Maternity Rights in Taiwan and the Philippines

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Abstract

Health care, job-protected leaves and wage replacement constitute three fundamental components of a maternity policy. Both Taiwan and the Philippines grant statutory job-protected maternity leave and regular wage benefits to female workers. Acts of illegal dismissal are considered discriminatory against women employees. However, the enforcement of laws for protecting workers in maternity is still problematic in Taiwan. In the Philippines, there are no illegal dismissal cases involving pregnant workers or workers on maternity leave filed in courts since the 70s. In Taiwan, however, many instances of illegal dismissal disguised as valid termination have been encountered in the past two decades.

The Labor Code of the Philippines is well-organized, unlike in Taiwan where laws for maternity rights are spread out in several statutes making it harder for ordinary workers to access the laws and to fully understand them.

In Taiwan, employers are asked to provide benefit payments to workers on maternity leave unlike in the Philippines where workers are covered under the Social Security System. Taiwanese policy puts maternity benefits at the expense of employers. From the employers' viewpoint, it is a loss if they hire pregnant workers.

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This policy deters the employment of more female workers and incurs acts of discrimination against pregnant workers and workers on maternity leave.

Introduction

Generally speaking, Taiwan is a patriarchal society where gender roles are influenced by Confucian ethics (Ma & Smith, 2001). Social values were shaped by family-oriented philosophies that were developed during the pre-modern and agricultural period (Hwang, 1990). In the past, Taiwan's working environment was recognized to be less favorable to women because of its paternalistic nature (Liu, 2002). For many decades after World War II, women were only relegated to household management or played a negligible role in workplaces. The disparity in treatment between men and women workers was easily identified. The less developed laws did not grant adequate protection to the maternity rights of women workers.

Although ethical values remain influential, there are questions as to their adequacy. Gender inequality is one of the most important examples. Rapid industrialization has brought about changes affecting traditional values and overturned women's disadvantaged and marginalized position in relation to men. As demographic factors suggest an aging population, Taiwanese society needs women to reproduce babies. These developments changed society's outlook on women in the light of women's increased labor force participation. In the past two decades, the new ethic of gender equality has been adapted into the social system and several new laws protecting women workers have been enacted.

However, the enforcement of laws to protect pregnant workers or those on maternity leave is still problematic because daily employment practices are unfavorable to the needs of women workers. Working mothers of childbearing age face discrimination arising from many employment practices. Many labor disputes occur from abuse of their maternity rights.

Unlike in Taiwan, however, Catholic Christianity seemed to have provided a favorable cultural climate for gender equality and the legal system in the Philippines have addressed the gender equality problem quite early. Women workers in the Philippines have been protected by the Labor Code since the 70s. Over the past

decades, disputes regarding maternity rights have been rare. There must be some merits in the Labor Code of the Philippines that Taiwan can look into and learn from. By comparing the labor laws of both countries, this paper attempts to find the wisdom governing maternity rights found in the Labor Code of the Philippines.

The maternity rights of women workers in Taiwan and the Philippines involve not only maternity leave and its benefits but also the right to get married and get pregnant, as well as the right not to be illegally dismissed during pregnancy and maternity. Three important aspects of the maternity right protection are compared: the statutory maternity leave and benefit, the validity of the contractual or unilateral stipulations against marriage and pregnancy, and the practices of illegal dismissal against workers in pregnancy or on maternity leave.

As for methodology, the legal approach is adopted to analyze the existing legal literature on maternity laws and regulations in Taiwan and in the Philippines. This paper focuses only on laws and regulations on maternity leaves and benefits and their enforcement because it may be fruitless to seek a complete comparison at this stage (Bamber & Lansburym 1998).[1]

THE STATUTORY MATERNITY LEAVE AND BENEFIT

Health care, job-protected leave and full or partial wage replacement constitute three fundamental components of a maternity policy (Kamerman, Kahn & Kingston, 1983). Both Taiwan and the Philippines grant statutory job-protected maternity leave and regular wage benefits to female workers.

1. Maternity Leave and Benefits Under Taiwanese Laws

1.1 The Grant of Maternity Leave

Article 50 of the Labor Standards Law of 1984 (LSL) guarantees pregnant workers eight weeks of maternity leave for childbirth. In case of miscarriage after the first three months of pregnancy, the woman employee is granted maternity leave for a period of four weeks (par. 2).

Article 15 of the Gender Equality in Employment Law of 2001 (GEEL) further provides that employers shall discontinue female employees from working and grant them a maternity leave prior to and after their childbirth for a combined period of eight weeks.[2]

In case of a miscarriage after being pregnant for more than three months, the female employee shall be granted a maternity leave for four weeks. In case of a miscarriage after being pregnant for more than two months and less than three months, the female employee shall be granted a maternity leave for one week.

During maternity leave, an employee's work obligation is suspended but her employment rights remain. While on maternity leave, women workers have the right to keep their jobs and the rights they acquired under their employment contract. This entitlement is not restricted by length of service and the type of contract.

1.2 The Benefits of Maternity Leave

LSL provides that the employer must continue paying regular wage and benefits during the period of maternity leave. If the woman employee has been in service for more than six months, she shall be paid full regular wages during her maternity leave. If her service is less than six months, she shall be paid half of her regular wage (LSL, par. 2).

As for other benefits granted during the maternity leave, they include annual vacation, pension, and health insurance entitlements. A woman worker is still able to accrue seniority and remain eligible for pay increases and other benefits such as the annual bonus. Taking maternity leave shall not be considered absence from work so that the bonus benefit specifically designed for full-attendance employees shall not be withheld if the employee taking maternity leave is qualified to enjoy the benefit.

1.3 It is Illegal to Deny Maternity Leave and Benefits

Article 26 of the GEEL provides that when employees suffer from the employment practices described in Articles 7 to 11 or Paragraph 2 to Article 21 of the Act, the employers shall be liable for any damage arising from it. Article 29 of the GEEL further provides that employees may claim a reasonable amount of compensation even for such damage that is not a purely pecuniary loss. For instance, if an employee's reputation has been damaged, the ill-treated employee may also file a claim for taking proper measures

for the rehabilitation of her reputation. The employer shall also be liable to pay compensation in the event of illegal pregnancy dismissal if the employee brings the case to the District Court as employment discrimination under the GEEL.

1.4 Criminal Sanction Against Violations of Workers' Right to Maternity Leave and Benefits

Article 78 of LSL states that an employer who violates the stipulations of Articles 13 and 50 that protect employees' maternity rights shall be sentenced to a fine of not more than NT$30,000. Furthermore, if the employer is a legal entity, the punishment shall be extended to the managing directors and staff members. Article 81 further provides that if the representative of a legal entity, the agent of a legal entity, or a person, an employee or any other staff member violated the Act in the rendering of their respective actions, the violator shall be penalized. Therefore, the legal entity itself or the person shall also be subject to such fine or administrative fine as prescribed in the respective articles of the law. Criminal sanctions shall be applied if an employer disregards his employee's rights to maternity leave.

2. Maternity Leave and Benefits in the Philippines

2.1 The Grant of Maternity Leave

Paragraph (a) of Article 133 of the Labor Code states that every employer shall grant to any pregnant woman employee, who rendered an aggregate service of at least six (6) months for the last twelve months, maternity leave of at least two (2) weeks prior to the expected date of delivery and another four (4) weeks after normal delivery or abortion with full pay based on her regular or average weekly wages.

2.2 The Benefits of Maternity Leave

2.2.1 The Qualifications for Maternity Leave benefit

Paragraph (c) of Article 133 states that the maternity leave provided in this Article shall be paid by the employer only for the first four deliveries. However, the employer's obligation required under this paragraph (c) has been superseded by the Social Security Law (SSS) (RA 1161, as amended by RA 7322 [1992] & RA 8282 [1997]). Section 14-A of SSS provides that a woman

member who has paid at least three monthly contributions in the twelve-month period immediately preceding the semester of her childbirth or miscarriage shall be paid a daily maternity benefit equivalent to one hundred percent (100%) of her average daily salary credit for sixty (60) days or seventy-eight (78) days in case of caesarian delivery, subject to the following conditions:

(a) That the employee shall have notified her employer of her pregnancy and the probable date of her childbirth, notice of which shall be transmitted to the SSS in accordance with the rules and regulations it may provide;
(b) That full payment shall be advanced by the employer within thirty (30) days from the filing of the maternity leave application;
(c) That payment of daily maternity benefits shall be a bar to the recovery of sickness benefits provided by this Act for the same period for which daily maternity benefits have been received;
(d) That the maternity benefits provided under this section shall be paid only for the first four (4) deliveries or miscarriages;
(e) That the SSS shall immediately reimburse the employer one hundred percent (100%) of the amount of maternity benefits advanced to the employee by the employer upon receipt of satisfactory proof of such payment and legality thereof; and
(f) That if an employee member shall give birth or suffer miscarriage without the required contributions having been remitted for her by her employer to the SSS, or without the latter having been previously notified by the employer at the time of the pregnancy, the employer shall pay the SSS damages equivalent to the benefits which said employee member would otherwise have been entitled to (Azucena, 2004).

According to Azucena (2004), a female worker may qualify to the entitlement of the benefits, if she is employed at the time of delivery, miscarriage or abortion, and has given the required notification. On the other hand, her employer must have paid at least three (3) months of maternity contributions within the 12-month period immediately before the semester of contingency (DOLE Handbook, n.d.).

2.2.2 Applicable to Both Married and Unmarried Women Workers

For those female workers who qualify for the entitlement, it does not matter whether they are married or not. Every pregnant woman in the private sector is entitled to maternity leave benefits (DOLE Handbook, No. XI).

2.2.3. Maternity Benefits Are Not Wages

Maternity benefits are granted to employees in lieu of wages and may not be included in computing the employee's 13th-month pay for the calendar year (No. XI).

2.3 It is Illegal to Deny Maternity Leave and Benefits

Pursuant to Article 137 of the Labor Code, it shall be illegal for any employer to deny any woman employee the benefits or to discharge her for the purpose of preventing her from enjoying any of the benefits provided under this Code. Pursuant to Sec. 13 of Rule XI, Book III of Implementing Rules and Regulations (Rule XI, book III), it shall be unlawful for any employer:

(a) to discharge any woman employed by him for the purpose of preventing such woman from enjoying the maternity leave, facilities and other benefits provided under the Code;
(b) to discharge any woman or any other employee for having filed a leave or in confinement due to pregnancy;
(c) to discharge or refuse the admission of such woman upon returning to her work for fear that she may again be pregnant;
(d) to discharge any woman or any other employee for having filed a complaint or having testified or being about to testify under the Code; and
(e) to require as a condition for or continuation of employment that a woman employee shall not get married or to stipulate expressly or tacitly that upon getting married a woman employee shall be deemed resigned or separated, or to actually dismiss, discharge, discriminate or otherwise prejudice a woman employee merely by reason of her marriage (Alcantara, 2005).

INVALIDITY OF CONTRACTUAL OR UNILATERAL STIPULATIONS AGAINST MARRIAGE AND PREGNANCY

Under the law in Taiwan and in the Philippines, the statutory maternity leave and benefit entitlement is generous to female employees. Compliance, however, is highly doubtful because employers may evade their obligations through covenants or policies against marriage and pregnancy.

1. The Regulation under Taiwan's Law

Though LSL provided solid protection against illegal dismissal during maternity leave, the protection has to be viewed in the context that most dismissals are governed by the practice of *covenant-not-to-marry* and *covenant-not-to-be-pregnant* before 2001.

1.1 Court's Support of *Covenant-Not-To-Marry* and *Covenant-Not-To-Be- Pregnant*

The practice of adopting *covenant-not-to-marry* and the *covenant-not-to-be- pregnant* clauses should be considered a form of discrimination against women workers. However, Taiwanese courts failed to stop the practice until Taiwan passed the GEEL.

Employers usually feared the long-term impact of pregnancy and the costs arising from maternity leave. By written restrictive contract of adhesion, restrictive passage or pre-executed resignation letter, as condition for employment, women workers were forced to impose on themselves a covenant to terminate themselves from jobs as soon as they got married or got pregnant. Employees were usually requested to sign the conditional terms when they were first hired.[3] The application of *covenant-not-to-marry* and *covenant-not-to-be-pregnant* was widely practiced in the industries hiring women workers.

For a long while, the voice from academia and human right groups denounced the enforceability of the clauses for being against public policy, and being contrary to the mandatory clause or good faith clause of the Civil Code (Kwo, 1999).[4] The Council of Labor Affairs (CLA) openly articulated that *covenant-not-to-be-pregnant* was void and unenforceable for its violation of public policy.[5] CLA explains that if a dispute arises from *covenant-not-to-be-pregnant*, sexual discrimination could be invoked and could place sexual discrimination sanction on the employer for an amount

not less than NT$3,000 and not more than NT$30,000 under Article 62 of the Employment Service Law (ESL) (Chino, 2002).[6]

However, for the Courts, *covenant-not-to-be-pregnant* may be effective and enforceable. The covenant is not necessarily unenforceable and in litigation the covenant might not be declared void in the light of employment as a whole and taking circumstantial facts into consideration.

1.2 The Invalidity of *Covenant-Not-To-Marry* and *Covenant-Not-To-Be- Pregnant*

Legislative Yuan, the legislative body of Taiwan, eventually passed the GEEL and ended the disagreement. Paragraph 2 of Article 11 states that work rules, employment contracts and collective bargaining agreements shall not stipulate or arrange in advance that if an employee gets married, becomes pregnant, gives birth or is into childraising activities, she has to quit her job or take a leave without her regular wage being paid. Any employer's prescription or arrangement that violates paragraph 1 and 2 of Article 11 shall be deemed null and void. Therefore, any type of *covenant-not-to-marry* or *covenant-not-to be-pregnant* shall be void and unenforceable under the GEEL.

1.3 Decided Cases

1.3.1 *Taiwan High Court Judgment Lau Shaung Yi No. 1*[7]

The court ruled *covenant-not-to-be-pregnant* was valid and did not violate article 5 of ESL. The termination was based on the *covenant-not-to-be-pregnant* entered on Aug. 21, 1987 when the plaintiff was employed. Since the defendant's business was in international trade that was not considered as a business falling within the applicable categories under LSL, restrictions on termination was deemed as inapplicable. Based on the valid covenant, the employer's notice of termination was served on May 25, 1996; a date prior to the expansion of LSL coverage under the LSL's Amendment on December 27, 1996. The termination was not restricted by LSL's regulation of the amendment in 1996. The court held that there was no public policy and mandatory regulatory law violated by the covenant. The court ruled that the termination was legal.

1.3.2 *Lin Mei-Na v. Yu-Chen Inc.*

In this case, the plaintiff, Lin Mei-Na, claimed payment for severance pay against Yu-Chen Incorporation seeking summary judgment with the Taipei District Court.[8] The plaintiff had been working with the defendant as accounting staff since August 4, 1998. The plaintiff claimed that she was fired without prior notice, while she was pregnant for seven months, for her alleged incompetence because she was not able to use the computer to process the accounting data and refused to undergo computer training. According to Article 11 of LSL, the defendant had to pay the severance pay if an employee was discharged due to incompetence. However, the defendant argued that he did not fire her and that actually it was the plaintiff who quit her job. The court found that the plaintiff was going to take her maternity leave and related benefits. Furthermore, there were questions as to why she would quit her job and why her responsibilities were not passed on to other employees if she did quit her job. The Court granted the plaintiff severance pay. The defendant appealed in the the same court but was not successful.

1.3.3 *Chang Tse-Hsuang v. Asian Annie International Inc.*

The plaintiff Chang Tse-Hsuang had been working for the defendant since December 4, 2001. When she was five months pregnent February 23, 2003, she asked her employer how she could enjoy her maternity leave on. She was told that she would get her non-pay leave after seven months of pregnancy. After she consulted the Labor Office about her maternity benefits and the illegality of the employer's maternity policy, she claimed her right. However, the defendant requested her to fill a standardized application form of non-pay leave. She refused. After five days, the defendant fired her on grounds of poor performance on February 28, 2003.

This case had gone through the informal conciliation of the Labor Office of Taipei Municipal Government but failed to come to a settlement agreement. The plaintiff instituted the civil action on June 2004 claiming back pay or retroactive pay amounting to NT $707,000 dollars covering the dismissal period between March 1, 2003 and June 30, 2004. The Court ruled to grant the plaintiff the full amount of NT $707,000 dollars.

1.3.4 *Wu Bi-Fin v. Tsuo-Li Electronics Inc.*

The plaintiff was hired on September 23, 1996 and agreed to be on a probationary period for three months. During the probationary period, she reported her pregnancy. On December 21, 1996 the defendant dismissed the plaintiff on account of her incompetence on the job and did not grant her severance pay. The plaintiff filed her case and the labor authority decided that the defendant's act was sexual discrimination. The plaintiff instituted civil action for reinstatement and recovery of damage with the Shih-Lin District Court which ruled that the dismissal was illegal and that the defendant violated Article 5 of ESL. The defendant's act constituted an act of Employment Discrimination and the District Court rendered the damage to the plaintiff.[9] The Defendant appealed the judgment to Taiwan's High Court. Taiwan's High Court reversed the judgment of the District Court and ru ed that the dismissal was fair.[10] No damage should be paid to the blaintiff on grounds that the clause of probationary period was a pre-arranged restrictive clause for conditional termination. The High Court decided that the pre-arranged clause did not violate the Civil Code provisions of public policy, good faith and statutory prohibition and, thus, valid and enforceable.

1.3.5 *Hsieh Yeu-Hsin v. Hwa-Hsin Medical Material Inc.*

The plaintiff had been working for the defendant since December 1, 1999 and was fired on Dec 22, 2000 for incompetence, three weeks before she was to deliver her baby. She instituted an action for back wages from the day of the illegal dismissal to the day the action was filed with the Taipei District Court. The Taipei District Court ruled that the dismissal was illegal and granted the back pay.[11] The defendant appealed the case and the Taiwan High Court overturned the judgment ruling that the dismissal was fair. The High Court accepted the evidence presented by the defendant.

2. Regulations under Philippine Laws

2.1 Statutes Prohibiting Contractual Stipulations against Marriage

In the Philippines, Article 136 of the Labor Code prohibits any stipulation against marriage. Under the Article, it is illegal for an employer to require as a condition of employment or continuation

of employment that a women employee shall not get married; or to stipulate expressly or tacitly that upon getting married a women employee shall be deemed resigned or separated; or to actually dismiss, discharge, discriminate or otherwise prejudice a female employee by mere reason of her marriage.

2.2 The Invalidity of Contractual or Unilateral Stipulations against Pregnancy

There is no statute explicitly stating the invalidity of contractual or unilateral stipulations against pregnancy. However, paragraph (2) of Article 137 states that it shall be unlawful for any employer to discharge such woman on account of her pregnancy, or while on leave, or in confinement due to her pregnancy. Furthermore, Article 135 of the Labor Code prohibits discrimination against women employees as regards to terms and conditions of employment. The policy under this Article reiterates the invalidity of dismissal that article 136 forbids (Azucena, 2004). Therefore, no contractual stipulation against pregnancy shall be valid.

2.2 Decided Cases

2.2.1 *Zialcita, et al. vs. PAL,* Case No. RO4-3-3398-76, Feb. 20, 1977

Complainant Zialcita, an international flight stewardess, was discharged from service on September 9, 1975 on account of her marriage. The only issue to be resolved in this case was whether the termination of the services of the complainant on account of marriage is legal. In terminating the employment, respondent Philippine Air Lines invoked its policy or regulation as follows:

> D. Flight Attendants. Flight attendant applicants must be single. Flight attendants will be automatically separated from employment in the event they subsequently get married.

The ruling was made in favor of Zialcita. The Court cited the incompatibility of the respondent's policy or regulation with the codal provision of the law. The respondent is resolute in its contention that Article 136 of the Labor Code applies only to women employed in ordinary occupations and that the prohibition against marriage of women engaged in extraordinary occupations, like flight attendants, is fair and reasonable considering the peculiarities of their chosen profession.

But the court could not subscribe to the line of reasoning pursued by the respondent. The employer's policy has already been invalidated as early as March 13, 1973 when Presidential Decree No.148, otherwise known as the Women and Child Labor Law, was promulgated.

2.3.2 *Philippine Telegraph and Telephone Company vs. National Labor Relations Commission and G. de Guzman*, G.R. No. 118978, May 23, 1997

The court decided that PT&T's policy of not accepting or considering as disqualified from work any female worker who contracts marriage, runs contrary to the test of, and the right against, discrimination against women workers guaranteed by labor laws and by the Constitution.

The court found that contrary to petitioner's assertion that it dismissed private respondent from employment due to dishonesty, the record disclosed clearly that her ties with the company were dissolved because of the company's policy barring married women from employment in PT&T. The petitioner's policy is not only in derogation of the provisions of Article 136 on the right of a woman to be free from any kind of stipulation against marriage in connection with her employment, but it also assaults good morals and public policy. It is true that parties to a contract may establish agreements, terms, and condition that they may deem convenient. But, similarly, they should not be contrary to law, morals, good customs, or public order, or public policy.

2.3.3 *Olympia Gualberto, et al. vs. Marinduque Mining Industrial Corporation*, CA-G.R. No. 52753-R, June 28, 1978

While still single, the plaintiff was employed in 1971 by defendant as company dentist in its Surigao Nickel Project. In March 1972, she married Roberto Gualberto, an electrical engineer in the same project. In the same month, the defendant informed her that she was considered resigned effective April 15, 1972, invoking a policy of the firm to consider female employees as separated the moment they get married due to lack of facilities for married women. The defendant further claimed that the plaintiff was employed in the project with an oral understanding that her services would be terminated when she gets married. The Court said that the efforts of the defendant to distinguish between a verbal pre-employment agreement between the project engineer and the plaintiff on the one hand, and company policy on the other, do not impress the

Court at all. The instrument is void whether it is a pre-employment agreement or company policy.

CITING PREGNANCY OR MATERNITY LEAVE AS LEGAL CAUSE TO DISMISS WORKERS

Both Taiwan and the Philippines grant protection from being illegally dismissed. The employer's power of termination is limited within the just and authorized causes. Actually, statutory maternity leave imposes heavy direct and indirect costs on employers hiring pregnant workers.[12] They may be trying to evade the costs so they end up in legal disputes. Using disguised legal causes to dismiss workers in pregnancy or on maternity leave is common in Taiwan.

1. DISPUTES IN TAIWAN

In Taiwan, LSL strictly outlines that any employer's action of termination shall only be conducted with authorized and just causes listed in Article 11 and 12 of LSL.

1.1 Subject to Just Cause Dismissal under Article 12 of LSL

Under Article 12 of LSL, any employee's default or her other misconduct within the six causes listed in the Article 12 may cause an employer to terminate her. If an employee is terminated under this Article, the employer is not required to give prior notice and no compensatory pay is needed. A pregnant worker or an employee on maternity leave can be terminated under this Article for her own fault or misconduct.

1.2 Authorized Cause Dismissal under Article 11 of LSL and the Exclusion of Workers on Maternity Leave

Under Article 11 of LSL, an employer can fairly terminate an employee for five causes: the cessation or transfer/handover of the employer's business, an operating loss or contraction, suspension for more than one month, redundancy, and employee incompetence.[13]

If the cause for the dismissal is that the pregnant worker is redundant simply because of her pregnancy, the dismissal shall be considered as illegal dismissal. An employer can lawfully dismiss

a pregnant employee if there is a situation of redundancy. However, decisions of the Courts suggest that there must be a situation in which it is impossible for the employer to maintain the employment contract for the employer to justify the dismissal of an employee on the ground of redundancy. If the employer singles out the employee's pregnancy-related condition and apply extraordinary standards of procedure to determine the employee's ability to work, the dismissal shall be considered illegal. If the labor authority or court finds that the employer's action is based on a mixture of both reasonable and illegal causes, the employer's defense will be denied and the mixed motive dismissal may be considered an illegal dismissal, thus favoring the complainant.

Workers on maternity leave enjoy immunity from being terminated. Pursuant to Article 13 of LSL, an employer shall not terminate a worker who is on maternity leave.[14] If an employee's maternity leave is ended by dismissal and the cause of the dismissal is merely that she has given birth or has something to do with her maternity, then she is illegally dismissed.

Because of the stipulations, as early as 1984 any termination or summary dismissal of an employee on maternity leave can be declared invalid. If the employers refuse to accept the invalidation, they will be liable to pay damages. Presumably, the employment contract continues to be effective during the period in dispute and the employee cannot be subjected to illegal dismissal. Back pay shall be claimed for the period in dispute. The employee shall have a claim under the LSL for illegal dismissal.

In addition to the LSL, terminating a worker who is pregnant or on maternity leave shall be considered as a void action on grounds of discrimination under a favorable interpretation of the ESL (Chen, 2003). However, prior to the GEEL the employee is still required to provide a relevant circumstantial evidence under the LSL.

Under the GEEL, an employer cannot fire an employee because she is pregnant or force the employee to end the mandatory maternity leave. Paragraph 1 of Article 11 of the GEEL states that in case of dismissal, employers shall not treat the employees unfairly on account of their gender. A female worker is protected from illegal dismissal throughout her pregnancy and maternity leave. Prior to the maternity leave, a pregnant worker is protected from dismissal due to her pregnancy. Illegal dismissal will be changed if the labor authority finds that the cause for dismissal is based on the employee's pregnancy.

1.3 Shift the Burden of Proof in Favor of Female Workers

Before the enactment of the GEEL, it was necessary for the complainant to show that the mistreatment was caused by her pregnancy or expected maternity. Under the GEEL, it is necessary for the employer to prove that the dismissal is fair and based on an assumption of wrongdoing, not on account of the employee's pregnancy. Article 31 of the law provides that after an employee makes a prima facie statement of the discriminatory treatment, the employer shall prove that the discriminatory treatment has nothing to do with the question of gender. Since the burden of proof has shifted to the employer, he must show that the employee's pregnancy or absence due to maternity plays no part whatsoever in the employer's treatment of the woman employee, otherwise the employer will be held liable for discrimination. Employees are protected in the exercise of their right to start a complaint with a statement listing some facts in question.

In the past, there were cases when employees were discharged verbally and had no recourse but rely solely on oral statements. They may fail to obtain proof of being discharged and, thus, forced to leave. When the dispute is brought up to the labor authority, the employer can deny the action of dismissal and insist that the worker resigned voluntarily. Employees find it difficult to produce concrete proofs of discharge issued by the employer to prove the illegal dismissal before the Labor authority and the Court. Formerly, the burden of proof was on the employee. But under the GEEL, it has now shifted to the employer.

1.4 Decided Cases

1.4.1 *Chang Yu-Chi v. NABS Asian Pacific Inc. (Taipei Branch Office)*[15]

The plaintiff had been working for the defendant since July 1998. She took a sick leave because of her pregnancy on July 12, 1999. She was fired on July 19, 1999 for incompetence on the job. She filed her complaint to the labor authority for illegal dismissal. The Committee decided that the defendant committed an act of illegal dismissal and sexual discrimination (27th Committee meeting). The labor authority's decision was affirmed when the defendant filed an administrative appeal against the decision (CLA Tai, 2001). The Taipei Administrative High Court also supported the decision when the defendant instituted the administrative litigation to overturn the decision (Taipei Admin. High Court Judgement).

With administrative assistance from the Committee, the plaintiff sued the defendant at the Taipei District Court to demand back wage from August 1, 1999 to March 31, 2000. The Court ruled that the defendant's illegal dismissal was an act of sexual discrimination and was in violation of Article 5 of the ESL. The Court reasoned that a tort was committed referring to Article 184 of the Civil Code, stating that an act which violates a law protecting people was an act of tort. The back pay was awarded to the employee.

2. No Illegal Dismissal Disputes Registered with the NLRC and Courts in the Philippines

Article 282 of the Labor Code stipulates the just causes for legally terminating workers and Articles 283 and 284 regulate the authorized causes for legal termination with separation pay. Article 135 prohibits discrimination against women employees as to the terms and conditions of employment. This policy reiterates the invalidity of dismissal that Art. 136 forbid. According to Atty. Nicolas Barriatos, arbiter at the National Labor Relations Commission, there have not been any cases of illegal dismissals disguised as legal causes against women workers who are pregnant or on maternity leave registered with NLRC or litigation courts.[16]

Conclusion

Discrimination against workers who are pregnant or on maternity leave did occur in Taiwan and the Philippines. But the situation is worse in Taiwan. This type of discrimination is practiced only against women workers (Colker, 1997). However, combining paid work with motherhood and accommodating the childbearing needs of working women are an ever increasing imperative in Taiwan in the light of its aging population. Taiwan has to look for a better model to control conflicts between women workers and their employers in order to provide a better environment for employment relations.

1. Both Countries Prohibit Maltreatment of Workers in Pregnancy or on Maternity Leave

The laws of both countries require employers to grant maternity leave. Acts of illegal dismissal due to maternity or pregnancy are

considered discriminatory against women employees both in Taiwan and in the Philippines.

Taiwan's ESL and GEEL prohibit employers from treating an employee less favorably on account of her pregnancy or other pregnancy-related reasons. Such acts constitute sexual discrimination (Chen, 2003). In the Philippines, the Labor Code guarantees the rights of workers who are pregnant and on maternity leave. The State protects working women by providing for job-protected leave and wage replacements that would enable them to reach their full potentials. Corrective labor and social laws on gender inequality have been implemented.

2. The Benefits of a Consolidated Labor Code in the Philippines

Unlike the Labor Code of the Philippines, Taiwan's laws for maternity rights are disorganized and scattered in several statutes. Thus, it is hard for ordinary workers to access the laws and to understand them fully. In the Philippines, the consolidated Labor Code allows the unions and the rank and file to understand their rights easily.

3. Proposal to Reform Taiwan's Maternity Leave Benefit following the Model in the Philippines.

Learning from the lessons in the disputes mentioned previously, Taiwan's pregnant workers may have been perceived as a financial burden or equated with inefficient labor force by employers who are indifferent to their special needs. It is sad to learn that major discrimination disputes arise from employers' evasion of the obligation to grant maternity leave and regular pay benefits. By contrast, we do not find such problems in the Philippines where employers follow the rules in granting maternity leaves and the State takes responsibility to guarantee the maternity leave benefit. Taiwan's policy of granting an eight-week regular pay maternity leave benefit to pregnant workers must be reviewed. The policy puts regular pay benefits at the expense of employers who are employing female workers of childbearing age. From the employers' viewpoint, therefore, it is a loss if they hire pregnant workers. This policy deters the employment of more female workers and results in many acts of discrimination against pregnant workers and workers on maternity leave. It is easy to understand the reason why illegal dismissals occur when one looks at the cost

the employer must bear. Taiwan needs to have a new policy to protect against illegal dismissal during pregnancy and maternity leave. If we want to reduce the disputes relating to discriminatory acts, the costs associated with pregnancy and maternity leave benefits have to be moved away from the employers accepting female workers. A state program that covers the payment of maternity leave benefits to replace the employer's payment obligation is needed.

Taiwan may follow the Philippine model that uses the Social Security System to cover maternity benefits. The Social Security System of the Philippines provides maternity benefits for workers. Maternity benefits currently constitute an important service of the Social Security System. My proposal is to incorporate the maternity leave benefit into Taiwan's Employment Insurance Program. Through the Employment Insurance Program, all employers and employees must be required to pay contributions regardless of whether or not an employer admits female workers of childbearing age. Uniform contributions based on payroll may ease the burden to companies employing female workers.

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Notes

[1] It seems to me that they do not advocate full-grown theories in international and comparative industrial relations at this stage.

[2] GEEL has a greater coverage than LSL. It covers the workers in the public sector and educational industry.

[3] The restrictive arrangements were not only applied to restrict the pregnancy but also to restrict the marriage. Covenant-not-to-marry was rather a widely unfavorable arrangement practiced in the local banking industry. The covenant is commonly referred to as the "single clause" in Taiwan.

[4] Several studies were conducted by the Judicial Yuan and legal practitioners as to the legality of the covenant.

[5] CLA Implementation Letter Tai Ne Lau, No.43187 dated Aug. 15, 1986.

[6] Article 62 has been amended by Article 65.

[7] Taiwan High Court Judgment in Lau Shaung Yi, No. 1, dated July 13, 1998.

[8] For the trial of first instance decided by the Taipei District Court please see the summary judgment file, Gen Yi Tin (93) Bei Lau Gen, No.25, dated April 1, 2004. For the trial of appeal of second instance decided by the Taipei District Court, please see the appeal file, Lau Gen Shang (93), No.25.

[9] Shih-Lin District Court Civil Judgment, Lau Su, No.18, dated Feb. 21, 2001.

[10] Taiwan High Court Civil Judgment, Lau Shuang, No. 17, dated Nov. 6, 2001.

[11] Taipei District Court Civil Judgment (91) Lau Su, No. 66, dated March 13, 2003.

[12] For instance, the benefits paid to female workers on maternity leave is the direct cost to employers; while the cost of recruiting and training substitute workers is the indirect cost.

[13] There are other requirements for an authorized dismissal. According to Article 16 of LSL, if an employer would like to terminate an employee fairly under Article 11, the employer is required to serve notice to the employee prior to the date of termination. In addition to the prior notice for a fair dismissal with one of the causes under Article 11, the employer should recompense a severance pay to the dismissed employee in accordance to Article 17 of the LSL.

[14] Article 50 of the LSL guaranteed pregnant workers eight weeks maternity leave for childbirth.

[15] Shih-Lin District Court Civil Judgment (89) Lau Su, No. 9, dated Aug. 16, 2002.

[16] Unable to find any relevant case, the author decided to conduct an interview instead on July 17, 2006.