

August 18, 2021

Submitted via email/www.regulations.gov

The Honorable Kristen Clarke
The Assistant Attorney General for Civil Rights Division
The U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

**Re: Request for formal recognition and interpretation that
existing Civil Rights laws recognize and prohibit Caste-based
Discrimination in the US, especially in the workplace**

Dear Madam Assistant Attorney General,

The International Commission for Dalit Rights (ICDR), together with the underlisted organizations, call on the U.S. Department of Justice to recognize the intertwined nature of caste and race and thereby enforce “caste-based discrimination” as already covered and prohibited by civil rights laws, including Title VII in relevant non-discriminatory guidelines and compliance.

On May 10, 2021, the ICDR, together with National Coalition Against Caste Discrimination and other civil rights groups/firms, submitted a memorandum to the **madam Chair, honorable Charlotte A. Burrows**, urging the ***Equal Employment Opportunity Commission*** (EEOC) demanding to recognize the intertwined nature of caste and race, and to include a prohibition against “caste-based discrimination,” as already covered by Title VII Civil Rights Law in relevant EEOC non-discriminatory guidelines and other EEOC materials.

The underlisted organizations are committed to eliminating race-, caste-, work-, and descent-based discrimination in the United States and throughout the world. Our efforts towards this goal include fighting violence, hate crimes, harassment, racial injustice and inequality, prejudice, and all forms of discrimination against underrepresented and minority communities in the workplace. Therefore, we collectively demand you to recognize that civil rights laws prohibit caste-based discrimination in the United States and integrate and enforce this recognition into civil rights and non-discrimination guidelines. We are also requesting you to provide applicable guidance to the EEOC in support of the



Memorandum to recognize and enforce the intertwined nature of caste and race and include “caste-based discrimination” in EEOC compliance and policies.

Race and Caste Discrimination in the Workplace:

Race and caste are social constructs designed to uphold systems of domination, exclusion, injustice, inequality, and discrimination. Caste systems are hierarchical forms of social division based on descent or ancestry in which rank is inherited social status and fixed at birth. The U.N. International Convention on the Elimination of All Forms of Racial Discrimination - which the U.S. ratified in 1994 – prohibits racial discrimination based on descent, which includes caste and analogous systems of inherited status. Like race, caste systems allot differential privileges and penalties depending on inherited social status. Even when someone escapes their caste-defined occupation or class status, they are still subjected to the same inherited social status, stigma, harassment, and discrimination. Caste-based discrimination is an urgent contemporary U.S. civil rights and social justice issue, especially in the workplace.

Americans of South Asian descent may have been victims of racial discrimination in the United States as South Asians. However, caste discrimination occurs within South Asian communities, based on differentiations within the South Asian population. Most glaringly, there is much documented evidence of dominant caste people excluding, exploiting, bullying, harassing and discriminating against subordinate caste people known as “Dalits” in private, in public and in places of work.

Indeed, caste-based discrimination exists and flourishes in the United States. According to the Census Bureau, in 2018 there were more than 5.6 million South Asians in the United States.¹ Workplace caste discrimination is most likely to occur among this population. According to a 2018 survey from Equality Labs, 67% of Dalits in the United States "reported being treated unfairly at their (American) workplace because of their caste."² A recent report has revealed that there are more than 250 complaints of caste-based discrimination from employees in major multinational companies like Microsoft, Facebook, Amazon, Google, Dell, Uber, Netflix, etc. These reports expose cases of verbal and physical assault, workplace discrimination, sexual harassment, and caste

¹ US Bureau of the Census, American Community Survey, Asian Alone or in any Combination by Selected Groups, 2018,

<https://data.census.gov/cedsci/table?q=B02018&tid=ACSDT1Y2019.B02018&hidePreview=true>

² Equality Labs, Caste in the United States: A Survey of Caste among South Asian Americans, 2018,

https://static1.squarespace.com/static/58347d04bebafeb1e66df84c/t/603ae9f4cfad7f515281e9bf/1614473732034/Caste_report_2018.pdf



slurs. Every day, on a covert basis, many Dalit Americans face discrimination that must be addressed by the US legal system.

In a recent discussion of this discrimination, Maya Kamble, a Dalit software engineer in Silicon Valley, spoke of her experience working with fellow Indians and the attempts by her employer to undermine her work and single her out for sanctions (Episode 4, “Caste in the USA” by Equality Labs).³ She noted that lack of understanding about caste prevented her from seeking help when she most needed it. Victims of caste-based discrimination have been left with few if any resources to fight this unfair and immoral treatment and get justice. Therefore, we are urging the Department of Justice and the EEOC to acknowledge this fact and interpret the Title VII and other civil rights laws accordingly. The Department of Justice’s Civil Rights Division and EEOC’s recognition of the intertwined nature of caste and race is an urgent and crucial step towards promoting human dignity and ensuring justice, equality, and nondiscrimination in the workplace.

A recent example of discrimination in the workplace illustrates the critical need to provide protection for caste-based discrimination. In June 2020, the California Department of Fair Employment and Housing (DFEH) filed a case against Cisco Technology for discrimination against an Indian engineer belonging to a subordinate caste of Dalits by two dominant caste Indian managers. Cisco’s human resources department had recognized that discrimination was taking place but did not take action because they believed that such discrimination was not against the law in the United States. Cisco, like many other Silicon Valley firms, employs a considerable number of workers from India. The company was among the top 20 recipients of H-1B work visas last year, and Indians account for more than 70% of H-1B visas. Tech firms like Cisco are thus especially prone to caste discrimination in the workplace.

DFEH dismissed the filing in the US District Court on October 16, 2020, and refiled in Santa Clara County, California court the same day, limiting its claims to those under the California Fair Employment and Housing Act (FEHA). In doing so, DFEH alleged Cisco engaged in unlawful employment practices on the basis of religion, ancestry, national origin/ethnicity, and race/color against Complainant John Doe (a Dalit). For purposes of caste discrimination, FEHA explicitly includes the term “ancestry” as a protected class appears that the question about whether Title VII covers caste led to the dismissal of the Title VII claims and thus the basis for federal jurisdictional. As we explain below, we contend that Title VII does cover caste discrimination.

³ Equality Labs, Caste in the USA, Episode 4: Battling caste bias as a Dalit woman in tech, and thriving under non-Indian bosses, <https://www.firstpost.com/world/caste-in-the-usa-episode-4-battling-caste-bias-as-a-dalit-woman-in-tech-and-thriving-under-non-indian-bosses-9000001.html>



We hope that this case will act as a catalyst for the EEOC and DOJ to provide the requisite guidance that Title VII and other federal employment laws cover caste discrimination, and thereby better protect the marginalized and most vulnerable Dalit people in the workplace.

Congressional Resolutions Against Caste Discrimination:

Congress has already recognized that caste-based discrimination exists and is unacceptable in the United States. In 2007, the 110th Congress (2007-2008) passed the historic House Concurrent Resolution (H.Con.Res.139), “expressing that ‘caste-based discrimination’ is unacceptable and the United States is committed to eliminating it and ensuring that qualified Dalits are not discouraged from working with the U.S. government or U.S. organizations.” Similarly, in 2015, during the First Global Conference Defending Dalit Rights organized by the ICDR, U.S. Congresswoman Eleanor Holmes Norton announced her introduction of a resolution (H.Res.158) into the US House of Representatives: “Condemning caste discrimination, untouchability and the practice of birth or descent discrimination against Dalit people, which is widely practiced in Americans of South Asian descent and South Asian nations.”

Impact of the Supreme Court Decision, *Bostock v Clayton County*, on Claims of Caste Discrimination:

Though Title VII does not explicitly include the protected trait of ancestry that is included in FEHA, like the DFEH, we believe that caste discrimination is a form of national origin, and/ or race/color discrimination.

Principally, caste discrimination is covered as a protected grounds in Title VII because it is a type of ancestry discrimination that is covered by the proper interpretation of the term “race.” As the EEOC has explained, “Race discrimination includes discrimination on the basis of ancestry or physical or cultural characteristics associated with a certain race, such as skin color, hair texture or styles, or certain facial features.” U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2006-1, QUESTIONS AND ANSWERS ABOUT RACE AND COLOR DISCRIMINATION IN EMPLOYMENT (2006) <https://www.eeoc.gov/laws/guidance/questions-and-answers-about-race-and-color-discrimination-employment>. This is further supported by the Supreme Court’s analysis in *Saint Francis College v. al-Khazraji*, 481 U.S. 604 (1987), which explained that the term “race” covers ancestry discrimination against Arabs (who were nominally categorized under the Caucasian race).⁴ In a similar vein, caste discrimination may, in

⁴ *al-Khazraji* interpreted the term “race” in Section 1981, but the analysis of that term applies to Title VII as well. *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F. 3d 840, 850 (9th Cir.2004).





many cases, be cognizable under Title VII as a form of religious discrimination, based on the employee's ancestry. *See* *Gulitz v. DiBartolo*, No. 08-CV-2388, 2010 WL 11712777, at *5 (S.D.N.Y. July 13, 2010) (recognizing discrimination of an employee for their Jewish heritage as Title VII religious discrimination). These arguments are set forth in detail in the law review article *Title VII and Caste Discrimination*, which was published in the *Harvard Law Review Forum*.⁵

Furthermore, the legal analysis utilized by Justice Neil Gorsuch for the Supreme Court's decision of June 15, 2020, in *Bostock v Clayton County* (140 S. Ct. 1731 (2020)) appears to bolster the alleged employment discrimination suffered by Dalits fits within the prohibitions of Title VII. In *Bostock*, the Supreme Court addressed whether Title VII's prohibition against employment discrimination based on sex banned employers from firing employees because they were homosexuals or transgender individuals. Applying a textual analysis of Title VII, the Court noted that the traditional tort "but for" causation test is the one derived from the language of Title VII. The Court notes that "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." Thus, while being homosexual or transgender was a "but-for" cause of their discrimination, the fact that their sex was inextricably bound up with their other characteristics means that their sex was another "but for" cause. Since sex played an integral part in the discrimination, the discrimination was also sex discrimination under Title VII.

While the Court's approach may rarely yield a different result for a Title VII employment discrimination claim, as several legal scholars have argued, this reasoning is not limited to sex, but can apply to other protected categories, including race and national origin. Thus, it provides an additional framework for rendering caste discrimination a violation of Title VII. These arguments are described in detail in the aforementioned article *Title VII and Caste Discrimination*, in the *Harvard Law Review Forum*, and the forthcoming law review article tentatively entitled *Bostock v Clayton County Game Changer: US Federal Employment Law Now Covers Caste Discrimination Based on Untouchability* to appear in *N.Y.U. Review of Law & Social Change*, written by an international group of four professors, three of whom are law professors.⁶

⁵ Guha Krishnamurthi & Charanya Krishnaswami, *Title VII and Caste Discrimination*, 134 HARV. L. REV. FORUM 456 (2021), available at <https://harvardlawreview.org/2021/06/title-vii-and-caste-discrimination/>.

⁶ Kevin Brown, Richard S. Melvin Professor, Indiana University Maurer School of Law; Dr. Kenneth DauSchmidt, Willard and Margaret Carr Professor, Indiana University Maurer School of Law; Dr. Annapurna Waughray, Reader in Human Rights Law, Manchester Law School, and Dr. Lalit P. Khandare, Social Work Program in the College of Arts and Sciences of Pacific University. The article is available in draft form at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3816265.



The critical point is that the caste system comes out of South Asia. Thus, the crux of the argument is that those facing discrimination on the basis of their caste identity are necessarily of a particular racial background (Asian, South Asian) and national origin (South Asian—encompassing Bangladesh, India, Nepal, Pakistan, Sri Lanka). Consequently, just as being a homosexual or transgender person is inextricably bound up with that person’s sex, being a Dalit is inextricably bound up with South Asian racial and national origin identity. If we change the race or national origin of an individual Dalit who is a victim of intentional caste discrimination in employment would the employer make a different choice? If the answer is “yes” then the discrimination suffered is also race discrimination.

Here, the answer is pellucidly “yes” because non-Asian black or white Dalits do not exist. Thus, caste discrimination involves not only discrimination based on descent or color, but also, because the individual is of Asian race and national origin. As a result, victims of caste discrimination based on descent and/ or color and caste are “but for” victims of both caste discrimination, which is not expressly prohibited, and racial discrimination, which is expressly prohibited.

Following the *Bostock* ruling, on January 20, 2021, President Joseph R. Biden Jr. issued an executive order directing agencies to appropriately interpret the ruling to apply not just to employment discrimination, but also to other areas of law where discrimination is prohibited, including education, housing, and health care.⁷

The United States constitution protects individual from discrimination by granting equal protection of the laws. Title VII of the Civil Rights Act of 1964 protects individuals against harassment, retaliation and other forms of employment discrimination in the workplace. We strongly believe that not recognizing and enforcing caste-based discrimination as a form of discrimination severely undermines the civil rights and goes against the mission of the US Department of Justice’s Civil Rights Division, which is to further the compelling government interest in addressing and preventing all forms of harassment, discrimination and injustice in the US and to ensure equal opportunity, inclusion, and dignity for all throughout the nation.

⁷ Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, January 20, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.

Madam Assistant Attorney General, all Americans must be treated with dignity and respect at work and in all other aspects of their lives regardless of caste or race, descent and national origin, or another protected classification. We would like to remind you that the Civil Rights Division of the Department of Justice, created in 1957 by the enactment of the Civil Rights Act of 1957, to uphold the civil and constitutional rights of all Americans, particularly some of the most vulnerable members of our society. We believe that it is both the legal and moral responsibility of the Department of Justice to undertake this change.

THEREFORE, BE IT RESOLVED THAT – the underlisted organizations and scholars demand to the US Department of Justice in the strongest possible terms to recognize the intertwined nature of caste and race and include “caste-based discrimination” in civil rights laws and enforce caste-based discrimination under the civil rights and nondiscriminatory laws.

We urge the Department of Justice to be resolute in its commitment to uphold the civil and constitutional rights of all Americans, particularly some of the most vulnerable members of our society.

On behalf of the Signatories,

DB Sagar

D.B. Sagar
Founder and President,
International Commission on Dalit Rights
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Representing the following organizations:

- International Commission on Dalit Rights (ICDR International) | icdrintl.org
- South Asian Americans Leading Together (SAALT) | saalt.org
- Hindus for Human Rights | hindusforhumanrights.org
- Sadhana, New York
- Dalit American Federation
- South Asia Initiative
- Boston Study Group (BSG)
- Ambedkar International Mission (AIM USA), Texas
- Ambedkar Association of Northern America (AANA), Michigan
- Ambedkar International Center (AIC), Maryland

- NASO Community, Maryland
- The Quander Historical Society, Washington, D.C.

In addition to the above organizations, the following scholars/firms wish to add their names in support of this Appeal:

- Kevin D. Brown, Richard S. Melvin Professor of Law, University of Indiana Maurer School of Law
- Annapurna D. Waughray, Reader, Manchester Law School, Manchester Metropolitan University
- Deepa Iyer, a South Asian American writer, strategist, lawyer, and racial justice advocate
- Purvi Mehta, Assistant Professor, History Department, Colorado College.
- Judge Rahulamin Quander, Retired Sr. Law Administrative Judge for District of Columbia, USA
- Kenya Tyson, Esq., - Chair of the Advisory Committee of the ICDR/ Civil Rights and Criminal Justice practitioner
- M. Farook Sait, Esq., former Special Counselor to the Assistant Secretary for Civil Rights at the U.S. Department of Agriculture and Civil Rights Attorney
- John Rushing, Founding Partner, Rushing McCarl LLP, California
- Ryan McCarl, Founding Partner, Rushing McCarl LLP, Californian