



U.S. Department
of Transportation
**Federal Highway
Administration**

1200 New Jersey Ave., SE
Washington, D.C. 20590

In Reply Refer to: HCR-20
DOT# 2021-0106

March 5, 2021

(b) (6)

Subject: Acknowledgment of Complaint #2021-0106

Dear (b) (6):

This letter acknowledges the Federal Highway Administration (FHWA) Office of Civil Rights received your complaint of sex discrimination against the California Department of Transportation. These alleged violations may be related to Section 162(a) of the Federal-Aid Highway Act of 1973 (codified at section 324, title 23 U.S.C) and Title VI program regulations administered by FHWA (23. C.F.R. Part 200). Your complaint was received by this office on February 24, 2021.

This complaint has been assigned to Erik Lacayo, FHWA Title VI Analyst – Office of Civil Rights. Mr. Lacayo will keep you informed regarding the status of your complaint. You may contact him at 202-913-3926 or via e-mail at erik.lacayo@dot.gov.

Please be advised that no one may intimidate, threaten, coerce, or engage in other discriminatory conduct against anyone because he or she has either taken action or participated in an action to secure rights protected by the civil rights requirements that we enforce. Any individual alleging such harassment or intimidation may file a complaint with the FHWA. Any questions or concerns that you have regarding the complaint process and your rights can be discussed with Mr. Lacayo.

Sincerely,

Nichole McWhorter

Nichole McWhorter
Title VI Team Leader
Office of Civil Rights

cc: Vincent Mammano, Division Administrator, FHWA California Division Office
Paul Schneider Deputy Division Administrator, FHWA California Division Office
Scott Carson, Civil Rights Specialist, FHWA California Division Office
Irene Rico, Associate Administrator, FHWA Office of Civil Rights
Jim Esselman, Senior Attorney-Advisor, FHWA Office of Chief Counsel
Irene Marion, Director, Departmental Office of Civil Rights

Yvette Rivera, Associate Director, Equal Employment Opportunity Programs Division,
Departmental Office of Civil Rights
Barbara Dougherty, Deputy Director, Departmental Office of Civil Rights

From: [Lacayo, Erik \(FHWA\)](#)
To: (b) (6)
Cc: [Chandler, David \(FHWA\)](#)
Bcc: [Mcwhorter, Nichole \(FHWA\)](#); [Mann, Arianne \(FHWA\)](#)
Subject: Complaint DOT # 2021-0106
Date: Wednesday, May 12, 2021 12:18:00 PM

(b) (6),

I am writing in regard to the discrimination complaint you filed with us on February 24, 2021. After an initial review, we are referring your complaint to FHWA's DBE Program team because the complaint alleges harms to your business, (b) (6). If you have any future questions about the status of your complaint, you may contact David Chandler with the DBE team at david.chandler@dot.gov.

Thanks,

Erik Lacayo

Title VI Program Analyst
Federal Highway Administration
Office of Civil Rights
(202) 913-3926
erik.lacayo@dot.gov

From: [Lacayo, Erik \(FHWA\)](#)
To: [Mann, Arianne \(FHWA\)](#)
Subject: FW: Disparate Discrimination - (b) (6)
Date: Wednesday, March 3, 2021 2:12:39 PM
Attachments: [Title VI - Types of Discrimination.pdf](#)

Arianne, here is the other sex complaint that needs to be processed. Thanks, Erik.

From: Mcwhorter, Nichole (FHWA)
Sent: Wednesday, February 24, 2021 12:27 PM
To: Lacayo, Erik (FHWA) <erik.lacayo@dot.gov>; Resler, Kevin (FHWA) <kevin.resler@dot.gov>
Subject: FW: Disparate Discrimination - (b) (6)

From: Thomas, Maria (FHWA)
Sent: Wednesday, February 24, 2021 2:24 PM
To: Mcwhorter, Nichole (FHWA) <nichole.mcwhorter@dot.gov>; Kenley, Martha (FHWA) <martha.kenley@dot.gov>
Subject: FW: Disparate Discrimination - (b) (6)

Sorry ladies,

She just sent me this attachment and message...thanks

Maria Thomas

Operations Program Analyst
Department of Transportation
Federal Highway Administration
Office of Civil Rights: The High Way to Equality
1200 New Jersey Avenue, SE
Room E81-105
Washington, DC 20590
Phone: (202) 366-0659
Fax: (202) 366-1599

From: (b) (6)
Sent: Wednesday, February 24, 2021 2:21 PM
To: Thomas, Maria (FHWA) <Maria.Thomas@dot.gov>
Subject: RE: Disparate Discrimination - (b) (6)

CAUTION: This email originated from outside of the Department of Transportation (DOT). Do not click on links or open attachments unless you recognize the sender and know the content is safe.

Hi Maria,

I have attached the Title VI checklist regarding initial evaluation of discriminatory acts according to legal application. Intentional discrimination does not list sex as one of the groups that can be discriminated against according to Title VI regulations at Title 49 of the Code of Federal regulations, Part 21. We are requesting a review and clarification of the attached documentation regarding the status of women as a group that is recognized under Title Vi.

Best regards,

(b) (6)

From: Thomas, Maria (FHWA) <Maria.Thomas@dot.gov>

Sent: Wednesday, February 24, 2021 11:04 AM

To: (b) (6)

Subject: RE: Disparate Discrimination - (b) (6)

Greetings (b) (6),

Thank you for submitting this information to me. I will forward these attachments to the respective office and someone should be contacting you soon.

Have a wonderful day.

Maria Thomas

Operations Program Analyst
Department of Transportation
Federal Highway Administration

Office of Civil Rights: The High Way to Equality

1200 New Jersey Avenue, SE
Room E81-105
Washington, DC 20590
Phone: (202) 366-0659
Fax: (202) 366-1599

From: (b) (6)

Sent: Wednesday, February 24, 2021 1:39 PM

To: Thomas, Maria (FHWA) <Maria.Thomas@dot.gov>

Subject: Disparate Discrimination - (b) (6)

CAUTION: This email originated from outside of the Department of Transportation (DOT). Do not click on links or

Background:

(b) (6) [Redacted text block]

(b) (6) [Redacted text block]

(b) (6) [Redacted text block]

Complaint:

(b) (6) [Redacted text block]

- [Redacted list item]
- [Redacted list item]
- [Redacted list item]
- [Redacted list item]

(b) (6)

[Redacted text block]

Documentation

- (b) (6)
- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

Other documentation is available upon request.

(b) (6)

What types of discrimination are prohibited by Title VI?

The purpose of Title VI is to ensure that recipients of federal financial assistance do not discriminate on the basis of race, color, or national origin in their programs and activities. The U.S. Department of Transportation's (USDOT's) Title VI regulations at Title 49 of the Code of Federal Regulations (CFR), Part 21, describe some specific types of discriminatory actions that are prohibited, but they generally fall under three legal categories:

1. Disparate Treatment

2. Disparate Impact

3. Retaliation

What is disparate treatment discrimination?

Disparate treatment (also called intentional discrimination) happens under Title VI when similarly situated persons are treated differently because of their race, color, or national origin by a recipient of federal funds directly or through contractual or other arrangements. For example, USDOT regulations provide that recipients of federal financial assistance, in operating a federally-assisted program, may not, on the basis of race, color, or national origin, among other things: [As a general matter, it gets a little messy when you try to summarize the regulations like this instead of just stating what the regulations themselves say.

- Deny an individual any service, financial aid, or other benefit;
- Provide any service, financial aid, or other benefit to a person that is different or is provided in a different manner from that provided to others under the program;
- Subject a person to segregation or separate treatment;
- Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;
- Treat a person differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which persons must meet in order to be provided any service, financial aid, or other benefit provided under the program;
- Deny a person an opportunity to participate in the program through the provision of services or otherwise or afford them an opportunity to do so which is different from that afforded others under the program; or
- Discriminate in site or location selection of facilities.

To establish disparate treatment requires a showing that the recipient decisionmaker was not only aware of the race, color, or national origin of the person(s) affected by the decision, but that the

recipient acted, at least in part, because of the person(s)'s race, color, or national origin. Discriminatory intent does not need to be the only reason for an action. Likewise, decision-makers do not need to have had "bad faith, ill will, or any evil motive." Instead, disparate treatment occurs when the evidence shows an action was taken "because of," not merely "in spite of," its adverse effects upon an individual or group based on race, color, or national origin (*Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

The evidence for disparate treatment can come from a variety of sources. Disparate treatment can be shown through comments or conduct by decision-makers, which demonstrates an intent to discriminate. It can also be shown through expressly using race, color, or national origin in the recipient's policies and procedures, if the recipient does not have a compelling governmental interest and the use is not narrowly tailored to suit that compelling interest. If the recipient explicitly conditions receipt of benefits or services on the race, color, or national origin of the beneficiary, or directs adverse action to be taken based on race, color, or national origin, such a policy or practice may be an express classification, which can constitute disparate treatment discrimination.

What is disparate impact discrimination?

Disparate impact (also called adverse impact) discrimination happens under Title VI when a recipient of federal funds from FHWA adopts a procedure or engages in a practice that has a disproportionate, adverse impact on individuals who are distinguishable based on their race, color, or national origin—even if the recipient did not intend to discriminate. USDOT's Title VI regulations, which apply to the FHWA, provide that recipients may not themselves, or through contractual arrangements:

...utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.

49 C.F.R. §21.5(b)(2). However, it is important to note that a disparate impact, alone, does not mean the policy or practice is prohibited. If a policy or practice creates a disparate impact, FHWA and recipients must also consider two things:

1. Whether there is a "substantial, legitimate justification" for the policy or practice, and
2. Whether there is an alternative policy or practice that has less of a disparate, adverse impact.

If there is a sufficient justification—one that is substantial and legitimate—for a policy or practice, then the policy or practice may not constitute prohibited discrimination. However, even if the recipient can establish a substantial, legitimate justification, if there is a feasible alternative policy or practice with a lesser adverse impact, the recipient must consider that alternative. Not considering such an alternative, or not establishing a sufficient justification, could constitute prohibited disparate impact discrimination under Title VI.

What is retaliation?

Just as recipients can not intentionally discriminate in their programs or activities, recipients are also prohibited from intentionally taking adverse actions against persons who exercise their rights under Title VI. This sort of intentional discrimination is called retaliation. USDOT regulations provide that:

No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by... [Title VI], or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing....

49 C.F.R. §21.11(e).

Retaliation involves three elements:

1. An individual engaged in protected activity of which the recipient was aware;
2. The recipient took a significantly adverse action against the individual; and
3. There is evidence to show the protected activity was the cause of the recipient's adverse action.

The types of activities considered protected can range from filing a Title VI administrative complaint against a recipient, to participating in an investigation or compliance review, or simply speaking at a public meeting. Evidence that shows the activity was the cause of the recipient's adverse actions can be direct comments or conduct, as well as indirect circumstantial evidence.

Finally, it is important to understand that retaliation is treated as a separate act of prohibited discrimination, even if it happens in response to a disparate treatment or disparate impact allegation. For example, if a person files a disparate impact complaint against a recipient, and FHWA does not find that prohibited disparate impact occurred, FHWA could still find that prohibited retaliation occurred.

From: (b) (6)
To: [FHWA, Civil Rights \(FHWA\)](#)
Cc: [Lacayo, Erik \(FHWA\)](#)
Subject: RE: Letter of Acknowledgment, complaint DOT # 2021-0106
Date: Friday, March 5, 2021 2:17:00 PM

CAUTION: This email originated from outside of the Department of Transportation (DOT). Do not click on links or open attachments unless you recognize the sender and know the content is safe.

I would like to emphasize that the complaint revolves around the DBE program and that I am DBE consultant who has filed a disparate discrimination charge against Caltrans based upon a pattern of behavior by the agency's staff. Additionally, Caltrans office of Civil Rights is party to the claim.

Regards,

(b) (6)

From: FHWA, Civil Rights (FHWA) <CivilRights.FHWA@dot.gov>
Sent: Friday, March 5, 2021 9:19 AM
To: (b) (6)
Cc: Lacayo, Erik (FHWA) <erik.lacayo@dot.gov>
Subject: Letter of Acknowledgment, complaint DOT # 2021-0106

(b) (6),

The FHWA Office of Civil Rights has received your Title VI complaint. This correspondence acknowledges that we have received the complaint and will determine if FHWA has jurisdiction to investigate. Please see the attached letter of acknowledgment for more detail.

Thank you.