BREAKING THE GLASS CEILING--EQUAL RIGHTS IN THE WORKPLACE FOR UPPER AND MIDDLE CLASS WHITE-COLLAR WOMEN

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Abstract - The purpose of this study is to survey female white-collar workers' promotion barriers. Taiwan's female labor force participation rate has been increasing in recent years. However, according to the latest analytical surveys conducted by authorities and private institutes, the percentage of women directors in both public and private sectors remains low, indicating the glass ceiling is still impenetrable. Especially, private corporations appear to have an obvious gap. In addition, observing Taiwan's judicial practice, the number of promotion-related lawsuits is considerably less than expected. It is possible that our equal employment laws are not well-designed enough in the aspect of procedure and substantive contents to protect women's rights in the workplace. In consideration of time and available cases, this study mainly focuses on female lawyers, female accountant and female engineers. By comparative law studies, this study aims to re-analyze the history of Taiwan's female workers, the glass ceiling effect and the practice of our present equal employment laws. Finally, this study proposes several legal changes in incentivize corporations to promote gender equality.

Key words - feminist legal approaches, Glass Ceiling Act of 1991, the glass ceiling effect, women in white collars

I. INTRODUCTION

This text discusses obstacles to promotion for upper and middle class white collar women in the private sector. This issue was analyzed using gender perspectives and comparative methods in hopes that the results of the research can help develop strategies to spur the promotion of white-collar women in the private sector. Due to limited space, we selected female technology managers, accounting firm partners and law firm partners as our research subjects. In addition, obstacles to promotion based on sexual orientation were not explored in this research.

The term "glass ceiling" was coined to describe the barriers to promotion that women experience in the workplace; these barriers are both invisible and impregnable[1]. In 2015, the German Congress passed the "Law for the Equal Participation of Women and Men in Leadership Positions in the Private Sector and the Public Sector[2] which required companies to set at least 30% of new board seats for women, legally breaking the glass ceiling effect[3]. Norway passed a law in 2008 that mandated all private enterprises meet 40% in their boardrooms[4]. According to statistics from the 2016 World Economic Forum's report listing gender ratios among legislators, mid-level administrators and managers for every country, it's evident that global women's workplace rights issues have gradually progressed from barriers to entry into the workforce to promotion barriers for women in specialized, higher-level positions[5].

II. THE SIGNIFICANCE OF THE GLASS CEILING AND THE IMPORTANCE OF DISCUSSING IT

A. Progress on Workplace Gender Equality in Taiwan

Observing Taiwan's legal workplace equality system in the context of its development, previous points of emphasis have included equal pay for equal work, barring discrimination of pregnant or single women and maternal protection. However, in this sort of legal environment, males continue to outnumber women in high-level decision-making positions among public or private Taiwanese companies. The following is a brief history of the development of the legal workplace equality system in Taiwan as well as some statistical data which sheds light on the current situation. The earliest law on equal pay for equal work and maternal protection was the Factory Law passed by the Government of the Republic of China (ROC, Taiwan) in 1929[6]. In 1984, the government of ROC passed the Labor Standards Act which expressly

[1] ADDISON HANNE, FEMINIST ECONOMICS, at 59 (2015).

[2] Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst

[3] Lin Zhi-jie, Qiu Yu-fan, *Breaking Through Taiwan's Glass Ceiling and Rebuilding Taiwan's Workplace Gender Equality Act-Equal Rights for Upper and Middle Class White Collar Women in the Workplace is Key*, APPLICATION FOR SPECIALIZED RESEARCH ON GENDER AND TECHNOLOGY, 15-16 (2016).

[4] Liu Mei-jun, *The Workplace Glass Ceiling Phenomenon*, TAIWAN LABOR QUARTERLY, at 79 (2010).

[5] World Economic Forum, *The Global Gender Gap Report 2016*, available at : https://www.weforum.org/reports/the-global-gender-gap-report-2016.

[6] Factory Law, Article 13: "Female Employees Cannot Work Between 8:00 PM and 6:00 AM." Article 24: "Male and Female Employees that do the same work and are equally productive should have equal pay.

forbade gender discrimination in the workplace[7]. In the subsequent Employment Services Act, these protections were expanded and the penalties for violating them were increased[8]. Taiwan's first "Workplace Gender Equality Law" originated from the "Marriage Pregnancy Discrimination Act" of 1987. Back then, women often had to sign agreements when they were hired stating that they would willingly leave or be fired when they married, became pregnant or reached the age of 30[9]. In 2002, Taiwan finally announced the "Male and Female Workplace Equality Act" and the government started to focus on the problems of the female workforce[10]. After 2008, when the idea of gender had become mainstream, its name was changed to the "Workplace Gender Equality Act"[11].

B. Specifics about the Legal Workplace Equality system and the Plight of Women-the Case of National Yilan University

(1) Taiwan's Gender Gap Still Exists

For the private sector, according to the Ministry of Labor (MOL)'s gender analysis statistics, 25.3% of public representatives, administrators and managers are women. Women also made up a majority (53.1%) of the 1.37 million professional employees. However, if we examine women's influence among industrial and commercial groups, 46.9% of peasant association leaders are women, 30.3% of union directors and supervisors are women and 36.6% of small and mid-sized business administrators are women[12]. According to Financial Supervisory Commission statistics, in 2014, 12.5% of publicly listed companies (including companies on both the Taiwan Stock Exchange and the OTC) were chaired by women[13]. Although the female manager rate cannot be directly calculated from private sector materials, generally speaking, the proportion of females in decision-making roles in the private sector is noticeably low.

(2) There is a Lack of Promotion-Related Lawsuits in the Taiwanese Judicial System

Not many lawsuits have been brought by women due to barriers to promotion. Although Article 7 of the "Workplace Gender Equality Act" clearly states that people cannot be treated differently with regards to promotions due to their gender and/or sexual orientation, in practice, very few cases of Article 7 are ever heard in Taiwanese courtrooms. A search of all judgment "Workplace Gender Equality Act Article 7" turned up 12 cases. Eight of those cases concerned pregnancy discrimination in employment, one case concerned transgender outfit, one case in which the law was quoted to explain the text of securities law, one case in which the plaintiff advocated that the exam favors women, and one case is that a reporter was not suspended for violating the equality principle[14]. However, none of the cases found during the search has to do with women's inability to gain positions of leaders. For that, we must examine the 2006 Yilan University Incident[15].

Ms. Chen Jinlian, the former Vice-President of National Taiwan University of Science and Technology, was the only female candidate for National Yilan University's presidency. The presidential selection committee was made up of 5 male members. During the interview, the committee members asked Ms. Chen questions including,

[7] Labor Standards Act, Article 25: "Employers cannot treat employees differently because of their gender. Employees that do the same work and are equally productive should have equal pay."

[8] Employment Services Act, Article 5 Section 1: "To ensure that citizens have equal opportunities for employment, employers cannot discriminate against job applicants or employees due to their race, class, language, creed, religion, party, nationality, birthplace, gender, sexual orientation, age, marital status, appearance, facial features, physical or mental disabilities or past/present membership in a union or unions; Other laws have explicit provisions about these issues as well and must also be respected."

[9] Chen Zhao-ru, Zhang Jin-fen, *Legal Recognition of the Gender Gap and Gender Inequality-Using the Treatment of Laborers as an Example*, POL. L., Issue 108,at 77 (2009).

[10] Chiao Cing-Kae, *Thinking about How Taiwan can Establish a Legal Workplace Gender Equality System*, MINGDAN LAW J., Issue 59, at 62. (2000).

[11] Review Committee Member Pan Weian's Proposal, Legislative Council Gazette, Volume 97, Issue 63, at 73 (2008).

[12] The Current State of Women's Political Participation in Taiwan, Labor Department. http://www.mol.gov.tw/statistics/2461/2473/25116/ (last visited: 4/30/2017).

[13] Articles on the Gender Gap-Equal Rights, Decision-making and Level of Influence, Main Office, http://www.stat.gov.tw/ct.asp?xItem=33340&ctNode=6135&mp=4 (last visited: 4/30/2017).

[14] 2012 Supreme Court Decisions, No. 2605, 2014 Hsinchu District Court Decision Briefs No. 15, 2012 Taipei Superior Court Decisions, No. 1425, 2011 Taipei Superior Court Decision Brieffs, No. 656, 2012 Taipei Superior Court Decision Briefs, No. 54, 2011 Taipei Superior Court Decisions, No. 1539, 2012 Taipei District Court Decision Briefs, No. 164, 2013 Taichung Superior Court Decisions, No. 150, 2010 Taipei District court Decision Briefs, No. 222, 2013 Kaohsiung Superior Court Decision Briefs, No. 6

[15] Taipei District Court 96 Civil Judgment No. 7313, Taiwan Superior Court 97 Civil Judgment No. 998, 2009 Taiwan Supreme Court Civil Judgment No. 2249, Taiwan Superior Court 98 Addendum I Civil Judgment No. 164, Taiwan Supreme Court 100 Civil Judgment No. 1062.

"Women are relatively poor fundraisers, what do you think?" and "If you come to Yilan University, what will your family do?", etc. In the end, the committee decided "Professor Jiang has comprehensive administrative experience and is quite a skilled administrator; he also has experience managing both private and public universities. Professor Chen's wealth of knowledge and experience will help her manage and develop our school. We have decided to select Professor Jiang and Professor Chen as our preferred candidates, and the Minister of Ministry of Education can choose one of them to be Yilan University's next president." Du Zheng-sheng, then serving as the Minister of MOE, was allowed to make the decision. In the end, Chen was not selected. Chen filed suit against the selection committee under Article 7 of the Workplace Gender Equality Act due to their concerns about women's poor fundraising and her inability to both raise a family and work at the same time. She demanded that the defendants (the Minister of MOE) and a few of the committee members) should pay her compensation and issue public apology[16]. The first court thought those questions, such as "what will your family do if you come to Yilan?" or "women are particularly bad fundraisers" did constitute unfavorable treatment because of sex. The court awarded Ms. Chen the entire amount she sought[17]. However, the final court believed that MOE did not treat the candidates differently. Furthermore, it ruled that the selection committee did not treat either of them unfavorably. The court believed that Ms. Chen did not prove that MOE definitely could have made a different decision if the gender composition of the committee had been different, and its actions did not constitute gender discrimination[18]. In 2011, after the case was decided, Taiwan passed a new law requiring university president selection committees to have at least a 1/3 female composition rate. However, in 2015, only 9.49% of public and private university presidents were women[19]. Therefore, the University Act alone cannot solve the problem. In addition, other methods to avoid from gender discrimination, besides going to court, are specified in Article 34 of the Workplace Gender Equality Act. Employees or applicants can file a complaint with the local authorities; If either the party objects to the local authorities' decision, the matter can be transferred to the central authorities' workplace gender equality association for mediation or they can file a suit. If either party is still dissatisfied with the resulting decision, they can file a civil lawsuit. The court can then review the Workplace Gender Equality Association's decision and comments[20]. We must think more about how Taiwan can use laws, ordinances and education to create a pathway of promotion that are friendly to people of all genders.

III. Research on Overseas Glass Ceiling Issues and Cases-Based on US Cases

A. US legal regulations and judicial system designed to spur the development of workplace gender equality

the following are listed and briefly described below in chronological order[21]:

(1) Title VII of the Civil Rights Act of 1964[22]

This act was enacted to prohibit from all types of discriminatory behaviors that result from an employee-employer relationship. The act clearly states that "employers are strictly prohibited from discriminating against employees because of their races, skin colors, religions, genders and/or nationalities" and established the Equal Employment Opportunity Commission (EEOC)[23] to independently implement the items contained in the law.

(2) The Civil Rights Act of 1991[24]

The following amendment was added to this act, including diminishing the liability of proof for plaintiffs in discrimination cases, diminishing the restrictions on bringing anti-discrimination suits, increasing the statute of limitations for discriminatory compensation suits, and confirming the legal principles can be applied outside the country[25].Furthermore, if victims win their case, the law mandated that a jury will rule on compensatory and punitive damages to make sure the victims are fairly compensated[26].

[16] Taipei District Court 96 Civil Judgment No. 7313.
[17] *Id.*
[18] 2011 Court No. 1062.
[19] Summary of Materials on Gender Statistical Indicators. Quantity and Ratio of Female University Presidents, Ministry of Education, http://depart.moe.edu.tw/ED4500/cp.aspx?n=C1EE66D2D9BD36A5 (last visited: Apr. 30, 2017).
[20] Lin Jia-he, Court Decisions on Workplace Gender Equality-2008 Taichung Superior Court Briefs No. 66, Included in: Featured Decisions and Commentary on the Workplace Gender Equality Law, at 199-208.
[21] Cing-Kae Chiao, *Research on America's Workplace Gender Quality System*, LABOR LAW SERIES (II), at 171-181 (2001).
[22] Pub.L. 88–352, 78 Stat. 241, enacted July 2, 1964.
[23] 42 U.S. Code § 2000e–4 - Equal Employment Opportunity Commission.
[24] Chen Jin-fa, *Debates about Taiwan's Legal Workplace Gender Equality System-As seen in Comparison with America's Workplace Gender Equality Laws and Situation,* CHUNG CHING UNIVERSITY LABOR RESEARCH INSTITUTE MASTER'S THESIS, at 82 (2011).
[25] *Id,* at 83.
[26] Chiao Cing-Kae, *supra* note 21, at 178.

(3) Glass Ceiling Act of 1991[27]

This act specified that the federal government would establish the Glass Ceiling Committee of US Department of Labor to research how to remove barriers preventing women and minorities from managerial and decision-making roles[28].

B. Classic US Court Cases Involving Upper and Middle Class White Collar Women Who Faced Discrimination when trying to get a Promotion

(1) Price Waterhouse v. Hopkins[29]

The plaintiff, Ann Hopkins, had worked for five years as a senior manager at Price Waterhouse. She had tried for two years to be promoted as a partner, but was rejected. Hopkins outranked all of the other employees seeking the partnership. The plaintiff's employer stated that they hoped she could wear more makeup and wear jewelry to work[30]. Hopkins felt the reason she was rejected violated her rights under Title VII of the Civil Rights Act[31]. The court finally ruled in favor of Hopkins because the firm could not provide any evidence supporting their claim that the decision had nothing to do with gender.

(2) Ezold v. Wolf Block, Schorr & Solis-Cohen[32]

The plaintiff, Nancy Ezold was assigned to minor cases, and with a few specified partners. Ezold applied twice for partnership were rejected because she was told that she did not possess sufficient legal analytical skills to handle complex cases and her hesitant personalities[33]. But Ezold complained that she was assigned only trivial cases, compared to other male lawyers. The Third Circuit Court of Appeals believed it should not arbitrarily revoke the firm's right to make its own decisions on promotions[34]. The court ruled in favor of the law firm.

(3) Pao v. Kleiner Perkins[35]

The plaintiff, Ellen Pao, filed suit against Kleiner Perkins Caufield & Byers in San Francisco's Superior Court, alleging employment discrimination based on gender, workplace retaliation, failure to take reasonable steps to prevent gender discrimination in violation of the "California Employment and Housing Act". The plaintiff presented her case, explaining that she was a victim of gender discrimination from her male co-worker, Nazre, kept important information from her, refusing to include her in meetings. Besides, she alleged that the company is not female-friendly, and there were many Gentlemen's Clubs within the company. The defendant claimed that the plaintiff was fired because of continuing substandard performance. For example, an external evaluation indicated that the plaintiff lacked qualities to become board member. As for the plaintiff's claims, the company indicated that plaintiff herself opposed to the company's decision to punish Nazre. The company also pointed out that it employs a higher proportion of female workers than other similar companies. The jury reviewed the facts of the case and decided to reject the plaintiff's four claims in the end.

IV. Comprehensive Analysis: Analyzing the Aforementioned Cases from a Gender Perspective

A. Gender stereotypes affect women's opportunities for promotion

Scholars have proposed that women are victims of a double-bind dilemma. If they do not act like men, they will be seen as lacking the necessary perseverance or even the necessary intelligence to succeed. However, if they do act like men, they will be branded as too aggressive[36]. Gender stereotypes ignore differences in personality and place people into rigid gender roles[37]. Many leadership qualities, are not typically ascribed to

[27] Title II of Pub. L. 102-166. This provision is part of Title II of the 1991 Civil Rights Act.

[28] Chiao Cing-Kae, *The Balance between Workplace Gender Equality and Preferential Treatment-Learning from America's experience*, National Weekly Magazine, Issue 7:2=26, 9-36. at 11 (2001.06); *See* Ji Meng-ban, *Guaranteeing International Labor Rights: An approach centered on cultural rights and International Conventions.* The thesis paper was published in "Two Conventions and Domestic Labor Laws" seminar, at 4, Note 8 (2009.12.11).

[29] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[30] *Id.* at 232-236. ([T]homas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.)

[31] *Id.* at 236-237.

[32] Ezold v. Wolf, Block, Schorr and Solis-Cohen, 758 F. Supp. 303 (3rd Cir. 1991).

[33] *Id*, at 512-521.

[34] *Id.* at 524.

[35] Pao v. Kleiner Perkins Caufield & Byers LLC, Not Reported in Cal. Rptr. 3d, 1 (2013).

[36] Deborah L. Rhode, What's Sex Got to Do with It?: Diversity in the Legal Profession 17 (2006).

[37] Tracy A. Baron *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. Pa. L. Rev. 267 (1994), available at: http://scholarship.law.upenn.edu/penn_law_review/vol143/iss1/9 (last visited Ari. 30, 2017).

women [38]. Gender stereotypes often cause matters unrelated to profession to enter into women's performance evaluation [39]. In jobs that were traditionally thought of as men's jobs, women often receive unequal treatment because they do not conform to gender stereotypes[40]. In the Hopkins case, Hopkins' supervisor did not promote her because he thought she should have acted more feminine. Both Hopkins and Ezolds' co-workers noted that they were "hard to get along with". Men with same characteristics might be thought of as "determined" but women are labeled as "hard to get along with." In Ezold's case, only 5 in 107 partners in her law were women. Female candidates for partnerships were forced to conform to "men's impressions on what partners should be like."[41] Some managers think that women cannot participate in occasional afterhours activities, unwilling to go on business trips or unable to work lots of overtime because they are busy raising a family. These are reasons why men may be favored by employers[42].

B. It's Hard to Join in Gentlemen's Club

Club culture is the specific exposition of "white male culture". Some clubs even have explicit rules of "forbidding women from joining[43]. It is still extremely difficult for women to join in the social circles that have been dominated by men. The "Gentlemen's Club Culture" is still used to describe industries that are mostly dominated by men, places where men view the entire industry as a "Gentlemen's Club" in order to secure and solidify their own status and positions. "That's not something women do." is often used as a reason to exclude women from important business and social occasions and/or decision-making circles. Cases like Ms. Pao's occurred in male-dominated environments are a classic example of this. In the Pao case, Pao's male superior and co-workers continually attempted to exclude her from meetings by failing to inform her, and required high-level female managers to take notes at the meetings, etc. By doing so, they refused to allow Pao to enter in the core decision-making circles. This originates from the sin of gender: men established a "club" based society in order to establish their own statuses, pursue career development and consolidate their own power.

C. Burden of proof problem—Structural Gender-based Discrimination

Nowadays the human resources department in many companies have learned to ensure that there were never any written expressions or commend related to gender discrimination shown on working valuation or decision of promotion, which makes it much harder to find the obvious clue of discrimination compared to the time of Hopkins and Ezold. When it comes to upper-management promotions, modern-day gender discrimination disputes do not only include cases of obvious, direct discrimination; there are also subtle instances of gender discrimination hiding in the employee evaluation system, work distribution or overall environment. This makes gender discrimination in workplace more difficult to identify and prosecute. Therefore, there comes a new type of discrimination which is called mixed-motive discrimination, a discriminative decision or deed with both legal and illegal intention at the same time[44]. As for mixed-motive discrimination, US courts have shifted the liability of proof (this shift will be described in detail in chapter five). The difficulty proving discrimination was evident in the Ezold case. The court found that most of the feedback seemed to focus on the plaintiff's abilities, but is it possible that her gender was the reason she was assigned to small cases, so she would never had a chance to require over 500 hours of casework experience (compared to other male lawyers on the same level as her had over 600 hours of casework experience). If this truly was the case, it would be very difficult for the plaintiff to prove. Today's gender discrimination cases are not as clear-cut as those in the past; they are more internal, based on an overall employment market and culture of firms or organizations. In this sense, "UNQUALIFIED" has been replaced with "DISFAVORED", but the true nature of the discrimination has not changed at all[45]. This is why barriers to promotion have still not been eliminated

[38] Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, HASTINGS L.J. 471, 494 (1990).

[39] Sex Bias in Work Settings: The Lack of Fit Model in 5 RESEARCH IN ORGANIZATIONAL BEHAVIOR 270 (B. Staw & L. Cummings ed. 1983).

[40] RAYMOND F. GREGORY, WOMEN AND WORKPLACE DISCRIMINATION: OVERCOMING BARRIERS TO GENDER EQUALITY 75 (2002).; *See* Bartol & Butterfield, *Sex Effects in Evaluating Leaders*, 61 J. APPLIED SYCHOLOGY 446 (1976).

[41] *Id*, at 77.

[42] M. Neil Browne & Andrea Giampetro-Meyer, *Many Path to Justice: The Glass Ceiling, the Looking Glass, and Strategies for Getting to the Other Side*, 21 HOFSTRA LAB & EMP. L.J. 61, 77 (2003).

[43] *David Doughan & Peter Gordon, Women, Clubs and Associations in Britain, Routledge*, at 43(2006).

[44] *Supra* note 26, at 87.

[45] *See* e.g., Sturm, *supra* note 45; Tristin K. Green, *Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear*, 43 HARV. C.R.-C.L. L. REV. 353 (2008); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007).

yet[46]. For example, employees may do because of the gender stereotype, "the men have to bring home the bacon[47]," women doing same job could be paid relatively low. In addition, in some organizations, female subordinates are never asked if they wish to be sent out on assignment. However, some of their male co-workers who have never had the experience of being out on assignment are still promoted to managerial positions[48]. It's a rationalization of gender discrimination since the same criteria are not applied to men. The
organization assesses male managers on their actual performance[49].

V. Conclusion and Recommendations-How to Establish a Gender-Friendly Promotion Environment

This paper provides the following recommendations, divided into two categories: how the government can encourage industries to change and how Taiwan can develop its judicial practices. The specific recommendations are as follows: Currently, Taiwan's government "actively encourages private enterprises to adopt a minimum male and female ratio of 3:1 in their boardrooms" and uses this principal to praise companies for good performance. Companies can apply for various subsidies where they'll get bonus points for meeting this quota[50]. If the MOL can lock in large, local enterprises and investigate them, it will increase the understanding of the internal factors that create disparate promotion opportunities based on gender[51]. Taiwan can also directly pass laws mandating gender quotas in corporations' upper management teams, as Germany has already done. The MOL can also consider a company's past history on gender issues when doling out punishment for violations of gender equality laws. A proven record of promoting gender equality may result in a lesser punishment. This will encourage companies to take policies and procedures of institutes that promote gender equality.

As for judicial practice, an important exception contained in Article 7 of Taiwan's "Workplace Equality Act" has severely affected Article 31's ability to shift the liability of proof in gender discrimination cases. Article 7 justifies companies' discriminatory behaviors under certain special conditions, providing that "the nature of the work is particularly suited to a certain gender." What does that mean? In practice, it means that courts, administrators, employers or employees do not have a clear standard to abide by, making it very difficult to facilitate gender discrimination suits. Thus, the shift in the burden of proof for gender discrimination suits contained in Article 31 has been greatly weakened. To address this problem, Taiwanese courts can use the same strict interpretation used in US courts, that is bona fide occupational qualification (BFOQ). When US courts hear a disparate treatment gender discrimination case, they first determine the state of disparate treatment discrimination involved. If it is possible to presume differential treatment through direct evidences, the court will term the behavior to be "obvious differential treatment". In this case, the defendant will be limited to "professional qualifications" as their statutory defense[52]. In another type of case, the victim may feel that the employers' discriminatory behavior was based on a pretext. The presumption of disparate treatment discriminatory behavior in such cases could only be indirectly proven after Title VII of the Civil Rights Act was passed. In McDonnell Douglas case, the Supreme Court clearly defined the order and pro rata of liability on two parties[53]. After this case was decided, American courts started to shift the liability of proof in the determination of gender discrimination cases. After the Hopkins and Ezold decisions came down, new types of gender discrimination cases began to appear, this is called "Mixed Motivation Discrimination". These types of cases often arise when factual evidence proves the employer had illegal motivations. The liability of proof is often a problem in these cases[54]. The employee has clear evidence to prove the employers' illicit motivations, but the

[46] *See* e.g., David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993). Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 YALE J. LAW & FEMINISM 119 (2012) Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, BERKELEY J. EMP. & LABOR LAW

[47] Yang Xiang-luan, *Gender Relationship Constructs in the High-Tech Work Environment*, WOMEN AND GENDER 9, 187-204 (1998); Zhang Jin-fen, *Taking Back our Culture: Gender in the System and Structure of the Labor Market*, TAIWAN SOCIOLOGY 29, 97-125(2002).

[48] *Id.*

[49] ZHANG JIN-FEN, PROGRESS ON AND REVIEW OF WORKPLACE GENDER EQUALITY: WHITE PAPER ON TAIWANESE WOMEN'S RIGHTS 2014, Chen Yaohua edit, P. 199 (2014).

[50] Ministry of Economy, *2016 Ministry of Economy Report on Mainstreaming Implementation of Gender Discrimination Laws*, https://www.moea.gov.tw/mns/dop/content/ContentLink.aspx?menu_id=2475 (Last visited: 4/30/2017).

[51] *Supra* note 59, at 186.

[52] 42 U.S.C. § 2000e-2(e) (1988).

[53] McDonnell Douglas v. Green, 441 U.S. 792 (1973); *See* Chen Jin-fa, *supra* note 26, at 86.

[54] Jiao Xing-kai, *supra* note 9, at 99.

employer has also professed legitimate motives[55]. The Supreme Court has handed down a number of decisions establishing standards in such cases: the employer must prove that they would have made the exactly same decision if there are no illegal motivations. The court will consider the circumstances of other individuals who were successfully hired, including the male and female ratio of successful interviewees, etc. to reach a comprehensive judgment and review. Congress also inserted language in the Civil Rights Act of 1991 that attempted to protect against mixed-motive discrimination[56]. In the Hopkins case, both parties stuck to their view of "whether or not disparate treatment discrimination had occurred". The court required the employer to prove that "it would still have decided to terminate Hopkins' employment if there is no consideration of her personality and gender characteristic." The employer could not prove this, and the court decided in favor of the plaintiff, thus establishing a practical evaluation process for mixed-motive discrimination cases in US. If Taiwan can learn from the US Supreme Court and shift the liability of proof onto the employer, using value choice and transfer of risk to lighten the plaintiff's evidentiary burden, it can indirectly encourage more victims of gender discrimination cases to pursue the matters through legal channels. Back to Taiwan, the most cases of gender discrimination is pregnancy discrimination. It somehow demonstrates that women labor is still seen as "temporary" and thus employers tend to give women the same beneficial treatment, expectation of working and cultivation as men[57]. As a result, women may not receive good opportunities of promotion and have no choice but work in dead-end jobs which will not only make the gap of self-fulfillment between male and female bigger and bigger, but also make the economic situation of women become more and more tough. Therefore, if we want to protect and create more ways for to enter in decision-making roles in the future, the implementation of material protections in both the "Labor Standards Act" and the "Workplace Gender Equality Act" is necessary for sure.

[55] "If Employees can Provide Evidence of Sexual Harassment, but the Employer can also Prove Substandard Job Performance", *see* Chen Jin-Fa, *supra* note 26, at 87.

[56] Article 107(a) of this law declares that as long as the plaintiff proves they have suffered discrimination based on gender, the employer is in the wrong, even if other legitimate factors played a role in their motivation. This was passed in 1991 (as an amendment to the "Civil Rights Restoration Act of 1990). *See* Section 107 of the Civil Rights Act of 1991.

[57] *Id.*