

From: [Mehta, Parag V - OFCCP](#)
To: [McGinnis, Laura K - OPA](#); [Smith, Kelley - OFCCP](#); [Shiu, Patricia A - OFCCP](#)
Cc: [Trupo, Michael - OPA](#)
Subject: RE: Following up ...
Date: Wednesday, December 04, 2013 4:37:00 PM
Attachments: [image001.jpg](#)

I spoke with Pat and would like to suggest a response along the lines of this:

The National Industry Liaison Group is an association comprised of companies with federal contracts and subcontracts. The non-profit organizations was formed more than 30 years ago as a conduit for disseminating information, providing training and fostering better communication between OFCCP and the agency’s regulated community. The NILG held its 2013 conference in Indianapolis from July 31 – August 2. Director Shiu’s [keynote address](#) to the NILG is available on the OFCCP’s web site.

With respect to Director Shiu’s comment to you this morning, a question about Macy came up in the Q&A portion of a panel session featuring a few members OFCCP senior staff. When asked about the agency’s position on Macy, OFCCP Mid-Atlantic Regional Director Michele Hodge responded – as Director Shiu did this morning – saying, “OFCCP follows Title VII principles.”

That is, has been and continues to be OFCCP’s position on this matter.

From: McGinnis, Laura K - OPA
Sent: Wednesday, December 04, 2013 3:35 PM
To: Mehta, Parag V - OFCCP; Smith, Kelley - OFCCP; Shiu, Patricia A - OFCCP
Cc: Trupo, Michael - OPA
Subject: FW: Following up ...

The inquiry below came in from BuzzFeed’s Chris Geidner. He’s on deadline for today.

Could you please let me know to what meeting she is referring, when and where it was held, who attended or participated, and what was said or discussed? If any materials were distributed, could I please have a copy of them?

(b) (5) [Redacted]

[Redacted]

(b) (5) [Redacted]



(b) (5)
[Redacted]

[Redacted]

Best,
Laura

Laura K. McGinnis
Office of Public Affairs, U.S. Department of Labor

(b) (6)
[Redacted]

From: Chris Geidner [mailto:(b) (6)]
Sent: Wednesday, December 04, 2013 2:20 PM
To: McGinnis, Laura K - OPA
Subject: Following up ...

Laura --

Regarding Director Shiu's following comments:

"I believe it was discussed at our national industry liaison group, this issue came up and that's what we said then. So, we follow Title VII principles for sex discrimination, pregnancy discrimination, and as the law evolved, we follow that as well."

Could you please let me know to what meeting she is referring, when and where it was held, who attended or participated, and what was said or discussed? If any materials were distributed, could I please have a copy of them?

Thanks --

Chris

--
Chris Geidner
Legal Editor
BuzzFeed: <http://buzzfeed.com>
Me@BuzzFeed: <http://buzzfeed.com/chrisgeidner/>
Twitter: <http://twitter.com/chrisgeidner>

(b) (6)
[Redacted]

[Redacted]

From: Mehta, Parag V - OFCCP
Sent: Wednesday, December 04, 2013 5:11 PM
To: Nanda, Seema - OSEC; Maxwell, Mary Beth - ASP
Cc: Shiu, Patricia A - OFCCP; McGinnis, Laura K - OPA
Subject: Geidner Inquiry on Macy

(b) (5) [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

(b) (5)

[Redacted]

[Redacted]

[Redacted]

[Redacted]

From: Maxwell, Mary Beth - OSEC
Sent: Wednesday, December 04, 2013 06:23 PM
To: Mehta, Parag V - OFCCP; Nanda, Seema - OSEC
Cc: Shiu, Patricia A - OFCCP; McGinnis, Laura K - OPA
Subject: Re: Geidner Inquiry on Macy

(b) (5)

From: Mehta, Parag V - OFCCP
Sent: Wednesday, December 04, 2013 05:10 PM
To: Nanda, Seema - OSEC; Maxwell, Mary Beth - OSEC
Cc: Shiu, Patricia A - OFCCP; McGinnis, Laura K - OPA
Subject: Geidner Inquiry on Macy

Dear MB & Seema,

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Chris seemed to think that that was a change of some sort and asked Pat if we had announced this position publicly. Pat responded by saying, "I believe it was discussed at our national industry liaison group. This issue came up, and that's what we said then. So, we follow Title VII principles for sex discrimination, pregnancy discrimination and, as the law evolved, we follow that as well."

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Keep in mind that, on November 8, Chris wrote a story about Secretary Perez titled, [Is the Obama Administration Playing Politics With LGBT Workers' Rights?](#) He cited the Secretary's response to the passage of ENDA in the Senate, in which Secretary called the protection of

workplace rights for LGBT Americans a “moral imperative.” The article criticizes DOL for being non-responsive to questions about both Macy and about a possible Executive Order extending OFCCP’s protections to LGBT Americans. He also asserts that the White House is blocking us from responding to such press inquiries.

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[REDACTED]

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To: Maxwell, Mary Beth - ASP; Nanda, Seema - OSEC
Cc: Shiu, Patricia A - OFCCP; McGinnis, Laura K - OPA
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Has this already been shared w Gautam and Shin?

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[REDACTED]

From: Mehta, Parag V - OFCCP
Sent: Wednesday, December 04, 2013 8:52 PM
To: (b) (7)(D)
Subject: Fw: Geidner Inquiry on Macy

(b) (5)

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From: [Mehta, Parag V - OFCCP](#)
To: [McGinnis, Laura K - OPA](#)
Subject: Re: Geidner Inquiry on Macy
Date: Wednesday, December 04, 2013 9:19:49 PM

(b) (5)

----- Original Message -----

From: McGinnis, Laura K - OPA
Sent: Wednesday, December 04, 2013 09:02 PM
To: Mehta, Parag V - OFCCP
Subject: RE: Geidner Inquiry on Macy

Ha! I just logged in to send this to you. :-) I'm five minutes behind, apparently.

-----Original Message-----

From: Mehta, Parag V - OFCCP
Sent: Wed 12/4/2013 8:57 PM
To: Maxwell, Mary Beth - OSEC; Nanda, Seema - OSEC
Cc: Shiu, Patricia A - OFCCP; McGinnis, Laura K - OPA
Subject: Re: Geidner Inquiry on Macy

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Sent: Wednesday, December 04, 2013 06:23 PM
To: Mehta, Parag V - OFCCP; Nanda, Seema - OSEC
Cc: Shiu, Patricia A - OFCCP; McGinnis, Laura K - OPA
Subject: Re: Geidner Inquiry on Macy

(b) (5)

From: Mehta, Parag V - OFCCP
Sent: Wednesday, December 04, 2013 05:10 PM
To: Nanda, Seema - OSEC; Maxwell, Mary Beth - OSEC
Cc: Shiu, Patricia A - OFCCP; McGinnis, Laura K - OPA
Subject: Geidner Inquiry on Macy

(b) (5)

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(b) (5) [Redacted]

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From: [Maxwell, Mary Beth - OSEC](#)
To: [Mehta, Parag V - OFCCP](#); [Nanda, Seema - OSEC](#); [Greenfield, Deborah - SOL](#)
Cc: [Shiu, Patricia A - OFCCP](#); [McGinnis, Laura K - OPA](#)
Subject: RE: Geidner Inquiry on Macy
Date: Friday, December 06, 2013 8:18:56 AM
Attachments: [image001.png](#)

(b) (5)

Sex Discrimination
Security Clearance Issue No Bar to Claim
By Transgender Federal Contract Worker
Pentagon



BNA Snapshot

[Muir v. Applied Integrated Techs., Inc.](#), 2013 BL 330738, D. Md., No. 8:13-cv-00808, 11/26/13

Key Holding: Defense contractor not entitled to dismissal of or summary judgment on sex bias claims of fired male-to-female transgender worker.

Key Takeaway: Title VII's national security exception only bars court's subject-matter jurisdiction if backed by adequate evidence.
By [Patrick Dorrian](#)

Dec. 5 — A part-time worker who allegedly was fired by a Department of Defense contractor in Maryland because she was transitioning from male to female can go forward with her sex discrimination claims under Title VII of the 1964 Civil Rights Act and state law, a federal district court ruled Nov. 26 ([Muir v. Applied Integrated Techs., Inc.](#), 2013 BL 330738, D. Md., No. 8:13-cv-00808, 11/26/13).

The U.S. District Court for the District of Maryland rejected Applied Integrated Technologies Inc.'s argument that Leanna Muir's Title VII and Maryland Fair Employment Practices Act claims weren't within the court's jurisdiction. According to AIT, Muir was terminated because she failed to comply with a directive from its client, the Defense Intelligence Agency, to provide information relevant to the review of her national security clearance. The government undertook the review after Muir began presenting herself at work as a woman. The national security exception to Title VII is well-established and, when backed by adequate evidence, requires the dismissal of a case for lack of subject-matter jurisdiction, Chief Judge Deborah K. Chasanow said. But she said AIT failed to support its motion to dismiss with proof warranting application of the exception.

The judge said the company didn't establish that the government agency responsible for determining Muir's security clearance status—either the Department of Navy Central Adjudication Facility (DONCAF) or the DIA—actually changed her clearance to a status that prohibited her from continuing to work at Fort Detrick in Frederick, Md.

Several federal appeals courts have held that subject-matter jurisdiction exists in cases that don't necessarily require a merits consideration of a government employer's security clearance decision, provided care is taken not to question the motivation behind the government's decision, Chasanow said. She cited rulings by the Third, Ninth and Federal circuits.

The court also rejected AIT's alternative motion for summary judgment, finding that no discovery had yet been conducted by the parties and that Muir established her need for information pertaining to the legitimacy of the company's proffered justification for firing her—the alleged revocation of her security clearance. Discovery also was necessary on the additional issue of whether AIT could have found replacement work for Muir even if she no longer was eligible to work at Fort Detrick, making the company's bid for summary judgment premature, the court ruled.

Worked for Two Federal Contractors

According to the opinion, AIT hired Muir as a part-time access control manager in December 2009. At the time, his legal name was Jesse Muir and he presented himself as a man in the workplace.

Muir also worked simultaneously for another government contractor—USIS National Security Division—and was required to maintain a security clearance for both jobs. An employee handbook he received from AIT stated that he could be terminated involuntarily if the government were to withdraw his security clearance. Muir held a top secret clearance with access to sensitive compartmented information, which the DIA had granted in approximately February 2007.

AIT assigned Muir to work for the DIA in Fort Detrick's National Center for Medical Intelligence. In early March 2011, Muir began reporting to work with painted fingernails, prompting a colleague to complain.

During a March 16, 2011, meeting called by AIT, Muir disclosed to managers that she was transitioning from male to female, but stated that the process wouldn't affect her job performance. The company suspended Muir, allegedly telling her it was doing so to give its client

—the DIA—time to “cool down.”

However, according to AIT's Human Resources Manager Vicki Redman, the DIA's security manager at Fort Detrick had communicated with AIT about Muir. According to Redman, the security manager said, to maintain her security clearance, Muir needed to submit a letter from a mental health care practitioner attesting to her fitness to work as well as a personal statement explaining her thought process in deciding to change genders.

Redman said AIT was merely following its client's instructions when it told Muir at the March 16 meeting that she had 60 days to provide the requested information or she would risk termination.

Contract Allegedly Terminated

At an April 2011 meeting with a DONCAF security clearance investigator, Muir revealed that she had been diagnosed with gender identity disorder. In May, she and her therapist sent letters to DONCAF describing her diagnosis and intention to transition from male to female and confirming the therapy she was undergoing at the time. In June, Muir began cross-gender hormone therapy.

In response to a message from DONCAF, AIT in early July 2011 wrote Muir to request a letter from her therapist regarding her gender identity disorder, treatment and ability to work. After Muir's therapist complied with that request, AIT asked Muir to provide a personal statement describing why and for how long she had been transgender.

Muir refused to do so, believing it was intrusive and unnecessary because DONCAF, and not AIT, was responsible for her security clearance.

According to AIT, Muir's failure to provide the personal statement requested by the DIA caused the government agency to unilaterally terminate its subcontract with AIT for Muir's position. Redman testified that she tried to find another job for Muir—who didn't have any performance issues—but that there were no open positions for which Muir was qualified.

AIT terminated Muir effective Sept. 1, 2011. She continued to work for USIS until her contract with that company ended in October 2011, and she continued her cross-gender hormone therapy until January 2013, when she had to stop receiving treatment because she was not employed full time, the court recounted.

Claims May Proceed

Muir sued AIT in March 2013, asserting sex bias claims under Title VII and Maryland law. According to Muir, the company fired her “because it perceived her to be a man who did not conform to traditional gender stereotypes associated with men in society or because [Plaintiff] is transgender and intended to physically transition from male to female.”

Arguing that the court lacked subject-matter jurisdiction over Muir's claims because the termination of her employment was caused by her failure to maintain the required security clearance, AIT moved to dismiss Muir's case. Chasanow denied the motion.

The court said Title VII contains an exception insulating national security clearance decisions from judicial review. The exception, which the U.S. Court of Appeals for the Fourth Circuit has held extends to national security clearance investigations, requires dismissal of a lawsuit stemming from such a decision or investigation when founded, the court added.

But Muir argued that the court didn't need to reach the propriety of DONCAF's or the DIA's security clearance determination or investigation because that wasn't the reason she was fired. According to Muir, “the security clearance issue is just a smokescreen to hide the fact that she was terminated by Defendant—under no orders of DIA—because of sex discrimination.”

Chasanow found that the evidence at this stage of the case favored Muir. The judge said AIT didn't submit any evidence showing that Muir's national security clearance had been revoked or downgraded or any documentation from the DIA indicating that the agency was terminating the subcontract for Muir's position.

Muir “acknowledges that DONCAF was investigating her clearance but insists she cooperated with them, providing the May 2011 letters to DONCAF from her and her therapist,” the court noted. Absent evidence from AIT to the contrary, the court said, “[t]he current record is insufficient to determine, as a matter of law, that the national security exception to Title VII has been triggered, thus eliminating subject-matter jurisdiction on this aspect of Plaintiff's case.”

The court added that summary judgment in favor of the company also wasn't warranted because no discovery had yet taken place, and Muir established that she needed to conduct some discovery in order to oppose AIT's motion.

“Plaintiff's affidavit identifies discovery needs relevant to the central issue of this case: whether Defendant was terminated because of a failure to maintain a security clearance, or whether this reason was merely a pretext by Defendant, hiding the real reason: impermissible discrimination on the basis of Plaintiff's sex,” the court wrote.

Eric L. Klein, David M. Friedland, Laura J. Brown and Nadira Clarke of Beveridge & Diamond PC in Washington represented Muir. R. Scott Krause and Stephen M. Cornelius of Eccleston & Wolf PC in Hanover, Md., represented AIT.

From: Mehta, Parag V - OFCCP

Sent: Wednesday, December 04, 2013 8:57 PM

To: Maxwell, Mary Beth - OSEC; Nanda, Seema - OSEC

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From: [Mehta, Parag V - OFCCP](#)
To: [Lenhoff, Donna R - OFCCP](#)
Subject: Fw: Geidner Inquiry on Macy
Date: Saturday, December 07, 2013 1:00:40 PM

Sorry, Donna. I thought I had included you in this e-mail thread. See link to BuzzFeed story below.

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