

May 10, 2021

Submitted via email/www.regulations.gov

The Honorable Charlotte A. Burrows
Chair, U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Re: Request for formal recognition and interpretation that existing EEOC's enforced laws recognize and prohibit caste-based discrimination in the workplace, based on the Supreme Court 2020 decision, *Bostock v Clayton County*

Dear Madam Chair,

The International Commission for Dalit Rights (ICDR), together with the undersigned organizations, call on the Equal Employment Opportunity Commission (EEOC) to recognize the intertwined nature of caste and race and thereby include a prohibition against “caste-based discrimination” as already covered by Title VII in relevant EEOC non-discriminatory guidelines and other EEOC materials.

The undersigned 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 Title VII prohibits caste-based discrimination in the workplace and integrate this recognition into EEOC non-discrimination guidelines.

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.

Caste-based discrimination and all forms of harassment occur within the same national origin or race and descent groups. However, every person with a caste also has a race. Americans of South Asian descent may be seen as part of a single race, descent, or national origin and may have been victims of racial discrimination in the United States as South Asians. Nevertheless, caste discrimination occurs within South Asian communities, with 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.

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 slurs. Every day, on a covert basis, many Dalit Americans face discrimination that can be addressed by the American 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

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/58347d04beba9bb1e66df84c/t/603ae9f4cfad7f515281e9bf/1614473732034/Caste_report_2018.pdf

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>





treatment and get justice. Therefore, we are urging the EEOC to acknowledge this fact and interpret the EEOC's laws accordingly. The 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 also includes "ancestry" as an additional protected class not included in Title VII.

We hope that this case will act as a catalyst to reform the U.S. legal and regulatory systems towards a more inclusive approach that protects 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 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. Moreover, before the summer of 2020, asserting an employment discrimination claim of intentional caste discrimination under Title VII was more contestable.

However, 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 tailored to answer the issue of whether 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. The following argument is described in detail in the forthcoming law review article tentatively entitled “*Bostock v Clayton County* Game Changer: US Federal Employment Law Now Covers Caste Discrimination Based on Untouchability” in *N.Y.U. Review of Law & Social Change*, written by an international group of four professors, three of whom are law professors.⁴

⁴ 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.



The caste system comes from South Asia. Thus, the race under US law of all of those who are Dalits is “Asian.” Simply put, there are no Dalits of African, European or Native American descent. Thus, 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 being of Asian descent. If we change the race of an individual Dalit who is a victim of intentional caste discrimination in employment to say, “white or even black,” would the employer make a different choice? Once again, if the answer is “yes” then the discrimination suffered is also race discrimination. And the answer clearly is “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.⁵

The EEOC, established by the landmark Civil Rights Act of 1964, is the principal federal agency charged with enforcing the nation’s laws prohibiting employment discrimination; and advancing equal employment opportunity for people of all races, national origins, and ethnicities in the workplace. Title VII of the Civil Rights Act of 1964 protects individuals against harassment, retaliation and other forms of employment discrimination in the workplace. Not recognizing caste discrimination as a form of discrimination already covered by the protected traits severely undermines Title VII of the Civil Rights Act. It also goes against the EEOC’s mission to further the compelling government interest in addressing and preventing all forms of harassment and discrimination in the workplace and to ensure equal opportunity, inclusion, and

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

⁵ 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/>.



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dignity for all throughout the nation's workplaces. We believe that it is both the legal and moral responsibility of the EEOC to undertake this change.

THEREFORE, BE IT RESOLVED THAT – the undersigned organizations demand to the EEOC in the strongest possible terms to recognize the intertwined nature of caste and race and include “caste-based discrimination” in compliance and nondiscriminatory laws.

We urge the EEOC to be resolute in its commitment to advancing non-discriminatory compliance, equal opportunity, and justice for all people in the workplace.

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.

Sincerely,

D.B. Sagar

D.B. Sagar
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
- Dalit American Federation
- South Asia Initiative
- Sadhana, New York
- 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.





International Commission for Dalit Rights

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

- Judge Rahulamin Quander, Retired Sr. Law Administrative Judge for District of Columbia, USA
- 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
- 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
- Deepa Iyer, a South Asian American writer, strategist, lawyer, and racial justice advocate
- Purvi Mehta, Assistant Professor, History Department, Colorado College.

