

**Understanding and Challenging
Employment Discrimination against
People Living with HBV in China**

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Yirenping Centre, Beijing

About Yirenping

The Beijing Yirenping Centre was established in December 2006 with the aim of promoting and defending the rights of people living with the hepatitis B virus (HBV) and campaigning for the end of employment discrimination against them. The Chinese characters Yi (益), Ren (仁) and Ping (平) mean respectively, benefit, benevolence and equality.

Yirenping has so far published three annual reports -- *Citizen Health and Right to Education* (2007, 2008, and 2009), a *Survey on the Living Conditions of the Hepatitis B Community in China* (March 2008), a *Report on Citizen Health and Right to Employment* (June 2008), a *Survey of Hepatitis B Discrimination in Higher Education in China* (October 2008), and the *2008 Survey on Hepatitis B Discrimination among Foreign Enterprises* (February 2009).

In 2007, it published a handbook for workers, with a step-by-step guide to protecting their rights during recruitment and employment, as well as the legal options available to them if they are dismissed or forced to retire on the grounds of their HBV status. The handbook describes how discrimination victims can gather evidence and present their case. It contains templates of complaint letters, telephone scripts to encourage employers to admit on tape that the reason for refusing employment was their HBV status, and formulae for calculating compensation.

In addition to offering advice, Yirenping is engaged in helping victims of HBV discrimination bring lawsuits against companies and public institutions. It can, in fact, be seen as one of the pioneers of public interest litigation in China.

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Introduction

Within a few months of graduation, Ms Wang had found what she thought was her dream job. She had passed two rounds of interviews and met the boss. “He talked with me for a while and appointed me as an assistant to the manager... I was very happy and was waiting to start work; we had already talked about benefits and everything,” she said. There was just one condition: like everyone else, before taking up her position at the company she had to pass a medical test.

When the results of Ms Wang’s blood test came in she was told she was HBV-positive and as a result had lost her job. “I was just stunned,” she said. “I was really depressed... I had no idea this kind of thing would happen to me. I told my friends all sorts of fibs as to why I did not get the job but in reality it was because of HBV discrimination.”

Ms Wang is one of an estimated 130 million people in China living with HBV, the virus that causes the liver disease hepatitis B. The virus can only be spread through the exchange of bodily fluids such as blood and semen. In most cases it is not infectious or is only mildly infectious. Yet the vast majority of people living with the virus in China keep their condition secret because of the prejudice against them in society and the discrimination they face in the job market.

This new research report shows first hand what it is like to suffer such blatant discrimination and have jobs one is eminently qualified for snatched away at the last minute just because most employers are fearful of a virus and a disease they, and the vast majority of people in China, do not understand. It reveals how many people with HBV are forced to accept lower paid jobs or employ subterfuge and sleight of hand to get a decent job. It also looks at the limited legal options victims have when they are refused employment because of their HBV status.

The report traces the widespread fear and misunderstanding of HBV back to a severe outbreak of hepatitis A in the late 1980s. This outbreak, combined with misleading advertising and discriminatory hiring practices in the civil service against anyone with hepatitis, led to people believing that those with HBV were unhealthy and dangerous to be in close contact with. Such views are still widely held today. This is the primary reason people with HBV are shunned and barred from jobs in companies where employees eat together and sleep in shared dormitories.

The government has taken some steps to penalise and eradicate employment discrimination based on HBV but all too often employers are unaware of or simply choose to ignore legislation and regulations protecting the rights of people with HBV.

Some victims of discrimination have started to fight back, however, initiating anti-discrimination lawsuits against companies, and many have been successful. This report examines 13 such cases, all handled by Yirenping, which showed that since the introduction of the *Employment Promotion Law* and other government regulations specifically targeting HBV discrimination in 2007, worker plaintiffs have had a much greater chance of winning. However, discrimination remains widespread and commonplace. Much more needs to be done in terms of public education and legal compliance before the problem can be eliminated.

In the conclusion, Yirenping offers six policy recommendations, which could go some way to easing the burden felt by one tenth of the Chinese population.

The study is largely based on transcripts of wide-ranging and open-ended interviews carried out by volunteers of the Yirenping centre in Beijing. The interviews were carried out during April and May 2009 in ten different cities: Beijing, Tianjin, Zhengzhou (in Henan province), Wuhan (Hubei), Chengdu (Sichuan), Nanjing (Jiangsu), Hangzhou (Zhejiang), Guangzhou (Guangdong), Nanning (Guangxi) and Jiamusi (Heilongjiang). With the interviewees' permission, the interviews were taped and the transcript of audio records totalled 350,000 Chinese characters.

The interviewees included 21 HBV-positive people, 35 HBV-negative people, five employers, two doctors and a judge. The HBV-positive people were primarily members of Yirenping action groups in each city. The majority of the HBV-negative people were friends or co-workers brought in by the HBV-positive people. They had good personal relationships with the HBV-positive people and were generally opposed to employment discrimination. Most of the HBV-positive and HBV-negative people interviewed were young (82 percent were aged between 20 and 30) and 80 percent had a university-level education or higher. The origins, ages and educational levels of these interviewees skew the sample but, given that employment discrimination takes place primarily among people in these age and education groups, the points of view, knowledge, opinions and suggestions provided by these interviewees can be seen as representative of those at the forefront of the problem.

The verbatim quotes used in this report have been translated from the original Chinese and some have been edited in part to give the reader a clearer, more concise picture. The interviewers' questions are sometimes included in the transcript in italics. The interviews are all coded with the family name and gender of the interviewee and date and location of the interview. For example, Ms Wang quoted above is coded thus (Wang F 5 May Zhengzhou).

Chapter One: Background

Medical facts about hepatitis B

Definition. Hepatitis B is an infectious disease of the liver caused by the hepatitis B virus (HBV). In its acute form, the illness causes liver inflammation, vomiting, jaundice and very occasionally death. Chronic hepatitis B may eventually cause cirrhosis and liver cancer (hepatocellular carcinoma), which is nearly always fatal. Most people with HBV however are asymptomatic and their liver function is normal.

Prevalence. Hepatitis B is endemic in China. According to a research report published by the Chinese Medical Association in 2005, there were 120 million people living with HBV in China, of whom 30 million suffered from hepatitis B. See *Understanding the Current Situation of Hepatitis B Sufferers in China: a Research Report* ([中国乙肝患者认知现状研究报告](#)). Despite a national vaccination programme, which as of 2006 had immunized 11 million children in the poorer regions, HBV infection has continued to rise and more recent estimates put the number of people living with HBV in China at 130 million. See Liu, J. (2007). “Hepatitis B in China” *The Lancet* 369: 1582–1583.

Transmission. Similar to HIV, the virus that causes AIDS, HBV is transmitted through the exchange of bodily fluids, most commonly through unprotected sex, exposure to infected blood and vertical transmission from mother to child.

The primary method of transmission in China is vertical transmission from mother to child and horizontal transmission in early childhood through bites or scratches from infected children. In addition, many children were probably infected by shared needles during mass-vaccination programmes for tuberculosis, tetanus and encephalitis from the 1970s to the 1990s.

Diagnosis. Blood or serum tests are used to detect the presence of viral antigens (proteins produced by the virus) and antibodies produced by the host to combat the virus. The first detectable viral antigen is the hepatitis B surface antigen (HBsAg), which together with the hepatitis B core antigen (HBcAg) give rise to hepatitis B surface and core antibodies (anti-HBs and anti- HBc). Soon after HBsAg appears it is usually joined by the hepatitis B e antigen (HBeAg) that is associated with higher rates of viral replication and indicates that the host is infectious. The e-antigen may be cleared naturally during the course of infection and be replaced by the e-antibody (anti-HBe). The presence of anti-HBe indicates a significant decline in viral replication and means that the host is less or no longer infectious.

In China, the most widely used HBV test looks for the presence of the above mentioned three pairs of antigens and antibodies in the blood. However because the hepatitis B core antigen (HBcAg) is difficult to detect, the test is usually restricted to five markers and known colloquially as the “HBV two and a half pairs” (乙肝两对半) test. Those who test positive for HBsAg, anti-HBc and anti-HBe are known as “small three positive” (小三阳), indicating they are not infectious or only mildly infectious, while those with HBsAg, anti-HBc and HBeAg are known as “big three positive” (大三阳), indicating that they are relatively infectious.

Prognosis. Acute infection is usually cleared by adults spontaneously within weeks or months, and they later develop immunity to future infection. Children or infants, and especially newly born infants who acquire the infection from their mothers are much less able to clear the infection.

Treatment. Contrary to the fraudulent claims made by some Chinese pharmaceutical companies, there are currently no drugs to clear the infection. The available treatments only limit liver damage by preventing viral replication. The disease however can be prevented through vaccination.

Origins of employment discrimination against people with HBV

Many of the interviewees in this survey described Chinese society’s fear of hepatitis B today in the following terms: “The look on someone’s face changes the instant you talk about hepatitis.” Such fear is widespread and can be traced back to a major hepatitis A outbreak in Shanghai in the 1980s. Hepatitis A is an acute infectious disease of the liver caused by the hepatitis A virus (HAV) that is relatively common in China. Unlike hepatitis B, it is spread primarily by the faecal-oral route in which victims consume water or foodstuffs contaminated by the faeces of infected persons. From January to March, 1988, an epidemic broke out in Shanghai primarily as a result of city residents eating clams contaminated with HAV. Nearly 300,000 cases of hepatitis A were reported, resulting in dozens of deaths.¹ The epidemic received extensive media coverage: people all over the country learned about the frightening speed of transmission of hepatitis A and how intensely the outbreak developed in such a short time. After this incident, people without much medical knowledge tended to think that all types of viral hepatitis could be transmitted in the same way and were as contagious as hepatitis A, resulting in a ubiquitous fear of hepatitis.

¹ “[医生回忆1988年上海甲肝大流行](#)” (Doctors Remember the Great Hepatitis-A Outbreak in Shanghai in 1988), taken from [新浪网](#) (Sina.com).

This fear coalesced into a prejudice against hepatitis sufferers, but it was government labour and hiring policies that fuelled full-fledged employment discrimination against people living with HBV. During the 1980s, the government reformed the enterprise hiring system that had been in place for several decades, making it more competitive and requiring employers to conduct medical tests on applicants. The tests were based on standards provided in the *Technical School Student Admissions Medical Test Standards and Implementing Regulations* promulgated by the State Labour Bureau and the Ministry of Health on 14 April 1981. According to these administrative regulations, no one diagnosed with chronic hepatitis could be hired. This opened the door to discrimination against people living with HBV.

The laws and administrative regulations promulgated in the 1980s and 1990s did not provide for a clear distinction between, or definitions of, the different types of hepatitis viruses and the people living with them. Thus, hepatitis B was misinterpreted as being transmitted via the faecal-oral route like hepatitis A, thereby negating the employment rights of people living with HBV.

For example, the *Regulations on Hygiene Management in Public Places* promulgated by the State Council on 1 April 1987 stipulated that people with the hepatitis virus should not engage in service occupations in public places; and the *Food Hygiene Law of the People's Republic of China* approved by the National People's Congress (NPC) on 30 October 1995 also said, "no sufferers of dysentery, typhoid, viral hepatitis transmitted through the digestive tract (including carriers of the pathogen), active pulmonary tuberculosis, suppurative or exudative dermatitis, or other diseases detrimental to food hygiene may engage in work with ready-to-eat foods" (Article 26). These laws gave virtually all employers in the food processing industry *carte blanche* to shun people living with HBV. Other laws and administrative regulations forbade HBV-positive people from working in the pharmaceutical, health products, water supply, and education sectors. Such laws, regulations and administrative rules both stripped away the employment rights of people living with HBV and created a misconception among the public that HBV can be transmitted through everyday contact.

During the 1990s, the central government promoted a civil service examination and hiring system, which further extended employment discrimination against people living with HBV. On 7 June 1994, the Ministry of Personnel issued the *Temporary Regulations on the Hiring of Civil Servants*, requiring civil service applicants to undergo a medical test. The same month, the Ministry of Personnel issued the *Medical Test Programme and Standards for Central Government Bureaus Hiring Civil Servants*, which stated that if "acute hepatitis is cured for one year and persistent

hepatitis is cured for two years, persons carrying the hepatitis virus but having normal liver function may be employed.” Despite this provision, many local governments, lacking basic scientific knowledge, required blanket testing for HBV, with no exceptions.² For example, the *Zhejiang Provincial Medical Testing Standards for Hiring Civil Servants* (Zhejiang Provincial Personnel Office, 1996; trial edition No. 95, revised in February 2001) disqualified those with “chronic hepatitis and abnormal liver function and those who are ‘big three’ or ‘small three’ positive.” Some reports suggested that, during the 1990s, all the provincial-level governments barred HBV-positive people from the civil service.³ The government’s actions aggravated discrimination against people with HBV seeking jobs and gradually led to the spread of discrimination against those already employed, those entering school and even against children entering preschools.

The rapid and chaotic development of the market economy in China has exacerbated employment discrimination against people living with HBV. Unscrupulous pharmaceutical companies exploited the suffering of people with hepatitis B and HBV in order to peddle their alleged cures and remedies. Their advertisements exaggerated the contagiousness and physical implications of HBV, claiming that a large proportion of HBV-positive people would later suffer from liver cancer or cirrhosis. They exaggerated the social impact of contracting HBV, listing obstacles in employment, education and marriage. In addition, they used celebrities and “medical authorities” to endorse and exaggerate the effectiveness of their products. Consequently, this false and misleading information became “common knowledge” throughout China.

Historical events, government policies and the mass media have combined to create a deep misunderstanding and prejudice towards people living with HBV. Although they comprise some ten percent of China’s population, they have effectively been marginalized and excluded from many areas of social life, including schooling, employment, marriage and family.

Legal redress for discrimination against people with HBV

The legal fight back against discriminatory employment practices began with a criminal rather than a civil case. In 2003, when university graduate Zhou Yizhao applied to become a civil servant in the Xiuzhou district of Jiaying in Zhejiang, he tested positive for the “small three” HBV markers, and as a result, was refused

² Di Minglei (翟明磊): “[1亿2千万人承受的荒唐歧视](#)” (The Absurd Discrimination Experienced by 120 Million People), taken from 39健康网 (Health Net 39).

³ Lin Shanshan (林珊珊): “中国式乙肝战争” (The HBV Wars, Chinese Style), 南方人物周刊 (*Southern People Weekly*), Issue 30 (Vol. 135) (2008), pp. 24-25.

employment. On 3 April, Zhou retaliated by stabbing to death a local government official and wounding one other person.⁴ The case received considerable publicity and led to the establishment of the HBV Forum ([肝胆相照论坛](#)), a non-governmental organization and website for people living with HBV. Its guiding principle was to “secure legal rights and interests through legal means, and to appeal to the people regarding the importance of the popularization of science and sympathy for disadvantaged groups in society.” Soon afterwards the forum drafted a letter entitled “Request for an Audit of the Constitutionality of Regulations in 31 Provinces, Regions, and Cities Restricting Civil Service Hiring of HBV-Positive People and the Strengthening of Legal Protections for People Living with HBV” jointly signed by 1,611 people, which was submitted to the Standing Committee of the NPC, the Legislative Affairs Office of the State Council and the Ministry of Health.⁵

These civic anti-discrimination activities helped focus the attention of government departments on the problem. In 2004, the central government and legislature formulated and issued a series of laws and regulations addressing employment discrimination against people living with HBV, revising existing laws and regulations that were discriminatory in nature. On 17 January 2005, the Ministries of Personnel and Health issued the *(Trial) General Standards for Medical Tests in Civil Service Hiring*, stipulating that HBV-positive people found not to have hepatitis conformed to the civil service medical test standards. The HBV Markers item was removed from the Medical Test Table attached to the *General Standards*. On 18 May 2007, the Labour and Social Security Bureau and the Ministry of Health issued an administrative regulation, the *Opinion Concerning the Protection of the Employment Rights of Hepatitis B Surface Antigen Carriers*, which provided for the protection of the employment rights and right to privacy of people living with HBV and requiring employers not to use the presence of the HBV surface antigen as a reason to refuse to hire or to terminate the jobs of employees. In addition, during the recruiting and hiring process, employers were not to forcibly test for HBV serum markers.

In March 2007, the Office of the Standing Committee of the NPC issued the draft *Employment Promotion Law of the People’s Republic of China*, soliciting comments from the public. According to a 25 June 2007 report by the *Xinhua News Agency*, 11,020 comments were received within a month. Among the numerous types of employment discrimination discussed, many people made special mention of the

⁴ See Fu Piyi (傅丕毅) and Fu Yangjie (傅扬杰): “[浙江嘉兴大学生周一超刺杀公务员一审被判死刑](#)” (University Graduate Zhou Yizhao of Jiaxing, Zhejiang, Given Death Sentence for Stabbing a Civil Servant to Death), taken from [新浪网 \(Sina.com\)](#).

⁵ Yang Fang (杨芳), Pan Ronghua (潘荣华), and Pan Lili (潘莉莉): “乙肝歧视与我国未来的反歧视立法” (HBV Discrimination and China’s Future Anti-Discrimination Legislation), *河北法学 (Hebei Law Science)*, Vol. 3, Issue 23, pp. 5-61 (2005).

problem of HBV discrimination.⁶ The law was passed by the Standing Committee of the NPC on 30 August 2007, its Article 30 explicitly stating that, “employers shall not refuse to hire a person based on their carrying the pathogen of a contagious disease.” On 5 November 2007, the Labour and Social Security Bureau issued the *Regulations on Employment Services and Employment Management*, which, on the basis of Article 30 of the *Employment Promotion Law*, clearly provided that when hiring personnel, employers could not mandate the use of HBV immunological markers as medical testing standards, except for work in which HBV-positive people are prohibited from engaging as provided by state laws and administrative regulations... (Article 19). These regulations also stipulated a 1,000-yuan fine for employers violating its provisions. On 28 February 2009, the Standing Committee of the NPC passed the *Food Safety Law of the Peoples Republic of China*, revising the provision in the *Food Hygiene Law of the Peoples Republic of China* forbidding pathogen carriers from working in direct contact with ready-to-eat foods; this provided HBV-positive people with the qualifications to be employed as cooks or in similar positions.

After the above laws and regulations were issued, all local governments revised their medical testing standards for hiring civil servants, eliminating the discriminatory content and admitting HBV-positive people into civil service jobs. The health departments of some local governments, such as in Shanghai, Chongqing, Hangzhou, Ningbo, Wuxi, Shenzhen and Xi’an and the provinces of Zhejiang, Jiangsu and Henan, also issued documents concerning medical tests in hiring. These documents required that in conducting tests for employment, medical entities must not make the HBV surface antigen a subject of routine examination on behalf of employers, or perform HBV serum tests during medical examinations on behalf of employers for recruiting and hiring, unless otherwise provided under state laws and administrative regulations, or by the Ministry of Health. During the testing process, they were required to pay attention to protecting the privacy rights of people with the hepatitis B surface antigen.

Legal and administrative redress for employment discrimination against people with HBV can thus be summed up in two principles. The first prevents employers from insisting that job applicants take the “two and a half pairs” HBV test. The second prevents them from using the presence of the HBV surface antigen as an excuse for not hiring a prospective employee. Chapter Five contains a detailed analysis of the effectiveness of the laws and regulations described above in protecting the rights of people with HBV.

⁶ Zhou Tingyu (周婷玉), Cui Jing (崔静), and Zheng Shengwen (邹声文): “[重视并消除就业歧视, 给我们一个公平的起点](#)” (Focusing on and Eradicating Employment Discrimination to Give Us a Fair Starting Point), taken from 人民网 (*People’s Daily On Line*).

Chapter Two: Employment options for people living with HBV

The 21 people living with HBV interviewed in this survey all discovered they were HBV positive whilst still at school or university. The majority of them said they did not give it much thought at the time and were not overly concerned. Only when they entered the job market did they begin to experience the prejudice that society harboured against people living with HBV. Of the 21 interviewees, 13 said they had experienced discrimination while applying for a job or for graduate school. Those who said they had not directly experienced employment discrimination based on their HBV status tended to seek out employers who did not require a medical test, or were self-employed.

Many interviewees had been turned down or advised against applying for sought after jobs on numerous occasions, leaving them with no option but to apply for jobs in small privately run companies that did not pay well. A Guangzhou woman living with HBV was one of those unable to find a good job because sought after positions all required testing:

– When I graduated and began looking for a job, my school provided references. I had always wanted to join ** Company but, there was a section in their hiring requirements clearly saying they would not accept people with the “big three” or “small three” positive markers. I really wanted to give it a go, but the director of our school’s recruiting and employment office told me the hospital this company used for testing was very strict and that I would not be able to pass the medical test.

My school referred me for a second job, at a bus station. I thought I would not have to take a medical test, but after I got there and had completed the interview, they said I had to get tested. I later applied for another job. I passed the interviews and everything and went for the medical test. After the test, they didn’t discuss the results with me; they just notified me of a final interview. It felt strange; usually you went to work as soon as the medical test was done, but they wanted to arrange for a third interview. When I got there, I saw few people there for the third interview and two days later, they notified me that I did not meet their requirements. Do I think they used the third interview as an excuse to eliminate me? This is what I think, but I don’t have any proof. (Lin F 08 May Guangzhou)

Responses to employment discrimination

Faced with such blatant discrimination, our interviewees reacted in different ways, some with anger, some despair and some with resignation. Those who were determined to find a job regardless developed four (non-exclusive) strategies outlined below, the most common being cheating in the HBV test.

Cheating to get into a desired company

Of the 21 people with HBV interviewed, nine said they had cheated to make it through an employer's medical test. Most had no qualms about trying to get around an unjust system. As an interviewee from Tianjin said:

- Society's errors and misunderstanding have resulted in a lot of people having no opportunity to work. Looking at our whole country, there are actually many excellent people with HBV and, for just this reason, they don't have a chance to go to school or get a good job. This is a loss for our nation and a loss for the individual. Actually, HBV has no impact at all on your work and it can't be transmitted to the people around you. At a time like this, when the public does not understand this, the only way is to get through by cheating. This is the way we can avoid such a loss for the country and loss for the individual. (X M 03 May Tianjin)

Another interviewee in Tianjin added:

- What is cheating? First, from the legal angle, I feel that there is no moral problem here, because it does not infringe on someone else's rights or interests. From another angle, the medical test itself is illegal and the organizations conducting them are acting illegally. Cheating on the medical test, if you look at it constructively, is nothing more than using some means to protect your own privacy. Once I got a job, this is how I understood it. You can't raise it to the level of morality, because the organizations giving the medical tests are the ones who first acted illegally and ignorantly. (Zhang M 12 May Tianjin)

Cheating on the HBV test is now so widespread in China, it has given rise to a new occupation, that of "medical test gunslinger" (体检枪手), HBV negative people who take the medical test on behalf of those with HBV. The Chinese internet service provider QQ lists numerous "gunslinger" services. One blog called "Pass the Test with Health City" cites the various services offered by the "Health City Test Centre," and states that: "to ZB the test is both a desire, and a skill. We hope that, in today's environment in which prejudice still exists, people with HBV who want to find a job

can all have this desire as well as the skill...”⁷ These “gunslinger” organizations can charge up to 1,500 yuan per test, and some provide services to nearly 1,000 people each year, earning an annual income of over one million yuan.⁸

Using personal connections

A man from Wuhan described how he got a job at a large state-owned enterprise with the help of his personal connections, even after failing the medical test a year earlier:

– After about a year, I went back to the company and told the people in the human resources department that a year had passed and I’d like to take the test again. After all, this was a state-owned enterprise, and a lot of people coveted this job. The human resources people took me to their employee hospital for a medical test. During the test, I asked people to do a bit of sleight-of-hand. Actually, I had already spent a lot of money by then to buy some people off. I spent about four or five thousand yuan. At that time, four or five thousand yuan was a quite a bit. This was a state-owned enterprise and I really wanted to get into it. So this time I bought myself in and I got right in. Even though my liver was not normal at the time, the liver function was not normal at all, and none of the doctors dared to say it was, because I had a good personal connection, and spent a lot of money, I was able to get myself in. Later, those who had applied with me the previous year asked me, are you better yet? Now I certainly can’t say it’s because I used my connections and I say that I’m much better. Everyone says, oh, it’s good that you are much better. I say, how could I talk about it if I weren’t cured? (Chen M 25 April Wuhan)

Seeking out employers who do not require medical tests

Several interviewees simply avoided taking the “two and a half pairs” test but, as two interviewees from Hangzhou and Chengdu pointed out, this left them trapped in low paying jobs in small privately owned companies.

– At one time I wanted to look for a better job at a prestigious company but they all require medical tests. I am HBV positive, and have been cured for many years, but at present I am living with HBV, so I’m very concerned. Because I can’t get into a large company, I have been applying at some smaller, private organizations on the margins. Right now, I work at this company; it’s a private company and

⁷ “ZB” stands for *zuobi*, the Chinese word for “cheat.”

⁸ Zhao Jiayue (赵佳月) and Jiang Zhe (蒋哲): “[消除乙肝歧视? ‘体检枪手’出租身体一次300](#)” (Eliminating HBV Discrimination? “medical test gunslingers” Rent Their Bodies for 300), *南方日报 (Southern Daily)*, taken from “中国网” (China.com.cn); and “[就业歧视催生‘体检枪手’, 体检团年赚百万](#)” (Employment Discrimination Gives Rise to “medical test gunslinger,” Organizations Earn a Million Annually), *齐鲁晚报 (Qilu Evening News)*, taken from 人民网(*People’s Daily On Line*).

the benefits fall short when compared to companies I would like to get into. (Chen M 20 May Hangzhou)

– I’ve been at a lot of companies... None of them did testing because they were all very, very small companies. But the pay and conditions were very poor so, after a few days, I’d feel it wasn’t right for me, and leave.

Actually, I’ve been interviewed at a few rather good companies; there was one that I remember was the subsidiary of a listed company. In my first interview at the time, I didn’t know they were going to do a medical test and, when I came out, I saw that they had written on a blackboard, “The company will take everyone as a group to the hospital for medical tests.” When I was called for a second interview later, I didn’t dare go. I feel like I’ve lost out on a lot of companies for this reason. (Lü M 19 April Chengdu)

Openly disclosing one’s HBV status

A small number of interviewees said that after failing the medical test many times they started to openly disclose their HBV-positive status to a prospective employer. However, even after the passage of the *Employment Promotion Law* and the promulgation of the two State Council documents clearly prohibited employers from refusing to employ a person “based on their carrying the pathogen of a contagious disease,” this approach rarely produced positive results. One woman from Guangzhou explained:

– There was one time with **** Company; again I had passed the third interview, and there was only the medical test. When they notified me to go take the test, I didn’t want to waste a lot of time and went and took the test, and they told me it was no good, so I explained my situation to them. I said I had the “three small” positive markers. Then they refused to employ me. There was another company, a real estate broker. I applied to be a secretary there and they had me take a medical test. Then I told them about my situation and they rejected me too. Another was hiring an information processor for *** Company from Hong Kong, and they also wanted me to take a medical test after the interview. I told them about my situation, and was rejected. (Lin F 08 May Guangzhou)

Obstacles to defending one’s rights

From 2003 onwards, some people living with HBV initiated anti-discrimination lawsuits against employers and a few successful cases received extensive media

coverage. (See Chapter Five). Most HBV-positive respondents supported such actions and praised the courage of the people involved. However, they also noted the tremendous obstacles faced by people seeking to defend their rights and interests. One of the biggest is to actually prove that discrimination took place.

Ms Lin in Guangzhou (quoted above), said that because she had not signed an employment contract with any of the companies that refused to employ her after she disclosed her medical status, she had no evidence with which to file a lawsuit:

– If they had already signed a labour contract with me, I'd certainly have the evidence to sue them. But until now I've always been refused before being hired and so I don't have good evidence. I've wanted to sue, but just let it go, because I didn't have the evidence. (Lin F 08 May Guangzhou)

Others said they were reluctant to file a lawsuit or conduct any activities in defence of their legal rights because they wanted to protect their privacy. A man from Tianjin applied to be a graduate student at an institute under the Chinese Academy of Sciences (CAS) but withdrew after learning that it did not accept people with HBV. Even though he was angry with the institute and would probably have been successful in a lawsuit, he did not pursue the matter:

– How can I explain it? Think about it, if people like us go and sue people; if, for example, I sued a certain institution of higher education, it would certainly lose. Or if it were the CAS in Beijing, they would also lose. But what would it be like after a lawsuit? The higher education institution is one entity, and everyone knows each other. If I made a lot of trouble, no other institution would want me. (X M 03 May Tianjin)

Even when legal assistance was offered to people with HBV it was often turned down because of privacy concerns, as another HBV-positive man from Tianjin who worked at a non-governmental organization in the city pointed out:

– Sometimes we offer to help people with HBV defend their rights, but they don't want to. We know that, according to state decrees, we can help them; at the very least we can demand compensation. But they feel they will have to go and look for new jobs, and they don't want the notoriety they would earn through this lawsuit. They want to remain anonymous and, when they change jobs, they don't want other people to know about their status. (Zhong M 17 April Tianjin)

From the interviews with people living with HBV, it was clear that their number one concern was protecting their privacy and thereby guarding themselves from the fear and prejudice endemic in society.

Chapter Three: From ignorance to discrimination – a cause and effect relationship

The fear and prejudice against people with HBV in Chinese society stems primarily from ignorance of the nature of HBV and widespread misunderstanding as to how it is transmitted.

During our interviews with HBV-positive people, the vast majority gave accurate answers to questions about how HBV is transmitted and the immunological markers of HBV (the “big three” and “small three” positive markers). In the interviews with 40 HBV-negative people, including five employers, however, most betrayed a lack of even the most basic knowledge about hepatitis B, this despite the fact that many interviewees were friends or colleagues of HBV-positive people. Among the 36 asked about the difference between people with HBV and those with hepatitis B (four people were not asked), only 12 answered correctly, the others responded “I don’t know the difference” or gave an inaccurate response based on supposition. The majority, 32 of the 40 respondents, had heard of the “big three” and “small three” positive markers but could not tell the difference between them or did not know the specifics. The others said they had not heard of the “big three” and “small three” positive markers or gave incomplete answers. The majority (22) said people with HBV were contagious, 14 said they were not contagious and four were unclear. Of the 31 people asked how was HBV transmitted, 21 gave the wrong answer and four said they did not know how. Only six people gave the correct answer, two of whom had studied medicine: one was a nurse in a hospital, while another had been an editor at a health magazine. Among the 21 people who gave the wrong answer, some believed that in addition to blood and sexual contact, HBV could also be transmitted via saliva, shared eating utensils, eating together, kissing, skin contact and shared towels. Ten believed HBV could be transmitted by eating together. Below are some typical responses from HBV-negative people to the question of how HBV is transmitted:

–I have always thought that it can be transmitted while eating. For example, when we were working in the countryside, we would often go to different families to eat and our unit required us to get a hepatitis B vaccination, so we all got one. We were all worried about this at the time. Everyone’s impression was that we could not use the eating utensils and cups used by people with HBV and that it was transmitted by eating and drinking. (Meng M 18 April Tianjin)

– It is through saliva or shared eating utensils; those can typically transmit it, or skin contact. *How would you take precautions?* Wear a mask, for example, or don’t eat together with them...just these simple things. *Wear a mask? What*

would you be preventing? Saliva, transmission through saliva...I'm just giving suppositions and thoughts. What I know about are rather superficial, minute details, so the ways to handle it are certainly at the minute level. (Ning M 16 April Zhengzhou)

– Everyone knows that hepatitis is contagious, but there are many kinds of hepatitis, and we can't specifically understand how hepatitis A and hepatitis B are transmitted. I'm not too clear on this. Some people say it is transmitted through saliva, some say it is transmitted through blood. We don't know how it is transmitted. But when we hear "hepatitis," that certainly means it is contagious. (Chen M 28 April Nanjing)

Most HBV-negative respondents' knowledge of Hepatitis B came primarily from advertising or word of mouth. Of the 31 asked, about the source of their knowledge, 12 said advertising, while 11 said that friends, co-workers or family informed them; four said they checked the internet; but only ten said their information came from more authoritative sources like classes, hospital bulletin boards, popular science education materials, hepatitis B informational materials or medical texts.⁹

Several interviewees described how they passively absorbed the ubiquitous advertisements of companies selling hepatitis B-related products or just accepted gossip without question:

– I usually don't go out of my way to learn about HBV; I haven't gone looking for it. Usually it is when I am listening to a programme and there are always advertisements all over the place about hepatitis this or that. There is also some information in the newspapers, but I don't actively try to learn about it. (Jiang M 03 May Wuhan)

– Everyone believes it can be transmitted in daily life. Everyone believes it is contagious; I also believe it is contagious, so everyone thinks this way. If everyone thinks this way, it gradually becomes common knowledge. When something is spread around enough, it becomes public opinion. (Wang M 01 May Wuhan)

The vast majority of HBV-negative people interviewed in this survey said they would maintain a normal working relationship with their co-workers if they discovered that they were HBV-positive. However, 21 of the 35 surveyed said they would adopt precautions such as not using shared eating utensils, not coming into close contact, getting vaccinated or getting regular medical check-ups.

⁹ Some interviewees cited two or more information sources.

An HBV-negative man from Beijing, who shared a dormitory room with a co-worker living with HBV said:

- Our relationship is pretty good, it's fine. I basically have not taken any protective measures. There are separate bathing items, and we rarely eat together so there is nothing to protect against. But if he does cook, I will not pick up any food directly from his bowl, I would take a separate portion out of his wok before eating. (Jiang M 14 April Beijing)

The main concern of HBV-negative people was the erroneous belief that they could contract hepatitis by sharing food and utensils with HBV positive people. For example, an HBV-negative man from Tianjin, who discovered prior to a voluntary blood donation organized by his work place that some co-workers were HBV-positive, said:

- I will take some precautionary measures, such as not sharing razor blades and the like. Then, there is using disposable utensils, chopsticks and soup spoons, when eating together, doing everything possible to avoid sharing these things. (Shun M 16 April Tianjin)

Only one third (13) of the HBV-negative interviewees said it was not necessary for them to take such precautions:

- Even if I know he is HBV positive, I would not treat him much differently from a normal person... Other than those few serious means of transmission, HBV-positive people are usually not contagious... There is no need to dodge someone as soon as you see him, turn pale at the mention of him or run away from him. (Yang M 02 May Wuhan)
- I would happily live and work together or hang out with HBV-positive people because it is not contagious at all and has no impact on life. They are just like normal people, except for having this virus, and this has no impact on our own work or life, so I think it is no big deal. (He F 08 May Guangzhou)

The majority of both HBV-positive and HBV-negative interviewees (44 out of 56), agreed however that there was a climate of fear in China with regard to Hepatitis B, which stemmed primarily from ignorance:

- I think these medical-related advisements have scared a lot of people. My co-workers will say to me when we go out to eat, things like, “oh, you can get hepatitis B.” Actually they don't know that I am HBV-positive. I just tell them hepatitis B can't be transmitted by eating together... None of them knows how it

is transmitted; they just think it can be transmitted in many different ways and are extremely frightened of it. (Li M 12 April Beijing)

– People think hepatitis B sufferers are highly contagious and that if they get it themselves, it will result in them having to pay all kinds of expenses and it might endanger their personal safety, things like that. It might have this kind of impact and, if I get it, could I infect my family? Maybe they are mixing this one up with some other, highly contagious diseases. (Feng M 19 April Chengdu, HBV negative)

– It's because no one understands it; people turn pale at the mention of it. As soon as you say hepatitis B, everyone's like, "Don't eat together with him." Chinese people are steeped in this thinking from an early age. This is the biggest problem. Why does the company boss make us take medical tests? Isn't it because he believes deep in his heart that hepatitis B is contagious? (Hao M 15 April Zhengzhou, HBV negative)

This fear of hepatitis B leads people to adopt a "better safe than sorry" approach to people with HBV, even when presented with evidence that there is no danger.

– The desire of people to protect themselves is very strong and, in a situation they don't understand, they will be even more self-protective. They think that this thing is right there next to them and might be a danger to them. (Zhang M 12 May Tianjin, HBV positive)

– It is like giving someone a snake: even if you tell them it is not poisonous, they will still be afraid of it and won't dare to take it. They are afraid of what might happen; this snake is not poisonous, but who knows whether or not it is poisonous? It is possible that it was judged incorrectly or it has mutated, or whatever, it might still be poisonous. It is the same with hepatitis B: even though they may know all of the means of transmission they still have a feeling that they might be infected. Even if you say it has been proven that it is not contagious, that you can't get it from shaking hands or hugging, if they think about it, they will still avoid doing these things if possible. (Shun M 16 April Tianjin, HBV negative)

When the public lacks accurate information about hepatitis B, it is more easily misguided by information in the media. When false advertisements exaggerate the harmfulness and dangers of hepatitis B, they increase people's fear of those with HBV and make them even more determined to be "better safe than sorry." And this gives rise to prejudice¹⁰ and discrimination against people with HBV. This prejudice is

¹⁰ The American psychology professor Ralph Rosnow defines "prejudice" as "an implicit consensus regarding a certain group. Race, economic status, gender, sexual orientation, age, and religious beliefs

expressed by the typical HBV-negative person as sympathy for, but avoidance of, HBV-positive people. Employers all too often betray their prejudice by refusing to hire HBV-positive people. Many interviewees said employers saw those with HBV as “unhealthy people” who might be a threat to the other employees and did not hire them for this reason:

- I feel the biggest factor is the mindset of bosses that HBV-positive people are unhealthy. They subconsciously feel that if you are not a healthy person, they don’t want to hire you. (Duwei M 26 April Nanjing, HBV negative)
- The public probably lacks a full understanding of hepatitis B. A lot of people are possibly rather sensitive about it, so that when an HBV-positive person appears around them, they can get a bit nervous. This puts a certain pressure on employers, who might not want to accept someone because of this. If they do accept them, either an HBV-positive person or a Hepatitis B sufferer, it may create a threat to the employees, whether psychological or in terms of personal relationships. (Feng M 30 May Tianjin, HBV negative)

Reasons cited by employers for not hiring people with HBV

In late 2008, Yirenping surveyed 96 China-based subsidiaries or joint-venture companies affiliated with 92 multinational corporations. Nearly half (44 percent) of these companies or subsidiaries clearly said they would not hire people living with HBV. This percentage, however, was significantly lower than that of the 77 percent found in a survey conducted by the Chinese Foundation for Hepatitis Prevention and Control in June the previous year. This suggested that laws and regulations passed in the interim such as the *Employment Promotion Law* and the *Regulations on Employment Services and Employment Management* may have helped reduce discrimination against people with HBV.

In designing this study, we prepared a specific interview outline for employers. We originally planned to interview ten employers but in the end, were only able to find four employers and one manager, previously a recruiter in the construction industry, willing to talk. They all claimed that their company would not hire HBV-positive

often become the objects of prejudice.” See Ralph L. Rosnow, “Poultry and Prejudice,” *Psychology Today*, 1972, 5(10):53-56. The English sociology professor Anthony Giddens points out that the preconceptions of a prejudiced person are often based on hearsay and not on direct evidence, to the point that they persist in their opinion even when faced with new information. People may harbour positive prejudice towards the group to which they themselves belong, and negative prejudice towards groups to which they do not belong. After some people become prejudiced towards a certain specified group, they may refuse to view them fairly or objectively. See Anthony Giddens (English), *社会学 (Sociology)*, Fourth Edition, Zhao Xudong (赵旭东), Trans., 北京大学出版社 (Beijing University Press), Beijing, 2003, pp.318-319.

people because of legal restrictions and occupational requirements rather than prejudice. The four employers' companies were in the food processing and service industries. They all said that according to the *Food Hygiene Law of the People's Republic of China* and the *Food Safety Law of the People's Republic of China* in effect at the time, food production and operation workers could only be employed if they obtained a health certificate:¹¹

– I'm telling you, working in our industry I would certainly not be able to take on someone with HBV. *Would you fire him?* Certainly; you have to take responsibility for the majority of people. *Is your industry considered to be food processing? Do you require a medical test when hiring?* We certainly require people to be in good health. *So, do you arrange for medical tests?* To work in our industry, you have to have a health certificate, and you have to go to the disease control centre for a test. If you haven't got a health certificate, you can't work in this industry. This is not my requirement; this is a state regulation. (Chen M 28 April Nanjing)

– If the person with HBV is not contagious, they can work in positions not in direct contact with customers, such as in security. Originally there were some people working in the service industry I worked in, but very few, because the regulations didn't permit them to be hired. *Does the company use medical tests when hiring?* They all take one, each person does. When each employee comes in, they all have to undergo a medical exam at the epidemic prevention station. Everyone must have a health certificate. *If someone tests positive in the "two and a half pairs" HBV test, for the "big three" or the "small three" positive markers, would the company hire them?* If someone tests positive, in our service industry we wouldn't dare hire them. Why not? Firstly the public is our customer base, and secondly because all of our employees live together; if they were contagious, we wouldn't dare hire them. (He M 25 April Zhengzhou)

An employer in the hotel and restaurant industry said he insisted that employees have a health certificate:

–When you get a health certificate, you can be tested for whether or not you have...I don't know if it is hepatitis A or hepatitis B, but there is a test for it. If someone had a disease like that, it is probably contagious, so the only choice would be not to use them. (Yuquan M 16 April Beijing)

One respondent from Tianjin, who had recruited people for a construction company,

¹¹ The *Food Safety Law of the People's Republic of China* went into effect on June 1, 2009; consequently, the *Food Hygiene Law of the People's Republic of China* was repealed.

said it did not hire HBV-positive people because the work load was arduous and the bosses needed to consider whether or not an applicant with HBV could handle such heavy work:

– I was a hiring manager there for a while. We were allowed to exclude HBV-positive people because the labour intensity requirements were high for construction. There is an unwritten rule that HBV-positive people had to take a medical test, and this was set up as hurdle to exclude them... As I mentioned before, the labour intensity was high at this construction firm, so this was not employment discrimination.

If you hire someone with HBV and he is assigned to the production team. Other people may find out, this then results in a certain distancing and impact on the team's stability or sense of harmony. Then didn't you essentially create trouble for the company? These days many people feel that the less trouble, the better. So then there is no harm in finding a reason... (Zhang M 19 May Tianjin)

A human resources manager in a retail company said he determined whether or not to hire a person with HBV based on the position they were applying for:

– It depends on the department; they probably have refused to hire people with HBV in the food department. In non-food departments they can't. *If a person with HBV had the exact same qualifications as other applicants, would your company refuse to hire them?* Everything else being equal, we would give special consideration to health status. *Do you treat people differently based on the distinction between the "big three" and "small three" positive markers, or refuse to hire them?* This would also depend on the specific circumstances. Like I said earlier, with regard to the food department, it is a bit more important, but I don't think it makes any difference in non-food. (Lan F 15 May Guangzhou)

The employer in Tianjin conceded however that even without their "rules and regulations," "government requirements," and "customer requirements" to hide behind, employers could always find an excuse not to hire someone with HBV:

– Hiring is very flexible these days; many times, employers don't give you an answer during the initial stages like the written test and the interview. They have you take the medical test. And even after the medical test, they don't use that as a reason not to hire you. Just like when someone is disabled or doesn't have a good appearance, I can absolutely find another reason not to take you, saying that your character isn't outstanding enough or you are not suited to the position. (Zhang M 19 May Tianjin)

An HBV positive man in Chengdu confirmed that his company would not immediately fire someone after finding out that they were HBV-positive. Rather they would wait for a while and devise a number of excuses to fire them:

– Last year we discovered a few, and it was publicized at the time on the company website. They were not fired straightaway but eventually they were all let go. One was fired maybe after a month or two, and the last one was maybe six or seven months later, all for various reasons. (Lü M 19 April Chengdu)

An HBV-negative man from Tianjin, who had worked at a foreign-invested company in the Pearl River Delta region, pointed out that most factories usually conducted medical tests on their workers every year and that if HBV-positive people were discovered, the factory would use various tactics to force them to resign:

– The people who tested positive for the “small three” markers might be retained in the factory and work while they were being treated. But most of the time these people would resign because of the atmosphere in the factory. If it was the “big three” positive markers, they would be sacked if they didn’t resign, that was certain. Basically, in the companies I’ve been in, under most circumstances if it was the “big three,” in this kind of social atmosphere, that employee would resign on their own volition, because they knew that this thing was very contagious. In other companies, they would also have to consider the reaction of other employees, because other employees only know that the “big three” mean a very contagious illness, so the company has to consider the mood and reactions of other, healthy employees. The company will also think of a way, either to sack the employee, and of course compensate him according to the law, or think of a way to force the employee to resign; this is the way they will protect the other employees. (Zhong M 17 April Tianjin)

We can conclude from these interviews that behind employment discrimination in China, there is a clear cause and effect relationship stemming basically from extremely poor knowledge about hepatitis B on the part of HBV-negative people and employers. This paucity of knowledge leads to widespread fear of HBV; the fear develops into societal prejudice; and this results in people living with HBV being shunned and excluded by the public. This mentality of exclusion has formed the basis of employment discrimination against HBV-positive people.

Chapter Four: A discussion of HBV discrimination in the workplace and the measures needed to combat it

In addition to answering specific questions related to medical knowledge, attitudes towards people with HBV and the precise mechanisms of employment discrimination, interviewees also discussed the wider factors underlying HBV employment discrimination in China and suggested possible remedies.

False advertising claims of the pharmaceutical industry

Several interviewees were deeply angered at the damage done by dishonest advertising about HBV and hepatitis in China and claimed the fear and misconceptions created by these advertisements were a significant factor in the spread of employment discrimination. They blamed the proliferation of false claims by advertisers on the failure of official regulation of the industry and demanded that the government take tougher measures to clamp down on them:

- I think the main reason for discrimination is that most people do not understand people living with HBV. In the 1990s, some unscrupulous hospitals and pharmaceutical companies just poured fuel on the fire. They were guilty of exaggeration, always saying how severe the disease was, how it could lead to a “triple effect” (HBV leading to cirrhosis followed by cancer of the liver), and their advertising was very damaging. (Dai M 19 April Zhengzhou, HBV positive)

- A lot of people watch the adverts on television now, and see all those false claims about hepatitis B. You can have the jab that supposedly turns a positive “big three” or “small three” result negative, the fake cures, the hospitals that swindle you and don’t care and the doctors that play up the dangers of hepatitis B and so people get the idea that it is something that must be avoided at all costs. To get it is a curse, they think, and if you do, you must spend a lot of money on treatment to avoid infecting others... A lot of those drugs were officially approved so what are the state and the drug authorities playing at? They are the ones who issued the production licenses. I believe the authorities have failed in their duties and policies. They failed to do their job seriously and neglected to strictly regulate these drugs. They have allowed conmen to openly swindle the

public by selling fake drugs and poisoning HBV-positive people. (Chen M 25 April Wuhan, HBV positive)¹²

- I feel that people are being poisoned by misleading ads. A lot of the TV commercials go on about undoing an HBV-positive result, but they are actually all telling lies. Because at the moment there is no way of rooting out the disease once it is in you. There may be drugs that have some effect, but there is no way of curing it properly ... there is nothing that can do what those TV or radio ads or fliers posted up on the street, these adverts claim. (Wang M 5 May Zhengzhou, HBV positive)

One HBV-positive interviewee focused his anger at a military hospital in Tianjin that made false claims in advertising:

- That a military hospital should do such things is simply a disgrace. To make money from people who are already in a pitiable state is totally immoral. When a country's soldiers behave like this, it is a national shame. I don't understand why the state doesn't sort out this matter. Isn't it a fact that the guys in charge of an armed police hospital are themselves military personnel? So shouldn't they take personal responsibility? Doesn't the top brass care about this sort of thing? They are military personnel, not quacks running street stalls. They are military medics. (X M 3 May Tianjin)

A number of interviewees criticised the role of so-called "experts" and "specialists" in HBV prevention and treatment. These charlatans, they said, gave false authority to the bogus claims made in advertisements and fuelled misconceptions about HBV.

Government needs to improve public awareness

Interviewees recommended that the government use its authority to dispel such misleading claims and heighten public awareness of the basic facts about hepatitis B and its modes of transmission. A Beijing employer believed that the most effective way would be for the government to carry out more authoritative campaigns to inform the public:

¹² In July 2007, Zheng Xiaoyu, the head of China's State Food and Drug Administration from 1998 to 2005, was sentenced to death for accepting 6.5 million yuan in bribes from eight companies in return for approving untested or dangerous drugs.

- No matter how many times people with hepatitis B seek to reassure others, they are not taken seriously. Only a direct appeal from an authoritative source like the government or the hospitals would be persuasive. So we need a better response from government and hospitals. It is ridiculous to say that we ordinary people have no opinion on this; it is simply that our opinion does not matter. (Yuquan M 16 April Beijing)

Wei, an HBV-positive male from Zhengzhou, said the government should put more effort into raising awareness:

- We need to improve scientific awareness, develop more medicines, give the public the evidence in an authoritative way... I cannot quite believe nobody is standing up for us. Why is nobody explaining things from a position of authority? As with AIDS, why is this so hard to change? The reality is we have in the past done too little. Other countries give it priority and their example could pressure China to take it more seriously, give the HBV community some respect. (Wei M 21 April Zhengzhou)

Although the government has taken the lead in abolishing the “two and a half pairs” test in its own public sector hiring, it has thus far failed to undertake any major public education and outreach initiative to raise awareness of the means of transmission of the virus, and to correct public misunderstandings and prejudices, which had been fostered in no small part by its own discriminatory hiring practices in the 1990s. An HBV-negative interviewee from Tianjin, for example, said that since the government was responsible in the past for discriminating against people with HBV, it was now obliged to dispel public misconceptions about the virus and the disease it causes:

- The government should launch a propaganda campaign within enterprises to drive home the message that this is not a highly infectious illness, but only a medical condition. That would alleviate people’s concerns about daily interactions with those who are infected. Because hepatitis B has always been portrayed officially as a highly contagious disease, the people cannot be blamed for their misconceptions. After all, their epidemic-prevention awareness is based on government propaganda. Nowadays, because this virus is basically transmitted from parents to children, or maybe among friends, the public do see it as highly infectious. If we want to overturn this thinking, we really have to carry out an effective public information campaign, targeting people with hepatitis B too. (Zhong M 17 April Tianjin).

One interviewee cited China's nationwide campaign to raise AIDS awareness as an example of what could be done and what should be done for HBV:

- Take the example of AIDS. Earlier, everybody was terrified of it. Then (actor) Pu Cunxin became the public face of AIDS victims on TV. He went on a nationwide campaign to spread basic awareness and foster understanding of this illness, with the message that AIDS was nothing to be afraid of and could not be contracted through everyday exchanges. When people understood it better, I think discrimination began to diminish. I believe that understanding of hepatitis B is relatively limited. Unlike with AIDS, we have not yet reached the point where everybody in China is fully aware of the issue. The job of awareness-raising is not complete yet and everybody views hepatitis B as a fearful condition that is highly infectious and that you only have to come into contact with an infected person to get it... But if everybody understood the basic facts, as with AIDS, they would not look on this special community differently. (Xie M 22 April Nanning, HBV negative)

Several interviewees believed that raising public awareness should start in the school system. For example an HBV positive woman in Wuhan said:

- The education process can change people's way of perceiving things at the most basic level. In the classroom, you can foster understanding and awareness, shared by everybody from the highest to the lowest levels. For example, in a case where a certain company refuses to hire a person with HBV, even though it is illegal, the law is just on paper, so no one bothers. But if this stuff is on the school curriculum, everybody would turn against the company, feeling how can they act like that? It is not right! If this kind of consensus can be built, then society does not really need laws. The shared sympathy and sense of justice would break the habit of discriminatory thinking. However, even though some children are now learning at school what exactly HBV is, how the illness can be prevented and how this infection develops, you still have to change their parents' ways of thinking because parents have strong influence over their children. Children go home from school and parents can tell them to stay away from HBV-positive people. This is a very serious matter. (Yin F 28 April Wuhan, HBV positive)

Ms Yin also suggested that companies willing to accept people with HBV should be held up as positive role models:

- I think the best approach would be fostering a kind of model employer. Such companies could set an example for others, blazing a trail in that particular sector, so that everybody could learn from them and allay their fears. Moreover, this kind of company could have a welfare or charitable role. If it could help HBV-positive people, and do so effectively, I think this would make a good impression on the public. Now, more education is needed, but if this kind of initiative is undertaken, it would be possible to substantially change people's mindset. (Yin F 28 April Wuhan)

Over-supply of labour and acceptance of discrimination

Discrimination against those who do not meet "required standards" is endemic in China's labour market. Several interviewees noted that with the current over-supply of labour, employers could afford to hire only applicants they considered to be in "good health." The interviews took place against the background of the global financial crisis and mass lay-offs from export-orientated enterprises, further exacerbating the problem.

- The sheer number of workers in China at the moment gives employers great leeway in choosing job applicants. To be honest, in times like this, being really selective doesn't do an employer any harm, does it? Nor is he going to end up unable to find suitable workers. (Huang M 18 April Tianjin, HBV negative)

- Employers feel they ought to put the company's interests first, and only take on staff in the best of health. And the unemployment rate is higher now, isn't it? Job demand is great and employers are not worried about not being able to find people. (Jiang M 19 April Chengdu, HBV negative)

- Employers believe it is entirely their discretion who they hire. If a person seems to pose a threat of some kind, they will not let them join their work unit. This kind of thinking is widespread. Another factor is the truly precarious employment outlook. If you are a person with this virus, there is nothing stopping an employer from finding someone else to do the job. He could easily find somebody without any health problems — so why would he need to hire someone like you? (Tang 29 April Nanning, HBV negative)

Support for people with HBV

Several of those interviewed suggested the government should adopt specific employment policies for people with hepatitis B and provide preferential medical treatment:

- First, I think the state has a legal obligation to take care of people with hepatitis B and support them with their medical treatment. The state should provide funding to China's scientists and medical experts, to make more effective drugs for hepatitis B and stop counterfeit production. At the very least, we should see if we can relieve the pain suffered by people with hepatitis B. Secondly, there is the matter of daily living costs. In other words, medical expenses are too high. These should be covered by medical insurance. Right now in China, illness plunges you into poverty. You cannot afford treatment. You do not dare to go into the big hospitals and the small hospitals don't do a good job or they swindle you. It creates a vicious circle. This puts psychological pressure on HBV-positive people. You have this serious condition, you cannot cure it and there are no effective drugs. If you look for a job, you are discriminated against and so you end up wondering, what am I living for? Do you see? This sort of thing leaves you with a sense that there is no future. (Chen M 25 April Wuhan, HBV positive)

- Another issue is whether or not the state should adopt a policy of encouraging employment of HBV-positive people and ensure preferential medical care for them, to allay all the different kinds of discrimination HBV-positive people suffer in society and stop the vicious cycle. People with HBV will then be encouraged to face challenges and a virtuous cycle will arise. (Wu M 28 April Beijing, HBV negative)

Chapter Five: Legal and judicial redress for employment discrimination

As noted in chapter one, the Chinese government has implemented several new laws and regulations penalising employment discrimination against people with HBV. The authorities have also gone a long way towards curbing discrimination in public sector hiring. A number of HBV-positive interviewees voiced their appreciation of the government's efforts. A young man in Wuhan said:

- The government's legislation is a positive and effective measure. I feel that the legislative measures in recent years to protect people living with HBV are rooted in humanitarian concern. They embody the administration's lofty goal of lawmaking for the benefit of the people, of wholeheartedly and resolutely serving the people. Therefore, as someone with HBV, I feel great gratitude to the Party and the government for taking these measures. (Chen M 25 April Wuhan)

All but one of the 21 HBV-positive interviewees claimed full or partial knowledge of the current laws and regulations pertaining to employment discrimination. In stark contrast, however, the vast majority of the HBV-negative interviewees knew little if anything about the laws related to HBV and employment discrimination. Of the 40 HBV-negative interviewees, including five employers, 27 said they "did not know of the laws and regulations," six said they "knew of the existence of such laws and policies, but did not know their specific terms," and only seven said they "knew of these laws and policies, and moreover understood their basic terms." Of the seven who did know about them, one was a lawyer, one a human resources manager, one a clerk in a human resources office, one was on a graduate programme in law and one was an undergraduate in law. And their knowledge was due to professional requirement or academic specialization.

Lack of legal enforcement

However, both the HBV-positive and HBV-negative interviewees (once the laws had been explained to them) clearly recognized that while they may look good on paper, lack of enforcement and absence of strict penalties for transgressors meant that China's laws and regulations were ineffective in the fight against employment discrimination:

- Although China is supposedly governed by the rule of law, often the rule of men prevails. If somebody does not want to hire you, they can use any number of pretexts for not taking you on. This is not like criminal law. There is really a lot of flexibility here. An employer will not just say “we don’t want you.” There are a lot of other factors they can cite, and simply make up an excuse. (Jiang M 3 May Wuhan HBV-negative)

- There are no penalties for hospitals and employers for failure to implement regulations. Hospitals just go on as they did in the past, the state has not backed the compulsory measures with fines, the hospitals never abide by the rules and there’s no way to force them. (Lü M 19 April Chengdu HBV-positive)

- They have issued these rules, but at the grassroots and enterprise level, they are ignored. These laws are pointless, really, aren’t they? And enforcement is insufficient. You, of course, end up the biggest loser. The employer stands to lose nothing. Enterprises in most cases only have to pay a thousand yuan or so in compensation. There is simply no downside for them, while we pay a heavy price. (Luo M 19 April Chengdu HBV-positive)

- Hopefully, the laws will be made to function better. A particular problem is lenient penalties. Because nobody is prepared to get tough, the law remains a dead letter. There is no way of truly eliminating discrimination. At the end of the day, industry codes of conduct and laws are only formalities, of no real concern to you. So more precise, clearer criteria are needed. Laws should not just be window-dressing. We shouldn’t have a situation where the public interprets laws in whatever way suits them best and just do what they like. (Yin F 28 April Wuhan)

- When a company behaves in a discriminatory way, there is no penalty. If they refuse to take on an HBV-positive person, they don’t suffer any loss. And there is no official oversight of any kind. In this situation, they will do exactly the same thing next time round. But if an employer who refuses to take on an HBV-positive person is punished, then maybe they will not do the same thing again. (Cao M Hangzhou 20 May, HBV positive)

Several interviewees cited the old maxim “government policies from above are met with local government countermeasures” (上有政策 下有对策) to explain why the central authorities’ well-intentioned policies would not work at the grassroots.

- I know that these laws do exist, but there are problems with their enforcement. As the saying goes “government policies from above are met with local government countermeasures”. The laws exist, but whether or not employers abide by them and the local authorities enforce them is another matter. (Cao M 20 May Hangzhou HBV-positive)

In light of these well-known problems, one HBV-positive respondent in Tianjin questioned the motives of the central government in devising regulations and policies ostensibly aimed at ending employment discrimination:

- Regulations and enforcement are two different things. The government lacked resolution and forcefulness when it needed to promote these measures. Maybe some people had undertaken human rights initiatives, promulgated measures and then the government felt it couldn't make any more excuses, so it drew up some laws. But the laws are not enforced or enforcement lacks teeth. There is no outcome or impact, because there is no impetus behind them. (Wang M 12 April Tianjin)

Effectiveness of specific regulations banning medical tests

The interviews in this report were conducted almost two years after the ministries of Labour and Health issued their *Opinion on Defending the Employment Rights of People Testing Positive for the HBV Surface Antigen* on 18 May 2007. Yet both HBV positive and negative respondents confirmed that most companies still included the “two and a half pairs” HBV test in their medical tests for new hires. Indeed, at least 11 interviewees said they had taken the “two and a half pairs” HBV test in the previous two years as a requirement for getting a job. These were large privately-owned companies, foreign- and Taiwan-invested firms and state-owned or majority-controlled enterprises. Despite the ban being in force, it is clear that employers and health-screening centres have failed to comply with the legal requirement to eliminate the hepatitis B test.

An HBV-positive teacher working at a private college in Zhengzhou said anti-testing regulations now on the books have not been enforced at all:

- Although the rules exist on paper, when you take up employment, you still have to be tested. Everything has to be checked, including your teaching

qualification exam certificate. I saw the documents; they said it didn't matter whether or not you are HBV-positive, it has no effect on your teaching qualifications, but they still want to test. Why do we have to take these tests? Maybe it's a way for the hospital to earn a few yuan or some other reason? Really, it is just a formality, but they still want to do these tests, and bring these things out into the open. (Wei M 21 April Zhengzhou)

A survey of multinationals and joint-venture companies by Yirenping in late 2008 found that although 56 percent of respondent companies said they did not explicitly refuse to hire people with HBV, some continued to require job applicants to test for the virus markers. Researchers also discovered that some companies, in a bid to get around the law, required applicants to sign a “voluntary” agreement to test for HBV. Those applying for jobs at one Shanghai company, for example, were required to sign a form entitled “voluntary test for the hepatitis B antigen and antibody.” (Figure 1 below).

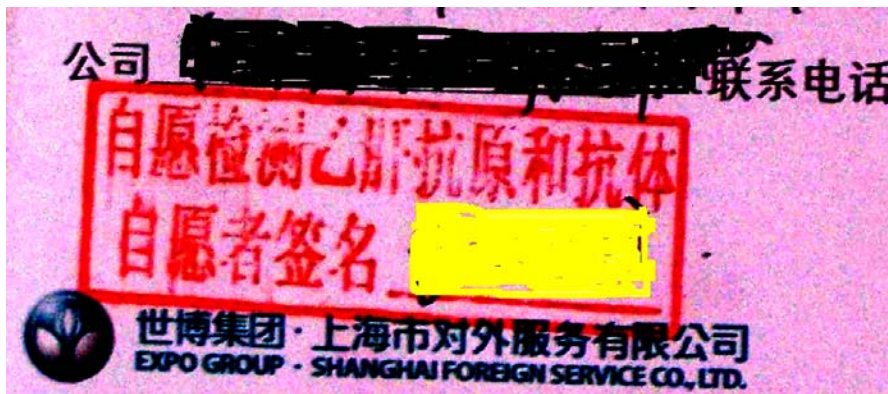


Figure 1: Box for signature for the “voluntary” acceptance of the test for the hepatitis B antigen and antibody.

Given that such testing is illegal, employers depend on the collusion of hospitals and testing centres to ensure that prospective employees take the “two and a half pairs” test. China’s regulatory framework for medical testing for new hires is chaotic and confusing. There are no clear regulations related to testing organisations, the way testing is carried out or the individual tests that can be conducted. Currently, testing is conducted at health-screening centres affiliated with general hospitals, such as physical check-up departments of hospitals, specialist screening centres independent of hospitals, including screening centres run by government health administration authorities or disease control and prevention centres and privately-run healthcare and screening centres. According to some media reports, a healthy profit margin of 15 percent can be earned on general medical services, but in the case of medical

examinations, this margin could rise as high as 30 percent.¹³ Clearly, the profit motive has driven health-screening organisations to collaborate with employers and thereby force job applicants to take the “two and a half pairs” test.

A hospital doctor responsible for conducting medical examinations claimed that the impetus for doing such tests always came from employers:

- All testing requests come from employers. In our experience, most of them want us to do the “two and a half pairs” HBV test. If you go to a hospital or health-screening centre and ask for a test, how could you be refused? This is a very important point. There are no provisions expressly banning hospitals or health-screening centres from carrying out hepatitis B tests. That would be impossible, since it is a question of people’s health. (Yang M 1 May)

In a letter sent in reply to a complaint from an HBV-positive person, the Suzhou Health Bureau in Jiangsu acknowledged that most local employers continued to illegally demand “two and a half pairs” HBV test reports, and that the examination centres agreed to conduct such tests as long as the examinees gave their informed consent in a signed document.¹⁴ After promulgation of the above *Opinion*, the Health Bureau of Shenzhen issued a notice banning all medical institutions from including HBV testing in their routine physical examinations and from forcing such tests on people. However, this document also stated that consent for a test could be obtained either from the subject or their employer, in effect giving enterprises the power to approve HBV testing by health-screening centres. The use of this “enterprise license” (企业授权) was condemned by Hao Yang, Deputy Chief of the Disease Prevention and Control Bureau of the Ministry of Health, saying it violated the spirit of the ministries’ *Opinion*.¹⁵

Impact of legal change on judicial redress

Although the laws and regulations banning the use of the “two and a half pairs” test have been routinely ignored by employers, they have given victims of discrimination

¹³ Guo Ailin (郭艾琳). ”[全民办体检鱼龙混杂，体检机构准入制有望出台](#)” (Health-screening organisations expected to enter chaotic private-sector medical testing market), 第一财经日报 (*First Financial Daily*), from 新华网 (*Xinhuanet.com*), 13 July 2005

¹⁴ From 肝胆相照网 (*hbvhbv.com*), 4 March 2009

¹⁵ “[劳动保障部刘丹华、卫生部郝阳、医学专家贾继东谈乙肝病毒携带者就业问题](#)” (Liu Danhua of the Ministry of Labour and Social Security, Hao Yang of the Ministry of Health, and medical expert Jia Jidong discuss employment discrimination issues facing the HBV-positive community), from 中国网 (*china.com.cn*), 13 July 2007

additional ammunition in their quest for redress. In this study we examined 13 broadly representative cases of HBV employment discrimination from 2003 to 2009, which showed that legislation and regulations promulgated in 2007 have helped victims who are willing to use the legal system in obtaining some measure of redress.

In the four cases before 2007, plaintiffs were all applicants for public sector jobs who had been rejected after they failed the “two and a half pairs” HBV test. The defendants in these cases were government departments and the claims were administrative rather than civil lawsuits. In the nine cases filed after 2007, all the plaintiffs had failed to get jobs at commercial enterprises or public institutions and filed civil lawsuits.

The four cases initiated before 2007 focused mainly on demands for the revocation of decisions to reject applicants based on the results of their “two and a half pairs” test. In what would become known as “China’s first HBV discrimination case,” college graduate Zhang Xianzhu of Wuhu in Anhui province filed a lawsuit against the Wuhu Bureau of Human Resources, arguing that its actions had “deprived him of his eligibility to act as a public servant, discriminated against a person with HBV, and violated his lawful rights and interests.” He accused the defendant of conduct tantamount to infringement of his rights of equality under the Constitution, as well as his political rights and rights to human dignity and to work. The court was fully aware of the constitutional issues at stake, thanks to the work of Zhang’s lawyer, Zhou Wei, a professor at the law school of Shanghai’s Jiaotong University. However it chose to ignore these complex matters and fudged its judgement. Zhang won the case, but the court stated that “there is insufficient primary evidence that the defendant, in the process of recruiting civil servants for Anhui in 2003, disqualified the plaintiff from participation in the entry examination process.”^{16,17} In the other three cases prior to 2007, the plaintiffs all lost, with the courts deeming the defendants “had not violated relevant regulations”, or that there was “insufficient evidence” or “no case to answer.”

Of the nine post-2007 cases, five plaintiffs won at the court of first instance, three lost at the initial trial, while another case was rejected *a priori* on the grounds that the claims were inadequate. All nine plaintiffs filed similar claims -- that their right to equal employment had been violated by the defendant, in contravention of laws and government regulations. And it was the courts’ acceptance or otherwise that the

¹⁶ See, “安徽省芜湖市新芜区人民法院行政判决书 (2003) 新行初字第11号” (First Instance Administrative Judgment No. 11 (2003), Xinwu District People’s Court, Wuhu City, Anhui Province).

¹⁷ Jiao Youlong (焦友龙). “聚焦全国首例‘乙肝歧视’案” (Focus on China’s ‘first Hepatitis B discrimination’ case), 民主与法制 (*Democracy and Law*), 2004, No. 10.

plaintiff's right to equal employment had been violated that largely determined the outcome of the case.

In the five successful cases, the courts invoked provisions of the *Employment Promotion Law* and administrative regulations of the ministries of Labour and Public Health. And in all cases, they acknowledged that employers' conduct had violated the plaintiffs' "right to equal employment." For instance, in the case in which Mr Gao sued a Beijing telecommunications company, the defendant argued that its refusal to employ him was based not on his being "small three" positive, but on the applicant's failure to pass the training course or meet the job requirements and other general factors. However, the court ruled: "Under the *Employment Promotion Law* and the *Regulations on Employment Services and Administration*, results from testing for HBV serum markers may not be used... except in certain professions closed by law to persons with HBV, and refusal to hire a person because of their HBV status is not permitted." The job the plaintiff had applied for was as an engineer, which was not a category from which HBV-positive people were excluded. The court concluded that the defendant's refusal to hire the plaintiff constituted a violation of the principle of equal or fair employment.¹⁸

These changes in attitude regarding rulings and their basis in law indicates that judges are trying, through the litigation process, to elevate the principles of equality and of the right of employment for citizens under the Constitution into legal rights. However, such "judicialisation of the Constitution" (宪法司法化) remains a controversial issue.¹⁹

¹⁸ See, "北京市朝阳区人民法院民事判决书 (2008) 朝民初字第06688号" (First Instance Civil Judgment No. 06688 (2008), Chaoyang District People's Court, Beijing)

¹⁹ The 1999 identity fraud case in which Qi Yuling sued Chen Xiaoqi for alleged violation of name and education rights became known as "China's first case of judicialisation of the Constitution." (Chen, daughter of a Party official, stole Qi Yuling's examination pass and used it to get a higher education and later a banking job) The Supreme People's Court applied civil law theory, interpreting the educational rights of the citizen as one of the rights of personal freedom under general rights of personal integrity. It applied protection of "interests of personal integrity" in upholding the educational rights of the citizen, and, in its Reply on judicial interpretation, indicated that it had applied infringement of name rights to establish civil liability for violation of constitutional rights of education of the citizen. This created a legal basis for the final ruling in this case. The Higher People's Court of Shandong Province cited Article 46 of the Constitution to establish the illegality of rights violation and based its final decision that the defendant should assume civil liability in civil law on the Reply of the Supreme People's Court and the provisions of Article 53 of the *Civil Procedural Law*. See, Wu Jing (吴兢). "寒窗苦读, 求学女遭人冒名顶替; 终审胜诉, 宪法与公民'直接对话'" (Study in perseverance: Female student wins suit against impostor; the victory, the Constitution and 'direct dialogue' with citizens), from 人民网 (*People.com.cn*), 4 September 2001. Subsequently, the Supreme People's Court on 8 December 2008 issued its *Decision on the overturning of relevant judicial interpretations issued before the end of 2007, No.7* and overturned the Reply regarding the question of whether or not civil liability for violation of constitutional rights of education of the citizen can be established on the basis of violation of name rights. For a discussion of the

In the five rulings in favour of the plaintiff, the court found that not only had the plaintiffs' rights to equal employment been violated, but that the defendant should apologise and provide compensation for mental injury to the plaintiff. According to Article 120 of the *Civil Code of the People's Republic of China* and Article 1 of the *Interpretation by the Supreme People's Court of various issues concerning the establishment of liability for compensation for mental injury in civil tort*, the premise for an apology and compensation for mental injury is violation of the rights of personal integrity of a natural person. The right to equal employment does not fall within the scope of the *Civil Code* or the "rights of personal integrity" cited in the interpretation of the Supreme People's Court.²⁰ Moreover, there is no provision for judicial redress under the current *Employment Promotion Law* or *Regulations on Employment Services and Administration* related to the violation of the right to equal employment. In these five cases however, the judges argued that "employment rights came under the scope of the rights of personal integrity," and that "the right to equal employment is inextricably linked with personal rights of the worker and should therefore constitute one of the other rights of personal integrity of a natural person."²¹ This is tantamount to a new interpretation of the rights of personal integrity within civil law. In other words, the "right to equal employment," in judicial practice, had been included among "rights of personal integrity," and as such redress for constitutional rights violations had been realised through judicial means.

In the three unsuccessful cases, the courts ignored claims of rights violations, basing their dismissal of the suits on specific, technical grounds. In Chen Long (pseudonym) versus Changshuo Technology (the Shanghai-based subsidiary of Taiwanese computer manufacturer Asus), the plaintiff was hired by the company after passing its recruitment examination prior to graduation from university in December 2005. But the contract was revoked after he tested positive for the HBV surface antigen. The court found that the defendant had not violated anti-discriminatory provisions of the

decision by the Supreme People's Court to overturn relevant judicial interpretations, see, "[宪法司法化第一案有关司法解释废止](#)" (Overturning of judicial interpretations in first case of constitutional judicialisation), 中国网 (china.com.cn), 31 December 2008.

²⁰ Article 120 of the general provisions of the Civil Code stipulates that in cases of violation of a citizen's rights of name, image, reputation or honour, an apology may be demanded. Rights of personal integrity in the *Interpretation* of the Supreme People's Court include: the rights to or of life, health, physical integrity, name, portrait, reputation, honour, human dignity and personal freedom.

²¹ Zhou Hao (pseudonym) v. Guangxi Jingui Pulp & Paper Co., Ltd.; See, "广西壮族自治区钦州市钦南区人民法院民事判决书 (2008) 钦南民初字第312号" (First Instance Civil Judgment No. 312 (2008), Qinnan District People's Court, Qinzhou City, Guangxi Zhuang Autonomous Region); Liang Qi (pseudonym) v. Zhongsheng Advertising Co., Ltd. (Hubei City), see, "湖北省武汉市江汉区人民法院民事判决书 (2008) 汉民一初字第1993号" (First Instance Civil Judgment No. 1 (1993), Jiangnan District People's Court, Wuhan, Hubei Province).

law at the time, since passing a medical test was one of the conditions for employment. Therefore, it said, the defendant was justified in terminating the contract as this condition had not been met.²² In the case of Chen Li (pseudonym) versus Coca Cola bottler Hangzhou Zhongcui Foodstuffs Ltd, the plaintiff passed an interview for a clerical (sales) position, but the company retracted the job offer after she tested positive for the HBV surface antigen. In this case, the court found that the position for which the plaintiff had applied would have entailed constant contact with food products as the defendant was a food processor. Therefore, under the *Food Hygiene Law* and the *Measures for the Administration of Preventive Health Screening*, the defendant was justified in refusing to hire the plaintiff, given the failure of the plaintiff to provide certification of good health.²³ In the case of Chen Ling (pseudonym) versus Johnson Electric (Shenzhen) Co., Ltd., an employment agreement signed with the defendant was terminated when Chen tested “big three” positive. The court determined that persons who were “big three” positive “were much more infectious” than those who were “small three” positive, and accordingly to employ a such person in a job entailing daily contact with large numbers of people would have been inappropriate; the defendant was therefore justified in considering public safety in terminating the contract with Chen.²⁴ What these three rulings had in common was that judges did not directly address claims that the defendant had committed a rights violation, and did not interpret the case in terms of “rights of personal integrity.” Litigation claims were dismissed on other grounds, on the basis of other laws and regulations.

In conclusion, it is clear that while new laws and administrative regulations have had some effect in alleviating HBV discrimination, enforcement has been lax. Employers determined to make prospective employees take the “two and a half pairs” test can do so largely with impunity. Clinics and health-screening centres, eager for profit, are more than willing to conspire with employers in this illegal activity. As for judicial redress, some courts have deemed discriminatory behaviour by employers to be a violation of victims’ constitutional rights. However, such rulings have by no means been universally accepted in China, and several plaintiffs have lost cases of an essentially similar nature. That said, new legislation and regulations related to HBV

²² See, “上海市南汇区人民法院民事判决书 (2007) 汇民一 (民) 初字第1423号” (First Instance Civil Judgment No. 1423 (2007), Nanhui No. 1 District People’s Court, Shanghai)

²³ See, “浙江省杭州市江干区人民法院民事判决书 (2007) 江民一初字第1628号” (First Instance Civil Judgment No. 1628 (2007), Jianggan No. 1 District People’s Court, Hangzhou, Zhejiang Province).

²⁴ See, “深圳市宝安区区人民法院民事判决书 (2009) 深宝法民一初字第773号” (First Instance Civil Judgment No. 773 (2009), Baoan No. 1 District People’s Court, Shenzhen).

have without doubt given victims of discrimination greater ammunition in their search for legal redress.

Conclusions and recommendations

Major findings of this study

As several interviewees pointed out, there is currently an over-supply of labour in China. This, combined with the lack of any truly representative union organisations means that workers are at a severe disadvantage in negotiations with management or when applying for a job. As has become clear from this study, people with HBV are particularly vulnerable in this regard. In fact, many people with HBV can only get decent work by falsifying their HBV test results or by pulling strings. But they were still left in a constant state of worry because of the risk of having to undergo random health checks arranged by their employer. Some people lowered their expectations and settled for low-paying jobs with meagre benefits with companies that did not require medical examinations. Working conditions in these enterprises were often so bad that employees only stayed until they could find a better job elsewhere. Employers hold all the cards and enjoy absolute authority over the hiring and firing of employees. Workers find it difficult to stand up for their rights. Even if they do, they run the risk of their HBV status becoming public knowledge.

While the employers interviewed in this study denied discriminating against HBV-positive job applicants and cited legal provisions which they thought justified their actions, it seemed evident they were driven by a fear or misunderstanding of HBV and how it was transmitted. Four of the employers pointed out that they were engaged in the food-processing and or service industries, and could not take on people with HBV in light of their responsibilities to customers. A fifth, who was once in charge of hiring at a construction company, said physical strength was important in his industry and for that reason could not have taken on people with HBV.

These misapprehensions about HBV are endemic in the general population. People usually cannot distinguish between the various types of hepatitis or between people with the virus and those with the disease. Crucially, many people do not understand how HBV is transmitted, thinking they can be infected through everyday contact with HBV-positive people or by eating with them. Such “awareness” as most people have is based on hearsay and misleading advertising. False information feeds on itself and inevitably creates misunderstanding. This is constantly amplified by false advertising claims, generating even greater prejudice against HBV-positive people. Most HBV-negative people including employers consider people living with the virus to be

“unhealthy” and see them as a threat to their own wellbeing and hence something to be feared. And feeling threatened, people develop a strong urge for self-protection. These attitudes translate into employment discrimination against people with HBV.

The study found that some HBV-negative people did express sympathy and concern for people with HBV. However, such concern was usually tinged with an element of fear. Most felt that, for the sake of their own wellbeing, they should be informed if one of their co-workers was HBV-positive or not. An HBV-negative interviewee from Zhengzhou said: “If somebody with HBV falls ill and cannot afford an operation, it’s easy to get people to make a donation. But if it is a question of contact with an HBV-positive person, people are very cautious. They would rather offer financial support than have contact.” Thus, even as they voice sympathy and concern, these people still regard those living with HBV as “unhealthy,” and find it difficult to accept that those with HBV should have the same rights of equal employment as other people.

Our research also showed that non-governmental organisations in China are fighting an uphill battle against employment discrimination. Only seven of the 19 HBV-positive people who were asked about NGOs had taken part in their activities. Among the 30 HBV-negative employees questioned on this issue, 25 said they had little knowledge of NGOs and four said they had some knowledge. Only one said he had participated in NGO activities. Most NGOs have limited funds and limited scope for development. They are often not understood by the public and often pressured by local governments. However NGOs still manage to play an important role by gathering information, making legislative proposals, monitoring legal compliance, naming and shaming rights violators and defending their victims.

The promulgation of the *Employment Promotion Law* and other regulations in 2007 to combat discrimination against people with HBV has provided the courts with a legal basis on which to accept and rule on HBV cases. The post-2007 cases examined in this report show that people are already using this new legal framework to defend their rights and interests. Courts are more willing to accept civil lawsuits based on employment discrimination.

However, China still lacks a comprehensive legislative system outlawing employment discrimination. The constitutional provision outlawing discrimination in principle is little more than a formality buried in current legislation. For example, Article 12 of the *Labour Law* and Article 3 of the *Employment Promotion Law* both stipulate that

“workers shall not suffer discrimination in employment on the grounds of difference of nationality, race, gender or religious belief.” This provision does not mention other currently widespread areas of employment discrimination such as household registration, physical appearance, age or height. Moreover, there is no clear definition of employment discrimination in the current *Labour Law* or *Employment Promotion Law*. Nor are there strict definitions of discriminatory behaviour or clear provisions regarding the rights and obligations of perpetrators and victims in cases of discrimination. Employers who have engaged in discriminatory behaviour are not required to assume legal liability. There is a legal disconnect between anti-discriminatory principles in the Constitution and the laws and administrative regulations of the PRC.

This legal disconnect not only means that employers lack clear guidelines in the hiring process, and administrative authorities a clear remit for their enforcement responsibilities, but that the courts, after accepting employment discrimination cases, struggle to ground their rulings in law. In the five cases after 2007 in which the plaintiffs were successful, the court asserted that the defendant’s refusal to hire the plaintiff constituted a violation of the “right to equal employment” based on the principles of the Constitution, the *Labour Law*, the *Employment Promotion Law* and other legislation. However, while supporting plaintiff demands for an apology and compensation for mental injury, they had difficulty in acting on them. In the general provisions of the Civil Code and the *Interpretation of the Supreme People’s Court on Several Issues concerning Establishment of Liability for Compensation for Mental Injury in Civil Tort*, the principal “rights of personal integrity” are stated as the rights to life, health and physical integrity, and the rights of name, image, reputation, honour, spouse, human dignity and personal freedom. Conspicuously absent from this list is the “right to equal employment.” Therefore, in providing judicial redress in cases of violation of the right to equal employment, judges can only give new interpretations derived from “rights of personal integrity,” within which the right to equal employment is regarded as a kind of “other right” or as one of the “rights of human dignity.” This convoluted approach does not provide for a firm legal basis that can be applied to all cases. It serves to highlight that in China, the right to equal employment is still a vague commitment in principle under the Constitution. There is as yet no basic legislation elevating it into a full right that can be regulated and redressed.

The promulgation of the *Employment Promotion Law* and other regulations outlawing discrimination against HBV-positive persons and compulsory “two and a half pairs” HBV testing by employers shows that the government has begun to be more proactive

and sympathetic. These initiatives were welcomed by most HBV-positive people and the general public. However, in terms of organising and mobilising communities, and developing comprehensive broad-based measures against employment discrimination, the government still has much work to do. This survey found that most HBV-negative people have no real understanding of the new legislation. Some are unaware even of the existence of important measures promoted by the ministries of Labour and Social Security and of Public Health. Of the five employers interviewed, three were clearly ignorant of both laws and regulations.

Given the underdevelopment of civil society in China, the government plays a key role in public education, its actions guiding the actions of others. The fostering of public misunderstanding and prejudice towards HBV-positive people in China was directly linked to long-standing discriminatory policies in civil service recruitment. As one interviewee (Shun M 16 April) said, the government set an extremely bad “example” for enterprises. “If the government has not been prepared to do what is necessary, then the private sector is certainly not going to risk it,” he said. Many interviewees stressed that the government should provide more authoritative explanation of HBV and its means of transmission.

Moreover, the government has no effective means of control or intervention strategy for dealing with employment discrimination against people with HBV. Its ban on “two and a half pairs” test has often been sidestepped by private and public sector employers alike. Many health-screening centres continue to cooperate enthusiastically with employer testing requests. The labour affairs supervisory authorities’ remit does not extend to this aspect of employer behaviour. The public health administrative authorities say their “hands are tied” with regard to hospitals and cultural supervisory authorities have failed to fully screen and act against advertising that makes false claims. Interdepartmental coordination and cooperation have been lacking. With regard to employment discrimination against HBV-positive people, the government has yet to show a really proactive attitude or take a leading role.

Policy recommendations

Specific legislation against employment discrimination

From a legal perspective, the key to abolishing employment discrimination is the “right to equal employment.” This right goes beyond the scope of existing labour law, affecting as it does human dignity and values, and human rights under international

conventions. It is a problem that needs to be resolved in terms of human rights legislation rather than just labour legislation.²⁵ We find a legal basis for the “right to equal employment” in the *Universal Declaration of Human Rights* adopted on 10 December 1948 the General Assembly of the United Nations, and in the *International Covenant on Economic, Social and Cultural Rights* adopted on 16 December 1966.²⁶

The government of China has already acceded to several international conventions aimed at banning or eliminating employment discrimination. They include the above-mentioned covenant, the International Labour Organisation (ILO)’s *Discrimination (Employment and Occupation) Convention (C111)*, and the ILO’s *Convention concerning Vocational Rehabilitation and Employment (Disabled Persons) (C159)*. On the basis of these conventions and the anti-discriminatory principles established under PRC Constitution, we urge the government to draft and adopt a specific law against employment discrimination. Such legislation would kick-start the overall process of developing human rights legislation in China, become a catalyst for building an anti-discriminatory belief system and have a direct role in the future eradication of employment discrimination.²⁷ In the near term, this new legislation would mean employment discrimination clauses in the Constitution, *Labour Law* and *Employment Promotion Law* become workable laws and legal provisions, that could be used to curb both legally recognised acts of employment discrimination, and acts not yet legally recognised but universally prevalent. This can address the disconnect between the principles of the Constitution and administrative regulations and laws.²⁸

²⁵ Lisa Stearns, Li Weiwei (李薇薇). ”第一章 导论” (Introduction to Chapter 1), in Li Weiwei, Lisa Stearns eds.-in-chief, “禁止就业歧视：国际标准与国内实践” (Prohibiting employment discrimination: International standards and national practice), Beijing: Law Press China, 2006,

²⁶ The *Universal Declaration of Human Rights* lays down all rights and freedoms relating to the “principle of equality.” In Article 2, these are listed as follows: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 23 (1) of the *Declaration* also establishes that “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.” Articles 2, 6 and 7 of the *International Covenant on Economic, Social and Cultural Rights* further expand employment equality rights.

²⁷ Tong Xin (佟新), Zhu Xiaoyang (朱晓阳), Hu Yu (胡瑜). “歧视研究的方法论 - 底层劳工群体对歧视的认知” (Methodology for discrimination research: Recognition of discrimination against disadvantaged labour groups), in Li Weiwei (李薇薇), Lisa Stearns, eds.-in-chief, 禁止就业歧视：国际标准与国内实践 (Prohibiting employment discrimination: International standards and national practice), Beijing: Law Press China, 2006, 86.

²⁸ Employment discrimination is defined under Chinese law as including ethnic, racial, gender and religious discrimination, and discrimination against disabled people. Still lacking is legal recognition of discrimination based on household registration, appearance, height and HBV status.

The legislation should include the following: a definition of employment discrimination, parameters for amendments of such legislation, parameters for measures outlawing discriminatory behaviour, responsibilities of employers and employees, the definition and scope of privacy rights, establishment of organisations and powers for enforcing such laws and monitoring compliance, and liability in case of violation of such laws. The burden of proof should be shifted to the employer, who must prove that he has not violated anti-discriminatory regulations. This “inversion” of burden of proof can also, to a certain extent, help restrain employers who resort to “reasonable-sounding pretexts” as a cover for deliberate discriminatory behaviour.

Raise awareness through public education and legal measures

Public education is the key to eliminating the fear and misunderstanding that leads to employment discrimination. As China is far from being a civil society, the government must take the lead in any public education and outreach initiative. We propose that (1) the civil authorities raise awareness of the issues and related legislation through newspapers, radio, television and the Internet, as well as public service advertising; (2) educational authorities direct elementary and secondary schools to properly discuss hepatitis B, its transmission and prevention in health and physical education classes; (3) labour authorities compile and distribute information packs to workers, employers and managers; (4) health authorities direct hospitals and health-screening centres to establish bulletin boards to clarify the transmission routes, with information on prevention and basic facts of the virus; and (5) local authorities regularly organise street campaigns targetting residential areas and districts with factory clusters in spreading awareness of the basic HBV issues and laws.

Establish a joint government-private sector monitoring and regulatory system

We propose that: (1) The labour and health authorities jointly carry out regular investigations into legal violations at enterprises and health-screening centres, and make public the results; (2) cultural administration and industry and commerce authorities act jointly to clean up and ensure accuracy in advertising of HBV treatments and drugs, and investigate those responsible for making and spreading false claims, with the results made public.

Committees of government officials and local community representatives should be established to: accept complaints from victims of discrimination and help with dispute mediation; provide legal assistance in cases where it is necessary to bring a discrimination lawsuit; help educate people in combating employment discrimination; publicise laws and policies; provide both workers and managers with advice and

training services in fighting employment discrimination; help legislative organisations in their anti-discriminatory lawmaking activities; and help labour and management organisations compile fair rules of employment.

Encourage NGOs in their anti-discriminatory activities

The eradication of employment discrimination requires the cooperation of the government and non-government organisations, with the participation of all sectors of society. As such, the government should support non-governmental organisations committed to fighting employment discrimination, allowing them space to develop. In partnership with government health authorities, labour supervisory agencies and unions, NGOs should be allowed to engage in public education and outreach, monitoring employers and hospitals, providing legal assistance in litigation launched by people with HBV. Government departments should maintain a dialogue with NGOs on employment discrimination, to better understand the needs of the HBV-positive community, and revise and adjust policy based on such feedback.

Encourage HBV-positive people to launch public interest litigation

Since Zhang Xianzhu pioneered employment discrimination lawsuits in China by successfully suing the Bureau of Human Resources of Wuhu in 2003, there have been nearly one hundred similar anti-discrimination cases filed across the nation. These cases can all be seen as public interest litigation because they were clearly and materially effective in terms of spurring amendment of laws and administrative regulations, removing barriers to applications for public sector jobs, getting the public to accept the need to fight HBV employment discrimination, and improving the overall environment for hiring for the HBV-positive community. These lawsuits however were all initiated by individuals, requiring not only a great deal of time and effort but also great courage on the part of the litigant in laying bare details of his or her personal life.

Making a plaintiff's HBV status public can jeopardise their future employment chances. The government and judiciary therefore should clear the way for public interest litigation filed by NGOs. At present, Article 108 of the *Civil Procedural Law of China*, which states that a plaintiff in a lawsuit must be a citizen, corporation or another organisation involved in the case or with direct interests in it, prevents NGOs from acting on behalf of the plaintiff. The legislature should revise the *Civil Procedural Law* and *Administrative Procedural Law* to enable redress through public interest litigation.

Abolish medical examinations for job applicants

In August 2009, the Ministry of Health stated its intention to ban the “two and a half pairs” HBV test for college and nursery enrolment, hiring procedures and routine medical checkups for health certificates. This set of measures shows the government is now actively seeking ways of eliminating employment discrimination against people with HBV. However, as long as the public continues to view the HBV-positive community as “unhealthy,” there is a risk of employers and health-screening centres joining forces and using the test in medical exams for prospective employees. We propose that when universal health coverage becomes a reality in China, the current system of medical examinations for job applicants should be completely phased out except for highly specialised positions. In this way, we can tackle employment discrimination against HBV-positive people at the root.

In recent years, real legislative breakthroughs have been made in the fight against employment discrimination against people with HBV in China. However, deep-rooted public misunderstanding and prejudice mean there is still a mountain to climb. The damage caused by years of misinformation and prejudice cannot be undone overnight by a few state and provincial laws and regulations. Therefore, what is needed is not only legislation, but also a comprehensive system of regulation and supervision, with aggressive intervention and mediation by all branches of government, and, most of all, the mobilisation and active involvement of all society.