

## China: Landmark Ruling on HIV Employment Discrimination

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A court in China finds that it is unlawful for an employer to banish an employee from the workplace due to his or her status as an infectious disease carrier.

On June 19, the Guangzhou Intermediate People's Court issued a landmark ruling in holding that it is illegal for an employer to require an employee to leave his post in the office to stay at home for "rest" based on the individual's HIV-positive status.<sup>[1]</sup> This is the first ruling in the People's Republic of China (PRC) where the court has deemed that an employer's banishment of an employee from the workplace because of his or her status as an infectious disease carrier is unlawful.

Infectious disease carriers in the PRC have experienced considerable recruitment and retention discrimination based on this medical status. The main targets of this discrimination have been carriers of Hepatitis B, who are estimated by some sources to compose approximately 10% of the country's population. To combat this form of discrimination, among other national and local regulations, government agencies such as the Ministry of Human Resources and Social Security, Ministry of Education, and Ministry of Health in 2010 prohibited the inquiry and testing by employers into whether a candidate is a Hepatitis B carrier.<sup>[2]</sup> Notably, the local and national regulations generally do not expressly extend to HIV-positive status, but that status is covered under the umbrella category of "infectious disease carriers." Accordingly, the recent case carries significance because the plaintiff is HIV-positive, and therefore the court's ruling can be seen as endorsing a broader and more open extension of the protection of law against employment discrimination to include HIV-positive individuals.

### Current PRC Anti-discrimination Laws

China's anti-discrimination laws are not unified in one code. Rather, they are scattered throughout the Labor Law,<sup>[3]</sup> Employment Promotion Law,<sup>[4]</sup> and—with respect to infectious diseases in particular—the Law on Prevention and Treatment of Infectious Diseases<sup>[5]</sup> and Law on the Protection of Persons with Disabilities.<sup>[6]</sup> To supplement the national laws, a number of provinces and municipalities have implemented their own regulations providing protections against discrimination based on infectious disease carrier status. Despite these protections, many people in China who test positive for HIV are barred from advancing in the workplace or face discrimination in recruitment—in both the public and private sectors.

### Case Overview

The plaintiff, who goes by the pseudonym Ah Ming, joined Guangzhou's Food Inspection Institution (FII) in September 2012. He signed four one-year fixed-term employment contracts with FII, and the last contract expired in August 2016. In 2015, Ming was eligible to take an exam and apply for a public institution position within the company. As a part of the application process, Ming underwent a physical examination that revealed his HIV-positive status.

Upon learning of his HIV-positive status, FII asked Ming to remain on an indefinite paid leave (exclusive of overtime pay). In April 2016, Ming petitioned for arbitration. He argued that despite receiving full pay during this period of mandatory leave, it was not lawful for FII to demand that he stay home and not report to the office for

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work. The arbitration commission rejected his claim for the right to return to work, and he remained on paid leave.

After this ruling, Ming filed a case in the People's Court asking for an open-ended employment contract (given that his last employment contract had expired during the course of the trial) and the right to return to work. In a ruling dated June 19, 2016, the People's Court rejected his claims.

Ming subsequently appealed the decision to the Guangzhou Intermediate People's Court. On June 19, 2017—exactly one year after the lower court issued its judgment—the appellate court overruled the lower court's decision and awarded Ming the right to return to work.

## Legal Reasoning

The Guangzhou Intermediate People's Court provided three reasons for overruling the lower court's decision:

1. FII did not provide sufficient evidence showing that Ming consented to going on paid leave.
2. By requiring Ming to take paid leave, FII unilaterally changed the terms of Ming's employment contract, constituting a violation of PRC law.
3. Under PRC law, there is no basis to prohibit HIV-positive employees from working.

Despite the fact that Ming had received a salary throughout the period of his employer-mandated leave, the appellate court maintained that continuous payment is not sufficient to prove that the original terms of the employment contract were upheld. The court held that in changing the location of Ming's work by requiring him to stay home, the company altered the terms of the employment contract without the employee's consent, thus violating the Employment Contract Law.<sup>[7]</sup> Moreover (and importantly), Ming's claims never focused on financial compensation—rather, they focused on the right to return to the workplace.

## Implications

There have been other legal rulings regarding discrimination based on HIV status—a socially and politically sensitive topic in the PRC—but most of those cases have resulted in financial compensation for the plaintiff. In 2016, a teacher in Guizhou province was awarded ¥9,800 (\$1,440) when his school, upon learning that he was HIV positive, abruptly terminated his contract.<sup>[8]</sup> In addition, in 2014, an HIV-positive teacher in Jiangxi province was awarded compensation in the amount of ¥45,000 (\$6,620) for being denied a job due to his HIV status.<sup>[9]</sup>

This recent ruling marks the first time that a high-level court has ruled against a state-run institution for employment discrimination based on HIV status. While many provincial-level regulations and social stigmas still may hinder the employment rights of HIV-positive citizens, the case creates important precedent for future anti-discrimination cases. However, it should be noted that while this is a landmark case in promoting anti-discrimination, the ruling in Ming's favor largely was due to procedural errors in his employment contract. In that sense, it is as much a lesson in employment contract law as it is in anti-discrimination law.

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[1] "[Guangdong's First HIV Employment Discrimination Case in the Court of Final Appeal](#)" (Chinese language only and official report from the People's Court) (June 21, 2017) (last visited June 26, 2017); "[HIV carrier in Guangdong sues State-run employer for job discrimination](#)," *People's Daily Online* (June 12, 2017) (last visited June 27, 2017).

[2] Notice on Further Regulating School Admission and Employment Physical Examination Items to Maintain Employment Rights of Hepatitis B Carriers, issued by Ministry of Human Resources and Social Security, Ministry of Education, Ministry of Health, Feb. 10, 2010.

[3] Labor Law of the People's Republic of China, effective Jan. 1, 1995, arts. 12-14.

[4] Employment Promotion Law of the People's Republic of China, effective Jan. 1, 2008, art. 3.

[5] Law on Prevention and Treatment of Infectious Diseases of the People's Republic of China, effective Dec. 1, 2004, art. 16.

[6] Law on the Protection of Persons with Disabilities of the People's Republic of China, effective July 1, 2008, art. 30.

[7] Employment Contract Law of the People's Republic of China, effective Jan. 1, 2008 and as amended, art. 15.

[8] "Chinese Teacher with HIV Wins Compensation in Landmark Labour Law Case," *South China Morning Post*, May 12, 2016.

[9] “Jiangxi's first HIV employment discrimination plaintiff successfully awarded 45,000 Yuan” (Chinese language only), *China National Radio*, Jan. 29, 2013.

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