

A Personal and Professional Perspective on Civil Rights

KALPANA KOTAGAL

Kalpana Kotagal serves as Commissioner of the U.S. Equal Employment Opportunity Commission (EEOC), where she has dedicated her career to supporting workers and championing diversity, equity, inclusion, and accessibility. Prior to joining the Commission, Kotagal was a partner at Cohen Milstein and served as a law clerk to the Honorable Betty Binns Fletcher of the United States Court of Appeals for the Ninth Circuit. She is also co-author of the Inclusion Rider, a framework designed to encourage inclusive hiring practices in the entertainment industry.

The work of the EEOC is about preventing and remedying unlawful employment discrimination. That's what we do. It has been a real privilege to join a storied institution at this particularly remarkable moment. We just celebrated the 60th anniversary of the passage of the Civil Rights Act of 1964. It was that law that founded our agency 60 years ago. We were birthed out of that movement, out of the work of civil rights pioneers and leaders like Dr. King and Rosa Parks, from right here in Detroit. The EEOC and laws like Title VII wouldn't exist but for the advocacy, struggle, organizing, and hard work of that movement, as well as major protests like the bus boycott in Montgomery or the March on Washington for Jobs and Freedom.

I'm not a historian, but I find a connection to who we are, where we came from, and where we're going from the original texts. I was reading about Rosa Parks, and she said something instructive, as I think about my own priorities. Parks focuses on the need for action with her words when she says, "we must have the courage and determination to go on with the task of becoming free, not only for ourselves but for the nation and the world." Action is a fundamental principle in my family's religious tradition of karma in Hinduism. Karma means action. We're committed to the work and action at the EEOC as we continue to press to make our nation's commitment to equal opportunity real.

That work is not done. We're busy. In fiscal year 2023 alone, the EEOC recovered more than \$665 million for more than 22,000 victims of discrimination. For anybody who tells you that discrimination in the workplace is over, that we are a post-discrimination society, they're wrong. I am focused on serving vulnerable and underserved workers. Earlier this year, we made progress on a couple of my priorities. We finalized regulations that govern the enforcement of the Pregnant Workers Fairness Act, one of the few major civil rights laws passed by Congress in 30 years. We also finalized updated guidance for workers and employers on harassment in the workplace. I represented workers before I came to the Commission, including workers who struggled for fair pay, and so advancing pay equity is also a paramount priority of mine.

This year we've actually moved backward. It has been 60 years since the passage of the Equal Pay Act. This

year marks the first statistically significant increase in the gender pay gap in 20 years. Women working full-time, on average, earn roughly \$10,000 a year less than men. That's money for housing, health insurance, childcare, among other things. It's real money. The amount is even more significant for women of color. That's an area that I continue to be committed to and focused on, especially since research suggests a significant portion of the wage gap may be attributed to discrimination.

I have also had the chance to lead the EEOC's REACH Initiative. The Initiative, launched earlier this year, focuses on reaching vulnerable and underserved worker communities. As a child of immigrants and a Midwesterner, the opportunity to reach workers who may not know about their rights to be free of discrimination in the workplace is just critically important. I've traveled the country on a listening session tour for 10 months. It's taken me everywhere, from New Hampshire, Maine, to Texas, and from tribal lands in Minnesota to West Virginia, and Florida. I've learned more about the barriers that workers face when they seek to be free from discrimination in the workplace. I've met with workers and advocates all over the country. It's been a remarkable learning opportunity. We will take that learning back to the Commission and figure out how to implement it and how we can better serve the most vulnerable and underserved workers.

I should not leave the topic of my priorities without mentioning diversity, equity, inclusion, and

accessibility. I have been and will continue to be vocal in supporting these issues. I will continue defending that work and encouraging employers to continue it. It's just critically important.

Reflecting on her time as a partner at Cohen Milstein, where she specialized in civil rights and employment law and chaired the firm's hiring and diversity committee, Kotagal pointed to the deep connection between the most challenging cases and the ones she found most meaningful.

The things that I'm most proud of and the most challenging things go hand in hand. That's not surprising. I spent almost 17 years at Cohen Milstein. I joined the firm in 2006, fresh out of my clerkship. I had been in Seattle, clerking for Judge Fletcher (Honorable Betty Binns Fletcher of the United States Court of Appeals for the Ninth Circuit), whom I think about every day. She was one of the very first women appointed to the bench by President Carter in the late 1970s and was a pioneer in the profession her whole career. She left a legacy of over 100 clerks during her 30 years on the bench, many of whom have gone on to important and meaningful public interest careers.

I think about her all of the time because she never shied away from the hard stuff. She got right into it and encouraged us to do the same thing. When I sat down with her to talk about a case before oral argument, we'd prepare so that she would know what issues she wanted to focus on from the bench. By the time I worked for her, she was in her early eighties. She'd been on the

bench for so long that she could do it with one hand tied behind her back. I would have read all the cases and dug into the record. I would write my bench memo, talk to the other chambers' clerks, and then sit down to talk to her. She would have already zeroed in on the most critical issue. She didn't really need me. But she taught me something about the importance of mentoring and teaching.

I took that commitment to Cohen Milstein where I chaired the Hiring and Diversity Committee for a decade and led the firm's fellowship program for nearly that long. I loved that work. It was very different from my practice, where I litigated complicated, massive cases. When a defendant produces terabytes of documents and data, you must figure out what to do with it. Where's the needle in the haystack? How do I find the documents that are going to prove my case?

I litigated a case for about 15 years on behalf of 70,000 women. We finally resolved it right before I left the firm. That case sat right at the intersection of forced arbitration, class certification, and employment discrimination law. This is challenging work: you have to show a court that you can bring a lot of people together in a single case, that their problems are similar enough, that their cases can be litigated together. In addition to those complex procedural issues, we also had to establish that these women had experienced discrimination. All of that went up and down to the Second Circuit Court of Appeals four times and to the Supreme Court twice. We resolved that case just before I left the firm for nearly \$200 million. That was a case

where women at the company found each other, figured out that they had been paid less than lesser qualified men, and came to lawyers. They found us.

One of my clients in that case lived in the farthest northern reaches of upstate New York. You could fly into Boston or New York, and then you took one of those six-seater planes, where the pilot instructs each passenger where to sit to balance the plane's weight. She was not a woman with advanced degrees. It bothered her that the guy hired after her, who had no experience selling jewelry, was getting paid more than her. It just bothered her; it sat wrong with her. The word spread through the organic network of employees at a large retail chain of jewelry stores.

This same client connected to a woman in Florida who thought that a man working in her store, who was less qualified than she was, someone she had trained, was getting paid more than her and had been promoted over her. She wanted that store manager position, and they gave it to the less qualified man, she believed. As we dug deeper, it became clearer that there was evidence of pay discrimination, discrimination in promotions, and a grotesque disregard for the dignity of women that permeated the company, in our view. We fought that case hard, and I'm incredibly proud of it. It felt righteous and meaningful.

I litigated a case right here in Detroit very early in my career. I represented nurses who alleged that various hospitals in the area were exchanging information about how much they were paying nurses in a way that

suppressed nurses' wages. It was a fascinating, incredibly challenging, and righteous case.

I felt proud to represent these women who could have quit, looked for work elsewhere, or acquiesced. They didn't—not just for themselves, their families, and their dignity but also for those who came after them. They recognized that if they were silent, the behavior would continue. I could talk about my clients' bravery and tenacity all day long. The work was so powerful. I have so many memories of being a litigator that continue to move me to this day.

On mentoring and advising the next generation of lawyers, Kotagal drew on her experiences as a Harvard Law School Public Interest Fellow and as the Vanderbilt Law School Barrett Distinguished Practitioner in Residence, reflecting on both what she has learned and the guidance she offers to students navigating challenges to their personal values.

I mentioned Judge Fletcher. I have been so fortunate to have teachers, mentors, and sponsors who have seen, supported, and challenged me. They've pushed me. And so, when I was first in a position to offer support to folks who were coming up, I felt I needed to pay that forward. Little did I know what I know now, which a lot of mentors and sponsors here in the room know, that we who do that work of mentorship and sponsorship and teaching get so much more from that experience than we give. I get more than the law students and the junior lawyers I'm privileged to work with. And I wonder if that's how Judge Fletcher felt,

and if what kept her on the bench for so long was the chance to teach and train generation after generation of new lawyers and to send them off into the world.

Litigation is hard. It is particularly hard to represent the little guy when you're on the plaintiffs' side when you are outmatched and outspent by your opponents. Taking on major companies and their legal teams makes litigation hard. It's an adversarial process. It is inherently antagonistic. My career, hopefully, speaks to the value of taking on systemic discrimination. It's righteous work. I'm grateful to be in a position to do it, but it can be wearing.

There have been moments where I have lost sight of the forest for the trees. The nasty email or letter from opposing counsel on Friday at 5 p.m. sits with you as you go home to your family. Those things are real. They're a real part of the work but talking to and learning from law students and junior lawyers has motivated me. It has refreshed me. It has re-inspired me. It has reminded me why I continue to do this work.

One of the things that I have noticed from this new generation of lawyers is a fearlessness, a willingness to take on injustice, an impatience and unwillingness to mince words when they see something that isn't fair. They are strategic enough to use their own power as a force for good. At Harvard as a Wasserstein fellow, I met four women, second-year law students, who had launched an organization after learning that some law firms recruiting Harvard law students were using forced arbitration provisions. The organization's early focus

was to advocate for more equitable employment practices in private law firms, including eliminating the use of forced arbitration provisions, which require someone who alleges discrimination to go through private arbitration rather than bring their case in court.

I met them 6 years ago, so they've graduated and are now relatively junior lawyers. The organization they founded as law students is now one of the country's influential progressive legal organizations. They're advocating for judicial nominees and progressive legislation. They have a seat at the table on all kinds of critical questions that impact the law, and they are calling lawyers to the table. They're calling lawyers into the room to make the profession better. They're bold, fearless, and strategic. They bring the best energy, so I will continue working with younger lawyers and law students as long as they want to keep hearing from me.

I also admire how young lawyers are carving their paths and finding their way. I empathize with the impatience that young people feel in wanting to get out of school and do something. By the time I graduated from college, I had spent years studying how things work and why they work the way they do. I was ready to be part of the solution. That's when I went into professional organizing. So, I get it.

I don't have easy answers to what happens when an aspect of someone's work or their employer's priorities don't align with their values. But I can say a couple of things about it.

The first question that folks in that situation have to ask themselves is: at what level is the misalignment occurring? For example, is what's bothering you that you see a colleague treating another colleague in a way that seems wrong and unfair? In a way that appears discriminatory? If that's the friction, the misalignment between your values and your work, you must ask yourself whether you can do something about it. You must ask yourself whether you can bring your workplace back into alignment with your values. Can you speak up? Can you support that worker who's facing a hard time?

If the misalignment is happening more systematically, that's harder. If you're in a situation where the employer's goal or your work is fundamentally at odds with your worldview, it's important to think carefully about your plan for the future. What do you want to do? What fires you up? What moves you? Where do you want to be? What's your plan to get there? Could you find ways to connect with that organization? Could you use LinkedIn? Could you connect with places you want to be or people doing the work you want to do? Make a plan for the next step. The other thing is to look for ways to be involved while you're making your plan. Don't wait. There are so many things you can do. You can be part of civic life in your community. You can be part of organizations that do work that's meaningful to you. Do the work while you're making your plan. Sometimes, looking for other ways to do the work can lead you to your next step, and you can find ways to achieve greater alignment.

There are no perfect jobs. There are great jobs. Every job has its upsides and its downsides. Everybody entering the workforce must know what matters to them the most and how to be practical about their realities. Be thoughtful about the steps that you take to get there. Your career is really long. You don't have to have the perfect job right away. You don't have to have the dream job for your first job. Work through what matters to you to head in the right direction.

Kotagal also highlighted her work co-authoring the Inclusion Rider and collaborating with industry leaders to advance its implementation across film, television, music, and fashion.

This was a funny moment. Some articles in the press from that time describe how I had no idea that Frances McDormand would talk about the Inclusion Rider at the Oscars. I didn't know she knew about it. The way that all unfolded was a profound surprise to me and to the other co-authors of the Inclusion Rider.

The Inclusion Rider is a voluntary agreement encouraging more inclusive hiring practices, expanding the candidate pool, setting flexible goals and benchmarks, collecting and analyzing the data, and going through a cycle of accountability for how a production company or studio could do better. Those principles are broadly applicable. The Inclusion Rider is one of many strategies. Many folks are working in Hollywood to make it better and more inclusive, both in terms of who you see on screen, who you don't see behind the camera, and what stories get told. I'm proud

to have been part of those efforts. But I want to underscore that there are lots of folks doing that valuable work.

After the Inclusion Rider broke through after the Oscars in 2018, what I said more than anything about it is that the principles it embodies are just good employment law. They're just basic principles. The Rider is a tool we wanted to offer; we never intended it to become something exclusive. We wanted folks to know that there was this way of doing things. We offered it at a moment when the narrative around diversity, equity, inclusion, and accessibility in film and television was bubbling up.

Since we first authored the Inclusion Rider and Frances McDormand talked about it in 2018, we worked with several production companies and studios to tailor its principles for particular settings. It was used in the Grammy's production. We've used the Inclusion Rider in New York Fashion Week. I believe that dozens of production companies and studios across Hollywood use the Inclusion Rider on their slate of productions or have taken it as a set of principles and developed their own. My co-author, Fanshen Cox, took the Inclusion Rider into the earliest stages of productions she has been executive producer on.

The Inclusion Rider is fundamentally about improving recruitment practices, hiring practices, and outreach to address barriers to equal opportunity that have existed in Hollywood for decades. When I was most actively engaged in that work, I had a remarkable window into

how Hollywood companies were thinking about DEIA and working on DEIA. I loved the chance to collaborate at all levels of the work, from the stories chosen to the stories told. Slowing down the hiring process and challenging stereotypes in a story and casting felt particularly important.

Hollywood, the entertainment industry, perhaps more than other industries, is adept at telling stories about what it is doing in certain areas without always doing those things. Marketing and narratives are powerful forces in Hollywood. Making sure that the work continues to happen is really important. Since I joined the Commission last year, I've met regularly with business leaders about DEIA principles and practices, and I can take a lot of that learning from Hollywood and the Inclusion Rider into this next chapter.

On techniques for reaching common ground in situations involving differing ideas and perspectives, Kotagal noted:

As an advocate, my starting point is what I think is right and how to get what I feel is right for my clients. My stubbornness has served me well over the years through the adversarial nature of the litigation process. But finding common ground is critically important to continue progressing on the issues I care about.

In my experience, the most important techniques, the ones that I practice every day for finding common ground, are the ones that our achievement-oriented culture doesn't necessarily prioritize. I'm talking about

listening more than you talk. Listening is hard. We reward talking, we reward extroverts, and we reward communication, which is a good thing. When you have a good idea, it's important to talk about it, but fundamentally, making progress and finding common ground requires us to be quiet. It requires us to listen to what people say, whether it's our partner, colleague, or adversary. One of the first rules of organizing I learned 25 years ago was to listen more than I talked, which lets you find out what matters to the person you're listening to.

I also have sought to prioritize humility. My parents always remind me to be humble. After the Oscars in 2018, my email exploded with requests from reporters and media organizations and invitations to speak. The first message I received was from my parents: “Good for you, but focus on the work and stay humble.” Recognizing that you don't know everything, that none of us know everything, is key to finding common ground. Taking a step back is key to opening the door to finding common ground. These are not easy skills. My experience has been that the more I practice them, the more effective I am, and the more secure and grounded I feel.

When I'm being thoughtful about my self-care and exercising the personal practices that help me sustain myself, I'm better at listening and humility. I can come from a place of empathy, which is different for everybody. Figure out what works for you. For me, it's regular meditation practice, exercise, nutrition, and sleep. I don't get all those things all the time. If I can

maintain 3 of them, I am better prepared to listen. I am more humble and less defensive.

I think that's what it takes to find common ground, to feel grounded in where you are coming from—not only security in the position that you are advocating for but also in who you are, your work, your value, that you belong in the room and at the table, and that you're doing the things to sustain that sense of yourself so that you can show up as your best self in hard settings.

On the Pregnant Workers Fairness Act (PWFA) and the EEOC's updated harassment guidance, Kotagal addressed what businesses should know following recent regulatory developments.

The PWFA is amazing. It's one of the few major civil rights laws passed in 30 years. It passed on a bipartisan basis, which we should all celebrate. The PWFA advances the civil rights of pregnant and postpartum workers by expanding access to accommodations for workers. It goes without saying that ensuring that we're providing accommodations to pregnant and postpartum workers can be a lifeline for them and their families.

Before the law's passage a couple of years ago, we found that women were routinely denied modest workplace changes like light duty, water breaks, a place to sit, or bathroom breaks, with some incredibly devastating health consequences as a result. This new law allows workers to ask their employers for job changes, like time off to go to health appointments. If

you're pregnant, you can get an accommodation to go to your prenatal doctor's appointments, to get light duty, to get breaks to eat, drink, or use the bathroom.

Here's the new part about it. Employers are required to provide reasonable accommodation to pregnant and postpartum workers unless doing so would cause an undue hardship, which is a significant difficulty or expense. This law was a long time coming. Congress charged us at the EEOC with writing the rules to enforce it.

After many, many months of work, we put out our final rule. Before we finalized our rule, there was a notice and comment period, during which we received over 100,000 public comments. We're a little agency. One hundred thousand comments in 60 days is a lot. We finalized our final rule in the spring of this year. It includes more than 75 examples of hypothetical situations that might arise to illustrate how this law's protections can be made real for people and their lives.

The law is already working to make pregnant people safer, to keep them in the workplace, and to protect their pregnancies at a time when they most need those jobs. We just announced a settlement of \$100,000 on behalf of a worker whose employer fired her just days after she had a stillbirth and asked for time to recover. That is not an isolated story. There are stories of women who asked to go to the emergency room only for their employer to deny them the right to leave work, leading them to quit their jobs to get the care they

needed. In some of these stories, they couldn't go fast enough, and they miscarried.

I am proud of how quickly we've gone to work to enforce the law. In the last fiscal year, we sued five employers for violations, and with that litigation, we sought to drill down the core aspects of the law. The kinds of violations that we see, for example, are employers sending workers out on unpaid leave immediately when they ask for an accommodation, rather than going through the negotiation, what we like to call the interactive process, to see whether there's some reasonable accommodation that they can provide. We've also seen employers asking for too much documentation about the condition of the pregnant worker that requires accommodation.

So, there are many things that we can focus on in the enforcement context. But we're also hearing from employers that once they understand their responsibilities, they can do it. They've done it with the Americans with Disabilities Act (ADA) for 30 years. It's normal for people to get pregnant and have families during their working years; we should create the space for those workers to be protected.

Finally, I want to talk briefly about the Harassment Guidance. It means a lot to me as somebody who represented workers facing harassment. The Enforcement Guidance on Harassment in the Workplace was a decade in the making. We updated it with more than 75 examples drawn from the case law. These examples help workers know their rights and

help employers understand their responsibilities so that they can protect their workers.

The guidance reflects some critical changes in the law, including the Supreme Court's decision in the *Bostock* case, which affirms that individuals are protected against discrimination on the basis of sexual orientation and gender identity while also dealing with emerging issues like online harassment. Online harassment did not exist in the same way the last time these guidelines were updated. We also highlight intersectional harassment: the way in which Black women face harassment is different sometimes than the way in which White women face harassment. We wanted to help people understand all the different ways harassment can occur. We also focused on harassment of vulnerable workers, like survivors of gender-based violence who might face stereotyping in the workplace. I genuinely hope that with this updated guidance, we'll be able to improve the state of work for people because workers will know their rights, and employers will know their responsibilities. People will have the tools and information they need to ensure workplaces are safe.