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Research on the regulation of age discrimination in employment encountered by workers during the job-seeking stage

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Abstract. As the contrast between supply and demand in China's labor market continues to be tilted toward the buyer, it is not uncommon for workers to suffer discrimination in the process of job hunting, among which age discrimination is the most common, widespread and involved type. In contrast to the frequent occurrence of age discrimination in employment, there are gaps in the existing laws and research on the regulation of age discrimination in employment during the job-seeking stage.Based on this, this paper starts from the phenomenon of age discrimination in employment at the job search stage, analyzes its causes, the nature of the problem, as well as the identification criteria, regulation methods and relief measures of the problem of age discrimination in employment, in order to put forward targeted legal regulation ideas in the context of "age discrimination in employment during the job-seeking stage of workers".

Keywords: Employment; Age discrimination; Legal regulation.

1. Introduction

In recent years, the aging trend of China's population structure is becoming more and more obvious, and the results of the seventh national census released by the National Bureau of Statistics in May 2021(1) has once again made "age" a hot topic. In contrast, with the adjustment of industrial structure and the rise of new industries, the employment age of China's workforce has shown a tendency to "rejuvenate". (2)The hedge of these two opposite trends has undoubtedly caused a wide and profound impact on society as a whole - from the "uselessness of the elderly" to the "mid-life crisis" and then to the youth "The psychological and social problems caused by the "age" factor have spread from the older generation to the younger generation, and even swept through the entire adult community. In reality, age discrimination is the most common, widespread, and extensive type of employment discrimination in China. [1]Age discrimination in employment is a common occurrence in China’s labor market. However, through the observation of the legislation and judicial practice related to "age discrimination in employment" in China, I regret to find that until now, the problem of "age discrimination in employment" in China has not been fundamentally and effectively addressed and solved. Searching through platforms such as China Judicial Documents Network, the author finds that the judicial system of "age discrimination" in China is in a rather awkward situation. For example, I tried to search civil cases related to "age discrimination" nationwide, and finally only got less than 500 adjudication documents.(3)Carefully reading the facts of the cases, there are actually very few cases involving age discrimination in employment recruitment.

However, this does not mean that the problem of "age discrimination in employment" is not a problem in China. On the contrary, it is because of the "indirect discrimination" characteristic of high concealment and difficulty of proof that it is difficult to effectively solve the problem of "employment age discrimination" through litigation. The lack of judicial practice leads to the lack of judicial experience, problem identification and feedback, which is not conducive to the effective regulation of "age discrimination in employment" at the legislative and judicial levels. In contrast to the delayed legal regulation, the problem of "employment age discrimination" will expand and ferment in the society -- "employment age discrimination" is difficult to be supported by the court as a factual act of infringement. On the one hand, it is easy to encourage employers to abuse the

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right of independent employment, arbitrarily set age limits for job competition, and substantially violate the equal employment rights of workers. On the other hand, it will lead to, for example, young people blindly choosing early employment to avoid employment age discrimination, resulting in workers' lack of self-awareness and severely limited personalized development, and middle-aged people falling into the "mid-life crisis".

Why is the response to "age discrimination in employment" in China in such a quagmire? There are clues at both the legislative and remedial levels.

With regard to the issue of "age discrimination in employment", China's legislation has only principle-based answers scattered in various laws, but there is no unified legal system regulating employment. Although the Constitution of the People's Republic of China (hereinafter referred to as "the Constitution") stipulates the "principle of equality" and expressly opposes discrimination in Article 33(2), Article 3(1) of the Labor Law of the People's Republic of China (hereinafter referred to as "the Labor Law") and the Law of the People's Republic of China on Employment Promotion (hereinafter referred to as "the Employment Promotion Law") Article 3, paragraph 1 of the Labor Law of the People's Republic of China (hereinafter referred to as "Labor Law") and Article 3, paragraph 1 of the Law of the People's Republic of China on Employment Promotion (hereinafter referred to as "Employment Promotion Law") clearly define the "principle of equality in employment" for workers, but these principle provisions are too abstract and vague when facing the specific issue of "age discrimination in employment", and lack operational provisions. Article 12 of the Labor Law and Article 3 of the Employment Promotion Law also "coincidentally" avoid the provision of "age discrimination" when they list the prohibited forms of employment discrimination. Although Articles 25-26 of the Employment Promotion Law clarify the obligations of governments and employers at all levels to eliminate employment discrimination, the lack of specific guidance measures has not been effective in practice. The absence of laws directly addressing "age discrimination in employment" has led to the lack of clear and reasonable judgment standards, defenses and regulation methods for "age discrimination in employment" at the legal level.

In dealing with employment discrimination, China basically relies on only two remedies, administrative remedies and judicial remedies.[2]

At the level of judicial remedies, most judicial organs are rather passive in dealing with discrimination issues, unless there is a law that explicitly provides for active intervention. [3]Take the case of Zhang Jixing and the administrative decision of the Human Resources and Social Security Bureau of Gaoqing County not allowing him to apply for administrative institutions as an example, the judge who heard the case wrote in his judgment that "equality in equal employment is not the same as equality; equality means that those who meet the requirements and the conditions of the position should be given equal opportunities, not equal treatment regardless of the conditions. "(4) The facts of the case, the employer set a competitive exclusionary access threshold for the position from the surface is indeed neutral, and does not target a particular individual or group, so the judge in the case held that as long as the conditions set by the employer are neutral, there is no discrimination. Another example is the case of Mr. Ning v. A Credit Union General Personality Rights Dispute, in which the rural credit union in Hunan Province required the worker to withdraw from the competition on the grounds that the worker's height did not reach the unit's established height of no less than 157 cm. Even though the worker argued that the recruitment requirement of height for female employees violated Article 19 of the Measures for the Implementation of the Employment Promotion Law of the People's Republic of China in Hunan Province, which states that "employers shall not treat workers unequally in employment on the basis of factors unrelated to the employment position, such as height", the court held that "as long as the employer is not required to pay for the job, the worker shall be treated equally. The court still held that "as long as the recruitment restrictions set out by the employer do not violate the mandatory and prohibitive provisions of the law, it has the right to set individualized conditions, and height is reasonable as one of the elements to optimize the structure of the workforce." （5） This in fact reflects the cognitive limitations of the majority of our judiciary, and the source of this cognitive limitation is

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essentially related to the way our law perceives and prohibits "forms of discrimination". The forms of discrimination prohibited by our law have always been clarified by direct enumeration. However, such "direct discrimination prohibition" is effective only for the obvious forms of discrimination, but it is limited to the hidden "indirect discrimination" which is neutral on the surface but has adverse consequences for certain people. Many front-line judges are not willing to take the risk of breaching the boundaries of the types of legal provisions to argue and determine "indirect discrimination" out of respect for the judicial requirement of "no prohibition" and the self-protection of avoiding the risk of misjudgment. Therefore, the overall attitude of judges towards "indirect discrimination" such as "age discrimination in employment" seems passive and conservative.

At the level of administrative remedies for "age discrimination in employment," China's shortcomings are even more pronounced: the administrative agency dedicated to anti-discrimination in employment in China has been absent until now. This means that there is neither a professional body to carry out targeted legal campaigns against employment discrimination, nor an administrative department to provide assistance and intervention when employment age discrimination occurs. In this process, most of the workers who suffer from employment discrimination choose to hold their tongue and find another way out, while the remaining few parties in employment discrimination disputes will flock directly to the courts. When employment discrimination is dealt with in the form of judicial cases, the court cannot directly deal with the case according to the labor dispute, but must be transformed into a general tort of personality rights.（6） As a general tort of personality rights, it is necessary to follow the burden of proof requirement of "whoever claims, whoever proves" in ordinary civil disputes, and the difficulty of proving the existence of "employment age discrimination" is obviously too great for ordinary workers, which means that even if This means that even if the issue of employment age discrimination is litigated, it will be difficult to obtain effective judicial remedies because of the difficulty of litigation.

Injustice at the employment level is one of the most widespread and serious problems in society at this stage, yet it is ignored by the government and the public. The gaps in legislation, the lack of legal concepts and the fact that judicial remedies have not yet been established are a series of imperfections that lead to the fact that the right to equal employment is still a right that cannot be put into practice to a certain extent[4]. Among them, age discrimination in employment is one of the most prominent and urgent types of discrimination. Therefore, I think it is reasonable and necessary to explore more effective ways to solve the problem of "employment discrimination" on the basis of reflecting and summarizing the lack of existing measures, and I intend to focus on the "employment age discrimination" encountered by workers in the specific situation of "job seeking stage". "We also propose to discuss the criteria for identifying, regulating, and remedying age discrimination in specific contexts, with a view to finding new possibilities for the realization of workers' equal employment rights.

2. Causes of action for age discrimination in employment

2.1 Generation of the Problem

The fundamental way to address age discrimination in employment is to reconcile the conflicting interests of workers and employers. However, based on the reality that the domestic labor market has been in a buyer's market for a long time and the contrast between the objective power of workers and employers, workers who encounter age discrimination when seeking employment are often unable to reach a compromise with employers through non-litigation channels. In the absence of private power, the best choice for workers who wish to protect their legitimate rights and interests is to seek public remedies through litigation and arbitration.

In order to file a civil lawsuit, a cause of action needs to be established. However, at the institutional level, the cause of action for "employment discrimination disputes" is not explicitly provided for in the Supreme People's Court's Regulations on the Causes of Civil Cases (Law [2008]

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No. 11, as amended for the second time by Law [2020] No. 346), and in judicial practice, different adjudicative bodies have adopted different causes of action based on different perceptions of "employment discrimination. In judicial practice, different adjudicating bodies have adopted different causes of action based on different perceptions of "employment discrimination". （7） Different causes of action mean different procedural and substantive effects for workers. Therefore, choosing the most appropriate cause of action is of great significance to safeguard workers' equal employment rights.

There are four types of civil causes of action that may be applicable to employment age discrimination disputes: labor disputes, contract disputes, contractual negligence, personality disputes and tort disputes. In the following, the author will analyze these four types of civil causes of action, with a view to arriving at the most appropriate civil cause of action for age discrimination disputes.

2.2 Labor Disputes

In the author's opinion, the employment discrimination disputes in the job-seeking stage are not suitable for the labor dispute resolution mechanism. In labor law theory and judicial practice, the two basic criteria for the establishment of labor relations are subjectivity and content (subordination)[5]. In the case of age discrimination in employment during the job-seeking stage, it is obvious that the worker and the employer have not yet constituted a restricted personality or economic subordination, and the labor relationship has not been established. Therefore, the labor dispute resolution mechanism is not applicable in the context of "age discrimination in employment at the job-seeking stage".

For other types of employment discrimination disputes: In terms of litigation procedures, according to Article 79 of the Labor Law(8） , if the case is a labor dispute, the worker must first apply for arbitration of the labor dispute and can only sue in court if he/she is not satisfied with the arbitration award. This means that arbitration is a necessary pre-procedure for labor dispute litigation. Article 27 of the Law of the People's Republic of China on Mediation and Arbitration of Labor Disputes (hereinafter referred to as the "Mediation and Arbitration Law") stipulates that the period for applying for arbitration of labor disputes is one year(9) . In terms of the burden of proof, according to Article 6 of the Law on Mediation and Arbitration(10) , in addition to the parties' obligation to prove their claims, the employer also has the obligation to provide evidence related to the disputed matter in its possession and management. In terms of litigation costs, according to Article 53 of the Law on Conciliation and Arbitration(11) , there is no fee for arbitration of labor disputes. In terms of the scope of compensation, China's current labor laws do not expressly provide for compensation for moral damages, apology and other forms of legal liability. If the worker requests the other party to pay compensation for moral damages and apology under the cause of labor dispute, he/she will bear the risk that the court will not support the request.

Regardless of the fact that labor disputes do not apply in this context, the effect of age discrimination by a single employer in the job search phase is often short-lived and contingent and a worker is generally unwilling to go to the trouble of winning a dispute that does not result in "substantial" harm and whose chances of success are unknown. Although the cause of action for a labor dispute may result in a lower burden of proof and lower litigation costs for the worker, the shorter statute of limitations, more complex and lengthy litigation procedures, and incomplete forms of damages are not conducive to the preservation of his or her rights.

2.3 Liability for contractual negligence in contract disputes

Age discrimination lawsuits in the context of job search may also be based on contractual negligence under contractual disputes. There are two elements of contractual negligence that can create obstacles for workers' rights and interests: (1) contractual negligence requires that a party be at fault[6] , but in employment discrimination cases, it is difficult to prove that the employer was at fault in the contracting process. (2) Contractual negligence liability also requires the job applicant to

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have "reliance" on the employer[7] , but in reality, employers often directly exclude job applicants from job opportunities, and job applicants do not have "reliance". In addition, from the perspective of the scope of compensation, contractual negligence liability also includes only reliance and economic loss, but not performance benefits and moral damage. [8]Therefore, I believe that it is difficult to provide workers with sufficient and effective judicial remedies by choosing the cause of action of"contractual negligence liability", and the cause of action of "contractual negligence liability" is not suitable for employment age discrimination lawsuits in the job-seeking stage.

2.4 Disputes over personality and infringement

2.4.1 Broadly defined infringement disputes

Chinese civil litigation cause of action system involves the tort of "personal rights disputes" (infringement of personal rights) and "tort liability disputes" (general tort), in view of the two belong to the same broad sense of "tort disputes In view of the fact that they are both "tort disputes" in the broad sense, here I will discuss them together. If a worker chooses "tort dispute" as the cause of action, he or she can seek remedy through litigation without applying for labor dispute arbitration; according to Article 188(1) of the Civil Code of the People's Republic of China (hereinafter referred to as "Civil Code"), the statute of limitations for requesting protection of rights in court is three years(12) ; according to the Civil Code's personality rights and tort liability sections and the relevant articles of the Civil Code (13) , the worker is entitled to request for moral damages and apology. Although workers need to pay a certain amount of litigation costs when choosing this cause of action, and also need to bear the burden of proof of "who claims who proves", but in terms of simplifying procedures, reducing the cost of remedies, substantive protection of workers' rights and interests, the choice of tort disputes as a cause of action for employment age discrimination in job hunting is obviously more favorable to workers.

2.4.2 Personality Rights Infringement and General Infringement: How to Define the Nature of Age Discrimination in Employment More Precisely

On the premise of basically determining the cause of tort disputes more suitable for employment age discrimination disputes, it is necessary to distinguish the differences between personality rights disputes and general tort disputes through further analysis. Therefore, the author will compare the two by analyzing the elements of personality rights tort and general tort, so as to find out which one of them is more suitable for employment age discrimination disputes.

2.4.2.1 Analysis of the constituent elements of personality right infringement

The right to claim personality rights is an absolute right[9] with its own independence, which is dominant and exclusive, and mainly contains two aspects of personal equality and human dignity. Based on the absolute property of personality right, the infringement of personality right is not predicated on the act of the perpetrator, as long as the right holder's perfect state of domination of his personality interest is wrongfully infringed, he has the right to make relevant requests to restore such perfect state of domination.[10]

In the case of age discrimination in employment, it is sufficient to prove that the employer's conduct is detrimental to the worker's human dignity in order to establish that the employer's conduct violates the worker's human rights by setting an exclusionary age threshold (hereinafter referred to as the "age threshold") for competing for jobs.

2.4.2.2 Analysis of the constituent elements of general infringement

According to the provisions of Article 1165 of the Civil Code, the establishment of general tort liability requires the tortfeasor to assume liability should have three elements of fault, causation, and the consequences of infringement of other people's rights and interests: (1) the subjective fault of the aggressor. Here the fault contains intentional and gross negligence two forms. (2) tort liability is based on the causal relationship between the act of aggression and the rights and interests of the

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infringed and established. (3) other people's property or personal rights and interests because of the harm suffered a realistic already existed or constitute a real threat of adverse consequences.

If it is found that the employer's act of setting the age threshold constitutes a general infringement, it is necessary to prove that (1) at the time of setting the age threshold, the employer subjectively had the intention or gross negligence to infringe upon the rights and interests of others; (2) the worker is or may be required to bear the adverse consequences; and (3) the adverse consequences that the worker is required to bear arise based on the age threshold set by the employer.

2.4.2.3 Summary

Through the analysis of the elements of tort of personality rights and general tort, I believe that although the fact of tort of personality rights is easier to prove in terms of the elements, in fact, "impairment of human dignity" is more abstract and more difficult to prove, while the meaning of general tort is clearer and more friendly to the workers in terms of proof. (14)In the case that both tort liability and general tort liability include stopping infringement, removing obstruction, eliminating danger, etc., as well as the absence of a special cause of action and special trial procedure for "employment discrimination disputes", the choice of general "tort liability disputes" is more favorable to workers. The case is more favorable to the workers.

In addition, I also found that whether "personality rights dispute" or "tort liability dispute" is chosen as the cause of action, the core is to prove that "employment age discrimination is a tort The core of the case is to prove that "age discrimination in employment is a tort". In this regard, it is necessary to identify the nature of the "tort" of "employment age discrimination" and clarify the boundary of the legal prohibition of employment age discrimination.

3. Generation and Resolution of Age Discrimination in Employment: The Conflict and Boundary between Equal Employment Rights and Employment Autonomy

The issue of age discrimination in employment has complex social and jurisprudential roots. When asked why they exclude over-age workers from competing for jobs, different employers have different considerations: some employers believe that young people are more energetic, physically active and enterprising, and that their knowledge is more up-to-date and malleable[11] ; some employers say that the "experience" of middle-aged job seekers is no longer valuable for new industries, and their knowledge structure is not reasonable and inconvenient to manage. Some employers claim that middle-aged job seekers' "experience" is no longer valuable for new industries, and their knowledge structure is not reasonable, and there are many inconveniences in management[12] ; some employers have the mentality of rejecting middle-aged job seekers based on their recognition, speed and degree of adaptation to the workplace environment and new positions. [13]By observing and analyzing different employers' statements, we can easily find that at the level of public perception, the perception about the recruitment age threshold has considerable individual subjectivity and industry variability. Such subjectivity and differences are based on individual cognitive biases, and individual cognitive differences are the diverse reflections of different subjects on the same contradiction, so the so-called "social cognition leading to employment age discrimination" is only the surface of the problem. The conflict between the two legal rights of workers' equal employment rights and employers' employment autonomy.

3.1 Reasons for the conflict between workers' equal employment rights and employers' employment autonomy

The essence of the conflict between workers' equal employment rights and employers' autonomy in employment is the conflict of interests and the conflict of values. The conflict between workers' right to equal employment and employers' right to employment autonomy is mainly influenced by

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three factors: economic development, development of rule of law and awareness of rights[14] : (1) From the perspective of economic development, although China's society is aging, the labor market alone is still in a "buyer's market" and the overall labor force is still in surplus. The labor force is still in surplus. Under such a supply-demand relationship, employers have the initiative and appear to be very strong, and when they defend and advocate their own interests and value needs, "employment autonomy" will strongly squeeze or even infringe upon the space for exercising "equal employment rights". (2) From the perspective of the development of the rule of law, the developing but imperfect rule of law in China has created conditions for the conflict of rights. The traditional definition of the right to equal employment cannot objectively reflect the profound meaning of the right, and cannot effectively release the maximum function of the right to equality. [15]Under the situation that the boundary of rights and the core of rights are not clear enough, not only the conflict of rights is inevitable, but also how to adjust and balance when the conflict of rights occurs will become a legal problem. (3) The development of civil rights awareness and the development of the rule of law are naturally interrelated. On the whole, the incomplete development of the rule of law will be manifested in the imperfection of civil rights awareness or even misunderstanding; on the individual level, there is a long-standing unbalanced and uncoordinated development in various regions of China, and such unbalance and uncoordination will also be reflected in the understanding of different rights subjects about their rights and the way they exercise them. In fact, rights are "interests". When there is a conflict between individual interests, the advocate of the interest will naturally only think about the issue from the perspective that is conducive to the realization of his own interests and exercise his rights to ensure the maximum realization of his interests. When the interests of both parties do not coincide, the conflict of rights will be manifested.

3.2 Ideas for resolving the conflict between workers' equal employment rights and employers' right to employment autonomy

3.2.1 Guiding Ideas

In order to resolve the conflict between the two rights, it is necessary to reconcile the interests of both sides to resolve the conflict. Influenced by the contrast of supply and demand in domestic labor market, the impression employers usually leave to the public and the traditional concept of "pitying the weak and supporting the weak", people generally consider employers as the strong side, and the protection of equal employment rights must be realized by restricting the autonomy of employment. However, from the viewpoint of legal rationality, we must be clear that rights are mutual in nature, and no matter which right the law finally decides to protect, in fact, it is inevitable to infringe on another right as a quid pro quo. [16]When dealing with the conflict of legal rights, many scholars have tried to explain that "the kinds of rights are unequal" from "the rank of rights"(15) , and based on this "inequality", they deduce that the scale of law should be tilted to the higher rights. The balance of the law should be tilted in favor of higher-order rights. Although I agree that workers are relatively disadvantaged in the labor market and face unfair treatment or even violation of their rights, and that the state should provide them with appropriate remedies and protection at the institutional level due to the size of their numbers and the negative social impact that their rights will have if they are not guaranteed, such a "tilt" should not be based on the principle of "equality". However, such a "tilt" should not be based on the principle that "there are higher and lower rights". There is no doubt that the legal system has "rank", but I am skeptical about the argument that the rights system has "rank". As Professor Liu Zuoxiang said, "In a specific time and case, rights are concrete, real rights rather than abstract, conceptual rights. In the specific, realistic rights conflict, there are specific scenarios, specific reasons, specific degree of conflict of rights and the nature of the respective behavior of the two parties to the conflict of rights, the responsibility (or tort liability) should be assumed, etc." [17]Metaphysically distinguishing the high and low and sequential from the properties of rights themselves is undoubtedly rigid, unreasonable and does not facilitate real and reasonable problem solving. In addition, if the judiciary does not

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distinguish, argue, and weigh in favor of the subject with the so-called "higher rights" in a specific case, this is essentially an acknowledgement of the "priority" of the subject with the "higher rights". "This is undoubtedly a deviation from the constitutional spirit of "equality before the law".

Of course, I am not denying the correctness of "public (general) interest before individual (special) interest", but I hope to explain the difference between "right" and "interest" and clarify the true jurisprudence of "protective action". The true jurisprudential basis of the "act of protection". Since "equal employment rights" are more predominantly subjective and the interests they represent are more general, the general interests of the majority of workers represented by "equal employment rights" should take precedence over the special interests of employers represented by "autonomous employment rights. The general interests of the majority of workers represented by the "equal employment rights" should be protected in preference to the special interests of employers represented by the "independent employment rights". However, at the same time, we should pay attention to the fact that "equal employment rights" and "independent employment rights" are equal rights from the perspective of rights, and we cannot ignore the special interests represented by "independent employment rights". In order to achieve the effect of fully protecting the "equal employment rights", we should pay attention to the fact that "equal employment rights" and "independent employment rights" are equal rights from the perspective of rights.

Based on the above analysis, the author believes that in order to truly solve the problem of conflict between workers' equal employment rights and employers' employment autonomy, the following principles should be followed: (1) The principle of equal protection of rights. On the one hand, when identifying and dealing with the issue of "age discrimination in employment", it must be recognized that it is a conflict of equal rights, and it is necessary to start from two directions: to guarantee the realization of equal employment rights and to guarantee the autonomy of employment, and not to ignore, avoid or slacken the efforts to protect the rights of either party; on the other hand, the state and the government, when ruling and regulating the conflict of interests represented by these two parties, should balance as much as possible. On the other hand, the state and the government should balance the interests of both parties as far as possible when adjudicating and regulating the conflict of interests represented by these two parties, and seek to achieve a general balance in the results. (2) The principle of case-by-case analysis under the premise of general constraints. China is a codified country, but in judicial practice, judicial interpretation and case law have a greater influence and guidance on judges' decisions. In regulating the contradiction between the two, we should not only strictly follow the written provisions of the law and implement the basic spirit and principles of the law, but also refer to study the relevant guiding cases and the judicial decision experience of typical cases. (3) The principle of taking into account special interests under the premise of general interests. In order to take into account and protect the legitimate interests of employers, it is necessary to provide them with the possibility of defense when determining the existence of "age discrimination in employment". However, in order to protect the general rights and interests of the workers, the employer's defense must be given extremely strict boundaries. [18]Specifically, the employer must, firstly, explain and disclose the reasons for the differentiated treatment in terms of "age", and secondly, the employer must prove to the worker through evidence that the reasons for the differentiated treatment are based on the circumstances provided for by law. If the employer fails to prove the legality of the purpose and justification of the differentiation, then, according to one of the basic principles of the restriction of equal employment rights, namely, the "favorable principle"[19] , the adjudicator shall interpret it in favor of the interests of the worker, i.e., the infringement of age discrimination in employment is found to be established.

3.2.2 Elements of the infringement of age discrimination in employment

The most widely recognized method of examining employment discrimination is the purposive (proportionality) review established by the German General Equal Treatment Act.

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German jurisprudence is of the opinion that, based on the fact that there are always compelling and objective reasons aimed at protecting the interests of the parties to a contract in the sense of private autonomy (Privatautomomie) or the interests of third parties in the sense of public welfare (Gemeinwohl), in the matter of the regulation of employment discrimination, the law should on the one hand guarantee the right to equal employment and on the other hand should not prohibit On the other hand, the law should not prohibit unequal treatment by employers. [20]Therefore, the law needs to seek the boundary between "lawful" and "reasonable", so as to "prevent both unlawfulness of purpose and unreasonableness of result".[21]

Based on the above considerations, the German General Equal Treatment Act adopts a mixed legislative model of "principles plus exceptions" - on the one hand, for direct and indirect discrimination in general, the legislation requires the employer's defense to be in line with the principle of "important and decisive occupational prerequisites" and the judicial review to be in line with the principle of proportionality. On the other hand, in the case of age discrimination, which is specifically provided for in the EU Directive on equal employment rights(16) , the German General Equal Treatment Act, in compliance with its Directive, provides for special defenses to these exceptions, i.e. positive measures and a special prohibition of discrimination. The German General Equal Treatment Act, in compliance with its directives, provides for special defenses to these exceptions, i.e. positive measures and special prohibitions of discrimination.

With regard to "important" and "decisive" "occupational prerequisites", Section 8 of the General Equal Treatment Act provides as follows Differences in treatment for the reasons enumerated in Article 1 of this Act are permissible on the basis of the characteristics of the activity or in consideration of the conditions of performance, unless this reason constitutes an important and decisive occupational necessity (eine wesentliche und entscheidende berufliche Anforderung) and is justified in terms of purpose and necessity. appropriate."[22] In the light of the judicial practice of the German labor courts, "decisiveness" is the primary limitation of occupational needs, in the sense that if such occupational needs are not observed, the occupation will not (nicht), worse (schlechter), or cannot (nicht Ordnungsgemäß) be carried out in a compliant manner. The profession can be carried out.[23] The "decisive" restriction, however, also justifies the existence of the "occupational need". "The second limitation of the occupational need is "important", which means that if a significant part of the total work of the worker in the occupation cannot be performed because of the absence of the occupational need, then the The "occupational necessity" should be considered "important". A study by German jurists on the judicial practice of German labor courts shows that in judicial practice, judges do not determine the so-called "substantial part" in quantitative terms (which is also difficult to measure), but rather focus on whether the core part of the work of the occupation has this characteristic.[24]

In addition, the judicial practice of German labor courts at all levels shows that the determination of the "prohibited forms of employment discrimination" also takes "social prejudice or customer preference" into account to a large extent.[25] As German scholars Lindacher, Pfeiffer, and Dammann argue in their Commentary on the German Civil Code, the law cannot, in principle, require employers to act without preference, regardless of the expectations of society or the requirements of business partners. However, at least two principles should govern "conduct with a tendency": the principle of the objectivity of the perceived source of the tendency, i.e., the employer's defense cannot be based on personal perceptions of discrimination, but only on the continuing influence of social expectations; and the principle of the practical effectiveness of the tendency to avoid business losses, i.e., the long-term practice of not The second is the principle of the actual effectiveness of the tendency to avoid business losses, that is, the long-term implementation of neutral behavior without "the tendency" will really harm the business interests of enterprises[26] . Anti-employment discrimination laws are not capable of, and do not seek to, counteract social prejudice, and therefore can only prohibit discrimination on the employer's own account.

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In his book "Textbook of State Law", the German scholar Professor Maurer concludes that the examination of the employer's defense under the principle of proportionality should be divided into two stages. The first stage is the "lawfulness of purpose" examination, i.e., the purpose pursued by the employer's "differential treatment" is lawful and does not harm the public interest of the state and society; the second stage is the "appropriateness, necessity and proportionality" examination. The second stage is the review of "appropriateness, necessity and proportionality". Among them, suitability (Geeignetheit) means that the means can achieve the purpose, necessity (Erforderlichkeit) means that there is really no alternative means other than this means that is less harmful but can achieve the same result, and proportionality (Angemessenheit) requires a certain proportional relationship between the means and the purpose (through the negative impact on the means). (through the consideration of the negative effects of the means, the end itself is required to be appropriate and not excessive). Moreover, this proportionality must exist, even if there is only one means, and that means meets the requirements of appropriateness and necessity, but is merely disproportionate to the end achieved, then that means cannot be used.[27]

However, "legitimacy of purpose" and "suitability" relate to the scope of the enterprise's autonomy and judicial review is largely limited by the employer's evidence and statements; likewise, in the case of "proportionality In the same way, in terms of "proportionality", in order to achieve the legitimate purpose of "safeguarding the economic interests of the enterprise" at the level of hiring employees, and only through the means of "setting a competitive exclusion threshold" to exclude a portion of the workforce, the employer can use the "proportionality" argument. In case of exclusion, the employer can justify the existence of a proportionality relationship on the grounds that "it would be too costly for the company to select and hire employees without setting an age threshold". With this exclusion, the focus of the proportionality review falls on "necessity," i.e., whether there are less invasive alternatives to such differential treatment. In order to help employers find "other less aggressive means", I believe that there are two possible ways: first, the existence of laws that can be applied to the situation, from the level of legal regulation to find a way out; second, through extra-legal means to help workers cross the employer to protect their own interests as far as possible "exclusionary access threshold", but also to take into account the legitimate interests of enterprises, and not to impose a higher burden on enterprise labor costs and management costs.

In summary, the author believes that there are three key elements in determining that an employer's conduct constitutes an employment age discrimination violation: (1) the illegality of the employer's purpose in setting the age threshold. If the employer's purpose for setting the age threshold is unlawful, then the employer's conduct should be considered as age discrimination in employment. (2) The employer's purpose in setting the age threshold is not necessary and appropriate. If the employer sets the threshold based solely on its own cognitive bias and not on the overall orientation and requirements of the market, or if the excluded worker is shown to be able to perform all of the work required by the job and to achieve the industry average expected results required by the work content, the employer's conduct shall be deemed to be age discrimination in employment. (3) The employer's act of setting an age threshold has alternative possibilities. If it can be proven that the employer can achieve the business purpose it has achieved by employing the excluded worker through other auxiliary means without significantly increasing the cost of doing business, then the employer's act of setting the age threshold for competition shall be deemed to be employment age discrimination.

3.2.3 Forms of civil liability for tortfeasors of age discrimination in employment

Civil liability is an important part of civil litigation, the landing point of civil litigation, and an important tool for judges in judicial trials. Therefore, in order to alleviate the problem of employment age discrimination by trying to relieve workers' losses and restore the infringed rights to the non-discriminated state as much as possible, it is especially important to clarify the legal provisions on the form of civil liability for employment age discrimination tort. Article 68 of the Employment Promotion Law specifies the civil liability of the employer for employment

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discrimination(17) , but the law does not provide in detail what form of civil liability the employer shall bear. On the one hand, this article creates the possibility of "convergence with other laws"[28] , but on the other hand, because the legislation does not explain what kind of liability workers can request the employer to bear, some claims in the lawsuit are not supported by the court due to the lack of legal basis, which makes it difficult for workers' infringed On the other hand, because the legislation does not explain the specific forms of liability that workers can request the employer to assume, some claims in the lawsuit are not supported by the court due to the lack of legal basis.

Therefore, in the absence of special laws, the provisions of the Civil Code and other relevant existing laws on civil liability for tort should be invoked to adjudicate. In the long run, civil liability forms directly applicable to the tort of age discrimination in employment should be added to more comprehensively protect the legitimate rights and interests of workers and reduce the pressure on judges, while improving the quality of trials and consistency of judicial outcomes in such cases with relative certainty of case outcomes.

3.2.3.1 Application of general forms of tort liability

The main forms of tort liability are: stopping infringement; removing obstruction; eliminating danger; returning property; restoring the original state; compensating damages; making apologies; eliminating influence and restoring reputation. Among them, the forms of liability applicable to age discrimination in employment are mainly cessation of infringement, compensation for damages, and apology, and these forms of civil tort liability can be applied individually or in combination.

As a common form of civil liability, cessation of infringement is applicable to all kinds of infringement cases and has a large scope of application. The premise of the application of the cessation of infringement must be that the infringement is occurring or the infringement state is continuous, that is, it does not apply to the situation where the infringement has stopped or has not yet occurred. [29]The function of cessation of infringement is to stop the continuation of infringement in time and prevent the occurrence of damage to the victim or the expansion of the damaged result. During the job-seeking stage, workers may bear adverse consequences, such as the expenditure of energy and financial resources and the loss of opportunity benefits, as a result of the employer's discriminatory behavior on an ongoing basis. Therefore, workers may file a request to the court to stop the infringement in the employment age discrimination lawsuit in order to prevent the expansion of their damage consequences.

Damages refers to the tortfeasor caused by the tort of the tortfeasor, the tortfeasor to its property to compensate the tortfeasor suffered losses[30] , can be divided into property damages and moral damages, is the most common and the most important way to bear civil liability.

In disputes over the infringement of age discrimination in employment, the actual compensation for economic losses suffered by workers mainly includes the costs of transportation, accommodation and medical examination paid by workers during the job-seeking stage and the costs including notary fees, litigation fees and attorney's fees incurred by workers in the process of defending their rights in arbitration or litigation. If the employer sets the age threshold in violation of the principle of proportionality and causes the worker to suffer the aforementioned economic loss in the job search, the law shall allow the worker to request the employer to bear the property compensation. In addition, the employer's employment age discrimination will also violate the worker's right to employment equality, and at the same time, it is a slight or even an insult to the worker's human dignity. Therefore, if an employer's discriminatory employment age behavior causes a worker to lose his or her job search, the worker may also request the employer to bear the responsibility for moral damages.

According to Professor Danile W. Shuman, an apology has the potential to help those who have suffered serious emotional harm as a result of another person's misconduct, harm that cannot be repaired by monetary compensation alone. [31]Apologies are more effective than other forms of liability in soothing the trauma of the victim, resolving the conflict between the parties, and educating the tortfeasor about morality. [32]From the perspective of effectiveness, if the employer

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can consciously admit the mistake and apologize to the worker, it will help to remove the bad feelings and repair the relationship between the two parties. If the employer does not know the mistake or does not correct the mistake, the judgment of tort liability of apology will, on the one hand, punish the employer and, on the other hand, help to dispel the negative emotions of the workers due to the employment age discrimination. From the perspective of reasons, the establishment of civil liability for compensation and apology is based on the prerequisite that the employer's actions have caused moral damage to the workers. Therefore, as long as the tort of age discrimination in employment is established and the worker can prove that he or she has suffered moral damage due to the existence of the age threshold, the worker should be deemed to have the right to request an apology.

3.2.3.2 Supplementary to the special form of tort liability for age discrimination in employment

3.2.3.2.1 Be hired

Section 706(g) of Title VII of the Civil Rights Act, the predominant source of anti-discrimination law in employment in the United States, provides: "If the court determines that the defendant has knowingly committed or is knowingly committing an unlawful employment practice, the court may order the defendant to enjoin said unlawful employment practice and to order such affirmative measures as the court deems appropriate, including, but not limited to, reinstatement with or reinstatement or employment without back pay, and any other equitable relief the court deems appropriate. (18)For workers in the job search stage, obtaining compensation is not the fundamental purpose of the lawsuit, and establishing an employment relationship with the employer is consistent with the original intent of the job search. However, the current law in China does not have the civil liability form of "to be employed", so the judge will not support the worker's claim. Based on this, I believe that if we want to evaluate age discrimination in employment more comprehensively and protect workers' equal employment rights more fully, we can add "to be hired" to the tort liability for employment discrimination, and juxtapose hiring and damages, so that workers can choose what kind of remedy to seek.

3.2.3.2.2 Punitive Liability

Punitive damages are predicated on the existence of compensatory damages and have a sanctioning and deterrent function based on the compensatory function. [33]Economically, in age discrimination disputes, the damages caused by the employer to the worker are often difficult to prove, or if they can be proved, not very much. If compensation is limited to actual damages, it is likely that workers will not file lawsuits because of the economic considerations of high litigation costs, high risks, and low benefits. In this case, punitive damages can encourage workers to sue for more substantial damages to expose and deter age discrimination violations. As for the perpetrators of age discrimination, when the cost of discrimination to the employer is much greater than the benefit of discrimination, the employer will, for profit, avoid the harm and reduce the discrimination, thereby reducing the amount of litigation resulting from the discrimination. In this way, punitive damages can achieve the effect of "killing three birds with one stone". In summary, I believe that it is reasonable to allow workers to seek punitive rather than compensatory damages under the special circumstances of age discrimination in employment.

In addition, in order to avoid the arbitrariness of the amount of punitive damages, the reference points for the amount of punitive damages can be "the reprehensibility of the defendant's infringement", "the defendant's financial ability", "the benefit that the defendant can get from the infringement", and "the size of the loss suffered by the plaintiff". The size of the plaintiff's losses"[34] , and also the experience of the Law of the People's Republic of China on Food Safety Liability and the Law of the People's Republic of China on the Protection of Consumer Rights and Interests in calculating the amount of punitive damages.

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4. Summary

Employment discrimination is the most widespread social and legal problem in China's labor market today, which has a great impact on workers' employment. Age discrimination in employment is a kind of indirect discrimination that is highly concealed and difficult to deal with. The existing laws are still naive in regulating employment discrimination in general, and the response to age discrimination in employment is even more inadequate. By clarifying the causes of employment age discrimination and the substance of the infringement, we can consider the existing civil tort regulations in the short term and deal with it with reference to civil tort disputes. At the same time, we should recognize the complexity of age discrimination in employment, which is beyond the general civil tort disputes and the difficulty of general regulation, and propose targeted legal regulation countermeasures for age discrimination in employment. In terms of the cause of action, a special cause of action should be created for "employment discrimination disputes". When hearing the case, the existence of the fact of discrimination should be examined in accordance with the principle of proportionality based on the three principles of equal protection of rights, case-by-case analysis under the premise of general constraints, and taking into account special interests under the premise of priority of general interests, and strict examination of the employer's defenses. In addition to the general tort liability of "stopping infringement, compensating damages, and apologizing", two additional forms of liability of "accepting employment and punitive damages" should be added for workers to choose, so as to achieve a more comprehensive evaluation of the tort of age discrimination in employment. In order to achieve the effect of more comprehensive evaluation of the tort of age discrimination in employment, more complete relief for discriminated workers, and more powerful curbing of the phenomenon of age discrimination in employment.

Annotation

(1) Statistics show that by the end of the count, China's population aged 60 and over was 264 million, accounting for 18.70% of the total population, an increase of 5.44 percentage points compared to 2010. Data available at http://www.stats.gov.cn/ztjc/zdtjgz/zgrkpc/dqcrkpc/ggl/202105/t20210519_1817701.html, last accessed on December 12, 2022.

(2)Internet Talent Flow Report 2020" released by Pulse Data Research Institute shows that the average age of talents in 19 Internet head enterprises (Byte Jump, Alibaba, Jingdong, etc.) is 29.6 years old; the "2021 College Employer Recruitment Observation Report" released by MileagePlus and Freshers' Job Search Network based on 123 college employers' research data shows that the average age of employees is 33.5 years old. The average age of employees in state-owned enterprises is 35 years old, while the average age of employees in Internet and retail are both below 30 years old. See https://baijiahao.baidu.com/s?id=1662576682432240955 for data

(3) Statistical cut-off date: December 12, 2022.

(4) (2014) Zicheng Final Word No. 4.

(5) (2014) An Min Chu Zi No. 331.

(6) In December 2018, the "Notice of the Supreme People's Court on the Increase of Civil Case Causes" added "disputes over equal employment rights" to the third level of "disputes over personality rights" under "disputes over general personality rights". "as the fourth-tier cause of action. The revised "Regulations on Civil Causes of Cases", which came into effect on January 1, 2021, has not been changed.

(7) Some of them are classified as contract disputes, such as Xiao Chunhui v. Huan Sheng Company (Shenzhen Nanshan District People's Court Civil Judgment (2009) Shen Nan Fa Min Yi (Labor) Chu Zi No. 320; Shenzhen Intermediate People's Court Civil Judgment of the Second Instance (2010) Shen Zhong Fa Min Liu Final Zi No. 1032); some are classified as labor disputes, such as the case of Gao Yiming, the plaintiff, and Beijing Bide Chuangzhan, the defendant. Ltd. (2008) Chaoyang District People's Court Civil Judgment (2008) Chao Min Chu Zi No. 06688);

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some are classified as disputes over personality rights, such as the case of Li Jinren and Jiangxi Daily's right to human dignity (Nanchang City East Lake District People's Court Civil Judgment (2006) Dong Min Chu Zi No. 71); some are classified as disputes over infringement, such as the case of the plaintiff × × × × and the defendant Popular Daily News special tort dispute (Jinan city under the district people's court civil judgment (2008) No. 3972 of the first word).

(8) Article 79 of the Labor Law of the People's Republic of China provides: "After a labor dispute has arisen, the parties may apply to the Labor Dispute Mediation Committee of the unit for mediation; if mediation fails and one of the parties requests arbitration, he or she may apply to the Labor Dispute Arbitration Committee for arbitration. A party may also apply directly to the Labor Dispute Arbitration Committee for arbitration. If you are not satisfied with the arbitration award, you can file a lawsuit to the people's court."

(9) Article 27 of the Law of the People's Republic of China on Mediation and Arbitration of Labor Disputes provides: "The period of limitation for applying for arbitration of labor disputes shall be one year. The period of limitation for arbitration shall be calculated from the date when the parties know or should know that their rights have been infringed. The statute of limitations for arbitration under the preceding paragraph shall be interrupted by one party asserting its rights to the other party, or requesting rights relief from the relevant authorities, or the other party agreeing to perform its obligations."

(10) Article 6 of the Law of the People's Republic of China on Mediation and Arbitration of Labor Disputes provides that "In the event of a labor dispute, the parties have the responsibility to provide evidence for the claims they make. If the evidence related to the matter in dispute is under the control and management of the employer, the employer shall provide it; if the employer does not provide it, it shall bear the adverse consequences."

(11) Article 53 of the Law of the People's Republic of China on Mediation and Arbitration of Labor Disputes provides that "No fee shall be charged for arbitration of labor disputes. The funding of the Labor Dispute Arbitration Commission shall be guaranteed by the treasury."

(12) The first paragraph of Article 188 of the Civil Code of the People's Republic of China provides that "The period of limitation for petitioning the people's courts for the protection of civil rights is three years. If the law provides otherwise, it shall be in accordance with its provisions."

(13) For example, Article 1000 of the Civil Code provides that "The civil liability of the perpetrator for infringement of the right of personality to eliminate the influence, restore reputation, make apologies, etc. shall be equivalent to the specific manner of the act and the scope of the influence caused." Article 1182 of the Civil Code provides that "Where the infringement of another person's rights and interests causes property damage, compensation shall be made in accordance with the damage suffered by the infringer as a result or the benefit obtained by the infringer as a result; where the damage suffered by the infringer as a result or the benefit obtained by the infringer as a result is difficult to determine and the infringer and the infringer do not agree on the amount of compensation and bring a lawsuit in the people's court, the People's Court to determine the amount of compensation according to the actual situation."

(14) Article 995 of the Civil Code provides that "Where the right of personality is infringed, the victim shall have the right to request the perpetrator to assume civil liability in accordance with the provisions of this Law and other laws. The victim's right to request for cessation of infringement, removal of obstruction, elimination of danger, elimination of influence, restoration of reputation, and compensation and apology shall not be subject to the provisions of the statute of limitations." Article 1167 of the Civil Code provides that "Where an infringement endangers the personal or property safety of another person, the infringer has the right to request the infringer to assume infringement liability such as stopping the infringement, removing the obstruction and eliminating the danger."

(15) For example, He Weifang, "Three Questions on Media and Justice"; Wang Liming, "Restriction and Protection of Personality Rights of Public Figures"; Wang Yueming, "Elimination of Age Discrimination is the Primary Component of Equal Protection of Labor Rights".

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(16) means Directives 2000/43/EC ("Directive on Equality of Race and Descent"), 2000/78/EC ("Directive on the Principle of Equality in Employment"), 2006/54/EC (Council Directive 2000/43/EC of 29 June 2000, Council Directive 2000/78/EC of 27 November 2000, Council Directive 2006/54/EC ("Directive on equal opportunities and equal treatment for men and women") and other directives, Council Directive 2006/54/EC of 5 July 2006 etc.)

(17) Article 68 of the Law of the People's Republic of China on Employment Promotion stipulates that "those who violate the provisions of this Law and infringe upon the lawful rights and interests of workers, causing loss of property or other damage, shall bear civil liability in accordance with law; if they constitute a crime, criminal liability shall be investigated in accordance with law."

(18) Title VII of the Civil Rights Act of 1964 (g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate. affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

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