care of their families and with outstanding results, competent authorities at each government level may provide suitable rewarding measures for them.

Chapter V Remedies and Appeals Procedures

Article 26

When an employee or an applicant is damaged by the employment practices referred to in Articles 7 to 11 or Article 21 of this Act, the employer shall be liable for any damage arising therefrom.

Article 27

When an employee or an applicant is damaged by the employment practices referred to in Article 12 of this Act, the employer and the harasser shall be jointly liable to make compensation. However, the employer is not liable for the damages if he or she can prove that he or she has complied with this Act and provide all preventive and correctional measures required, and he or she has exercised necessary care in preventing this damage from occurring but it still happens.

If compensation cannot be obtained by the injured party pursuant to the provisions of the preceding paragraph, the court may, on his or her application, taking into consideration the financial conditions of the employer and the injured party, order the employer to compensate for a part or the whole of the damages.

The employer who has made compensation has a right of recourse against the harasser.

Article 28

When an employee or an applicant is damaged because an employer contravenes the obligations referred to in Paragraph 2 to Article 13 of this Act, the employer shall be liable for any damage arising therefrom.

Article 29

In the case of circumstances referred to in the preceding three articles, an employee or an applicant may claim a reasonable amount of compensation even for such damage that is not a purely pecuniary loss. If his or her reputation has been damaged, the injured party may also claim the taking of proper measures for the rehabilitation of his or her reputation.

Article 30

The claim for damages arising from a wrongful act referred to in Articles 26 to 28 of this Act is extinguished by prescription, if not exercised in two years by the claimant becomes known of the damage or the obligee bound to make compensation. The same rule applies if ten years have elapsed from the date when the harassing conduct or other wrongful act was committed.

Article 31

After an employee or an applicant makes a *prima facie* statement of the discriminatory treatment, the employer shall shoulder the burden of proof of non-sexual and non-sexual orientation factor of the discriminatory treatment, or the specific sexual factor for the employee or the applicant to perform the job.

Article 32

An employer may establish a complaint system to coordinate and handle the complaint filed by an employee.

Article 33

When an employee finds out that an employer contravenes the provisions of Articles 14 to 20 of this Act, he or she may appeal to the local competent authority.

When he or she appeals to the central competent authority, the authority shall refer the appeal to the local competent authority after it receives the appeal or within seven days after the date it has found out the above-mentioned contraventions.

Within seven days after the local competent authority has received the appeal, it shall proceed to investigate and may mediate the matters for the related parties in accordance with its competence and authority.

The measures for handling the appeals referred to in the preceding paragraph shall be drawn up by the local competent authority.

Article 34

After an employee or an applicant finds out that an employer contravenes the provisions of Articles 7 to 11, Article 13, Paragraph 2 to Article 21, or Article 36 of this Act and appeals the matter to the local competent authority, if the employer, employee or applicant is not satisfied with the decision made by the local competent authority, he or she may apply to the Commissions on Gender Equality in Employment of the central competent authority for examination or file an administrative appeal directly within ten days. If the employer, employee or applicant is not satisfied with the decision made by the Commissions on Gender Equality in Employment of the central competent authority, he or she may file an administrative appeal and proceed an administrative lawsuit pursuant to the procedures of the Administrative Appeal Act and the Administrative Lawsuits Act.

The measures for handling the examination of the appeal referred to in the preceding paragraph shall be drawn up by the central competent authority.

Article 35

When a court or a competent authority determines the fact of a discriminatory treatment, they shall examine the investigation reports, rulings and decisions rendered by the committees on gender equality in employment.

Article 36

An employer may not terminate, transfer or take any disciplinary action that is adverse to an employee who personally files a complaint pursuant to this Act or assists other file a complaint.

Article 37

The competent authority shall provide necessary legal aid when an employee or an applicant who files a lawsuit in a court because of any violation of this Act by his or her employer.

The measures for providing legal aid referred to in the preceding paragraph shall be drawn up by the central competent authority.

When an employee or an applicant files a lawsuit referred to in the preceding paragraph and applies for precautionary proceedings, the court may reduce or exempt the amount for security.

Chapter VI Penal Provision

Article 38

An employer who violates the provisions of the final part of Paragraph 1 and Paragraph 2 to Article 13, Article 21, or Article 36 of this Act, shall be punished by an administrative fine not less than 10,000 yuan but not exceeding 100,000 yuan.

Article 38-1

An employer who violates the provisions of Articles 7 to 10, or Paragraph 1 and 2 to Article 11 of this Act, shall be punished by an administrative fine not less than 100,000 yuan but not exceeding 500,000 yuan.

Chapter VII Supplementary Provisions

Article 39

The enforcement regulations of this Act shall be drawn up by the central competent authority.

Article 40

This Act shall become effective on March 8, 2002.

The effective dated for Article 16 as amended on December 19, 2007 shall be decided by the Executive Yuan.

Appendix (3)
Organizational Rules for the Establishment of the Commission on Gender Equality in Employment for the Council of Labor Affairs, Executive Yuan

Promulgated by the Council of Labor Affairs of the Executive Yuan on March 6, 2002.

Article 1

The Council of Labor Affairs of the Executive Yuan sets up the Commission on Gender Equality in Employment (hereinafter referred to as the Commission) pursuant to Paragraph 1 to Article 5 of the Gender Equality in Employment Act. The Council also enacts these rules pursuant to Paragraph 3 of the same Article.

Article 2

The Commission is in charge of the following matters:

- (1) The consultation and research of the Gender Equality in Employment Act and its related statutes and administrative regulations.
- (2) The investigation and examination of the complaints concerning gender equality in employment.
- (3) The examination of annual working plans.
- (4) The investigation of current situations of gender equality in employment.
- (5) The promotion of other matters concerning gender equality in employment.

Article 3

The Commission shall have eleven members. The chairperson of the Commission shall be the Deputy Chairperson of the Council of Labor Affairs of the Executive Yuan designated by the Chairperson of the Council of Labor Affairs of the Executive Yuan and shall serve on a part-time basis. Other members of the Commission shall be designated or appointed by the Council of Labor Affairs of the Executive Yuan from the following persons:

- (1) One representative from the Council of Labor Affairs of the Executive Yuan.
- (2) Two representatives recommended by labor organizations.
- (3) Two representatives recommended by employers' organizations.
- (4) Two representatives recommended by women's organizations.
- (5) Three representatives from scholars and who are regarded as experts in their fields.

Article 4

The term of the members of the Commission is two years. When a membership is vacant for cause, the term of successor member shall last to the expiration of the term of former member.

Article 5

The Commission shall designate an executive secretary and in charge of ordinary day-to-day matters of the Commission under the supervision of the chairperson. The Committee shall also have three to seven staff members handling general affairs and under the direction and supervision of the executive secretary. The executive secretary and staff members shall be appointed by the Council of Labor Affairs of the Executive Yuan from its current personnel and serve on a part-time basis.

Article 6

The Commission shall hold its regular meeting every three months. Temporary meetings shall be held, if necessary. In case of the filing of complaints, the examination meeting shall be held immediately.

Article 7

When the Commission is in session, it shall be chaired by the chairperson. When the chairperson is in absent, he (or she) shall designate a member in attendance as a substitute chairperson.

The members shall attend the meetings in person and cannot be substituted. When the Commission is in session, it may invited other related persons to attend with no voting right.

Article 8

The Commission shall be in session when over one-half of the members attend. The decisions of the Commission shall be rendered by the approval of over one-half of the members attended.

Article 9

The Commission may commission academic institutions, scholars, or experts to provide assistance in collecting related materials concerning gender equality in employment or to do researches on related topics.

Article 10

The members of the Commission shall receive no salary for their work. However, for the members who are not the personnel of the Council of Labor Affairs of the Executive Yuan, they may receive transportation fees under the existing regulations.

Appendix (4)
Measures for Processing Complaints Concerning Gender Equality in Employment

Promulgated by the Council of Labor Affairs of the Executive Yuan on March 6, 2002.

Article 1

These measures are enacted pursuant to Paragraph 2 to Article 34 of the Gender Equality in Employment Act (hereinafter referred to as the Act).

Article 2

When an employee or an applicant file a complaint pursuant to Article 34 of the Act to a local competent authority for examination, the commissions on gender equality in employment of the local competent authority shall examine the complaint in accordance with these measures. When an employer, an employee or an applicant is not satisfied with the decision made by the local competent authority, he (or she) may file an administrative appeal directly, or file a complaint to the Commission on Gender Equality in Employment of the Council of Labor Affairs of the Executive Yuan in written form within ten days after the decision is rendered. If the said period has expired, his (or her) complaint will not be accepted.

The written form referred to in the preceding paragraph shall contain the following items and signed or sealed by the applicant or his (or her) agent:

- (1) Name of the applicant, his (or her) address or residence, contact telephone number and I.D. number. If the applicant is a juristic person or other group with an administrator or a representative, its name, office or business office, name, address or residence, contact telephone number and I.D. number of the administrator and representative.
- (2) Name, address or residence, I.D. number of the legal representative and agent of the applicant.
- (3) Subject-matters, facts and reasons of the complaint.
- (4) Authority which makes the decision and the name of its head.
- (5) Year/month/day.

Article 3

When an applicant files a complaint to the commission on gender equality in employment of a competent authority for examination, he (or she) may withdraw the application for examination before the delivery of the decision. When an application for examination is withdrawn, the applicant may not file another complaint on the same case.

Article 4

If an application for examination is not in standard form or pattern, the competent authority shall inform the applicant to supply and correct within fifteen days after the receipt of the notice. If the supplement and correction cannot be completed within the prescribed period, the application shall not be processed.

Article 5

The commission on gender equality in employment of the central competent authority shall deliver the photocopied or duplicated copy of the application for examination to the local competent authority. The local competent authority shall respond and explain within seven days after the receipt of the official documents and forward related documents and materials to the central competent authority.

Article 6

When the commissions on general equality in employment of the central and local competent authorities are in the process of examining complaints, they may notify the applicants or other related persons to present and make statements.

When the commission on gender equality in employment of the central competent authority is in the process of examining complaints, it may invite local competent authorities to attend without voting rights.

Article 7

The central or local competent authorities shall render decisions within three months after the receipt of the application for examination. They may have one extension, if necessary. The extension may not exceed three months and the applicant shall be informed ahead of time.

Article 8

When the commission on gender equality in employment of the central and local competent authorities are in the process of examining the applications, they may designate over two members of the commission to organize special sub-committees to investigate the cases, if necessary.

When the special sub-committees are in the process of investigation, they shall protect the privacy rights of the applicants, respondents of the complaints and the related third-parties. After the process of investigation, the special sub-committees shall make investigation reports and forward them to the committees on gender equality in employment of the competent authorities for examination.

Article 9

When the result of an examination is pending on the settlement of other legal relationship, if that legal relationship is not yet certain, the commissions on gender equality in employment of the competent authorities may, under their own authorities or after the application of the related parties, suspend the proceedings of the examination and inform the applicants.

Article 10

In principle, the proceedings of examination of the application cases shall be held in private.

Article 11

The commissions on gender equality in employment shall render decisions in accordance with the findings of the examination. The decisions shall be informed to the applicants and respondents to the complaints in writing by the competent authorities.

Article 12

These measures shall be effective on the date of promulgation.

Employment Discrimination Law in Japan : Human Rights or Employment Policy?

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I. Introduction

Every advanced country has some form of regulation to promote the employment of racial minorities, women, older people, disabled persons and the like, who find it difficult to find employment and suffer low wages. Their approaches, however, are not uniform. There are two types of regulations: a “human rights approach” and an “employment policy approach.”¹

The “human rights” approach treats differences of treatment based on the prohibited grounds (ex. sex, race) as a violation of the human rights of the individual to equal treatment. Any exception to this principle is strictly construed so as to interfere as little with the rights of individuals as possible. Preferential treatment for female workers and the like, so-called “reverse discrimination,” is also considered to be against the principle of equality. In contrast, the “employment policy approach” uses a variety of policy instruments to support individual workers, paying attention to their different attributes, such as their age or disability². The general principle of equality provides only protection against arbitrary discrimination; strict judicial scrutiny is not applied. When certain treatments based on certain grounds are regulated to attain employment policy objectives, those regulations take on a patchwork aspect, and are realized through gradual legislative processes.

Japan takes both approaches, the former for women and the latter for the elderly, disabled persons and part-time workers. It has paid subsidies to employers who hire and maintain the employment of the elderly but enacts no comprehensive age discrimination laws. It sets employment quotas for disabled persons but has no disability discrimination law. Paying lower wages for part-time workers has not been illegal per se. Moreover, it can be analyzed that Japan has treated discrimination on the grounds of belief or social status as an object of the employment policy approach, since regulations against such discrimination have been subordinated to the principle of “freedom of contract.”

However, in Japan, even sex discrimination laws have evolved from the employment policy approach into the human rights approach step by step over a long period. Putting this into consideration, there is a good chance that legal protection for the elderly, disabled

¹ See Kazuo Sugeno, “Discrimination In Employment: Dynamism And The Limits of Harmonization In Law” in Roger Blanpain (ed.), *I Discrimination In Employment XV World Congress of Labour Law And Social Security 5* (1998); Takashi Araki, “The Impact Of Fundamental Social Rights On Japanese Law” in Bob Hepple (ed.), *Social And Labour Rights In A Global Context: International And Comparative Perspectives 215* (2002).

² See Bob Hepple, “Legislation Against Age Discrimination In Employment: Some Comparative Perspectives” JILL Forum Special Series No.19 (2004).

persons and part-time workers to be strengthened progressively through legislative and judicial efforts on the basis of formation of social consensus and changes in employment practices in the future.

II. Constitutional Basis

In the development of Japanese employment discrimination law after World War II, constitutional provisions on fundamental human rights and social rights provided its basis³. The Japanese constitution promulgated in 1946 had a list of fundamental human rights, including the guarantee of equality under the law and prohibition of discrimination on the grounds of race, creed, sex, social status or family origin (Art.14 Para.1).

Besides human rights, the Constitution prescribes fundamental social rights. Article 27 Paragraph 1 proclaims that all people shall have the right to work and thus obliged the state to give workers suitable employment opportunities. This objective is established in the “Law of Labor Market” including the Employment Measure Act (hereinafter the “Measure Act”) of 1966 which proclaims the general principle of labor market policies, the Older Persons’ Employment Stabilization Law of 1971 (hereinafter the “Older Persons Act”) and the Disabled Persons’ Employment Promotion Act of 1960 (hereinafter the “Disabled Persons Act”).

Article 27 Paragraph 2 requires the state to enact laws regulating terms and conditions of employment. Accordingly, the Labor Standards Act (hereinafter the “LSA”) was introduced in 1947. Other labor-protective legislation followed, including the Equal Employment Opportunity Act of 1985 (hereinafter the “Equality Act”) which regulated discrimination against women, the Child Care Leave Act of 1991 (amended as the Child Care and Family Care Leave Act later, hereinafter the “Child Care Act”), the Act Concerning the Improvement of Employment Management, Etc. of Part-Time Workers of 1993 (hereinafter the “Part-Time Act”) and so forth. Apart from these acts, general clauses of the Civil Code including abuse of rights (Art.1), public order (Art.90), tort (Art.709), have played an important role in the development of Japanese employment discrimination law.

Here it is worth noting that “Japanese employment discrimination law” (defined as containing the LSA, the Older Persons Act, the Disabled Persons Act, the Equality Act and the Part-Time Act in this article) has its source not only in the equality clause (Art.14) but also the right to work and the obligation of states regulating terms and conditions (Art.27 Para.1 and 2). This is illustrated by the fact that the principle of equal treatment was incorporated in the LSA whose basis was mainly Article 27 Paragraph 2 of the Constitution.

III. Employment Discrimination Law during the Postwar Period

A. The Principle of Equal Treatment in the LSA

Articles 3 and 4 of the LSA of 1947 declared the principle of equal treatment applied to labor contracts as follows:

(Equal Treatment)

Article 3. An employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker.

³ Regarding the Constitutional basis of Japanese employment and labour law, see Araki, *supra* note 1.

(Principle of Equal Wages for Men and Women)

Article 4. An employer shall not engage in discriminatory treatment of a woman as compared with a man with respect to wages by reason of the worker being a woman.

These articles were inserted to match international standards⁴. They also aimed to combat major types of discrimination which attracted social concern at that time, covering discrimination against persons from other Asian countries, that is to say, discrimination by reason of “nationality.” That is why Article 3 of the LSA listed “nationality” instead of “race,” although nationality has been construed as including race by major labor scholars after that.⁵ The word “social status” was added because there had been discrimination against persons originated from the lowest class under the feudal system. Discrimination by reason of “creed” was interpreted as covering discrimination based on workers’ political opinions and thus unfavorable treatment against leftists, which prevailed with the influence of the red purge right after the War, became illegal.

Japanese employment equality law during the post-war era, however, had limitations with regard to its concept of discrimination, scope of application and breadth of forbidden grounds. It can be analyzed to have started taking the employment policy approach rather than the human rights approach.

B. Concept of Discrimination: Cases of Wage Discrimination

Discriminatory treatment (dismissal, demotion and the like) in violation of the foregoing articles is nullified (LSA Art.13). When there is differentiation in wages by reason of prohibited grounds and preferred groups’ wages are determined by a clearly articulated rule, discriminated workers can demand equal treatment with preferred workers. Discriminatory treatment can also give rise to responsibility in damages as a tort (Civil Code Art.709).

What is difficult for discriminated workers is that they bear the burden of proof for unfavorable treatment “by reason of” prohibited grounds, that is to say, discriminatory intent. Japanese courts have devised the imposition of this burden on employers de facto under certain circumstances. Yet this attempt was not always successful. This point will be illustrated with reference to wage discrimination cases.

1. General Wage Systems

A brief overview of Japanese wage systems⁶ will help us to understand how this limit has been revealed in cases of wage discrimination. In Japan, normally, basic wages for regular workers are divided into basic wages and various allowances regularly paid. Basic wages have been decided not only by contents of jobs performed by workers; they consist of two types of wages; age/seniority-based wages that increase automatically in accordance with workers’ age or length of service; and skill-based wages determined under the “skill-based grade system.” Besides those wages, various allowances are paid according to workers’ personal circumstances, such as family allowances and housing allowances. In short, Japanese wage systems have had their basic idea in providing workers with the security of their life; as

⁴ For example, the principle of equal remuneration for men and women for equal work or equal value had been already confirmed in the 1919 Treaty of Versailles. The Declaration of Philadelphia (1944) had provided that “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”.

⁵ Kazuo Sugeno (translated by Leo Kanowitz), *Japanese Employment And Labor Law* 148 (2002).

⁶ See Takashi Araki, *Labor And Employment Law in Japan* 70-73 (2002).

a (male) worker gets older, more dependent relatives are added to his family, and their increasing living expenses can be covered by age/seniority-based wages and family/housing allowances⁷.

In order to provide incentives for improved performance, basic wages systems were gradually modified to reflect an individual's skill and performance: the "skill-based grade system." This system has a certain number of grades (e.g. A-G), which are further divided into subgrades (A1-A5, B1-B5, etc.), both of which reflect workers' level of skill. In order to move to a higher grade, workers must fulfill certain requirements and undergo evaluation. A certain amount of wages has been, however, dependent on worker's seniority, because it had the merit of being impartial; promotions to higher grades are decided considering the worker's length of service, and workers can automatically be raised to a higher subgrade after spending the maximum period in a particular subgrade. Meanwhile, employers enjoy discretion in deciding who deserves pay raises in a shorter period.

2. Typical Forms of Discrimination

The typical forms of wage discrimination involved the topping off for women in an age/seniority-based wage system and the payment of housing and family allowances to men only⁸. In one district court case, the amount of age-based wage was previously topped off when the employee reached the age of 26 only for employees who were not "heads of households" and then, only for employees whose work areas were limited⁹. It was presumed that the employer, in adopting both policies, "recognized" that they adversely affected women, and thus deliberately discriminated against women in violation of Article 4 of the LSA. In another case, with regard to the payment of a family allowance to an employee who was a head of household, the employer treated only male employees as heads of households if the income of the employee's spouse exceeded the non taxable level¹⁰. This practice was also presumed to be intentional discrimination.

Furthermore, because employers have margin of discretion under the "skill-based grade system," establishing discriminatory intent required a reasonable presumption. Where there was a great wage disparity between men and women (in some cases between leftist workers and workers not on that wing), the judicial decisions, in view of difficulty of proof on employees' side, held that it was deemed to be the product of discrimination on the grounds of sex (or creed), unless the employer offered specific proof that it was based on differences in the contents of the jobs or the individual employees' poor performances¹¹.

Thus, courts struck down not only overtly discriminatory wage policies but also covertly discriminatory policies. In contrast, where the payment of a family allowance depended on whether he or she is a head of household supporting family members "in fact," it was not held unreasonable in light of the family allowance's object and was not considered to constitute discriminatory treatment against women¹². Although apparently more men could comply with this "head of household" requirement than women, this type of wage system which uses

⁷ Wages as a means to satisfy workers' needs have developed under the guidance of the Japanese government during the War, when it wanted individual workers to fully perform their occupational duties. These systems continued after the War at trade unions' assertion, since workers were hard pressed to support themselves and their families then. Keiichiro Hamaguchi, "Nenrei Sabetsu" 79-3 *Horitsu Jiho* 53 (2007).

⁸ Sugeno, *supra* note 5, 162; Araki, *supra* note 6, 106ff.

⁹ The *Sanyo Bussan* case, Tokyo District Court (16 Jun 1994) 651 *Rohan* 15.

¹⁰ The *Iwate Ginko* case, Sendai High Court (10 Jan 1992) 43-1 *Rominshu* 1.

¹¹ The *Shiba Shinyo Kinko* case, Tokyo High Court (12 Dec. 2000) 796 *Rohan* 5.

¹² The *Nissan Jidosha* case, Tokyo District Court (26 Jan. 1989) 40-1 *Rominshu* 1.

sex-neutral criteria could not be judged as unlawful without the concept of indirect discrimination.

C. Scope of application

1. “Freedom of Contract” Supremacy

An important issue concerning Article 3 of the LSA has been whether an employer may deny employing a worker because of the worker’s beliefs or creed, nationality or social status.

The Mitsubishi Jushi Case¹³ involved denial of employment of a worker who hid his campus activism history at a job interview. The firm refused to hire him because it came out that he had been telling a lie at the interview. Denial of employment for such reasons was asserted to violate the principle of equal treatment in the LSA as well as the constitutional guarantees of freedom of beliefs (Art.19) and the equality clause (Art.14). The Supreme Court stated that fundamental human rights prescribed by the constitution did not directly apply to the acts of private persons. Moreover, the court handed down the verdict that the principle of equal treatment in the LSA was limited to post-hiring working conditions, and did not restrict hiring. In this way, the limitation of the principle of equal treatment articulated in the LSA, which came from Article 27 of the Constitution, was revealed¹⁴.

2. Sex-Based Practices other than Wage Discrimination:

The reach of Article 4 of the LSA was restricted to sex wage discrimination, since it was considered at its enactment that a conclusive anti-sex discrimination act would have contradicted the LSA’s protective provisions for women such as prohibition of night work. However, the then widespread discriminatory practices, that is to say, mandatory retirement upon marriage or an earlier retirement age only for women was nullified because of disturbance of the public order (Civil Code Art.90¹⁵) imbued with the ideal of Article 14 of the Constitution prohibiting discrimination on the basis of sex.

On another front, this case law was not effective in eliminating all types of sex discrimination. For instance, female-targeted redundancy dismissal was held not to be illegal because of business necessity¹⁶. Wage disparity between men and women did not was held not to be against public policy in the firms with sex-segregated personnel system for men and women¹⁷. In such a case, wage disparity was considered merely a result of discrimination against women during the process of hiring and therefore out of the reach of the case law for equal treatment¹⁸.

D. Forbidden Grounds

Article 3 of the LSA put only three grounds in the catalogue of discrimination. Discrimination on other grounds, such as age, disability and sexual orientation, was not

¹³ The *Mitsubishi Jushi* case, Supreme Court (12 Dec. 1973) 27-11 *Minshu* 1536.

¹⁴ The Supreme Court has maintained this attitude, holding that the Trade Union Act, in connection with the prohibition of employers’ unfair labor practices did not clearly bar employers from refusing to hire workers because of their being union members. The *JR* case, Supreme Court (22 Dec. 2003) 57-11 *Minshu* 2335. That is why Japan have not ratified the Discrimination (Employment and Occupation) Convention (ILO No. 111) yet.

¹⁵ This article can be invoked to nullify a contractual provision repugnant to the public order and good morals of the society.

¹⁶ The *Koga Kogyo* case, Supreme Court (15 Dec. 1977) 968 *Rokeisoku* 9.

¹⁷ The *Nihon Tekko Renmei* case, Tokyo District Court (4 Dec. 1986) 37-6 *Rominshu* 512.

¹⁸ Wage gap between male and female was 64.2% according to the wage survey in 2005. JILPT, *Kokusai Rodo Hikaku* 268 (2007).

covered. In its legislative process it was argued that age-based practice, such as low wages for younger workers, should be banned. Yet, since age-based employment practice was then widespread, this opinion was not adopted.

Against this legal background, employers, could lawfully maintain or begin to set mandatory retirement systems after World War II¹⁹. The practice of mandatory retirement at the age of 50 or 55, which appeared during the recession in the early 20th century as a means of company restructuring, was once abolished during the war, and revived again, because of intensive restructuring of the superfluous workforce. Trade unions also accepted mandatory retirement systems as desirable to acquire employment security and household wages until that age.

When all of the workers in a firm participated in a trade union which concluded a collective agreement containing a mandatory retirement clause, employers could retire those workers by the normative effect of the agreement (Trade Union Act Art.16). In addition, firms could resort to changes of “work rules” in cases where no trade unions existed at the workplace or where trade unions at the workplace opposed the introduction of mandatory retirement. “Work rules” are what should be drawn up by employers who continuously employ 10 or more workers with respect to specified items (the LSA Art.89). The Supreme Court stated while the unilateral imposition of disadvantageous working conditions by newly drawn up or changed work rules is not permitted, nevertheless because firms need to unify working conditions, when particular work rules are reasonable, the new rules should be applied to workers including those who do not give consent to the rules^{20,21}. The court tested the reasonableness of mandatory retirement at the age of 55 under this work rules theory, and decided that the mandatory retirement systems, which enable employers to maintain appropriate personnel systems under seniority-based wage systems, could not be said to be unreasonable.

On the other hand, employment security until mandatory retirement had been realized through restraints on dismissals²². Following Japan’s defeat in the War, when there was shortage of food and employment opportunities, Japanese courts had recognized a need to protect workers from arbitrary dismissals by invoking the general clause of abuse of rights (Civil Code Art.1, Para.3). Employers have not been able to turn to dismissals if they were not admitted as the ultimate means to attain particular objectives.

A mandatory retirement age, from which workers could not escape through their own efforts, could be argued to be unlawful as overt discrimination. However, the test which mandatory retirement systems had to pass was merely a reasonableness test. The mandatory retirement system was approved as an integral part of the Japanese employment system, such as age/seniority wage systems, under this test. In addition, the age-based wage, which can be classified as “reverse age discrimination,” was not discussed in terms of its legality at all. It can be summed up that the employment policy approach was taken to deal with age-based employment practices.

¹⁹ A “mandatory retirement age” signifies a system that causes employment contract relations to terminate automatically, regardless of the worker’s wishes, when the worker reaches a certain age.

²⁰ The *Shuhoku Basu* case, Supreme Court Grand Bench (25 Dec. 1968) 22-13 *Minshu* 3459.

²¹ Regarding the work rules doctrine, see Araki, *supra* note 6, 51ff. This doctrine was codified in Articles 7,9, and 10 of the Labor Contracts Act which was introduced in November of 2007.

²² Regarding the development of this doctrine, Araki, *supra* note 6, 17ff.

IV. The Gradual Development of Employment Discrimination Legislation

A. Sex Discrimination Law

1. The Equality Act: from “Duty to Endeavor” to Compulsory Duty

The Equal Employment Opportunity Act (the Equality Act) was enacted in 1985 to conquer limits found in Article 4 of the LSA and the public policy theory mentioned above²³. The government’s effort to ratify the United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979) contributed to its enactment.

The original Equality Act, however, still indicated its character of the employment policy approach. First, while provisions with respect to training and education, fringe benefits, and retirement and dismissals were mandatory, employers were merely obliged to “endeavor” to treat men and women equally during the processes of recruiting, hiring, assignment and promotion. Second, the objective of the act was to “promote the welfare” of female workers and thus the act was construed as protecting only women. This interpretation, combined with the weakness of the “duty to endeavor” clause, allowed employers to hire only men for main career positions and pay high wages to them, while on the other hand employing only women for auxiliary positions and paying lower wages to them. This typical practice was judged not to constitute a tort even after its enactment²⁴. Then there was strong opposition that it conflicted with the traditional male-centered employment practices. Accordingly, it started as a product of compromise.

On the other hand, the “duty to endeavor” clauses were effective in changing workplace culture and building social consensus that women should be given equal employment opportunities. Courts also considered female workers’ interests in a sexual harassment case holding that rumors disseminated by a male boss about a particular female worker’s wide acquaintance invades the female worker’s interest for comfortable work environment and constituted a tort (Civil Code Art.709).²⁵ The court ordered the male worker and his employer to pay compensation for non-economic damages to the female worker.

Accordingly, there was no strong opposition when the Equality Act was reinforced in 1997²⁶, adding a mandate of equal treatment at the time of recruitment and hiring, assignment and promotion, and the special provision that employers have to take measures to prevent sexual harassment and set in place grievance procedures for workers who are harassed (Art.11)²⁷.

2. Current Act: Conclusive Employment Discrimination Law

In June 2006, a bill reinforcing the Equality Act was passed and took effect in April 2007. The amended act prohibits not only discrimination against women but protects men as well as women from “discrimination on the basis of sex” (Articles 5-6).

²³ Regarding the development of the Equality Act, see Takashi Araki, “Equal Employment And Harmonization Of Work And Family Life: Japan’s Soft-law Approach”, 21 *Comp. Labor Law & Pol’y Journal* 451 (2000); Araki, *supra* note 6, 108ff; Hiroya Nakakubo, “ ‘Phase III’ Of The Japanese Equal Employment Opportunity Act” 4-3 *Japan Labor Review* 9 (2007).

²⁴ The *Nomura Shoken* case, Tokyo District Court (20 Feb. 2002) 822 *Rohan* 13.

²⁵ The *Kabushikigaisha Hei Kikaku* case, Fukuoka District Court (16 Apr. 1992) 607 *Rohan* 6.

²⁶ The protection for women in the LSA, such as the ban on night work, was abolished at the same time.

²⁷ Labor participation rates of women rose between 1980 and 2004, especially for the age bracket from 25 to 29, 49.2% rose to 74.0%. JILPT, *supra* note 18, 57.

The material scope of regulations were extended to “placement” including the “allocation of duties” and “grant of authority,” the “demotion” of workers, “change in job type or employment status” “encouragement of retirement” and “renewal of the labor contract” (Art.6) as well as recruiting and hiring, promotion, education and training, fringe benefits, and retirement and dismissal. New provisions were added to prohibit pregnancy or maternity-related discrimination (Art.9). Thus employers should not discriminate on the grounds of sex at almost all stages of employment unless they could demonstrate legitimate reasons justifying differential treatment.

The guidelines issued by the Ministry of Labor provide only narrow justifications; the following acts are permitted as positive actions and occupational requirements.

- a Favorable treatment for women in employment categories where women are substantially underrepresented (positive action).
- b Unfavorable treatment against men or women if:
 - b-1-1 requirements of authenticity call for the assignment of only a man or woman in the arts or entertainments;
 - b-1-2 requirements of security call for the assignment of only a man in a guarding role;
 - b-1-3 any other occupational characteristic, such as religious or moral, or work in a sports competition, calls for the assignment of only a man or woman, where there is the same degree of necessity as in the aforementioned items.
- b-2 statutes prohibit employers from assigning a man or woman to particular work²⁸.
- b-3 a job requires work in a particular foreign country whose manners and customs are so different that a man or a woman could not exercise his or her ability.

If a worker is treated unfavorably, she or he may take the procedure of the act to solve her or his dispute, asking for assistance (advice, guidance, or recommendations) from the Prefectural Labor Bureau and for mediation by the Dispute Adjustment Commission (Articles 17 and 18). They can also bring a suit claiming for nullification of unfavorable treatment against them and for damages²⁹.

In sum, it can be analyzed that the revisions of the Act brought a shift from the employment policy approach to the human rights approach in that: the purpose of the act became “the prohibition of discrimination on the basis of sex”; the scope of its application was extended to all aspects of employment; regulations against discrimination became mandatory³⁰.

²⁸ The LSA provides that an employer may not have a woman on underground work, work, heavy-materials lifting and work in places where harmful gas or dust (ex.lead) is generated (Art.64(2) and 64(3) Para.2); only women could be licensed to perform midwives (Health Nurses, Midwives and Nurses Act Art.3)

²⁹ They are not considered be entitled to claim for hiring or promotion, since employers’ discretionary acts should be respected and cannot be ordered by courts.

³⁰ This does not mean that there are no regulations or program to encourage women to work. Harmonization of work and family life has become an urgent policy issue with the declining fertility rate (1.32 in 2006). For instance, the LSA provides female workers with the right to 14 weeks of maternity leave (Art.65). The Child Care Act provides that a worker can make a request for parental leave for his or her child who is less than 1 year old (Art.5). While these leaves are unpaid, 60% of the previous income is paid during the maternity leave from the Health Insurance system; 40% of the previous income is paid during the parental leave from the Employment Insurance system. For details, see Araki, *supra* note 6, 119; Michiyo Morozumi, “Special Protection, Equality, And Beyond: Working Life And Parenthood Under Japanese Labor Law”, 27 *Comp. Labor Law & Pol’y Journal* 513 (2006).

3. Remaining Task: Indirect Discrimination

The most significant, but most criticized in the revision was the introduction of a new concept, so-called “indirect sex discrimination” into the Equality Act (Art.7).

This provision is applied to 1) a criterion concerning a person’s condition other than the person’s “sex” and 2) regarding matters listed in Article 5 or 6 (in the process of hiring, promotion and so forth), 3) which are specified by the Ordinance of the Ministry of Health, Labor, and Welfare (hereinafter “Minister of Labor”) as measures that may cause discrimination in effect by reason of sex, considering the proportion of men and women who satisfy the criterion and other factors. 4) Employers shall not take these measures except in cases where there is a legitimate reason, such as cases where it is specifically required for the purpose of performing the job in question or for the purpose of employment management of the firm³¹.

The significant feature of this new indirect sex discrimination concept is that it limited its application to “the measures specified by the Ordinance of the Minister of Labor.” Following the passage of the revised act, the Ministry issued a new ordinance including the following items (Art.2 of the Ordinance).

- 1) applying a criterion concerning body height, weight or physical capacity when recruiting or hiring workers
- 2) in the case of the employer adopting a dual career ladder system, requiring workers to be able to accept future transfers with a change of residence when recruiting or hiring workers or
- 3) requiring workers to have experiences of job relocation when deciding their promotion.

On the other hand, Article 7 does not apply, for instance, when a firm requires a college degree (such as engineering or literature) at the time of recruitment; adopts the criterion of “head of household” with regard to fringe benefits; differentiation in terms and conditions between part-time workers and regular workers. However, if a lawsuit is filed, a judge may decide these practices to be unlawful by turning to Article 90 or 709 of Civil Code. As the Ministry itself said, applicable items listed in the Ordinance will be reviewed in consideration for the development of the court cases in the future.

The background against which this concept was introduced into the bill was that the prohibition of indirect discrimination became an international trend. The concluding comments of the CEDAW (The UN Committee on the Elimination of Discrimination against Women) to Japan in 2003 recommended that domestic law incorporate a definition of discrimination against women to include direct and indirect discrimination. A committee of experts set at the Ministry released its report in 2004, which stated that prohibiting such discrimination was crucial for securing the equal treatment of men and women in employment. Meanwhile, employers showed concern about legal uncertainty. As a product of compromise, the scope of the provision was confined to the above three cases, which were officially

³¹ This article prescribes as follows. “An employer shall not take measures concerning the recruitment and hiring of workers or any of the matters listed in the items of the preceding Article which apply a criterion concerning a person’s condition other than the person’s sex and which are specified by the Ordinance of the Ministry of Health, Labor and Welfare as measures that may cause a discrimination in effect by reason of sex, considering the proportion of men and women who satisfy the criterion and other matters, except in cases where there is a legitimate reason to take such measures, such as where said measures are specifically required for the purpose of performing the relevant job in light of the nature of that job, or cases where such measures are specifically required for the purpose of employment management in light of the circumstances of the conduct of the employer’s business.” Regarding its meaning and effect, see Nakakubo, *supra* note 23, 15ff.

recognized to cause unfavorable outcomes for female workers³².

Furthermore, whether the new concept has a profound impact on employment practices depends on courts' interpretation of a "legitimate reason" to adopt these measures. One reason for the large wage disparity between men and women has been that firms adopt employment management differentiated by career track; a track for workers who carry prospective jobs and could be transferred to far workplaces has been chosen mainly by male workers; and another track for workers who carry auxiliary jobs at workplaces limited to the commutable area was chosen by female workers. Whether this separate employment management (the case of (2) above) can be corrected through new indirect sex discrimination concept or not is not completely articulated by Article or the Ordinance, thus being left to courts' interpretation of Article 7.

The Minister of Labor has given guidelines for cases in which it is recognized that no legitimate reason exists; in the case of 2) above, for instance, a company cannot claim to have a legitimate reason if it has no branches or regional offices in wide areas and has no plans to have transfers in the foreseeable future; work experience in various regions or in local factories are not necessary to perform management jobs; personnel rotation is not necessary for its business operation. These cases, however, can give rise to responsibility for damages even under the former Equality Act, since it can be said that an employer "deliberately" adopted the meaningless employment category to disguise sex discrimination. In the case that the separate track is genuine, whether female workers with auxiliary jobs can invoke Article 7 to recover the pay difference is uncertain.

Thus, it is anticipated that the indirect discrimination concept will be nurtured in the course of accumulated court decisions and the Ordinance and Guidelines revisions in the future.

B. Improvement of Terms and Conditions for Part-time Workers

1. Legal Background

The other major reason for wage disparity between both sexes is that many women work as part-time workers³³. There is a huge difference in wages between part-time and regular workers, since part-time workers receive no age-based pay rises, bonuses or retirement allowances;³⁴ and part-time workers fill about half the number of female workers³⁵.

Japan has had no explicit provision prohibiting discrimination against part-time workers. According to the general theoretical interpretation of "social status," prohibited as a ground for discrimination by Article 3 of the LSA, the classification of "part-time worker" is not contained, since "social status" was intended to restrict differences in treatment based on the

³² Regarding the criticism against the confinement of indirect discrimination to certain cases, see Mutsuko Asakura, "Kintoho no Nijunen" Sayaka Dake & Shigeto Tanaka (eds.), *Koyo Shakai Hosyo to Gender* 35, 43 (2007).

³³ Regarding the legal protection for part-time workers, see Kazuo Sugeno & Yasuo Suwa, "Part-Time And Other Non-Regular Workers In Japan: An Issue In A System Centered On The Internal Labour Market" JILL Forum Paper No.8 (1997); Mutsuko Asakura, "Gender And Diversification Of Labour Forms In Japan," in Joanne Conaghan and Kerry Rittich (eds.), *Labour Law, Work, And Family: Critical And Comparative Perspectives* 177 (2005).

³⁴ The wage gap between full- and part-time workers (female) was 65.7% according to the wage survey in 2003. JILPT, *supra* note 18, 269.

³⁵ According to the part-time workers (defined as workers whose working time is less than regular workers) survey in 2006, rates of part-time workers rose from 22.8% in 2001 to 25.6% in 2006. 46.1% of female workers work part-time, while 11.2% of male workers part-time.

ground from which workers cannot escape by an exercise of one's own will³⁶. Furthermore, it was hard to restrict discrimination against part-time workers through the concept of indirect sex discrimination on the grounds that women predominate among part-time workers. Article 4 of the LSA prohibiting wage discrimination between men and women has not been interpreted as prohibiting indirect discrimination. In the revised Equality Act, the items of indirect sex discrimination were limited to the three cases mentioned above.

From a comparative perspective, it might seem odd that part-time workers are not covered by the same collective agreements as regular workers in the same establishment. As mentioned above, a collective agreement has a normative effect on an individual employment contract only when he or she is a union member. Part-time workers, who usually do not participate in regular workers' unions, do not enjoy the same working conditions. Although Article 17 of the Trade Union Act provides that the effect of a collective agreement concluded with the majority union are extended to members of the other union or non-union members, this extension of collective agreements is limited to the "same type of workers" in the same establishment. The general binding effect is not exerted on part-time workers who are not construed as the "same type of workers" as regular workers.

Another way to redress the wage disparity has been that part-time employees resort to the provision of torts to claim for damages. Especially in cases of "quasi-part-time work," where part-timers perform the same work for almost the same hours as regular employees, differentiation in wages was raised as an unfair practice. In the Nagano District Court's Ueda Branch in 1996, there was a case in which female non-regular workers, who worked in production line nearly full-time and underwent renewals of their fixed-term contracts, received far lower compensation than regular employees³⁷. This decision stated that if the wage amount was below the 80% of the wage of regular workers with the same years of service, this would contravene the ideal of equal treatment underlying the provisions of the LSA, and constitute a tort (Civil Code Art. 709). Those employees could demand the damages covering up to 80% of the wage difference.

On the other hand, in a case of letter-delivering part-time employees with three-month terms, who engage in almost the same work for almost the same working time as the regular employees, but received only half the amount of the regular employees' wages, courts did not affirm the plaintiffs' claim for damages, stressing that the ideal of equal treatment did not exist and that the decision of which wage systems should be adopted in each employment category should be left to firms; thus the principle of freedom of contracts should be applied³⁸.

Thus to redress the wage disparity, legislation that demands equal treatment of regular workers and non-regular employees is required. This discrimination-based approach is being gradually developed in recent years.

2. Statutory Regulations: "Duty to Endeavor"

The Part-Time Act enacted in 1993 to improve part-time workers' conditions had required employers to consider only the "balance" between part-time workers and regular workers. The Research Group set at the Ministry issued a report in 2002 stating the need for labor and management to reach a consensus to bring about "treatment proportionate to work performed" regardless of whether employees are regular or part-time, and the need to create

³⁶ Sugeno, *supra* note 5, 150.

³⁷ The *Maruko Keihoki* case, Nagano District Court Ueda Branch (15 Mar. 1996) 690 *Rohan* 32.

³⁸ The *Nihon Yubin Teisou* case, Osaka District Court (22 May 2002) 830 *Rohan* 22.

“Japanese rules for equal treatment” suited to the particular Japanese situation. On the other hand, this report stated that prompt enactment of these equal treatment rules would be difficult, and only guidelines were introduced in 2003 as follows:

- (1) when personnel systems are not different from those of regular employees, employers shall endeavor to guarantee equal treatment including unification of methods for deciding terms and conditions of employment”;
- (2) when those systems are different, they shall treat employees in accordance with the degree of difference.

The underlying idea in this report was as follows. Regular employees’ age/seniority-based wages enable them to maintain the same amount of wages irrespective of flexible transfers and to be motivated for long-term employment. On the other hand, even if part-time employees’ job functions are the same as regular employees, part-time employees are expected neither to work over a long term nor to accept transfers with a change of residence. Under this circumstance, there is a case where differential treatment between regular employees and part-time employees can be reasonably justified even if their job contents are comparable. On the other hand, some cases show a large wage disparity despite that there is no difference with respect to responsibilities (case (1) mentioned above). In other cases there is lack of proportionality; that is to say, too much differentiation in terms and conditions considering the real difference in their responsibility (case (2) mentioned above).

Two reasons were put forward to explain why this policy was adopted: effective use of human resource and a correction of the wage gap. In some cases, for instance, older workers and women with high skills might not even start working as part-time employees if they are not fairly treated. In addition, part-time employees unsatisfied with unjustified treatment against them will not be motivated to work satisfactorily. Unreasonable treatment because of the employment category may lead to ineffective use of human resources. Further, among part-time workers are not only persons who put work-life balance before career development, but also persons who entered this employment type involuntarily because of lack of employment opportunities following long-term recession after the collapse of the bubble economy.

Since this act only prescribed that proprietors could receive administrative guidance, it was not generally construed as a basis invoked to demand equal treatment with regular workers.

3. Current Act: Mixture of “Duty to Endeavor” and Compulsory Duty

With the increasing social concern about the enlarged income gap among nations and the intensified struggle between two major political parties, an important revision of the Part-Time Act was adopted in June of 2007 making the rule (1) above mentioned into compulsory one. The current act regulates working conditions of “part-time employees with the same job functions” by dividing them into three types.

First, with regard to “part-time employees with the same job functions” “who shall be equated with regular employees” a proprietor shall not engage in discriminatory treatment with respect to decision of pay, implementation of education and training, access to welfare benefit facilities and other treatment against them (Art.8 Para.1). This provision covers part-time employees (1) who engage in work with the same contents and the same level of responsibility such as over-time work (hereinafter “job functions”) as the regular employees employed in the same establishment (hereinafter “part-time employees with the same job functions”), 2) under indefinite contracts with the proprietors and 3) whose job functions and placements are, in view of the practices in the establishment and other contexts, possible to be

changed within the same limits as those of regular employees, during a total period until the part-time employees' relations with the proprietors terminate. Indefinite labor contracts shall embrace definite labor contracts, which in view of social order should be identified as indefinite labor contracts, through definite contracts' repeated renewals (Art.8 Para.2). Part-time employees under this category can demand equal treatment with regular employees relying on this provision.

Second, there lies the intermediate category of "part-time employees with the same job functions." With regard to employees who comply with the requirement (1) "part-time employees with the same job functions," but do not satisfy the requirement (2) indefinite contracts and (3) transferability, proprietors incur only "administrative duty" "duty to endeavor" and "duty to consider."

In a case where proprietors implement the education and training for regular employees to provide them with abilities necessary to perform the employees' job functions, they must implement the same ones for their part-time employees under this category (Art.10 Para.2), but part-time employees will not be able to demand equal education invoking this article in a lawsuit. In addition, proprietors have merely "a duty to consider" giving them the chance to access to welfare benefit facilities (facilities for meals, workers lounges) which are accessible by their regular workers (Art.11). Furthermore, when this category of part-time employees' job contents and placements are, in view of the practices in the establishment and other contexts, possible to be changed within the same limit as those of regular employees, but only during a certain period of employment with the proprietors (i.e., closer to the first category), a proprietor "shall endeavor" to decide the wages of part-time workers under the same system as the regular employees' system (Art.9 Para.1). Failure to fulfill these duties is taken into consideration in the process of assistance (advice, guidance, or recommendations) from the Prefectural Labor Bureau and for mediation by the dispute Adjustment Commission(Art.21-22; the "duty to endeavor" is excluded from this process).

Third, with regard to part-time employees not falling under the first or second category, proprietors incur only "duty to endeavor." They shall endeavor to decide wages and implement education and training for part-time employees in due consideration of part-time workers' job functions, job performance, their motivation, ability or experience, while considering balance with regular employees (Art.9 Para.2, Art.10 Para.2) as well as having the duty to consider with respect to welfare benefit facilities (Art.11).

Other means to improve part-time employees' status were taken. With regard to all the categories of part-time employees, to promote their conversion into regular employees, proprietors shall take one of the measures; when they recruit workers, they shall notify the job contents and terms and conditions to their part-time employees; or when they assign new regular workers, they shall give a chance for part-time employees to make a request for engagement in that work; or they shall implement tests for the conversion of part-time employees with certain qualifications (Art.12). Proprietors have an obligation to explain considerations pertinent to all the duties mentioned above (Art.13).

Furthermore, the Labor Contract Act which was introduced in November of 2007 to codify several judge-made doctrines on labor contracts, eventually included the provision as follows, as a product of negotiations between the two major parties.

Article 4 (2) At the conclusions or changes of labor contracts employers and employees shall consider the balance in accordance with actual conditions of employment.

Since this provision is positioned at the "principle" part, which usually sets no rights or

obligations but only spiritual or ideal provisions, and thus its meaning and effect is ambiguous, there is only the possibility that this law's idea of proportionality is imbued with the interpretation of the tort clause (Civil Code Art.709).

Thus, to put it briefly, differential treatment between regular employees and part-time employees with the same job functions are not unlawful under the act in both cases where the latter's contracts are not indefinite or where their possibility of transfers is not comparable with regular employees. Given that only apparently arbitrary treatment is absolutely forbidden, and other differential treatment is regulated by non-intrusive administrative procedures, it can be said that the employment policy approach has been taken in case of discrimination on the grounds of employment category. This approach, which might be evaluated as inadequate to the task of bringing about proportionate treatment, meanwhile, seems fit to attain policy objectives, such as efficient utilization of human resource or redress of wage gaps.

C. Stabilization of Employment for Older Persons

1. Raise of Mandatory Retirement Age to the Age of 60

Promoting the employment of older persons has become an important political and economic concern in Japan as mentioned above³⁹. In 1986 was passed the Older Persons Act⁴⁰, which required employers to "endeavor" to set a retirement age of 60 years old or over by lifting up the then widespread retirement age of 55 years. With trade unions' strong assertions, administrative guidance and promotions provided to employers, and the subsidies from the Employment Insurance, mandatory retirement age at the age of 60 was realized in most firms. The 1994 revision of the Older Persons Act finally mandated the mandatory retirement age to be 60 or older providing that when a mandatory retirement age is set by an employer, it cannot be "below the age of 60" (Art.8 (former Art.4)).

2. Measures for Persons between the Age of 60 and 65

As the population rapidly ages, it became inevitable to increase the age limit for the commencement of old-age pensions. The pensionable age has been raised from 60 to 65 since 2001. Therefore, employment security for workers aged between 60 and 65 became an urgent concern. First, the revision of the Older Persons Act of 1990 created employers' duty to "endeavor" to continue employment of those who reached the age of 60 and are below 65. In order to provide economic incentives, the employment stabilization programs under the Employment Insurance Act subsidize employers who continue employing workers past the age of 60. Since this effort-making provision was not so effective, the revision of the act of 2004 finally transformed it into compulsory one as follows (Art.9).

In cases where the employer fixes the retirement age (limited to under 65 years old), he or she shall conduct any one of the measures listed in the items below in order to secure stable employment for older workers until the age of 65:

- (1) raising the retirement age;
- (2) introduction of a continuous employment system (refers to the system of

³⁹ Labor force participation rate in 2004 was 76.3% for the age bracket 55 to 59; 54.7% for the bracket 60 to 64. JILPT, *supra* note 18, 68.

⁴⁰ Regarding the developments of the Older Persons Act, see Kazuo Sugeno & Yasuo Suwa, "The Changing Japanese Labour Market And Legal Adjustments: The Retirement System" JILL Forum Paper No.3 (1994); Hideyuki Morito, "Graying Japan, Swaying The Policymaker," 16-1 *The International Journal Of Comparative Labour Law And Industrial Relations* 25 (2000); Noboru Yamashita, Act Concerning Stabilization of Employment of Older Persons" 4-3 *Japan Labor Review* 71 (2007).

continuing to employ an older person wishing to be employed following employee's retirement); or

(3) abolition of the retirement age.

“Continuous employment systems”, for example, include conclusions of fixed-term contracts with retiring employees at the age of 60.

Meanwhile, this provision reflects the reserved attitude of the government toward the promotion of employment of older persons. First, the effect of violation of this provision is vague. A firm which does not introduce any measures for securing employment for older persons may receive administrative guidance or recommendation, but can retired persons file a lawsuit to demand that ex-employers not retire them, or rehire them? The Ministry of Labor officially states that the above provision merely obliges employers to introduce measures, but not give individuals rights to demand employment. There is a possibility that courts examine individual cases in view of work rules theory, considering that the firms have not yet introduced measures for securing employment for older persons, and they might order employers to pay compensation for non-economic damages to the retired employees; however, Article 9 will not enable courts to nullify a mandatory retirement age in every case.

In addition, Article 9 allows employers to select the employees who can continue working after mandatory retirement age when it has designated the standards concerning older persons who are subject to the continuous employment system by a contract concluded with a labor union organized by a majority of workers or by a written agreement concluded with the person representing a majority of the workers (Art.9 Para.2)⁴¹.

Thus this act neither abolishes the mandatory retirement age nor extends employment of all workers to the age of 65. In the legislative process, the business environment amidst global competition and diverse employment management were referred as a reason to give employers flexibility. Mandatory retirement, as an exit of long-term employment and seniority-based wages, has been an integral part of Japanese employment system. There were concerns that its abolishment would have disrupted general employment practices significantly.

3. Reinforcement of Regulations on Age Limits for Hiring

Apart from mandatory retirement, regulations against age limits for hiring have been reinforced in recent years. Subsequent to the collapse of the bubble economy, persons over 40 years of age, once unemployed, found it difficult to find new jobs because employers often set age limits for recruitment. In addition, persons in their 30s—so-called “older younger persons”—who had found it quite difficult to obtain a job at the time of their graduation, have sometimes not been able to obtain stable employment yet since then. The normal recruiting practices in Japanese firms⁴² had an adverse impact on those workers. In the case of long-term regular workers, recruitment activities usually begin during the year prior to graduation. New recruits enter their companies immediately following graduation from school. Thus “older younger persons” who graduated from high schools or colleges many years ago, met difficulties even in the current relatively upward economy.

Under this circumstance, labor economists and trade unions began to contend that Japan should introduce anti-discrimination laws to abolish the practice of imposing such age limits.

⁴¹ According to the survey in 2006, 93% of firms with 300 workers or more introduced the continuous employment system rather than elimination or extension of mandatory retirement age. Eighty percent of these firms established selection criteria.

⁴² See Araki, *supra* note 6, 59-60.

Thus, the Measure Act was revised to provide that proprietors must, when it is regarded as necessary in order for workers to effectively display their abilities, “endeavor to provide equal opportunity” to workers in relation to recruitment and employment, irrespective of age (Art.7). When proprietors set age limits for recruitment, officials of public employment organizations could ask them to write in reasons for those limits on their help-wanted ads.

However, guidelines of the Ministry set 10 justifiable reasons, for example, cases where age limits are necessary to keep an appropriate age balance among the workforce, where wage systems would have to be modified because age-related pay systems in the establishment are not suitable for hiring middle-aged or older persons. Therefore, this provision was criticized for having the character of being a “duty to endeavor” and having too many exemptions⁴³. Thus the 2004 revision of the Older Persons Act obliged proprietors to explain for the reasons for the age limits to applicants. Furthermore, in June of 2007, the provision of the Measure Act was revised to be compulsory as follows.

Article 10. Proprietors must, when it is regarded as necessary under the Ordinance of Ministry of Welfare and Labor in order for workers to effectively display their abilities, provide equal opportunity to workers in relation to recruitment and employment, irrespective of age, in accordance with the Ordinance of Ministry of Welfare and Labor.

This provision was reinforced in that when employers deny employing persons on the grounds of workers’ age, it will constitute a tort (Civil Code Art.709). However, the Ordinance issued on this article maintained relatively broad exemptions; in the following cases proprietors can

- (1) set age limits for hiring in accordance with mandatory retirement age;
- (2) recruit only young graduates to give them skill developments over a long period of their service;
- (3) hire persons in the particular underrepresented age bracket in view of succession of skills and knowledge;
- (4) employ only persons at the age of 60 or above or the persons in certain age brackets, the employment of which is encouraged by employment policies.

In addition, in the following situations in which even sex discrimination can be justified, proprietors can set age limits.

- (5) there is a requirement for authenticity in the arts or entertainments;
- (6) there is a statutory age limit for the particular work.

Moreover, this provision does not clearly cover indirect age discrimination, recruitments only for new graduates, age-neutral practices, will not be construed as unlawful per se.

Over all, regulations on age-based treatment appear to be merely patchwork rather than a conclusive anti-age discrimination law. Employers enjoy the possibility of maintaining age-based practices such as age-based pay. “Reverse age discrimination” is not an issue. Mandatory retirement at the age of 60 is still lawful with the introduction of continuous employment systems until the age of 65. Age limits for hiring can be set if they are exempted for reasons listed in the Ordinance. Here again, however, the employment policy approach has been taken as a suitable means to stabilize the employment of older persons.

⁴³ Hideyuki Morito, “Koyo Seisaku Toshiteno ‘Nenrei Sabetsu Kinshi’,” in Atsushi Seike (ed.), *Syogai Geneki Jidai No Koyo Seisaku* 85, 126 (2001).

D. Promotion of the Employment for Disabled Persons

With the international movement, promotion of the employment of disabled persons also has increasingly become an important issue. The principal act has been the Disabled Persons Act firstly adopted in 1960⁴⁴. The act requires the State, local public bodies and proprietors to employ a certain proportions of physically disabled or mentally disabled persons (). The number is determined by a rate fixed by the government ordinance; the employment rate for the state and local bodies is 2.1%; and for ordinary employers, 1.8%. Employers are required to report the employment situation of disabled persons to the Ministry once a year (Art.43 Para.5). The Minister may order an employer who has not achieved the required rate to formulate a hiring plan for disabled persons (Art.46). If that plan is not put into effect, it can make recommendations as to the proper execution of the plan.

The purpose of the Disabled Persons Act is to contribute to the occupational stability of the disabled⁴⁵ rather than regulate discrimination. Thus, firms can lawfully deny hiring qualified persons with disability by reason of their disability as far as the firms satisfy the requirements of employment rates for disabled persons or even when they do not satisfy it, all they have to do is merely pay the contribution⁴⁶. Thus also in the arena of disability law, the employment policy approach has prevailed in Japan.

V. Case Law

To understand the Japanese employment discrimination law correctly, complementary judge-made laws should be mentioned, although the results of their decisions are not certain depending on individual cases and judges' evaluations.

A. Age-based Practices

1. Older Persons-Targeted Redundancy

Whether older workers-targeted redundancy is unlawful or not depends on the application of adjustment dismissals doctrine. The revision of the LSA in 2003 provided that an objectively unreasonable or socially unacceptable dismissal was an abuse of the right to dismiss (Art.18(2))⁴⁷. With regard to employment adjustment dismissals, judicial decisions have been handed down that any adjustment dismissal is an abuse of the right to dismiss unless it meets the following four requirements. There must be business necessity; the employer is obligated to take various measures to avoid adjustment dismissals, such as implementation of transfers; the selection of those workers to be dismissed must be made on reasonable criteria; proper procedures are taken, such as consultation with trade unions.

Older workers-targeted redundancy triggered a discussion on whether the selection criteria "older workers" was reasonable or not, and satisfied the third requirement or not.

⁴⁴ The act was originally enacted as the act for "Physically Disabled Persons." The 1987 revision also covered mentally disabled persons.

⁴⁵ The Article 2 defines "disabled persons" as "those who, because of physical, intellectual and/or mental impairment, are subject to considerable restriction in their vocational life, or have great difficulty in leading a vocational life, over a long period of time".

⁴⁶ Proprietors with more than 300 workers must pay contributions for the employment of the disabled persons when they do not meet the employment rate in accordance with the reduced numbers (Arts.53 and 54). Meanwhile, when they exceed the standard rate, they are paid allowances (Arts.49 and 50).

⁴⁷ The "abuse of dismissal rights" doctrine was codified in the Labor Contract Act (Art.16) in 2007.

There have been several cases where its reasonableness was affirmed. The judges ruled that older workers' dismissals were necessary to save money because their wages were relatively high. However, in a recent case the court struck down the dismissal because older workers usually found it difficult to obtain new jobs, their ability did not deteriorate as a result of aging, and their disadvantages should at least be compensated by special early retirement allowances⁴⁸.

2. Wage-cuts

Another example of disadvantageous age-based practices is the wage-cut for the elderly⁴⁹. Traditional age- or length of service-based wage systems are being transformed into performance-based pay in recent years through changes of work rules or conclusions of collective agreements. The "Daishi Ginko Case" was the first where the Supreme Court showed their decision on this issue. The wages of those between the age of 55 and 60 were reduced in exchange for the extension of workable age from the age of 58 to 60⁵⁰. Courts weighed the disadvantage for the worker against the business necessity for changing the working conditions, considering interests of employment extension, and consequently decided that the reduction of wages as a reasonable modification has binding effect on workers. On the other hand, in the second Supreme Court case, where the wages of the elderly were cut by 30-40% of those paid under the former systems while wages of younger workers were increased, a decision was reached that the disadvantages were too great, and unfair in that only older employees were disadvantaged⁵¹.

Thus in cases of redundancy or reduction in wages targeting older employees, although there were no statutes prohibiting these practices and the tests which are applied here were no more than reasonable tests, some age practices could be nullified by courts' decisions.

B. Protection from Dismissals against Disabled Persons

Although there is no statute prohibiting discrimination on the grounds of disability, doctrine of abusive dismissal rights can fill the gap. One recent case involved a dismissal of a sand gathering driver with one weak eye which could not be corrected with eyeglasses⁵². Courts nullified the dismissal on the ground that the driver was qualified for the work, because the worker passed the skill test at the time of starting working at the company and had continued working for eight years and had just renewed the special driver's license at the time of the dismissal.

However, the level of protection based on this theory was not so high as that of anti-disability discrimination law with the concept of reasonable accommodation. For instance, a dismissal against a dental hygienist who visited many elementary schools on the grounds that she injured her spine and had to use a wheelchair was affirmed⁵³. She advocated that if pupils also had been seated in chairs, she would have been able to check their teeth. Courts held that this time-consuming way would not be effective for group dental checkups, and affirmed the effect of her dismissal.

⁴⁸ The *Varig Nihon Sisha* case, Tokyo High Court (19 Dec. 2001) 817 Rohan 5.

⁴⁹ Shinya Ouchi, "Restructuring Of Enterprises And Protection Of Working Conditions of Middle-Aged And Elderly Employees In Japan," 30 *Kobe University Law Review* 29 (1996).

⁵⁰ The *Daishi Ginko* case, Supreme Court (28 Feb. 1997) 51-2 *Minshu* 705.

⁵¹ The *Michinoku Ginko* case, Supreme Court (7 Sep. 2000) 54-7 *Minshu* 2075.

⁵² The *San Sekiyu* case, Sapporo High Court (11 May 2006) 938 *Rohan* 68.

⁵³ The *Yokohamashi Gakko Hokenkai* case, Tokyo High Court (19 Jan. 2005) 890 *Rohan* 58.

VI. Concluding Remarks

Japanese employment discrimination law has not been so strong an instrument to abolish discrimination as that in, for instance, the US or EU. The most serious issue is perhaps that Japanese courts have been conservative about the regulations on discrimination during the process of hiring. Besides the Equality Act on sex discrimination, there has been no legislative attempt to overturn the courts' decisions. In Japan, principle of freedom of contract predominates over the equality principle with regard to hiring process. Business interests are superior to human rights to equality, thus in this regard the employment policy approach and the human rights approach were intermingled in Japanese employment discrimination law.

Apart from this, Japanese law is prominent in that even sex discrimination has been gradually developed into a powerful "human rights approach." The Equality Act at the time of its enactment included many "duty to endeavor" clauses in consideration of then dominant employment practice such as short length of service of female workers, as a result of (voluntary in some cases) retirement upon marriage or childbirth. Formation of social consensus was necessary for these clauses to become compulsory.

This incremental approach seems to be reproduced in other types of discrimination recently: the concept of indirect sex discrimination is limited to only three types of treatment; regulations on age limits for hiring evolved from a "duty to endeavor" to be compulsory, allowing, however, employers to set age limits if there are justifiable reasons, such as an age balance of the workforce; mandatory retirement has not been yet eliminated completely. Regulations on equal treatment to part-time workers are only applied to part-time workers under indefinite contracts whose jobs, responsibilities are identical with those of regular workers. In addition, the Japanese employment discrimination law has left certain matters to the consultations between management and labor. For example, regulations on mandatory retirement age allow labor-employer agreements to set criteria about whose employment can be extended beyond mandatory retirement age.

The Japanese approach illustrated here might be supported as an effective means in a consensus-based society. On the other hand, opponents may criticize it as taking only lukewarm measures giving priority to management prerogatives.

Four points should be represented here, however.

First, equality issues being discussed currently can be considered as areas in which employers should enjoy a relatively broad margin of discretion. Age-based treatment affects everyone in the society, and is reasonable in some cases. Workers can choose their status as regular or part-time workers, at least in a theoretical sense. If widespread employment practice and labor market conditions could be taken into consideration in deciding whether these types of discrimination should be banned or not, it should be noted that these practices are deeply rooted in Japanese employment culture. A mandatory retirement age has been considered an integral part of the Japanese long-term employment system. In Japan, the typical work style of regular employees is not suitable for employees with family responsibilities because of their overtime work and broad work areas. That is why part-time workers or workers with auxiliary jobs are considered not to be in comparable situations with regular workers in many cases. Thus it has been difficult to declare that all the differences between different categories of employment are unfair.

Second, even with no compulsory anti-discrimination acts against certain types of discrimination, when particular acts are unfair from the judge's viewpoint, they can order

employers to compensate damages or nullify acts invoking the general clause such as public order (Art.90 of Civil Code), abuse of rights (Art. 1), and tort (Art.709). They can also turn to the labor contract doctrine such as reasonable tests of work rules.

Third, seemingly weak regulations, such as “duty to endeavor”, can play an important role in the development of discrimination law. Philosophies of “duty to endeavor” or “ideal provisions” in some statutes could be imbued with the interpretation of general clauses of the Civil Code. Especially in cases of indirect discrimination, there have been high expectations of the judicial role in the legislative process. Moreover, administrative efforts based on such clauses will contribute to consensus building among labor, management and citizens in the future.

Fourth, equality matters are thus addressed through the employment policy approach rather than the human rights approach in Japan. While this approach is sometimes weak in securing rights of individuals, it allows us to enjoy flexibility in selecting appropriate policies to attain the purposes of promotion of women, older people and the like, in view of built-in employment practices and labor market situations.

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