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Analysis of the Legal Definition and Remedies for Employment Discrimination Against Sexual Minorities

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Abstract. As the global sexual minorities' rights movement makes great progress, the protection of sexual minorities' right to equal employment has attracted much attention. However, various cases and data demonstrate that this group still faces widespread discrimination in employment. There are problems such as vague legal definitions and the difficulty of identifying hidden discrimination in China's anti-discrimination judicial practice. In contrast, the judicial review model emphasizing substantive equality demonstrated in the Bostock case in the United States provides China with ideas for improvement. Research has found that the provisions on equal employment rights in China are overly general in principle, which may lead to difficulties in evidential burden and judicial review avoidance. Based on this, a comprehensive safeguard system should be established at the legislative, enforcement, and social consciousness to effectively protect the equal employment rights of sexual minority employees and to realize the commitment of equality before the law.

Keywords: Sexual minorities, Employment discrimination, Substantive equality, Formal equality, Legal definition

1. Introduction

In recent years, the rights movement for sexual minorities has made significant progress in the legal, social, and cultural aspects on a global scale. According to various authoritative research reports and typical cases, sexual minorities still face serious employment discrimination in the field of employment. This kind of discrimination includes employment opportunities, salaries, career development and working environment. To illustrate, the 2017 Survey on the Living Conditions of Transgender People in China [1], which was jointly published by the Beijing LGBT Center, which is the Department of Sociology at Peking University and the United Nations Development Programme, clearly indicates that transgender individuals in China face serious employment discrimination. The unemployment rate of them is significantly higher than cisgender groups' unemployment rate. Likewise, a 2023 report released by New York State Department of Labor Report on Transgender, Gender Non-conforming, and Non-binary Persons in The Workforce also reflects that gender identification has a substantial impact on unemployment rates [2]. These data indicate that gender identity and sexual orientation have become significant factors affecting the employment quality of the LGBTQ+ community. The high unemployment rate among the LGBTQ+ community reflects

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that even though laws protect citizens' equal employment rights, it is very difficult for non-binary gender individuals to use this general legal provision to stand up for themselves. Against this backdrop, how to identify implicit gender discrimination in judicial practice and protect the equal employment rights of LGBTQ+ workers has become an important goal of anti-employment discrimination efforts.

Therefore, this paper aims to study the legal definition of employment discrimination against sexual minorities. Taking China as an example, although China explicitly recognizes that everyone has the right to equal employment, it has not clarified whether "gender identity" and "sexual orientation" are included within the scope of gender discrimination, causing sexual minorities to face ambiguity in legal characterization when seeking remedies for discrimination. Hence, this research has significant theoretical and practical implications. On the one hand, by comparing domestic and foreign theories on employment anti-discrimination and existing research on the rights protection of sexual minorities, it helps deepen understanding of current problems of employment discrimination against sexual minorities. At the same time, using the concepts of "formal equality" and "substantive equality" helps address the legal definition issues of employment discrimination and deepens the understanding of the content of the right to equality. On the practical side, by comparing the similarities and differences between China and the United States in terms of anti-discrimination institutional construction, judicial precedent accumulation, and public policy support, this study can provide experience for the revision of relevant Chinese laws and for judicial practice, thereby further promoting the construction of a truly equal and pluralistic inclusive employment environment and ensuring the realization of equal employment rights.

To achieve the above objectives, this paper begins with a comparison of domestic and international theories of employment anti-discrimination and combines a large number of cases and employment discrimination survey data. The study employs the methods of employing comparative research, case analysis, and literature review. It focuses on analyzing the rights protection of sexual minorities as well as the similarities, differences, and dilemmas faced by relevant legal systems in China and the United States. The research will revolve around two key words, "formal equality" and "substantive equality," and will conduct an in-depth analysis of key issues such as standards for defining employment discrimination against sexual minorities, burdens of proof, and remedial measures. Finally, the paper proposes a legal definition and institutional optimization outlook for China regarding employment discrimination against sexual minorities, aiming to promote the achievement of genuine employment equality.

2. Data and case analysis on the employment situation of sexual minorities in China

Sexual minorities generally refer to individuals whose gender identity, gender expression or sexual orientation are at odds with societal norms, specifically including homosexuals, bisexuals, transgender people and non-binary individuals. Such groups more or less face discrimination in daily life, public spaces and workplaces. There are many authoritative institutions that have conducted substantial research on this topic. The 2017 Survey on the Living Conditions of Transgender People in China jointly issued by the Beijing LGBT Center, the Department of Sociology at Peking University, and the United Nations Development Programme, shows that, compared to the contemporaneous national unemployment rate of 3.97% published by the Ministry of Human Resources and Social Security, the unemployment rate among transgender respondents in the sample reached 11.87%. Among transgender individuals who were employed, 24.58% considered their work environment unfriendly to transgender identity, with the highest proportion of perceived unfriendliness reaching 35.04% in government, public institutions, and military

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workplaces. Among transgender respondents, 40.34% would not choose to freely express their gender identity. The report also specifies that 33.54% of transgender respondents had an after-tax annual income below 25,000 yuan, and 57.60% had an after-tax annual income below 50,000 yuan. Overall, the proportion of low-income individuals is relatively large. Furthermore, analysis of respondents' work histories in the survey shows that among those who had experienced depression, 27.48% believed their work environment was unfriendly, whereas only 16.58% of respondents considered their work environment friendly. These data jointly indicate that transgender individuals being excluded from work or unfairly treated because of personal gender issues is widespread in China, which directly leads to difficulties for sexual minorities in integrating into society, harder living conditions, and lower levels of well-being.

In judicial practice, there are also cases in which workers suffered employment discrimination due to sexual orientation, and were even dismissed on the basis of their sexual orientation. For instance, Mr. Mu was involved in a verbal dispute with someone privately and a video of the incident was posted online, exposing the fact that he was homosexual. Shortly thereafter, Mr. Mu was dismissed by his company without receiving appropriate compensation. His lawyer, Liu Xiaohu, argued that the company's claim that the publicized video harmed the company's image was itself discriminatory against homosexuality. Only by discriminating against homosexuals would one conclude that a video revealing someone's homosexuality harms the company's image. Therefore, the company's dismissal on the grounds that the video disclosure of homosexuality harmed the company's image was essentially a dismissal based on homosexuality. In the court's judgment, it held that the company did not explicitly state that the reason for terminating the employment contract was because Mr. Mu was homosexual, and Mr. Mu also lacked evidence proving that his personal dignity had been violated. The court ultimately dismissed all of Mr. Mu's claims and maintained the original judgment after his appeal. Besides homosexual cases, a transgender person surnamed Xiao Ma also brought China's first case concerning equal employment rights for transgender individuals. Xiao Ma underwent gender reassignment surgery because of struggles with gender identity. After the surgery, the company's HR considered that Xiao Ma was unsuitable to work with either men or women, and then terminated his labor contract on the additional ground that he had "been repeatedly late" during the postoperative recovery period. Ultimately, the court held that the company had not clearly indicated that the dismissal was due to the gender reassignment surgery, and therefore dismissed all of Xiao Ma's claims.

In the above cases, the courts uniformly regarded employment discrimination as behavior that lacks legally legitimate purposes or causes and treats individuals differently, excludes them, or grants preferential treatment based on factors unrelated to the job, personal ability, or work performance, thereby violating measures of equality. The essential feature of employment discrimination is unreasonable differential treatment. Employment discrimination constitutes an infringement of workers' right to equal employment. The legal interest protected by the right to equal employment is the worker's lawful employment right. The determination of tortious conduct should be based on a solid evidentiary foundation. The employment and litigation rights of sexual minorities, except for special provisions that the law may make to achieve substantive equality, should neither be reduced because of gender reassignment nor increased because of it. One must not lighten the burden of proof or lower the standard of proof simply because the party is a sexual minority. Otherwise, overcompensation could lead employers, fearful of potential legal risks, to hesitate to hire individuals from such groups, thereby harming the employment rights of sexual minorities in the long term.

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The above cases vividly illustrate the issue of gender-related workplace discrimination against sexual minorities. In recent years, this kind of gender discrimination has become more serious. According to the 2015 Big Data White Paper on China's LGBT Community, the number of homosexual people in China is nearly 70 million, accounting for one-twentieth of the total population. The above figure only includes homosexual individuals. If other sexual minorities are added, the number would be even larger. Therefore, the rights of such a large group should not be ignored [3]. It is not only about human dignity, but also about the realization of social justice. Thus, China has been constantly promoting progress and institutional reform in the field of anti-discrimination. In 1997, China officially abolished the provision on hooliganism in the Criminal Law of the People's Republic of China, which had previously been used to punish homosexual behavior. In 2000, Chinese Classification of Mental Disorders Version 3 (CCMD-3) removed homosexuality from the list of mental illness [4]. Since then, homosexuality has achieved both "decriminalization" and "depathologization." As human beings, sexual minorities' human dignity deserves respect. Human dignity is the most basic right a person should possess. It refers to self-respect and self-love. In legal terms, it manifests as the protection of reputation, honor and privacy [5]. This series of changes not only reflect the gradual transformation of social attitudes, but also lay the foundation for the protection of sexual minorities in the future. In 2004, Amendments to the Constitution of the People's Republic of China added the content of the state respects and protects human rights, which elevated the concept of human rights to a constitutional principle. It can be seen that China's laws and policies have been making efforts and changes for the anti-discrimination work of sexual minorities. However, There are still many difficulties for the victims of discrimination to defend their rights.

There are two main reasons for these difficulties. First, relevant provisions in China are relatively scattered and there is no unified law. Article 3 of the Labor Law of the People's Republic of China stipulates that workers enjoy the rights to equal employment and freedom to choose occupations, the right to obtain remuneration for labor, rights to rest and vacations, the right to occupational safety and health protection, the right to receive vocational skills training, the right to enjoy social insurance and welfare, the right to apply for handling labor disputes, and other labor rights provided by law. Article 3 of the Employment Promotion Law of the People's Republic of China provides that workers lawfully enjoy equal employment and the right to choose occupations freely. Employment of workers shall not be subject to discrimination on the grounds of nationality, race, gender, religious belief, or other differences. Besides these, China acceded to the Convention concerning Discrimination in Respect of Employment and Occupation in 2005, and as a member of this international convention China has made efforts, but no law clearly defines whether "gender identity" and "sexual orientation" constitute grounds for gender discrimination. Therefore, when China adjudicates such cases, judges have broad discretionary space and the outcomes of rights protection for plaintiffs remain uncertain. Second, cases involving employment discrimination require the rights-holder to prove that the employer engaged in discriminatory behavior and caused harm, that the employer acted intentionally, and to demonstrate a causal link between the discriminatory behavior and the harmful result. As a disadvantaged party, sexual minorities often find it difficult to prove that a company's conduct constitutes employment discrimination and that such conduct is causally related to adverse outcomes such as dismissal or pay reduction.

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3. The United States: legal definitions and the current state of protection against employment discrimination targeting sexual minorities

3.1. Data and case analysis on the employment status of sexual minorities in the United States

From the data and cases discussed above, it is clear that China still faces significant difficulties in handling employment discrimination against sexual minorities. Similar forms of employment discrimination also exist abroad. According to New York State's 2023 TGNCNB employment report, BRFSS data show that only 7 percent of cisgender people were unemployed, while the unemployment rate among transgender people reached as high as 14.5 percent. Beyond employment, sexual minorities also face differential treatment in income and working conditions [6]. Despite a series of setbacks, the United States has now built, through both legislation and judicial decisions, a relatively mature and comprehensive legal protection mechanism that is worth studying and drawing lessons from. The legal rulings and policy thinking in the U.S. addressing discrimination against sexual minorities deserve careful reflection and emulation.

Title VII of the Civil Rights Act of 1964 is the principal statutory basis prohibiting employment discrimination on the grounds of race, color, religion, national origin, sex, age, or disability. That law applies not only to companies within the United States but also to American citizens working for U.S. employers abroad. However, the ability of this law to protect the LGBTQ+ community has always been controversial. This is because when it comes to gender, most people subconsciously think only of male and female. But in today's society, there are a large number of non-binary gender groups. The law's provisions on gender discrimination are too general. Therefore, whether the concept of "gender" here includes non-binary genders has become the focus of the debate. This has led to a difficult time for the LGBTQ+ employees in the United States to fight for their rights.

It was not until the emergence of the Bostock case that a turning point was marked. This case as a milestone in advancing gender equality in the United States. It also added a significant stroke to the American judicial and legislative fields. The ruling in this case means great progress for the United States in the area of anti-employment discrimination. The Bostock case refers to an employee named Gerald Bostock in Clayton County, Georgia, who was fired a short time after joining a gay softball league. The employee brought a lawsuit to court under Title VII of the Civil Rights Act of 1964. He believed that he was fired because of his sexual orientation. This decision was an act of gender discrimination. Obviously, this case is similar to Mr. Mu's experience, but the outcome of this case is at odds with his. On June 15, 2020, the U.S. Supreme Court endorsed the federal statute and declared that Title VII prohibits employment discrimination on the basis of sexual orientation and gender identity. The decision legally confirmed that dismissal decisions taken by employers due to an employee's sexual orientation or gender identity could be identified as sex discrimination.

Although California and other U.S. jurisdictions have long advanced anti-discrimination protections for LGBTQ people, the question of whether federal law prohibits employment discrimination based on sexual orientation or gender identity remained contested for many years. The Bostock ruling afforded greater protection to gay and non-binary workers, reducing the fear of openly acknowledging sexual orientation in the workplace and relieving pressure to conform to another "gender" for safety. Since then, LGBTQ individuals in the U.S. can invoke this federal precedent when confronting employment discrimination. While anti-discrimination protection for LGBTQ people in the United States continues to evolve and face challenges, this landmark victory was instrumental in resolving the core legal question of how sex discrimination should be defined.

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3.2. Comparative approaches in China and the United States to employment discrimination against sexual minorities

After reviewing the cases above and weighing the evidence, this paper proposes that the determination of employment discrimination against sexual minorities can be judged using the following two-tiered review framework. The approach to combating employment discrimination can only effectively address the complex forms of discrimination faced by the LGBTQ+ community by moving from formal equality to substantive equality. From a comparative law perspective, existing cases indicate that the United States and China adopt different approaches in dealing with these matters. In the Bostock case, the Supreme Court not only reviewed the equality of the company's employment system but also used the "but for" test to identify that there was implicit gender discrimination behind the decision. At the same time, Justice Neil Gorsuch emphasized Title VII's content that "it is illegal to discriminate against any applicant or employee because of that person's sex." This is because the employee's sex inevitably becomes part of the employer's decision to fire a worker because of their sexual orientation or gender identity. Bostock's opinion provides specific examples. There is a male employee and a female employee, whose sexual orientation is towards male. If the employer fires the male employee because he will be attracted to male, but he can accept this trait in the female employee [7]. Then the employer fired the male employee entirely because of his sex. Thus, when the justices of the U.S. Supreme Court realized that Title VII of the Civil Rights Act, which prohibits gender discrimination in the workplace, did not fully protect the LGBTQ+ community, they made an extraordinary ruling. They concluded that Title VII of the Civil Rights Act of 1964 also prohibits discrimination in the workplace based on sexual orientation or gender identity. This decision truly protects the rights of sexual minorities.

Moreover, the application of the but for test also provides ideas and methods for achieving the goal of substantive equality. The Bostock decision shows a judicial logic that advances from protecting formal equality to pursuing substantive equality. Comparing with this case, Chinese courts' decisions in similar cases have still relied on general equality clauses and labor law principles. To illustrate, the case of Mr. Mu can be directly compared with Bostock. Both of them were fired because of implicit discrimination.

Chinese courts tend to emphasize whether the plaintiff can present clear and convincing evidence of sex discrimination. But such discrimination is often implicit. Courts seldom judge whether employer systems or societal prejudices have produced indirect unfairness from the perspective of substantive equality. If the plaintiff fails to provide strong evidence, the case may not be classified as sex discrimination. Although this adjudicative approach satisfies formal-equality review standards, implicit discrimination still exists and substantive equality is difficult to achieve. This reflects the dilemmas China faces in the anti-employment-discrimination field. On the one hand, the law has not clearly defined the scope of identity protection for sexual minorities, which leads to problems of application. On the other hand, judicial review still takes attention to formal equality and lacks effective tools for identifying implicit discrimination. Based on the comparison of U.S. and Chinese judicial review approaches, courts can construct a two-tiered review framework that starts with formal equality and aims at substantive equality. Such a framework would absorb the U.S. judiciary's experience in anti-discrimination law while adapting to China's realities, thereby sexual minorities' rights can be truly safeguarded.

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3.3. Defining employment discrimination against sexual minorities: from formal equality to substantive equality

Formal equality, also called equality of opportunity, emphasizes starting-point fairness. It means that everyone is equal before the law and rules, and requires society to provide equal competitive opportunities and entry conditions for every person, without regard to sex, race, origin, or other factors. Substantive equality, also called equality of outcomes, is not satisfied with procedural or formal fairness alone. It advocates using differentiated measures to remedy the disadvantaged conditions of vulnerable groups and thereby pursue relatively fair results. Thus, substantive equality can be seen as a deepening and complement to formal equality. Formal equality is the foundation. Without formal guarantees of rights, substantive equality cannot be pursued. If only formal equality exists, genuine equality is difficult to achieve.

Formal equality is the basic prerequisite for anti-discrimination work, so the first-tier review primarily addresses structural differential treatment. The starting point for review is whether the employer or workplace environment manifests overt discrimination. To illustrate, whether sexual minorities receive the same interview opportunities and hiring probabilities as cisgender applicants. The review must then confirm whether differential treatment in fact exists, such as whether sexual minorities' incomes and promotion opportunities differ from the average. On the other hand, an employer may engage in systemic discrimination, which often appears in institutional design and day-to-day operations, such as mandatory binary gender registration systems, dress codes based on gender stereotypes, or refusal to provide restroom facilities consistent with a transgender employee's gender identity. If such conditions are present and the employer cannot supply persuasive reasons or evidence during defense to show that the plaintiff's experience is unrelated to sex or gender, then differential treatment is probably established.

This is the first step in employment discrimination judgement. This judgement system of formal equality not only provides a way to identify overt discrimination, but also lays the necessary foundation for the next step. It embodies the progressive logical of moving from the surface to the core in the pursuit of fair employment.

Because of the existence of implicit discrimination, only formal equality review is no longer sufficient to deal with the complex realities. Therefore, aiming to eliminate structural barriers and achieve true substantive fairness, the second step is to review the actual impact of workplace and employment policies on the LGBTQ+ community.

The but for test applied in the Bostock case in 2020 lays the important judicial foundation for this stage of review. The core of the substantive-equality review is to identify covertly discriminatory measures that appear neutral on their face but produce adverse effects for sexual minorities. Examples include important work assignments being denied to sexual minorities, greater difficulty in promotion for sexual-minority workers, or social isolation within the workplace. All of these can ultimately lead to lower income compared to cisgender peers, increased psychological stress, and reduced life satisfaction. The experience of Mr. Mu in the cases discussed above suggests the presence of possible covert discrimination. As his lawyer argued, the company claimed that his public video harmed the company's image, but only those who are biased against homosexuals would conclude that a leaked video revealing someone's homosexuality harms corporate image. In other words, if Mr. Mu were not homosexual, or if his homosexuality had not been made public, the company would likely not have terminated his contract.

This adjudicative logic corresponds precisely to the but-for test used in Bostock. The test constructs a hypothetical scenario of whether the same result would have occurred had the contested fact or condition been different. If the result differs, that indicates the contested fact was a decisive

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cause and that a causal relationship exists between the fact and the outcome. For instance, if the employee who faced unfair treatment were not a sexual minority, whether the employer would have made the same decision. If the employer's choice would differ, then sex has become an indispensable factor in the employer's decision. This assumption can prove that the employee indeed faced discrimination because of sexual orientation or gender identity. This test is highly persuasive because of its rational logic. It can help courts clearly and effectively determine whether there is a causal relationship between the conditions and the outcomes in the case. In addition, this test reduces the pressure of burden of proof on the plaintiff. Victims do not need to directly prove the employer's discriminatory intent. They only need to demonstrate the logical connection between the decision and gender factors.

The application of this test in the review system ensures substantive equality will be truly achieved in judicial practice rather than remaining an empty promise. It improves anti-discrimination efforts by ensuring equal opportunities to pursuing substantive fair outcomes by providing a powerful legal tool for achieving true workplace equality for the LGBTQ+ community.

4. Multiple remedies

According to the analysis of the current employment situation of the sexual minorities, the law remedies are also important factors affecting the realization of employment equality. Therefore, in addition to a mature review system, it is also necessary to explore practical law remedies. Only when review and law remedies complement each other, can a comprehensive protection system be established. This system needs to improve legislative and judicial, as well as the joint progress of social concepts.

Traditional anti-discrimination remedies are mainly declaratory judgement, which means judicial confirmation of the existence of discriminatory acts to restore the victim's reputation and rights. However, declaratory judgement is not able to correct the situation because of structural and lasting employment discrimination. Therefore, declaratory judgement and injunctive relief should complement each other to constitute the multiple remedies. The former focus on restoring the victim's dignity and social status through judicial judgement, while the latter achieves substantive protection for the sexual minorities through specific orders and institutional regulations. The two must work in coordination to safeguard the equal employment rights of the sexual minorities. Specifically, declaratory remedies play a foundational role in sexual-minority employment-discrimination cases. Victims often face problems such as difficulties in providing evidence, social pressure and public opinion during the judicial process due to implicit discrimination. The value of a declaratory judgment is the fact that even if no substantive compensation can be obtained, its judicial recognition itself has an important symbolic and guiding role. When the court declares the plaintiff to win the lawsuit, the psychological pressure on the sexual minorities will be relieved and some rigid social mindsets may also change. In Bostock case, although the Supreme Court's ruling that sexual orientation is a kind of gender discrimination has profoundly influenced judicial decisions and employment policies in the future. There are many members of the LGBTQ+ community who have become more confident in job interviews and at work since this case was decided. Let sexual minorities recognize their gender and sexual orientation bravely is the meaning of declaratory judgement. Based on this, injunctive relief refers to public apologies, pay compensation or reinstate employment relationships. It not only offers substantive assistance to the victims compared with declaratory judgement, but also reduces the possibility of discrimination in the future. In judicial practice, the court can make a declaratory judgment firstly to establish the basis for the claim, and then decide whether to compensate the plaintiff in different cases. This

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multiple remedies not only ensures the legal effect of the judgment but also enhances the social impact of anti-discrimination.

All in all, declaratory judgement embodies the formal-equality ideal that everyone enjoys equal rights under the law. Mandatory remedies reflects substantive equality by using compensatory measures to protect employees' rights. Such a remedy system also achieves the goal of substantive equality.

From the perspective of Chinese legislation, it is necessary to improve the specific provisions of the anti-employment discrimination law and clarify the protective status of sexual minorities within the existing legal system. For instance, sexual orientation and non-binary gender should be listed as prohibited reasons for employment discrimination in the Labor Law of the People's Republic of China and the Employment Promotion Law of the People's Republic of China. It will offer clear law provisions for judicial review and administrative enforcement of law, as well as strong legal support for sexual minorities to stand up for themselves. Only when laws and institutions can identify and correct structural unfairness, can the goal of equality be truly realized. On the basis of improving legal provisions, it is also necessary to actively play the role of labor supervision department in investigating anti-discrimination cases. This will form a coordinated anti-employment discrimination system involving administrative, judicial and social aspects.

Achieving equal employment is a long process. In fact, the law is already the last line of defense in protecting rights. Enterprises and employers also need to take actions to achieve employment equality. Enterprises can create friendly work environments by inclusive recruitment requirements and corporate policies. Employees can also use the company's feedback channels to report discriminatory experiences they have met.

These measures are not only a reflection of social responsibility, but also help employers attract and retain outstanding talents.

5. Conclusion

To sum up, the definition and remedy of employment discrimination against sexual minorities should go beyond formal equality and delve into substantive equality. By establishing a two-stage review framework and a diversified relief system, China can achieve the goal of ensuring employment equality in both theory and practice. From a broader social perspective, protecting sexual minorities' equal employment rights concerns not only individual dignity and the realization of human rights but also constitutes an important manifestation of social justice. An equal labor market can promote social integration and economic development. A society that fully leverages the potential of all its members is the most vibrant and creative society. Allowing everyone to obtain dignity and development opportunities in the workplace without being limited or discriminated against because of gender or other factors should become a basic social consensus and common effort. Ultimately, it is necessary to develop collaboratively from the aspects of legislation, law enforcement and social awareness. Making efforts to realize the solemn promise of equality before the law in practice.

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