

KWDI ISSUE PAPER

Research Title: Redressing Systemic Employment Discrimination against Women in Korea

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Determining and addressing structural gender discrimination in employment by using statistical evidence

Abstract

- This research notes that the failed regulation of gender discrimination of a structural nature is one of the reasons behind the inefficacy of the existing system designed to eliminate gender discrimination in the labor market.
- Although various jurisprudence and institutions have been introduced to regulate structural discrimination, which occurs in a collective and repeated manner due to discriminatory policies and/or practices, they have failed to be effectively implemented.
- Statistical gender gaps that appear in hiring, placement, promotion, discharge, and wage are important evidence that enables the estimation of discrimination. If discrimination is presumed, employers should be able to provide legitimate reasons other than gender for the existence of the concerned gap. A claim that they simply followed established rules to make the employment decision should not be a ground for immunity from accountability.
- This research aims to suggest how statistical evidence can be used in determining, remedying, and preventing structural gender discrimination. Beginning in May 2022, the Labor Relations Commissions (LRCs) will be in charge of handling the cases of gender discrimination in employment. This paper will suggest standards that need to be considered in determining gender discrimination, as well as ways to improve relevant systems.

1. Background & Issues

- ▶ “There is no longer discrimination against women” or “It is because women avoid difficult jobs or because there are not many female engineering majors” are some of common responses that South Korean women encounter as to the country’s low ranking in the World Economic Forum’s Gender Gap Index (GGI) or the OECD’s gender wage gap index.
- ▶ Part of the reason behind this misunderstanding is that while general gender discrepancy in the labor market is reported in the media, there is little social discussion or awareness regarding the prevalence and type of discrimination in individual workplaces. Those who work at companies with little or no open discussion on gender discrimination and/or remedial practices often assert that there is no gender discrimination in their workplace.
- ▶ It is a common misperception among South Korean workers, who have few opportunities to discuss and learn about structurally embedded gender discrimination, let alone facial discrimination.
- ▶ Against this backdrop, it has not received much attention that the proportion of women among entry-level employees in large companies continues to be as low as 20-30% and this number is perceived to be a prohibitive cap among female job seekers. Only after discriminatory practices in the banking sector were revealed in 2018 did the public start understanding that the gender gap in the number of entry-level employees could be a result of gender discrimination.
- ▶ The numbers of lawsuits and complaints on job discrimination also indicate that it is not a common practice among individual companies to investigate gender discrimination in employment or to engage in legal procedures.
- ▶ There are only 107 legal cases regarding gender discrimination in employment for the 27 years from 1988, when the ‘Equal Employment Opportunity and Work-Family Balance Assistance Act,’ (‘the Equal Employment Opportunity Act’) was established, to 2014. For the period of one year beginning from 2019, the Anonymous Reporting Centers for Sexual Harassment and Gender Discrimination in the Workplace of the Ministry of Employment and Labor received only 189 complaints on gender discrimination. This number is significantly fewer than the number of complaints on sexual harassment (579 cases). In 2018, the National Human Rights Commission of Korea (NHRCK) received

a total of 46 complaints regarding gender discrimination in employment. This is a significantly smaller number compared to the complaints related to discrimination against disability (76), social status (151), or age (106).

- ▶ In comparison, the Equal Employment Opportunity Commission (EEOC) of the United States receives an annual average of 21,398 complaints regarding gender discrimination in employment. In 2020, the Employment Tribunal of the United Kingdom received 11,955 complaints regarding gender discrimination in wage and 5,779 complaints regarding gender discrimination in employment. Even if the differences in the size of population and economy are considered, the number of complaints on gender discrimination in employment in South Korea is significantly smaller compared to these two countries.
- ▶ The lack of discussions, complaints, and legal cases on gender discrimination in employment at the level of individual companies indicates that existing remedial systems to address gender discrimination in employment have not been working for a long time. This paper will discuss how to use statistical evidence to determine structural discrimination and improve the remedial systems, as well as ways to put the use of statistical evidence into practice.

2. Findings and overseas examples

1) Findings from the cases of gender discrimination in employment

● Characteristics of structural discrimination

- ▶ Except the case of the National Agricultural Cooperative Federation (NACF), which prioritized employee couples for layoff, and the case of the Korea Electrical Contractors Association (KECA), it was difficult to identify what standards were applied to result in negative consequences to women in hiring, promotion, and discharge. In the cases of gender discrimination, Daehan Flour Mills, KEB Hana Bank, Daejeon MBC, and automobile company each made hiring and promotion decisions following their established practices but it was not possible to identify exactly what caused the relevant gender gaps.
- ▶ Rather than the theory of indirect discrimination, the theory of direct discrimination may be more applicable to these cases. Furthermore, it may not necessarily be indirect discrimination just because the standards for discrimination could be specified as in the cases of NACF and KECA. It is possible to apply both the theories of direct and indirect discrimination in a single case and choose remedies that work.

● Structural characteristics of discrimination and lack of awareness of statistical evidence

- ▶ Upon examining discrimination cases and conducting in-depth interviews with the parties involved in these cases, we found that decisions were often made without considering the broad impact on women of the practices that induce discrimination and the context behind the discrimination. The fact that only certain minority groups experience disadvantages can be used as critical evidence in assuming discrimination. However, such statistical evidence was not importantly considered in the deliberation process.

● Need to revise the theory of interpretation

- ▶ The cases examined in this paper show the need for a theory of interpretation that views structural, collective, and cumulative gender discrepancies as gender discrimination in employment. When possible, it is necessary to expand the scope of interpretation to apply direct discrimination instead of limiting it to indirect discrimination.

● Problems in remedial processes

- ▶ Institutional improvement is needed to increase expertise of labor inspectors and/or investigators in charge of gender discrimination cases.
- ▶ The cases of inspection of gender discrimination in employment were limited in that they were focused around criminal procedures.
- ▶ It is necessary to implement remedial orders that can effectively correct discriminatory structures themselves.

2) Overseas jurisprudence on structural discrimination: The United States of America

● Jurisprudence on structural and customary discrimination

- ▶ The US has developed jurisprudence on structural and customary discrimination that allows statistical evidence to be used to prove direct discrimination

● Statistical methodology

- ▶ With proper materials and methods, it is possible to presume discrimination simply with statistical evidence. In a number of cases, US courts ruled in support of the complainant of discrimination if there were disparities between groups that would be statistically unlikely to occur had it not been discrimination even if intent to discriminate could not be proven. Before taking the case to court, moreover, the EEOC often strikes a deal between the parties by using the 80% rule and recommends remedial actions to the employer.

- ▶ It is essential to collect data to prove discrimination with statistical evidence. Information on job applicants should be collected in accordance with labor market segmentation. Without job stratification analyses, it will not be possible to identify the issue of gender segregation - women are concentrated in lower-ranking and/or irregular jobs and men in higher-ranking and regular positions. If a blind hiring process is adopted, a form that enables the identification of applicants by gender, similar to the EEO-1 Voluntary Self-Identification form, should be used.



Remedial procedures

- ▶ The remedial system for systemic discrimination in the US operates based on the EEOC's robust administrative and legal powers for remedy, a basic infrastructure that makes it possible for the EEOC to execute their powers, and the political will of decision makers. The EEOC's 2006 recommendations made by its Systemic Task Force served as a turning point in creating a foundation for a strong remedial system.
- ▶ Information on the status of the labor force of individual companies is a critical tool to identify potential discrimination in order to address structural and customary discrimination, which affects not only the complainant but also the entire group to which the complainant belongs. In the US, employers are required by law to compile and preserve information regarding employment, including hiring, placement, promotion, and wage. Employers that meet certain criteria should annually submit legal documents that show the status of their employees by race, ethnicity, gender, etc. and their distribution across job functions. The availability of such information is a good starting point to identify discrimination that is not apparent in direct evidence.
- ▶ Data on corporate labor force are accumulated in a computerized system and shared among related institutions. The EEOC analyzes the data and releases the status of employment every year, while also publicizing the data so that it can be used by other interested professionals and groups. The commission also shares the data with the Office of Federal Contract Compliance Programs, which is part of the Department of Labor responsible for ensuring that federal contractors comply with the laws and regulations requiring nondiscrimination in employment opportunities, in order to increase the effectiveness of data collection and utilization.
- ▶ Expertise to detect systemic discrimination is critical. Following the recommendations in the Systemic Task Force's 2006 report, the EEOC increased staff in field offices to handle systemic cases and deployed social scientists and labor economics experts to conduct statistical analyses of data on corporate labor force and identify discrimination.
- ▶ Commissioner charges and directed investigations are strategically used to address systemic discrimination. Even where no individual has filed a charge, Commissioners can file charges to pursue possible discrimination based on the data obtained from various sources. Commissioner charges and directed investigations reflect the EEOC's strong commitment to tackling structural and customary discrimination.

3. Policy suggestions

1) Importance of raised awareness of the structural nature of discrimination

- Structural discrimination refers to a form of discrimination resulted from complicated and repeated interactions between organizational systems, policies, and practices, which has broad negative ramifications on certain social groups in companies, industries, and/or regions.
- ▶ Among the cases we examined for this study, the female complainant in the NACF case lost it despite the existence of clear statistical evidence for discrimination. In the cases of Shinhan Bank and KEB Hana Bank, criminal charges were pursued with a focus on direct evidence although the possibility of discrimination was statistically significant.
- ▶ Employers that have few women in core job functions, those that take much longer time for women to be promoted compared to their male counterparts, or those that tend to hire men in regular jobs and women in irregular jobs are generally viewed as having gender-discriminatory culture. However, legal judgements about discriminatory practices have long been far from intuitive judgements. Such a wide discrepancy is because discrimination is often judged based on the employer's discriminatory intent rather than the structural nature of discrimination. It is necessary to see the systemic nature of discrimination when judging discrimination cases and to include collective and repeated gender gaps as evidence of discrimination.
- ▶ Jurisprudence determining disadvantageous treatment based on statistical evidence has been applied to the cases of disadvantageous labor practice.

2) Improving standards to judge discrimination

● Steps to judge discrimination using statistical evidence

- ▶ Direct discrimination may be presumed if gender discrepancy is proven by statistical evidence alongside circumstantial evidence such as the employer's discriminatory decisions and/or remarks (Step 1). If direct discrimination is presumed, the employer should provide legitimate causes other than gender that justify the statistical discrepancy (Step 2). If the employer fails to do so in step 2, discrimination could be determined. Step 2 places a burden on the employer to vindicate its conducts. The complainant may have a chance to provide counterargument to the employer's claim. Given that information accessible by the employee's side is often limited in a job discrimination lawsuit, it should be considered if the employer's claim is reasonable to a degree that could disprove the presumption of discrimination supported by statistical evidence. This also places a probative burden on the employer to show that the statistical discrepancy was caused by legitimate reasons other than gender.

- ▶ As proposed in Section 3 of Chapter 3, 2 standard deviations or p-value 0.05 may be used as a baseline for presuming direct discrimination based on statistical evidence, while physical importance may be based on the odds ratios of 1.2 and 0.8. A simple webpage to help the calculation of statistical significance may be provided and/or the EEOC's 80% rule may be adopted. However, the p-value may be useful as a basis for judging the initiation of investigation but not for determining discrimination. In order for statistical evidence to have a probative value, it is important to underscore that while it may not provide scientific certainty but is sufficient for legal significance.
- ▶ In the cases of hiring discrimination against women, the following population groups can be used for comparison.
 - The general population
 - Those participating in the general labor market
 - Those equipped with minimum qualifications required for the concerned job function
 - Actual or potential job applicants (Using these groups is often more compelling in presenting statistical evidence.)
 - Actual or potential job applicants who have required qualifications

Promoting statistical evidence in guidelines, manuals, and training materials on gender discrimination in employment

- ▶ As important as establishing a standard for the effective use of statistical evidence is promoting it in relevant guidelines, manuals, and training materials for legal professionals, employers, and other relevant organizations, including regulations on how to handle issues regarding equal employment opportunities, guidelines for labor inspectors, and NHRCK guidelines and manuals on the investigation of the allegations of discrimination. The information should not be known just to a limited number of people in an organization in charge of the issue but become common knowledge in regard to gender discrimination in employment.

Mandatory self-diagnosis of employment discrimination and distribution of diagnostic tools for employers

- ▶ The statistical methodology to identify possible job discrimination can be used by employers to diagnose their status of discrimination in employment and wage

3) Remedial procedures

The authority of discrimination investigation agencies to detect discriminatory practices and conduct directed investigations

- ▶ The EEOC reviews the data on employment and wage gaps that it collects and obtains through various sources, including EEO-1 Surveys, to pursue discriminatory practices or patterns even where no individual has filed a charge. In South Korea, however, there is no agency that can perform the role of detecting systemic and collective discrimination based on statistical data other than the National Human Rights Commission of Korea, which has the authority to conduct directed investigations. While gender data on employment and wage is collected thanks to the Affirmative Action (AA) program under the Equal Employment Opportunity Act, the data is not used for identifying potentially discriminatory practices at individual companies.
- ▶ Following the model of the EEOC, it is necessary to empower discrimination investigation agencies to identify possible structural discrimination and to pursue directed investigations or initiate charges.
- ▶ Since LRCs provide remedial procedures based on complaints filed by victimized individuals, it may be difficult to identify potential discrimination. Therefore, institutional efforts are needed in order to promote the use of the remedy notification system defined in the revised Equal Employment Opportunity Act (Article 29-5).
- ▶ In order for the effective identification of potential discrimination, the NHRCK OR LRCs should make it a priority to identify and address structural discrimination and create plans to achieve the goal. Using the EEOC's practice on systemic discrimination as an example, the NHRCK should establish goals regarding the identification, directed investigations, and initiation of discretionary charges of structural discrimination and monitor its outcomes. The Ministry of Employment and Labor is required by law to establish and implement a plan every five years to actualize equal employment and work-family balance (Article 6-2). The plan should include how to tackle gender discrimination by using the remedy notification system and to monitor outcomes.

Strengthening discrimination investigation agencies' access to and ability to analyze related data

- ▶ As indicated in the practice of the EEOC, discrimination investigation agencies should have tools to look into the potentially discriminatory practices of employers. Based on the practices of the US and Canada, it is necessary to introduce a legal basis in the NHRCK Act or the Equal Employment Opportunity Act for relevant agencies to access AA data.
- ▶ In the existing AA program, which requires employment status to be classified into three rankings and two job types, the classification of job type should be revised.
- ▶ It is also necessary to improve employer requirements regarding the compilation and preservation of information on new hiring. As suggested in Section 1 of Chapter 3, employers should be required to keep a record of the gender status of job applicants and to submit it when requested by investigators of hiring discrimination cases. This requirement may need to be first applied to large government contractors.

- ▶ There may be a concern that collecting information about the gender of job applicants is in conflict with the growing trend of blinding hiring. In the case of the US, the job application form enables applicants to mark their gender and race so that the gender information of applicants can be collected even in the blinding hiring process. Among the public organizations that we examined for this study regarding gender hiring gaps, there was an organization that had a statistically significant gender gap in the number of new hires to a degree that indicated discrimination; and this gap has continued since 2018 when the blinding hiring process was introduced in the organization. This suggests a need for monitoring for potential gender discrimination in the interviewing process.



Remedial actions to correct the discriminatory structure itself

- ▶ In order to improve systemic discrimination in the long run, the Canadian Human Rights Tribunal actively uses its power to order special measures. For example, the Tribunal ordered a special measure for CN to hire women until its female employment rate reaches 13%. The US Federal Supreme Court states that courts should make decisions to undo not only the effects of past discrimination but also possible effects in the future, highlighting the importance of injunctive relief in employment discrimination lawsuits. Courts can order the prohibition of biased testing in the hiring process, manager retraining, introduction of a system of announcing promotional opportunities and receiving applications. When it is proven that discrimination took place in the past, employers can be ordered to establish goals and a timeline to increase the hiring rate of a specific gender or race. This is called affirmative relief.
- ▶ In South Korea, courts can rule affirmative relief orders of this kind only based on the Act on the Prohibition of Discrimination against Persons with Disabilities (“the Disability Act”) but not in regard to gender discrimination cases. The revised Equal Employment Opportunity Act stipulates that LRCs’ gender-based discriminatory practice correction order may include the suspension of discriminatory treatment, improvement of working conditions including wage (this also includes systemic improvements such as regulations on hiring and collective actions), and/or appropriate compensation. Given the structural nature of employment discrimination and the fact that the phrase “the suspension of discriminatory treatment, improvement of working conditions including wage” is interpreted in the Disability Act as a basis for an affirmative relief order, there is a great need for remedial actions aimed to transform discriminatory structures themselves. In this regard, LRCs may need to adopt a more proactive theory of interpretation.
- ▶ Although remedial recommendations issued by the NHRCK are not binding, they have been relatively well received and implemented. However, it is rare for the NHRCK to recommend employers to establish specific goals and/or timelines to improve their systems. Hence, it is necessary to create a legal basis for affirmative relief orders (in civil lawsuits) in consideration of the systemic nature of gender discrimination in employment. The NHRCK and LRCs, both of which have legal bases for such actions, should adopt the theory of interpretation that allows more proactive remedial orders. Rather than abstractly requesting employers “to improve the system to prevent discrimination,” they should be able to demand employers to establish and implement concrete action plans to prevent structural discrimination.

<Summary> Policy suggestions

Policy suggestions	Implementation	Timeline		
		Short-term	Mid-term	Long-term
1. Improve standards for determining gender discrimination				
<ul style="list-style-type: none">- Establish the theory of interpretation regarding the concept of direct discrimination- Establish standards for determining discrimination using statistical evidence	<ul style="list-style-type: none">- Policy projects- Reflect the information in implementation orders and regulations	○		
2. Improve guidelines, manuals, and training materials regarding gender discrimination				
<ul style="list-style-type: none">- Introduce guidelines for labor inspectors and LRCs on the investigation of the cases of gender discrimination in employment (judgement criteria and handling procedures); and revise the administrative regulations of the Ministry of Employment and Labor- Revise the NHRCK manual on the investigation of employment discrimination cases- Include relevant information in training and promotional materials for employers- Promote and distribute a self-identification form that allows the indication of the applicant's gender and can be used in blind hiring	<ul style="list-style-type: none">- Policy projects- Revise guidelines, etc.	○		
3. Require employers by law to conduct self-diagnoses using statistical methods and distribute appropriate tools				
<ul style="list-style-type: none">- Provide an online tool that adopts the 80% rule and uses 2 standard deviations or p-value 0.05 as a basis for determination	<ul style="list-style-type: none">- Policy projects	○	○	
4. Strengthen the capacities of discrimination investigation agencies to identify discrimination and conduct directed investigations				
<ul style="list-style-type: none">- Give discrimination investigation agencies the authority to investigate discrimination and conduct directed investigations based on the status data of gender gaps in employment and wage	<ul style="list-style-type: none">-Revise laws and implementation regulations- Policy projects		○	○
<ul style="list-style-type: none">- Create ways to facilitate the use of the remedy notification system of the LRCs and of the directed investigations of the NHRCK- Include, in the discrimination investigation agencies' annual plans, activities to identify and investigate structural discrimination		○		
5. Strengthen the abilities of discrimination investigation agencies to access and analyze relevant data				
<ul style="list-style-type: none">- Enable the LRCs and NHRCK to access and analyze affirmative action data for the purpose of investigation of discrimination charges- Require employers to compile, retain, and publish the numbers of job applicants and new hires by gender- Monitor public organizations with patterns of structural gender discrimination in employment	<ul style="list-style-type: none">- -Revise laws- Policy projects		○	○
		○		

6. Enable affirmative relief orders

<ul style="list-style-type: none"> - Establish the theory of interpretation regarding affirmative relief orders by the NHRCK and LRCs - Include information on affirmative relief orders, including the type and standard for judgement, in related guidelines and manuals 	<ul style="list-style-type: none"> - Policy projects 	○		
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7. Use LRCs' authority to extend the effectiveness of order

<ul style="list-style-type: none"> - Establish detailed standards for the execution of LRCs' authority to extend the effectiveness of gender discrimination correction orders - Include information on affirmative relief orders, including the type and standard for judgement, in related guidelines and manuals 	<ul style="list-style-type: none"> -Revise guidelines, etc 	○		
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Hosting organizations: Women's Employment Policy Division of the Ministry of Employment and Labor; and Gender Discrimination Remedy Team of the National Human Rights Commission of Korea

Related organizations: Director for Gender Equality Policy of the Ministry of Employment and Labor; and Discrimination Redress Committee of the National Labor Relations Commission