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Disability Discrimination in Employment: Three Countries Comparison

Li Luo

IRS VITA Program

1500 Yanceyville St, Greensboro, NC 27405

Weian Wang*

Bryan School of Business and Economics, The University of North Carolina at Greensboro

479 Bryan Building, P.O. Box 26170, Greensboro, NC 27402-6170

Abstract

Firms to date regard their employees as one of the most critical components for their business success. Among them, one group of employees particularly raises our attentions and thoughts. Disabled employees are devoting themselves to make greater business achievements, as well as creating better lives. However, disabled employees to date are still differentiated to be neglected, despised, or even repudiated in many businesses. In this regard, it is important to understand the status quo of governmental actions in protecting employment of handicapped. So, this article employs a structured literature review with a disaggregated analysis of disability protection acts in three countries (i.e., United States, United Kingdom, and China) towards the issue of disability discrimination in employment. Based on the analysis, we suggest that either national legislation or corporate regulation needs to dedicate on protecting disabilities through a growing law-system. Simultaneously, they can also work on protecting disabilities from an active way by advancing their abilities of self-security.

Keywords: Disability Discrimination, Convention on the Rights of Persons with Disabilities (CRPD), Americans with Disabilities Act (ADA), Disability Discrimination Act (DDA), Hong Kong Equal Opportunities Commission (HKEOC)

1. Introduction

In this contemporary business world, employees are considered as one of the most important resources within organizations¹. Among them, one group of employees particularly raises our attentions and thoughts. Disabled employees are devoting themselves to make greater business achievements, as well as creating better lives². Obviously, it is unfair and unethical to treat them discriminatingly because having disability doesn't represent the un-qualification or extermination of work capability. Much importantly, the discrimination hurts the sustainability of business prosperities³, as well as the development of human civilization in the whole society⁴. However, studies on disability discrimination in employment is still under addressed because of lack of consensus on such issue.

Drawing on the World Health Organization (WHO)'s website, "Disabilities is an umbrella term, covering impairments, activity limitations, and participation restrictions"⁵. In this regard, the impairment is the damage that results in a reduction of quality or function; the activity limitation is the difficult condition of being unable to perform a task or action; and the participation restriction is an obstacle in the way of executing life circumstances. As such, "disability is a complex phenomenon, reflecting an interaction between features of a person's body and features of the society in which he or she lives"⁶.

In line with this concept, for example, the United Nations Standard Rules of Convention on the Rights of Persons with Disabilities (CRPD) set out a code of implementation for elaborating the rights belonging to the people with disabilities under the general community of living environment improvement globally. On Dec. 13th 2006, the United Nations adapted the CRPD and its Optional Protocol. As of 2010, there were 82 signatories who had ratified or acceded to the CRPD and 48 signatories who had ratified or accepted to the Optional Protocol. The convention has entered into force on May 3, 2008, with the highest number of signatories in history to a UN convention since its opening day⁷.

The United States, the United Kingdom of Great Britain and Northern Ireland, China and other Members or

¹ Wright, P. M., McMahan, G. C., & McWilliams, A. (1994). Human resources and sustained competitive advantage: a resource-based perspective. *International journal of human resource management*, 5(2), 301-326.

² Roehling, M. V. (1999). Weight-based discrimination in employment: Psychological and legal aspects. *Personnel Psychology*, 52(4), 969-1016.

³ Carroll, A., & Buchholtz, A. (2014). *Business and society: Ethics, sustainability, and stakeholder management*. Nelson Education.

⁴ Donnelly, J. (1998). Human rights: a new standard of civilization?. *International Affairs*, 74(1), 1-23.

⁵ <<http://www.who.int/topics/disabilities/en/>> Accessed 24 March 2017.

⁶ Ibid.

⁷ <<http://www.un.org/disabilities/default.asp?id=150>> Accessed 01 May 2017.

Associate Member States joined in the Convention and “engage themselves to develop and carry out policies, laws and administrative measures for securing the rights recognized in the Convention and abolish laws, regulations, customs and practices that constitute discrimination (Article 4)”¹.

In fact, the adoption of legislative measures to ensure the equal human rights and employment provision of discrimination was enacted by several countries quite a while before CRPD was formally enforced by the United Nations. Some examples are Americans with Disabilities Act (ADA) from the U.S. in 1990, Disability Discrimination Act (DDA) from the U.K. in 1995, and Decree by the President of the People’s Republic of China in 1990. They all meet and support the central function of CPRD’s framework, which sets the floor instead of the ceiling for legal protection and promotion of disabled people’s life equality for all Member States. Other than basically classified by discrimination based on difficulty in hearing, legs or feet, speech impediment etc., other countries more specifically clarify the definition of disability and discrimination under the employment criteria.

The sections of this article are outlined as follows: Next section describes current stage of legislation of disability discrimination in the United States, United Kingdom, and China. Section 3 provides a comprehensive analysis on such three countries. In section 4, we conclude our study.

2. The Status Quo of Employment Disability Act

2.1 The United States

On July 26th, 1990, President Bush signed one of the most comprehensive formulations of the rights for the people with disabilities into law – the Americans with Disabilities Act (ADA.), with a various areas in employment, public services provided by state and local governments, public services operated by private entities, transportation, and telecommunications². In 1998, ADA was amended with the ADA Amendments Act of 2008³. As stated in the ADA, a disabled individual is a person who meets one of the following conditions⁴:

1. *Has a physical or mental impairment that substantially limits one or more of the major life activities of such individual.*
2. *Has a record of such impairment.*
3. *Is regarded as having such an impairment.*

Under these standards, ADA fulfills one of its main goals for preventing employers from discriminating against employees and applicants with disabilities, by requiring employers to make reasonable accommodations for the person with physical or mental disabilities, and refraining employers from making firing and other employment decisions on the basis of disability.

ADA states the general rule of “No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment”⁵. This also includes a series of construction in terms of “discriminate against a qualified individual on the basis of disability includes conditions covering hiring and recruiting, accommodation and administration, qualification and training standards and criteria”⁶.

Accordingly, if an employee is suffering from the disability discrimination from his employer, this person can show that she or he meets all of the following to bring a successful claim under ADA⁷:

1. *Had a disability.*
2. *Was otherwise qualified for the job.*
3. *Was excluded from the job solely because of that disability.*

Even though the ADA attempts to resolve the disability employment issue, it is still an urgent and challengeable problems for all regions in the U.S. Until the end of 2011, over 1 in 4 of today’s 20 year-olds will become disabled before they retire, and over 36 million Americans are classified as disabled, which takes up 12% of the total population⁸. Furthermore, based recent disability statistics, people with disabilities only constitute 20.0% of Labor Force Participation while people without disabilities make up 68.9%, more than three times as large⁹ and the Unemployment Rate index was 12.9% for people with disabilities while only 8.7% for people without disabilities¹⁰.

¹ <<http://www.un.org/disabilities/convention/convention.shtml>> Accessed 01 May 2017.

² <http://www.dredef.org/publications/ada_history.shtml> Accessed 18 March 2017.

³ <<http://www.ada.gov/pubs/adastatute08.htm#12112a>> Accessed 22 February 2017.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Kubasek, Browne, Herron, Giampetro-Meyer, Barakacs, Dhooge, Williamson. Dynamic Business Law. McGraw-Hill Higher Education, 2009

⁸ <http://www.disabilitycanhappen.org/chances_disability/disability_stats.asp> Accessed 19 May 2017.

⁹ Ibid.

¹⁰ <<http://www.dol.gov/odep/>> Accessed 19 May 2017.

2.2 The United Kingdom

On November 8th, 1995, by the authority of Queen's most Excellent Majesty, with the advice and consent of the Lords Spiritual & Temporal & Commons, and with president Parliament assembled, UK Government passed the Disability Discrimination Act (DDA) 1995 (c. 50). After December 1996 when Part II of the Act came into force, it aimed to protect people in areas of employment and intends to terminal the discrimination against disabled people. It was hoped that the DDA could overcome the barriers for them to obtain and remain in employment¹.

In DDA, the meaning of disability and disabled person is confirmed as²:

1. *If he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities (Schedule 1).*
2. *In this Act 'disabled person' means a person who has a disability*

DDA also confirms that discrimination against employees and applicants with disabilities is unlawful in all kinds of situations:

From the recruiting aspect: "It is unlawful for an employer to discriminate against a disabled person in the arrangements which he makes for the purpose of determining to whom he should offer employment; in the terms on which he offers that person employment; [or] by refusing to offer, or deliberately not offering him employment"³.

From the retaining aspect: "It is unlawful for an employer to discriminate against a disabled person whom he employs in the terms of employment which he affords him; in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit; by refusing to afford him, or deliberately not affording him, any such opportunity; [or] by dismissing him, or subjecting him to any other detriment"⁴

With similar concepts with ADA in the U.S., the subsistence status of disabled people's equal employment opportunity is still not optimistic in the U.K. The possibility that disabled people experience unfair treatment at work is greater than non-disabled people. "In 2008, 19% of disabled people experienced unfair treatment at work compared to 13% of non-disabled people... the average gross hourly pay for disabled employees is £ 10.31 compared to £ 11.39 for non-disabled employees.... Around a third of disabled people experience difficulties related to their impairment in accessing public, commercial and leisure goods and services"⁵. Hence, the conditions included in the law don't truly prevent unfair-treatment.

2.3 China

On December 28th 1995, the 17th Session of the Standing Committee of the 8th National People's Congress adapted the Decree by the President of the People's Republic of China, which is formulated in accordance with the Constitution for protecting disabled person's equal rights.

In Article 2⁶, the definition, categories and criteria of disability are described as:

1. *A disabled person refers to one who suffers abnormalities of loss of a certain organ or functions, that perform an activity in the way considered normal.*
2. *The term 'disabled person' refers to those with visual, hearing, speech or other physical disabilities. Or mental retardation, multiple disabilities.*

The Chinese government specifically established a series of clause in accordance with this law to prohibit disability discrimination, on excluding on the work protection. "No discrimination in recruitment, employment, obtainment of promotion, professional titles, payment, welfare, insurance, or in other aspects." And "no enterprises or institutions shall deny employment solely on the grand of their disabilities"⁷. In addition to that, this law requires "enterprises and institutions where disabled person work shall provide the disabled workers with appropriate working conditions and labor protection, in-service technical training"⁸

The Decree by the President of the People's Republic of China on the Protection of Persons with Disabilities is a comprehensive law, amended in 2007 when the CRPD was ratified. It provides that persons with disabilities shall enjoy equal rights as other citizens in political, economic, cultural and social life.

In particular, Hong Kong of China also enacted its disability discrimination legislation in 1995. "The Hong Kong legislation, the Disability Discrimination Ordinance (Cap 487), draws both Australian and British legislative models – these are essentially statutes which make it unlawful to discriminate on the ground of disability in a number of fields of social activity and which provide an aggrieved individual with the right to lodge a complaint with an administrative agency or a court for resolution"⁹. The Hong Kong Disability

¹ <<http://www.legislation.gov.uk/ukpga/1995>> Accessed 19 May 2017.

² Ibid.

³ Ibid.

⁴ <<http://www.legislation.gov.uk/ukpga/1995/50/section/4>> Accessed May 19 2017.

⁵ <<http://odi.dwp.gov.uk/disability-statistics-and-research/disability-facts-and-figures.php#ds>> Accessed May 19 2017.

⁶ <<http://www.cdprf.org.cn/>> Accessed May 30 2017.

⁷ Ibid.

⁸ Ibid.

⁹ <<http://www.unescap.org/sdd/issues/disability/crpd/files/Paper-III-Andrew-20110121.pdf>> Accessed May 30 2017.

Discrimination Ordinance enacted on the purpose of protecting disabled people's right against discrimination. It prohibits discriminatory activities for employers, and also offers a channel for complaining about alleged discrimination for employees. "Individuals alleging such discrimination may lodge complaints with the Hong Kong Equal Opportunities Commission (HKEOC)"¹. This presumably indicates that it creates individually enforceable right effectively.

3. A Comprehensive Analysis

In order to empower disable people with more rights and benefits, and to improve their living standards and strength their self-confidences, the U.S., the U.K. and China enforced their own disability protection statutes.

Individuals with disabilities can enjoy better economic welfares, such as tax benefits. In the U.S, disabled people can possess a larger portion of personal exemption on personal income tax returns, and higher percentage deductions from self-employment business. In China, the State Council provides tax relieves and tailored advice to increase incentives for disabled people to seek employment.

Besides that, in China, firms can cover extra costs through a tax credit system, which means firms with disabled workers may fully offset ongoing accommodation and assistance costs at a certain degree. Generally, from this point, those laws are useful to some extent. In December of 2010, there were over 2.5 million disabled workers in their 20s, 30s, and 40s receiving Social Security Disability Insurance (SSDI) benefits. 8.3 million disabled wage earners, over 5% of U.S. workers, were receiving Social Security Disability (SSDI) benefits at the conclusion since 2011².

Despite the positive effects of those disability laws, there are many negative aspects of disability employment.

First, there is no guarantee that the disabled employees will win a lawsuit that they brought against their employer's discriminations. As reported by the American Bar Association of the U.S., "of the cases that actually go to court, 98 percent decided in favor of the defendants, usually businesses"³.

Second, most workers' incomes are not really under protection. According to the U.S. detailed indexes: "About 100 million workers are without private disability income insurance... 67% of workers in the private sector have no long-term disability insurance"⁴.

Third, the most common dilemma among three countries are involved in is the claimed counter-effect from anti-discrimination acts and laws—lower employment rate for disabled people. Due to the imposed prospective additional costs and pressure on employers, they considered probable expensiveness of hiring or firing of disabled people, and the potential threat of lawsuits. Jolls and Prescott (2004) argue that the ADA may provide unintended impact for disabled employees⁵. As such, it can be referred that all those acts – no matter from the U.S., the U.K or China – required reasonable accommodations for disabled people and designed firing penalty if the terminated employment is the only on the ground of disabilities.

Similar to the ADA's affect in the U.S., critics in the UK's DDA employment provision points out that implementing legislation have caused additional costs⁶. Many employees do not receive employment because of their disabilities. From the UK's government website of disability issues, in 2011, "the employment rate of disabled people was 48.8 %, compared with 77.5 % of non-disabled people"⁷. From this point, people with disabilities are less likely to be employed and even suffer a longer duration of unemployment than the rest of the working populations.

In China, the sixth Nationwide Population Census in 2010 states that, the disability employment rate is around 80%, and growing from 62.7% in 2000. Those statistics give people a positive signal of implementation of the disability protection. But, through an extensive literature review, there is an evidence of greater concern that the Chinese government provides an attractive tax benefit to increase incentives for employing people with disabilities. In detail, many corporations will be exempted from the enterprise income tax with a disability employment rate of 25% or higher, or will have 50% deduction of the enterprise income tax if they have the disability employment rate between 10% and 25%. Driven by this motivation, some firms are highly interested to provide job offers to people who have the Disable Certificates. As a result, for some unemployed people without disabilities may try to obtain this certificate by faking a disability in order to get a job opportunity⁸.

¹ Ibid.

² Ibid n14.

³ <<http://www.accessiblesociety.org/topics/ada/>> Accessed May 30 2017.

⁴ Ibid n14.

⁵ Jolls, C., & Prescott, J. J. (2004). Disaggregating employment protection: The case of disability discrimination (No. w10740). National Bureau of Economic Research.

⁶ <<http://odi.dwp.gov.uk/disability-statistics-and-research/disability-facts-and-figures.php#ds>> Accessed May 30 2017.

⁷ Ibid.

⁸ <<http://cmzyr.5d6d.com/thread-13693-1-1.html>> Accessed June 1 2017.

4. Conclusion and Future Research

From Convention on the Rights of Persons with Disabilities (CRPD) by the U.N, Americans with Disabilities Act (ADA) in the U.S., Disability Discrimination Act (DDA) in the U.F., to Decree by the President of the People's Republic of China and Hong Kong Equal Opportunities Commission (HKEOC), the international community conduct the international protection of disability human rights through legislation models and means.

Above all, it's not hard to learn both benefits and limitations of disability discrimination restriction legislations. On one hand, the employment-rate gap between disabled and non-disabled people has been shortened those years. On the other hand, we cannot ignore the unexpected aspect from employer's fear of hiring disability people due to the potential costs and risks reflected from reasonable accommodation and firing costs for disabled employees, which may mainly attribute to the post-enactment effect on comparative lower disability employment rate. Whether these requirements really playing the central role in the negative employment effects on disabled people needs to further confirmation research.

Therefore, based on analysis, we suggest that governmental actions may eliminate the barriers of requirements and costs, including providing the cost reimbursements to reasonable accommodation and listing tax benefits to recruiting disabled people. Moreover, we suggest that either national legislation or corporate regulation needs to dedicate on protecting disabilities through a malleable law-system, simultaneously, protecting disabilities from an active way by advancing their abilities of self-security.

Inevitably, this study only provides a comprehensive analysis within three countries from existing literature and works. It is hard to consider the side effect of governmental actions in dealing with disability discrimination. This provides an avenue for future research to explore the unintended consequences of implementing discrimination law for business organizations and disabled employees in a particular country.