

2011

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Recommended Citation

Jiefeng LU, *Curb Your Enthusiasm: A Note on Employment Discrimination Lawsuits in China*, 10 Rich. J. Global L. & Bus. 211 (2011).
Available at: <http://scholarship.richmond.edu/global/vol10/iss2/4>

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CURB YOUR ENTHUSIASM: A NOTE ON EMPLOYMENT DISCRIMINATION LAWSUITS IN CHINA

*Jiefeng LU**

I. INTRODUCTION

China's legal system continues to struggle with the political and social complications of its rapid economic development. One of the more glaring tensions in modern China is the treatment of workers in a capitalist economy nestled within a socialist political system. Research on employment discrimination is nevertheless quite a recent phenomenon in China. However, as early as in 2002, I was involved in several high-profile anti-discrimination cases and served as a legal counsel for the plaintiff in one of them. In fact, increasing attention to equal employment opportunity rights and anti-employment discrimination in China was triggered in large part by the emergence of these groundbreaking employment discrimination lawsuits early this decade.¹ Among them, the most pioneering case began in 2002 when the plaintiff, a graduate from Sichuan University, sued the People's Bank of China Chengdu Branch for height discrimination.² This case was followed by a remarkable Hepatitis-B employment discrimination case against a local government agency in Anhui Province in 2003.³ Other high-profile cases at the time included gender-based discrimination in the mandatory retirement policies at the China Construction Bank Pingdingshan Branch in 2005,⁴ age-based discrimination against the

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¹ Jiefeng Lu, *Employment Discrimination in China: Current Situations and Principle Challenge*, 32 *HAMLIN L. REV.* 133, 136 (2009)

² *Id.* at, 140 n.35.

³ *Id.* at 140 n.36

⁴ *Id.* at 141 n.37

Ministry of Personnel of the State Council in 2006,⁵ and physical appearance-based discrimination against an education investment group in Shanghai in early 2007.⁶

While many of these cases turned out to be a substantial burden to the defendants—especially when the discriminating defendant was a government agency—they have attracted enormous scholarly attention.⁷ They were acclaimed to have been instrumental in promoting the anti-discrimination cause in Chinese society and proof of groundbreaking achievement in the history and development of Chinese constitutional law. For example, the height discrimination case was lauded as China’s “First Constitutional Equal Rights Case”⁸ and “China’s *Marbury v. Madison*.”⁹ These cases have also stimulated intense scholarly discussion about employment discrimination and its regulation in the Chinese workplace, as evidenced by the increasing number of publications in recent years on the subject matter.¹⁰ The concept of workplace equality and an end to workplace discrimination,

⁵ *Id.* at 141 n.38

⁶ *Id.* at 141 n.39

⁷ The scholarly attention can be judged from the large volume of publications devoted to employment discrimination in China in recent years, *see infra* note 10.

⁸ *See* ZHOU WEI, CONSTITUTIONAL BASIC RIGHTS AND THE JUDICIAL REMEDY (Chinese People’s Public Security University Press 2003).

⁹ *See* Michael C. Dorf, *What a Chinese Height Discrimination Case Says About Chinese (and American) Constitutional Law*, FINDLAW.COM (May 26, 2004), <http://writ.news.findlaw.com/dorf/20040526.html>.

¹⁰ *See e.g.* ZHOU WEI, EMPLOYMENT DISCRIMINATION IN CHINA: LEGISLATION AND REALITY, (China Law Press 2006); Xiao Zesheng, *The Physique Classification in Check-up of Civil Servant and the Equal Right to Hold Public Office*, ADMIN. L. REV., Issue 2 (2005); Zhou Wei, *Height Discrimination in Urban Employment*, EAST CHINA U. OF POL. SCI. AND L.J., Issue 4 (2008); Zhou Wei, *Research on Sex Discrimination in Employment of City and Towns in China*, POL. SCI. AND L., Issue 4, 2008; Li WEIWEI AND LISA STERN, EMPLOYMENT DISCRIMINATION: INTERNATIONAL STANDARDS AND NATIONAL PRACTICE (China Law Press 2006); Xie Zengyi, *On The Anti—Employment Discrimination Act In England And The Legislative Improvement In China*, LAW SCI. MAG., Issue 5 (2008); Zhang Mingfeng, *Affirmative Actions in Canada and Their Implications to China*, LEGAL SCI. MONTHLY, Issue 7 (2006); Li Weiwei, *Non-discrimination Principle in International Human Rights Law and Its Application in China—The Canadian and Australian Legislation Mode as A Reference*, LAW SCI. MAG., Issue 4 (2003); CAI DINGJIAN AND ZHANG QIANFAN, EMPLOYMENT DISCRIMINATION OVERSEAS: LAW AND PRACTICE (China Social Science Press 2007); Rao Zhijing, *British Institutions and Practice on Anti-discrimination Law in Employment*, HEBEI L.SCI., Issue 11 (2008); Li Ao, *Study on Sexual Discrimination Cases in US*, LAW REV., Issue 6 (2008); Xie Zengyi, *A Comparative Study of Employment Discrimination Between U.S.A. and U.K.*, PEKING U. L.J., Issue 4 (2008); Wu Jinsong, *A Study on America’s Gender Bias in Occupations*, JURISTS REV., Issue 3 (2004); Mao Ling, *A Research on Canadian Anti-Workplace-Sexual Harassment Law*, ORIENTAL L., Issue 2 (2006); CAI DINGJIAN, THE

in addition to anti-discrimination enthusiasm, stirred hopes for a more equal Chinese society both within the country and abroad.¹¹

Even more exciting was the fact that, in response to demands from the civil society on regulating employment discrimination, China's legislature enacted new laws that prohibited certain kinds of discrimination in the workplace. Among them was an important piece of legislation, the Employment Promotion Law of the People's Republic of China, which was issued and took effect in 2007.¹² This law prohibits discrimination based on ethnicity, race, gender, religious belief, migrant-worker status, and carrier-of-an-infectious-disease status.¹³ In addition, provisions in existing Chinese laws, such as the Constitution, the Labor Law, and the laws for women and people with disabilities have now been more frequently interpreted as components of a Chinese anti-discrimination legal regime.¹⁴ On August 28, 2005, China's top legislature, the Standing Committee of the National People's Congress of People's Republic of China, also ratified the Discrimination (Employment and Occupation) Convention (No.111).¹⁵

Despite increased attention to the anti-discrimination issue in China, people might be easily misled by a few high-profile cases and the burgeoning scholarly interest in anti-discrimination and believe that employment discrimination is being seriously and effectively

EMPLOYMENT DISCRIMINATION IN CHINA: CURRENT CONDITIONS AND ANTI-DISCRIMINATION STRATEGIES (China Social Science Press 2007).

¹¹ The China Law Center of Yale University Law School, University of Oslo Norwegian Center for Human Rights, and Utrecht University School of Law of the Netherlands were among those foreign entities that involved, sponsored, and cooperated with their Chinese counterparts in conducting anti-discrimination law research in China.

¹² See *Zhong Hua Ren Min Gong He Guo Jiu Ye Cu Jin Fa* [Employment Promotion Law of P.R.C.] adopted at the 29th session of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on August 30, 2007, promulgated and effective as of January 1, 2008, available at http://www.gov.cn/flfg/2007-08/31/content_732597.htm.

¹³ See *Id.*

¹⁴ Lu, *supra* note 1.

¹⁵ The 17th session of the Standing Committee of the Tenth National People's Congress decides to ratify the Convention concerning Discrimination in Respect of Employment and Occupation (1958) adopted at the 42nd conference of the International Labor Organization on June 25, 1958, and simultaneously declares that before the Government of the People's Republic of China gives a separate notice, the Convention concerning Discrimination in Respect of Employment and Occupation (1958) doesn't apply to Hong Kong Special Administrative Region of the People's Republic of China for the time being. See Decision of the Standing Committee of the National People's Congress about Ratifying the Discrimination (Employment and Occupation) Convention, 1958, available at http://www1.www.gov.cn/gongbao/content/2005/content_77787.htm (last accessed July 2009).

dealt with through the Chinese legal system. The undeniable fact is that eight years after the hailed high-profile height discrimination case and five years after China signed the International Discrimination (Employment and Occupation) Convention, discrimination is still prevalent in the Chinese workplace.¹⁶ Furthermore, despite the role previous litigation played in unleashing enthusiasm about the anti-discrimination movement, litigating employment discrimination still is an unpopular proposition in China. Official statistics on employment discrimination cases in China are largely unavailable, and the number of such lawsuits appears to be trivial. What's more, up to this point, there are no high-profile employment discrimination cases on trial or appeal on a national or provincial level. Such cases that are on the dockets of lower courts are believed to be trivial as well. The number of employment discrimination cases coming to the court is so insignificant that the category of "employment discrimination lawsuit" has not been included as such in the civil litigation system by the Chinese Supreme People's Court.¹⁷

This article is among a series where I will address Chinese anti-discrimination in employment issues. Based on a survey administered to judges from different courts in China, I argue that employment discrimination lawsuits are considered trivial. Despite continued employment discrimination in the Chinese workplace, few discrimination cases are coming to Chinese courts. In spite of the enthusiastic anti-discrimination movement in China and despite the record-setting volume of laws and regulations prohibiting employment discrimination,¹⁸ employment discrimination litigation remains unpopular and politically sensitive in China.

Part II of this paper discusses the survey to the Chinese judges on employment lawsuits, including the survey's methodology, results, and limitations. Part III analyzes the survey results and argues that the employment discrimination lawsuits are trivialized due to their cultural and political sensitivity and the inconsistencies in the labor law system itself. The latter in particular has impeded people's efforts to file discrimination lawsuits in courts. Part IV concludes and pro-

¹⁶ For various forms and manifestations of employment discrimination in the Chinese workplace, see Lu, *supra* note 1.

¹⁷ The most authoritative guideline on what kinds of civil cases courts can hear, the Regulation on Cause of Action in Civil Litigation issued by the Supreme People's Court of China, has not yet listed employment discrimination as a category of civil litigation. The Regulation on Cause of Action in Civil Litigation was issued by the Supreme People's Court of China on February 4, 2008 and took effective on April 1, 2008.

¹⁸ See Jiefeng Lu, Tackling the Conceptual Barrier and the Institutional Barrier in Dealing with Employment Discrimination in China: A New Approach (a working paper).

poses measures necessary to encourage people to challenge discriminatory employment practices through legal channels.

II. A SURVEY ON EMPLOYMENT DISCRIMINATION LAWSUITS IN CHINA

The arbitrary and widespread discrimination people have faced in the Chinese workplace is now well documented.¹⁹ Early employment discrimination cases that later turned out to be unexpectedly high-profile cases have led people to believe that the Chinese judiciary could play a positive role in promoting the anti-discrimination causes in China.²⁰ The courts' decision to grant judicial review on these unprecedented cases indicated that Chinese courts would not always act as conservatively as they had been believed to be and criticized for. However, years later, questions remain: Are the courts really assuming their role in the anti-discrimination cause as expected? Are there cases decided by the courts with rulings that prohibit employment discrimination, provide a remedy to victims, and deter future offenses of discrimination? Is the enthusiasm towards anti-discrimination merely a reflection of some people's wishful thinking, or proof of the issue being undertaken seriously in China?

A. Motivations

As previously mentioned, employment discrimination frequently occurs in the Chinese workplace. Therefore, one would reasonably think that there should be a significant amount of employment discrimination litigation in Chinese courts; unfortunately, official statistics on employment discrimination lawsuits in

¹⁹ Publications recording various forms of employment discrimination taking place in the Chinese workplace are plentiful both in China and abroad. For a detailed discussion on forms and manifestations of employment discrimination in the Chinese workplace, see Lu, *supra* note 1. For other publications discussing the rampancy of employment discrimination in China, see, e.g., ZHOU WEI, EMPLOYMENT DISCRIMINATION IN CHINA: LEGISLATION AND REALITY (CHINA LAW PRESS 2006); CAI DINGJIAN, THE EMPLOYMENT DISCRIMINATION IN CHINA: CURRENT CONDITIONS AND ANTI-DISCRIMINATION STRATEGIES (China Social Science Press 2007); Zhou Wei, *On the Age Discrimination in Employment of Our Country: An Empirical Study of 300,000 Advertisements for Employees in Shanghai and Chengdu from 1995 to 2005*, 3 J. POL. SCI. & L. FORUM 13, 13-21 (2007); Xun Zeng, *Enforcing Equal Employment Opportunities in China*, 9 U. PA. J. LAB. & EMP. L. 991 (2007); Allison J. Wells, *Chinese Women Experience A Negative Side Effect of the Growing Private Sector in Gender-Based Employment Discrimination*, 6 IND. INT'L & COMP. L. REV. 517, 518 (1996).

²⁰ This author served as one of the legal councils for the plaintiff in a Hepatitis B discrimination case. Before the court officially accepted the case, we had concerns that the court might refuse to grant judiciary review on the matter because the defendant is a local government agency. See Lu, *supra* note 1, at 2.

China are currently not available. Regardless of the availability of official statistics, judges from Chinese courts should be aware of these cases, if any exist. Motivated by the desire to obtain an initial report on the number of employment discrimination cases courts hear each year, this author directly contacted certain Chinese judges to conduct a convenience survey on employment discrimination cases. This author was able to directly contact Chinese judges thanks to the network they established after taking part in a number of China Rule of Law programs at Temple University's Beasley School of Law. The Beasley School of Law has a longtime cooperative relationship with Tsinghua University's School of Law in Beijing, involving a number of academic Chinese Rule of Law development programs.²¹ As early as 2000, Temple University entered into a cooperative agreement with the Supreme People's Court of China to conduct judiciary training for Chinese judges. Since then, over 300 Chinese legal professionals throughout China have completed the three-month program at the National Judicial Training College in China, and many have participated in a subsequent month-long intensive summer training program in the United States.²² From 2005 to present-day, this author has participated as the deputy director and chief interpreter in many judiciary education programs, and has established fruitful personal relationships with many judges throughout China, making this survey possible.

*B. Chinese Courts and Employment Discrimination Lawsuits:
General Information*

The structure of the Chinese judicial system has four levels of courts, with at most two trials conducted to complete a case.²³ The four levels of courts are, from the lowest to highest, the basic People's Courts, the Intermediate People's Courts, the High People's Courts, and the Supreme People's Court.²⁴ The basic People's Court adjudicates ordinary criminal and civil cases of the first instance.²⁵ The In-

²¹ In 2009, the U.S. Senate passed a Resolution, No. 280, to celebrate the 10-year anniversary of Temple's rule-of-law program in China. S. Res. 280, 111th Cong. (2009), available at http://www2.law.temple.edu/servlet/com.rnci.products.DataModules.RetrieveAttachment/Congressional_Record_155_134/?server=templelawdb&dbname=templelaw&site=templeLaw&sction=international_attachments&article=1&filename=Congressional_Record_155_134.pdf.

²² See *id.*

²³ See Organic Law of the People's Courts of the People's Republic of China, adopted at the Second Session of the Fifth National Congress on July 1, 1979, promulgated by Order No. 59 of the President of the People's Republic of China on October 31, 2006, and effective as of January 1, 2007, arts. 2 and 12 (LEXIS 2006 China Law 8786).

²⁴ *Id.* at art. 2.

²⁵ *Id.* at art.21.

intermediate People's Courts have jurisdiction over cases of first instance as provided by law, cases of first instance transferred from the basic People's Courts, and appellate cases.²⁶ The High People's Courts have jurisdiction over cases of first instance assigned by law, cases of first instance transferred from lower courts, and appellate cases.²⁷ The cases of first instance assigned by law are usually those cases that have significant impact on a particular area's jurisdiction.²⁸ The Supreme People's Court has jurisdiction of first instance over cases assigned to it by law, cases that the Supreme People's Court considers it should try itself, and over appeals from High People's Courts.²⁹ The cases of first instance assigned by law are usually those cases that have a significant impact on the whole country.³⁰ Depending on the gravity of the case, the trial of first instance can occur at any level in the system, with a final appeal to a court at the next higher level. Cases of first instance decided by the Supreme People's Court are final.³¹

The people's courts are generally divided into three divisions: civil, criminal, and administrative. Each division hears the corresponding type of cases. Typically, the civil cases involve disputes between individuals and their property. Administrative cases are those brought by individuals against government entities that challenge the legality of administrative actions. Criminal cases are prosecutions against individual or certain entities in violation of the Chinese criminal code. Currently there is no provision in the Chinese criminal code that imposes criminal liability on employment discrimination violators. Cases claiming employment discrimination are either civil cases, if defendant is a non-government employer, or administrative cases, if the defendant is a government employer.

C. *The Survey Method and Limitations of the Study*

From January to March 2010, I conducted a survey of Chinese judges in different courts aiming to count the number of employment discrimination cases from their jurisdictions. Among those judges with

²⁶ *Id.* at art. 24.

²⁷ *Id.* at rt. 25.

²⁸ See Civil Procedure Law (promulgated by the Standing Comm. Nat'l People's Cong., March 8, 1982, effective October 1, 1982), art. 20, (Lawinfochina) (China).

²⁹ See Organic Law (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1979, effective January 1, 1980), art. 31, 32 (LEXIS 2006 China Law 8786) (China).

³⁰ See Civil Procedure Law (promulgated by the Standing Comm. Nat'l People's Cong., March 8, 1982, effective October 8, 1982), art. 21, (Lawinfochina) (China).

³¹ See Organic Law (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1979, effective January 1, 1980), art. 11 (LEXIS 2006 China Law 8786) (China).

whom I have regular contact, I selected nine judges from nine different courts throughout China. These courts are located in seven provinces and one municipal city in China, specifically Zhejiang Province, Hunan Province, Anhui Province, Guangxi Province, Guangdong Province, Liaoning Province, Hubei Province, and Chongqing Municipal City. These provinces and the municipal city span geographically from the north of China to south, and from east to west. They are economically representative of those most developed provinces (for instance, the Guangdong Province and Zhejiang Province), of the least developed provinces (for instance, the Guangxi Province), and of those moderately developed provinces (for instance, the Liaoning Province). These courts are listed as Appendix I at the end of this article.

The survey was designed chiefly to get an approximate number of cases, if any, filed for employment discrimination claims in each of those courts where the judges sit. The survey also intended to compare the number of employment discrimination cases with the total number of cases each court has heard in recent years (criminal cases excluded; currently Chinese law does not impose criminal liability on employment discrimination offences, thus criminal cases were excluded from the overall number). Because of limited public availability of the total number of cases heard in recent years (criminal cases excluded), this question was also incorporated into the survey, under the assumption that the judge in a particular court has access to the most accurate statistics on the total number of cases the court hears each year. The survey was composed of two simple questions: (1) how many employment discrimination cases have emerged in your court from the year 2005 to the year 2009; and (2) what is the total number of cases your court accepted each year (selecting any two years from 2007, 2008, and 2009). The purpose of counting the number of employment discrimination cases from 2005 to 2009 is to expand the scope of years so that more cases can be counted. Calculating the total number of cases the courts take in recent years allows me to compare the employment discrimination cases with all the cases the courts accept.

For purposes of the survey, employment discrimination cases were defined as any cases, civil or administrative, in which the plaintiff characterizes the employer's actions or inactions as violations of their equal employment rights. Such employer's actions or inactions include refusal or failure to hire the plaintiff, firing or terminating the employment contract with the plaintiff, paying less or withholding payment from the plaintiff, and sexually harassing the plaintiff, among others. The survey was sent out via email in early January 2010 to the nine judges in the previously mentioned courts, with the last response received in early March 2010.

The survey possesses limitations when viewed from the methodological point of view. This study intends to draw an initial report

on the number of employment discrimination cases in China by polling a convenience sample of judges from different Chinese courts. However, because the survey used a sample that is generated by convenience, the results obtained cannot be strictly generalized to the total numbers of employment discrimination cases in China as a whole. The sample judges were selected because they are readily available and convenient to survey. Such a pool of samples are not sufficiently representative to draw scientific generalizations on the numbers of employment discrimination cases courts accepted each year in China. However, it is important to note that the study did not seek to determine the exact number of employment discrimination cases Chinese courts take each year, but to test the proposition that employment discrimination cases have yet to become an important part of the civil docket in Chinese courts.

D. Survey Results

Among the nine judges surveyed, five responded with the specific statistics the survey requested. The other four judges were not able to provide any statistics. Among those four judges who were not able to provide any statistics, one judge did not reply to email solicitation (though he confirmed the receipt of the email containing the surveyed questions) two judges were not able to provide relevant statistics because their courts refused to reveal any such statistics due to its sensitivity, and one judge responded that he was not able to provide answers to the surveyed questions due to technical issues. It was interesting to note that judges from courts in the wealthier Guangdong Province were not able to provide any statistics. The courts that were not able to provide answers to the surveyed questions are listed as Appendix II at the end of this article.

The judge from the Cixi City People's Court of Zhejiang Province responded with information about two employment discrimination cases from the year 2005 to 2009;³² the judge from the Changsha City Intermediate People's Court of Hunan Province responded concerning one employment discrimination case from the year 2005 to 2009;³³ the judge from the Huangshan City Intermediate People's Court of Anhui Province reported zero employment discrimination case from the year 2005 to 2009;³⁴ the judge from the Shapingba People's Court of Chongqing Municipal City reported zero employment

³² Data provided by Judge Jing Zanyu of Cixi City People's Court of Zhejiang Province.

³³ Data provided by Judge Long Xingsheng of Changsha City Intermediate People's Court of Hunan Province.

³⁴ Data provided by Judge Cao Cheng of Huangshan City Intermediate People's Court of Anhui Province.

discrimination case from the year 2005 to 2009;³⁵ and the judge from the Nanning City Intermediate People's Court of Guangxi Province relayed that there had been one employment discrimination case from the year 2005 to 2009.³⁶ In addition, these judges also provided statistics on the total number of cases their court heard within its jurisdiction in recent years (select two years in the years of 2007, 2008, and 2009) with criminal cases excluded.³⁷ The result of the survey has been compiled into Table One as follows:

TABLE ONE: NUMBER OF EMPLOYMENT DISCRIMINATION CASES (2005-2009) AND NUMBER OF TOTAL CASES IN THESE COURTS IN RECENT YEARS

	Number of Total Employment Discrimination Cases from the Year 2005 to the Year 2009	Number of Total Cases This Court Hears in Its Jurisdiction in Recent Years (Criminal Cases Excluded)
The Cixi City People's Court of Zhejiang Province	2	10,758 cases in the year of 2007; 12,911 cases in the year of 2008
The Changsha City Intermediate People's Court of Hunan Province	1	13,379 cases in the year 2008; 14,008 cases in the year of 2009
The Huangshan City Intermediate People's Court of Anhui Province	0	10,092 cases in the year 2008; 10,883 cases in the year of 2009
The Shapingba People's Court of Chongqing Municipal City	0	5,207 cases in the year of 2008; 7,606 cases in the year of 2009
The Nanning City Intermediate People's Court of Guangxi Province	1	20,223 cases in the year of 2007; 24,064 cases in the year of 2008

³⁵ Data provided by Judge Yu Zhiqiang of Chongqing City First Intermediate People's Court.

³⁶ Data provided by Judge Qiu Bingbing of Nanning City Intermediate People's Court of Guangxi Province.

³⁷ Criminal cases are excluded from these statistics because there is no criminal liability imposed by the Chinese Criminal Law on discriminatory employment practice. See Chinese Criminal Law, available at http://www.chinacourt.org/flwk/show.php?file_id=27762.

The results show that the number of employment discrimination cases from the surveyed courts presents an extremely small percentage on the entire number of cases these courts hear (criminal cases excluded). The greatest number of total employment discrimination cases from the years between 2005 and 2009 is found in the Cixi City People's Court of Zhejiang Province, representing less than one percent of its total cases in the years of 2007 and 2008. In addition, the number of employment discrimination cases from 2005 to 2009 in the Changsha City Intermediate People's Court of Hunan Province and the Nanning City Intermediate People's Court of Guangxi Province is less than one percent of their total cases in recent years. The surveyed results found in the Huangshan City Intermediate People's Court of Anhui Province and the Shapingba People's Court of Chongqing Municipal City showed that there were no employment discrimination cases from 2005 to 2009.³⁸

III. DISCUSSION

Although discrimination occurs in many areas of people's lives, the greatest impact of anti-discrimination legislation is probably felt in the field of employment.³⁹ As the first Global Report on discrimination, *Time for Equality at Work*, has emphasized the workplace—be it a factory, an office, a farm or the street—has been a strategic entry point to free society from discrimination.⁴⁰ Anti-discrimination legislation has been enforced in the United States,⁴¹ United Kingdom,⁴² Japan,⁴³ Australia,⁴⁴ and some other countries for decades. However, in China anti-discrimination in employment was practically a non-issue until the aforementioned ground-breaking cases were filed in Chi-

³⁸ I learned through informal chatting with more judges from other courts in China that employment discrimination cases are very rarely seen in their courts. Most judges commented that they have read news reports about employment discrimination cases in some provinces, but have never presided over such a case.

³⁹ See Hugh Collins, *Social Inclusion: A Better Approach to Equality Issues?* 14 *TRANSNAT'L L. & CONTEMP. PROBS.* 897, 901 (2005).

⁴⁰ See ILO: *Time for Equality at Work*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report 1(B), International Labor Conference, 91st Session, Geneva, 2003, para. 11.

⁴¹ See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17 (2000); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000); Americans with Disabilities Act of 1990; 42 U.S.C. §§ 12101-12213 (2000).

⁴² See e.g., Sex Discrimination Act, 1975, c. 65; Race Relations Act, 1976, c. 74; Disabilities Discrimination Act, 1995, c. 50; Fair Employment and Treatment (Northern Ireland) Order, 1998; SI 1998/3162 (N. Ir. 21).

⁴³ See, e.g., Labor Standards Act, Law No. 49 of 1947; Equal Employment Opportunity Law, Law No. 45 of 1985; Child Care and Family Care Leave Law, Law No. 107 of 1995.

nese courts. The significance of these cases has been thoroughly discussed by Chinese scholars.⁴⁵ However, the cases — and the attention they brought to the anti-discrimination cause — gave people the false impression that the Chinese legal system would take serious steps to remedy the employment discrimination problem. Reality has thrown cold water on this premature enthusiasm. Only a trivial number of employment discrimination cases filed in court had their trial of the first instance in the basic People's Court. The results reported by the courts could be extreme outliers, but a number of indicators suggest they are more likely to be typical. No national appeals have been seen thus far. No cases have appeared in High People's Court or the Supreme People's Court for a trial of first instance.⁴⁶ Nor is anyone even collecting information on employment discrimination cases.⁴⁷ If the enthusiasm regarding anti-discrimination is real, where are the anti-discrimination cases?

Despite the limitations of this convenience survey, it provides powerful evidence in demonstrating the unpopularity of employment discrimination litigation in China. It undermines the claim that litigation is assuming an important role in the regulation of employment discrimination in the country. It is also evidence to demonstrate the political sensitivity of such litigation. The survey itself reflects such sensitivity, as four judges out of nine either refused to answer, or were reluctant to share any statistics on employment discrimination lawsuits.⁴⁸ People once applauded decisions by courts granting judicial review on unprecedented employment discrimination lawsuits.⁴⁹ However, in retrospect, the reluctance of the courts to enforce anti-discrimination law against powerful public and private entities is obvious. Particularly when the defending discriminating employer is the government or a government agency, the courts are especially reluctant to place a defendant under interrogation for employment discrim-

⁴⁴ See, e.g., *Public Service Act 1999* (Austl.); *Human Rights and Equal Opportunity Commission Act 1986* (Austl.); *Workplace Relations and Other Legislation Amendment Act 1996* (Austl.).

⁴⁵ See Lu, *supra* note 1, at notes 35-39.

⁴⁶ Cases appear in high people's court or the Supreme People's Court for the trial of first instance must be those major cases that have major impacts on the whole country. See Civil Procedure Law of the People's Republic of China, at Art. 20-1, *supra* note 28.

⁴⁷ Employment discrimination has not yet been included as a separate category of civil litigation, according to the Regulation on Cause of Action in Civil Litigation issued by the Supreme People's Court of China, see *supra* note 17.

⁴⁸ See Appendix II.

⁴⁹ See Lu, *supra* note 1, at note 2.

ination claims.⁵⁰ The desire that Chinese courts take more responsibility concerning anti-discrimination is only some people's wishful thinking; so far the role of the courts to promote the anti-discrimination cause in China is limited.

In addition to the limited role courts assume there are other challenges, too. First, a cultural implication exists that Chinese people usually prefer to avoid litigation, and traditionally lawsuits are viewed as the least preferred resolution for resolving disputes among people.⁵¹ The concept of "harmony" and "no suits" are in general considered as the basic value orientation of traditional Chinese legal culture.⁵² As the founder of Confucianism and a great and influential Chinese philosopher, Confucius said, "To handle lawsuits, I am resolved to eliminate lawsuits."⁵³ As a result of that cultural and traditional influence, many people in China tend to deem lawsuits as a very unfriendly way to remedy their violated rights, especially when those violations arise in the workplace.⁵⁴ It thus becomes a factor that limits the desire of people to bring employment discrimination claims to legal authorities. Socio-legal scholars have explained such a phenomenon as injurious experiences that do not become grievances and, ultimately, lawsuits in the process of emergence and transformation of disputes.⁵⁵

Second, the existing rules regulating employment discrimination in China have great inconsistencies, which make it difficult to file an employment discrimination lawsuit. According to the current Chinese labor law rules, Chinese workers, except for those who are self-employed, are divided into three large categories: (1) The Enterprise Employees, referring to workers employed by enterprises or companies, have employment contracts with their employers, and are regulated by the Chinese Labor Law; (2) The Civil Servants, referring to those who work for the government or government agencies, perform

⁵⁰ Courts tended to dismiss cases when government agencies were involved as defendants, see Jiefeng Lu, *Employment Discrimination in China Situations and Challenges*, Table Four at page 184, *supra* note 1.

⁵¹ See NIALL CROWLEY, *AN AMBITION FOR EQUALITY* 1,2 (Irish Academic Press 2006) (asserting that culture plays a part in societal views of equality).

⁵² See Zhang Wenxiang, *Saqironggui: The Dilemma of Traditional Litigation Conceptions—the Intrinsic Logic among "No Suit," "Dropping Suit" and "Disgusting Suit,"* 22 HEBEI L. REV. 3,79-82.

⁵³ See *The Analects*, Chapter 12, Verse 13.

⁵⁴ As noted in the previous paper that it would be not a likely scenario in China even nowadays that someone would be willing to seek an order from the court against an employer to ask to be hired. See Lu, *supra* note 1, at 189.

⁵⁵ See generally William L.F. Felstiner, Richard L. Abel and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 LAW & SOC'Y. REV. 631 (1980-81).

public duties according to law, have been included in the state administrative staffing, have wages and welfare borne by the state public finances, and are regulated by the Chinese Civil Servant Law; (3) Public Institution Employees, referring to people employed by public institutions, sometimes come under the regulation of Labor Law, while others are covered by Civil Servant Law.⁵⁶ A different worker status will lead to a different approach for possible legal actions one may take. However, incoherence and contradictions in the relevant regulations have presented hardships for employment discrimination claimants seeking legal protections and legal remedies.⁵⁷ In brief, first, for the enterprise employees, Chinese labor law prescribes its application only in cases where a contractual employment relationship exists, while most discrimination in China under current conditions emerges in the process of hiring,⁵⁸ before the establishment of a contractual employment relationship between the employer and the applicants and thus not within the scope of the applicability of the Chinese labor law system; second, for the civil servants, the Administrative Procedure Law of People's Republic of China excludes government employees from seeking judicial recourse with respect to possible discriminatory treatment by government employers; finally, for the public institution employees, as far as filing a claim for discrimination is concerned, the problems for public institution employees generally combine the problems of enterprise employees and civil servants.⁵⁹

Despite hurdles that remain, the enthusiasm surrounding the anti-discrimination movement nevertheless can still be transformed into a concrete force promoting the anti-discrimination cause in China, if properly guided. The bottom line is the Chinese people must realize that the only way to effectively curb employment discrimination is to establish a rule of law by creating a workable regulatory system. Although this paper is not about how to design and make such a system work—such issues will be addressed in my other papers—there are some basic aspects which are pertinent to the discussion of this article that are worth mentioning. First, Chinese law must be revised to make it easier for people to challenge discriminatory employment practice. Second, the Chinese people must be encouraged to use legal channels to claim their equal employment rights. To make it easier for people to file an employment discrimination lawsuit, China needs first to distinguish two types of employment discrimination, *i.e.* discrimination by government employers and discrimination by non-government employers. Discrimination by government employers should be in-

⁵⁶ See Lu, *supra* note 1, at 179.

⁵⁷ See *Id.*

⁵⁸ See *Id.*

⁵⁹ For a detailed discussion, see Lu, *supra* note 1, at 179.

cluded in the Chinese administrative litigation system by revising and expanding the scope of acceptable cases prescribed in the current Chinese administrative litigation law. Discrimination by non-government employers should be included in the Chinese civil litigation system by clearly prescribing a protected class in two major laws regulating employment issue in China: the labor law and the employment promotion law. The scope of statutory protection should also be expanded to cover discriminatory practice occurring before the formation of a contractual labor relationship, for instance, during the process of hiring. To encourage Chinese people to challenge discriminatory employment practice, we must properly educate and convince them that discrimination is wrongful, reprehensible, and does not have to be tolerated. Chinese people must further be educated that when discrimination occurs, using the weapon of laws to guard their rights by referring discriminating practice to legal authorities is necessary and important. Such actions may not only get remedies for their losses but may also deter discriminating actors from further discriminating against others in the future.

IV. CONCLUSION

The enthusiasm surrounding the anti-discrimination movement in China is somewhat misleading. Contrary to the heated scholarly discussion on employment discrimination are these chilling facts: discrimination in workplace is still commonly seen; a trivial number of cases have been accepted by the Chinese courts; there are no official statistics on employment discrimination cases courts accept; and no one is even collecting information on employment discrimination lawsuits. In all, employment discrimination litigation remains unpopular and politically sensitive.

Before the current Chinese labor law system fails totally in redressing and deterring employment discrimination, the inconsistent provisions in current Chinese labor law rules must be properly interpreted by the legislature so that the institutional obstacle can be cleared for people to file a lawsuit in court claiming equal employment opportunity rights. Meanwhile, Chinese individuals must be encouraged to challenge discriminatory employment practices. Despite the absence of employment discrimination cases, there is no lack of employment discrimination. Under these circumstances, can we say the enthusiasm about antidiscrimination in China will really make any difference?

APPENDICES**APPENDIX I-COURTS SURVEYED**

Name of the Court	Its Location Province
The Cixi City People's Court	Zhejiang Province
The Changsha City Intermediate People's Court	Hunan Province
The Huangshan City Intermediate People's Court	Anhui Province
The Shapingba People's Court	Chongqing Municipal City
The Nanning City Intermediate People's Court	Guangxi Province
The Shenzhen City Nanshan District People's Court	Guangdong Province
The Liaoyang Intermediate People's Court	Liaoning Province
The Dongguan Intermediate People's Court	Guangdong Province
The Wuhan City Intermediate People's Court	Hubei Province

APPENDIX II-COURTS NOT ABLE TO PROVIDE DATA

Name of the Court	Its Location Province
The Shenzhen City Nanshan District People's Court	Guangdong Province
The Liaoyang Intermediate People's Court	Liaoning Province
The Dongguan Intermediate People's Court	Guangdong Province
The Wuhan City Intermediate People's Court	Hubei Province