(b) (7) (c)

From: Lenhoff, Donna R - OFCCP
Sent: Friday, May 04, 2012 6:40 PM
To: Pinto, Consuela - SOL
Cc: Fromm, Theresa Schneider - SOL; Shiu, Patricia A - OFCCP; Wilkinson, Christopher - SOL; Dankowitz, Beverly - SOL; Garcia Jr, Gilberto - OFCCP; Dowd, Tom M - OFCCP; Coukos, Pamela - OFCCP; Mehta, Parag V - OFCCP; Chastain, Suzan - SOL
Subject: (b) (7) (c) ohnson complaint of sex discrimination because of gender identity
Attachments: EXEMPTION 5

EXEMPTION 5

From: Pinto, Consuela - SOL
Sent: Friday, May 04, 2012 9:27 AM
To: Lenhoff, Donna R - OFCCP
Cc: Fromm, Theresa Schneider - SOL
Subject:

EXEMPTION 5

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EXEMPTION 5

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GEIDNER

JUL 15 2011

MEMORANDUM TO: **PATRICIA A. SHIU**
Director of OFCCP

FROM: **BEVERLY DANKOWIZ** BD
Acting Associate Solicitor
Civil Rights and Labor-Management Division

RE: (b) (7) (c) **Johnson – Transgender Harassment Complaint**

INTRODUCTION

(b) (7) (c) Johnson is a male-to-female transgendered individual who has been employed by a federal subcontractor, (b) (7) (c) since October 2009. She alleges that she has been discriminated against and harassed by her co-workers, who are mostly employees of (b) (7) (c) (b) (7) (c) also a federal contractor. Ms. Johnson initially contacted the Department of Justice, Civil Rights Division, who forwarded her complaint to OFCCP. This memorandum addresses two questions: (1) Can OFCCP establish jurisdiction over (b) (7) (c) Canadian employer in (b) (7) (c) and (2) Is discrimination on the basis of an individual being transgender a protected status under Executive Order 11246 ("E.O. 11246").

STATEMENT OF FACTS

According to Ms. Johnson, she was hired by (b) (7) (c) in October 2009, and was recruited in (b) (7) (c) She is an (b) (7) (c) She was relocated to (b) (7) (c) to work on a US military base for DISA.[1] Her (b) (7) (c)

[1] Ms. Johnson only uses the abbreviation "DISA" and the file does not contain an explanation as to what DISA means. Our internet research indicates that DISA likely means Defense Information Systems Agency, part of the Department of Defense. http://www.disa.mil/

[2] Indeed, the (b) (7) (c) letterhead is used for the August 13, 2010 Performance Improvement Plan issued to Ms. Johnson.

[3] (b) (7) (c)

[4]

(b) (7) (c)

Ms. Johnson's evidence of discriminatory treatment/harassment includes the following:

- Shift - She works on the mid-shift, but on one occasion was asked to switch to volunteer to work the day shift, but she was not forced to switch. Then in December 2010, all the people from the mid-shift had to switch to work the day shift for two months. She was chosen to be the first person to work this new schedule.
- Training – She claims she was treated differently with regard to training. She states that the trainer was belligerent toward her.
- Dress code – Her supervisor, (b) (7) (c) told her to dress like another woman and that she should be aware of how to sit and cross her legs.
- Environment - She is usually the only female on her shift and her co-employees, mostly (b) (7) (c) employees, tell off color jokes about women and she says it's like the boys' locker room. Other employees have told her to "drop the attitude" and have called her a liar. She alleges her co-workers do not respect her.
- Vacation – She requested vacation to attend (b) (7) (c), a hobby of hers. She never heard back from whomever needs to approve such requests. It is unclear whether she was prevented from going on vacation.
- Bathroom – After she disclosed her transgender status, her supervisors decided that she would use the male/female bathroom. There have been a few incidents of people walking in without knocking, not shutting the urinal door, and walking in even if she was there.
- Tuition reimbursement – Her tuition reimbursement documents were delayed being sent. Her supervisor, (b) (7) (c), explained that he had misfiled them, and then sent them off using Express mail.

Ms. Johnson has been issued various warnings and she was placed on a performance improvement plan ("PIP") due to the performance issues outlined below:

- The August 13, 2010 PIP recounts that Ms. Johnson had verbal counseling on June 27, 2010 and July 9, 2010 due to customer complaints. It also states that Ms. Johnson:
  - complains in a loud and belligerent manner;
  - has issues with accountability and blaming others for mistakes;

[5] (b) (7) (c)

- makes mistakes on remedy trouble tickets;
- fails to do the required review of controller tickets; and
- performs inconsistently and doesn't follow procedures for issue escalation.

In a written response, Ms. Johnson largely disputes these allegations, and notes with regard to her "loud" complaints that she has a hearing deficiency.

- On April 19, 2011, Ms. Johnson was given a written warning that she was failing to meet the PIP.
  - The issues noted in the PIP are recounted and the warning also states that Ms. Johnson attempts to be the lead controller, although she has been told not to assume that role.
  - She has not passed the DGS certification which is a required part of her job.
  - In a written response, Ms. Johnson largely disputes these allegations, again pointing out her hearing loss.

- On May 23, 2011, Ms. Johnson reported that she could not work due to food poisoning, although she was seen, behaving normally, that same day directing someone into a parking spot in her apartment building. She explains that she was sick, had gone outside to get fresh air, and coincidentally saw her roommate's friend and directed her to the spot.

There is a March 2010 "Situational Awareness Counseling" document contained in the file, where Ms. Johnson responds "for the record" to counseling she has received. Ms. Johnson agrees that she has difficulties fitting in with a few of the controllers. But, Ms. Johnson says that there is a double standard, that she feels like she is in a "boy's locker room," because she is the only female on the floor, she is not wanted, that people don't speak loud enough for her to hear them, and that she has otherwise tried to change her behavior.

Ms. Johnson complained informally to her supervisor, [redacted] about the alleged harassment and on May 24, 2011, she e-mailed (b) (7) (c) HR Generalist at (b) (7) (c) [redacted]. Ms. Johnson gave documents purporting to reflect the discrimination/harassment. She states that complaints about her work performance started after she disclosed her transgender status. She also started seeing a therapist in December 2010 concerning the issues she had at work. In early June 2011, Ms. Johnson told Ms. (b) (7) (c) [redacted] opportunities, preferably in [redacted]. Ms. Johnson states that she contacted the "DISA EEOC person" the day before about the co-use bathroom issue and came away feeling that they do not care about sexual harassment issues when it comes to an example like hers.

DISCUSSION

1. Does OFCCP have jurisdiction over the relevant contractual entity?

There are a number of factual issues that need to be resolved before OFCCP can assert jurisdiction over Ms. Johnson's employer: (1) who is the contracting agency; (2) who has the prime contract with the contracting agency; (3) who is Ms. Johnson's employer; and (4) does her employer have a covered subcontract. OFCCP must find the answers to these issues before initiating any investigation into the merits of her complaint.

(b) (7) (c)

If Ms. Johnson's employer is not the entity with the contract or subcontract, OFCCP will need to study the corporate relationships to determine whether single entity coverage exists. We can provide further guidance on that issue should the need arise.

2. Is being transgender protected under E.O. 11246?

Johnson is alleging that she is being harassed and discriminated against, citing the allegations discussed above. Assuming these allegations are true, and would either constitute a hostile work environment or an adverse employment action, the question remains as to whether she has a claim under E.O. 11246 at all.

There are no cases addressing whether being transgendered is protected under E.O. 11246. We turn to Title VII cases for guidance, because OFCCP applies the legal standards developed under Title VII of the Civil Rights Act of 1964 to discrimination cases brought under E.O. 11246. *See, e.g., OFCCP v. Greenwood Mills, Inc.*, 89-OFC-39, ARB Final Decision and Order at 5 (Dec. 20, 2002); *OFCCP v. Cleveland Clinic Foundation,* 91-OFCCP-20, ARB Final Decision and Order at 3-4 (July 17, 1996); *OFCCP v. Honeywell*, 77-OFCCP-03, Secretary Decision at 8-9 (June 2, 1993). In the Title VII context, the courts are divided on the issue, with most circuit courts stating that being transgendered is not discrimination "because of sex" prohibited by Title VII.

Several courts have determined that transgender[7] discrimination is not discrimination on the basis of sex under Title VII because discrimination on the basis of

[6] That assumption could not be verified via our internet research. An examination of the relevant contract or subcontract at issue may provide that information.

[7] Some cases use the term "transsexual" while others use "transgender." Both terms are used in this memorandum, in accordance with the term used by the relevant court.

sex, "in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men." *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir.1984). In *Ulane,* the plaintiff was hired by the defendant airline in 1968 and was fired in 1981, and he claimed that he was fired because he was a transsexual. The plaintiff had sexual reassignment surgery in 1980 (male to female) and it was when she attempted to return to work after the surgery that the airline first knew of her transsexuality. The district court found that she was discharged because she was a transsexual and that Title VII prohibits discrimination on that basis. The district court recognized that such protection does not extend to homosexuals, but concluded that "sexual identity", but not "sexual preference" is comprehended by the term "sex." The Seventh Circuit disagreed, noting that the words of a statute should be normally be given "their ordinary, common meaning" and that the plain meaning of "sex" means male or female, not someone with a gender identity disorder. *Id.* at 1085. The court also pointed to the dearth of legislative history on the meaning of the term "sex" in Title VII, and concluded that if Congress had intended broad coverage under that term, there would surely be some legislative history to support it. Additionally, the court emphasized the failed attempts to amend Title VII to include homosexuals, which "strongly indicates that the phrase [because of sex] . . . should be given a narrow, traditional interpretation, which would also exclude transsexuals." *Id.* at 1085-86. The court rejected the plaintiff's attempt to claim that she was actually discriminated against because she was a female; rather the evidence indicated that she was discriminated against because she was a transsexual. *Id.* at 1087.

Similarly, in *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir.1982), a pre-operative male to female transsexual was fired because she misrepresented herself as a female when she applied for the job. The defendant moved for summary judgment, arguing that Title VII does not protect transsexuals and the district court agreed. The Eighth Circuit affirmed, reasoning that "sex" in Title VII should be given its plain meaning and pointing to failed attempts to amend Title VII to include sexual preference, which indicates that "the word 'sex' in Title VII is to be given its traditional interpretation rather than an expansive interpretation." *Id.* at 750.

In *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir.1977) at issue was whether an employee can be discharged, consistent with Title VII, for initiating the process of sexual transformation. The Ninth Circuit agreed that by giving Title VII its plain meaning, Congress only had the traditional notions of "sex" in mind, which was again emphasized by the failed attempts to prohibit discrimination on the basis of sexual preference.[8] *Id.* at 662-63. Transsexuals are also not a suspect class for equal protection

[8] In *Schwenk v. Hartford,* 204 F.3d 1187 (9th Cir. 2000), a case involving an alleged attempted rape against a pre-operative transgender prisoner under 42 U.S.C. § 1983 and the Gender Motivated Violence Act ("GMVA"), the court seems to move away from that distinction between gender and sex, at least in the context of the GMVA. In *Schwenk*, the court reasoned that *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) established that sex means both sex, the biological differences between men and women, and gender (i.e., social constructs and expectations about how a man or women should act). However, the statute at issue in *Schwenk,* the GMVA, specifically uses the term "gender" rather than sex, *see* 42 U.S.C. 13981(b), although the court determined that these terms are interchangeable. 204 F.3d at 1202. *Schwenk* thus

issues under the Fourteen Amendment, the court held. *Id.* at 663-64. *See also, Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1221 (10th Cir. 2007)(agreeing with *Ulane, Sommers, and Holloway,* and noting that "sex" only includes the categories of male or female). The Equal Employment Opportunity Commission ("EEOC") similarly agrees that discrimination based on being transgendered is not sex discrimination under Title VII except in the narrow circumstance discussed below.[9]

Other courts have found protection for transgendered individuals under Title VII, by relying on a *Price Waterhouse* sexual stereotyping claim. In *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), the plaintiff was denied a partnership in the firm and she alleged that it was because of her sex. She produced evidence that other partners reacted negatively because she was a woman, describing her as "macho", that she "overcompensated for being a woman," and advising her to take "a course at charm school." One partner advised her that in order to improve her chances for partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. The Court stated that the plaintiff had proved that the firm asked partners to submit comments, that some of these comments stemmed from sex stereotypes, and that such comments were used in assessing the plaintiff's bid for partnership, and that the firm in no way disclaimed reliance on these sex-linked evaluations. Thus, the plaintiff had showed that her sex played a motivating part in the decision to deny her the partnership. The Court held, "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 251.

Two circuits have recognized that a transsexual who alleges that he or she was subject to an adverse employment action for failing to conform to sex stereotypes concerning how an individual of that biological sex should look and behave have sufficiently pled claims of sex stereotyping under *Price Waterhouse* and gender discrimination. The EEOC similarly recognizes that such a claim is cognizable for a transgendered individual under this sex stereotyping theory.[10] In *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572, 575 (6th Cir. 2004), a male firefighter worked for seven years in the fire department without any negative incidents. He was diagnosed with gender identity disorder ("GID"), and began expressing a more feminine appearance on a full time basis, in accord with medical protocols to treat GID. The plaintiff's co-workers began questioning him about his appearance and commenting that it and his mannerisms were not "masculine enough." The plaintiff then notified his immediate supervisor about his GID diagnosis and treatment and that his treatment would likely include complete physical transformation from male to female. He asked his supervisor not to disclose the substance of the conversation to anyone, but the supervisor did disclose it to his superior, who met with the City's lawyer and its Executive Body to devise a plan to terminate the plaintiff's employment because of his transsexualism. The City then decided to require plaintiff to undergo three separate psychological evaluations in hope that he would either

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indicates that the Ninth Circuit may not follow *Holloway* if presented with a transgender claim under Title VII.

[9] We learned of the EEOC's position through discussions with attorneys in the Legal Counsel's office.

[10] *See supra,* note 9.

resign or refuse to comply. The plaintiff's lawyer then contacted the City and plaintiff was suspended for one 24-hour shift, based on an alleged infraction of policy. The plaintiff eventually sued, and his complaint was dismissed. *Id.* at 568-570.

On appeal, the Sixth Circuit held that the plaintiff had sufficiently pled a *Price Waterhouse* sexual stereotyping claim, in that it set forth the conduct and mannerisms which he alleged did not conform with his employers' or co-workers' sex stereotypes of how a man should look or behave, that his co-workers began to comment negatively on his appearance and mannerisms, and that his employer schemed to compel his resignation. The Sixth Circuit recognized that other courts have failed to extend Title VII coverage to transsexuals, but reasoned that *Price Waterhouse* eviscerated the reasoning of *Ulane, Sommers,* and *Holloway*:, "By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." *Id.* at 573. Thus, according to the *Smith* court, any sexual stereotyping based on a person's non-conforming behavior is impermissible, irrespective of the cause (i.e., being transgender). *Id.* at 575.

In *Kastl v. Maricopa Co. Cmty. Coll. Dist.*, 325 Fed. Appx. 492 (9th Cir. 2009),[11] the plaintiff was a transsexual (male to female) who identified and presented herself full time as a female. She was both an instructor and a student at the employer college. Upon receiving complaints that a man was using the women's restroom, the college banned the plaintiff from using the women's restroom until she could prove completion of sex reassignment surgery. The college subsequently did not renew her contract and the plaintiff sued. Citing *Price Waterhouse* and *Schwenk,*[12] the Ninth Circuit held, "[I]t is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women . . . . Thus, [plaintiff] states a prima facie case of gender discrimination . . ."). 329 Fed. Appx. at 493. However, because the employer proffered evidence that it banned the plaintiff from using the women's restroom because of safety reasons, and she did not put forward sufficient evidence showing that the employer was motivated by her gender, her claim was doomed. *Id.* at 494.

The Tenth Circuit in *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) rejected any claim that transsexuality *per se* is protected by Title VII, but assumed without deciding that a gender nonconformity claim could be available. However, in *Etsitty*, the Tenth Circuit determined that the plaintiff could not demonstrate that the stated reason[13] for her termination was pretext. *Id.* at 1224-25.

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[11] The *Kastl* case is unpublished, and thus its precedential weight may be questioned. Nonetheless, as *Schwenk* did, it indicates that the Ninth Circuit would be unlikely to uphold *Holloway*.

[12] See *supra* at 8.

[13] Her employer stated that she was fired based solely on her intent to use women's public restrooms while wearing her employer's uniform and despite the fact that she still had male genitalia. 503 F.3d at 1124.

In *Creed v. Family Express Corp.*, 2009 WL 35237 (N.D. Ind. Jan. 5, 2009) the transgender plaintiff was purportedly fired for not abiding by the company's dress code and grooming policy. The court recognized that she, "may succeed on her sex stereotyping claim if she can present sufficient evidence from which a rational jury could infer intentional discrimination," but ultimately concluded that statements made during her termination meeting about whether it "would kill [her] to appear masculine for eight hours a day" or that she had to report to work "as a male" do not establish that she was fired because she was not "male" enough." *Id.* at * 9.

Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) similarly recognized a sex stereotyping claim. The plaintiff, a male to female transsexual, was offered a job at the Congressional Research Service ("CRS"), and while the paperwork was being finalized, she told a CRS staff member, Charlotte Preece, about her transsexuality. The plaintiff told her that she intended to start work as "Diane" rather than "David," that she had planned to be living full-time as a woman for a year prior to her surgery, and that such surgery would not interfere with her job. Preece had many concerns about the name to use on her paperwork, her security clearance, etc. To assuage expected concerns about her appearance as a female, the plaintiff showed Preece photos of herself dressed as a woman. Preece talked with others at CRS about how to deal with these issues and ultimately decided not to recommend the plaintiff for the position, mostly because of her concerns with how long the security clearance would take. Thus, the plaintiff's offer was rescinded and she sued. The district court, following the reasoning of *Price Waterhouse* and *Smith,* concluded that a sex stereotyping claim had been established. In so doing, the court pointed to Preece's repeated mention of the photos as the plaintiff dressed as woman in that she saw a man dressed as a woman and that Preece found it especially difficult to comprehend the plaintiff's decision to transition because she viewed her not just as a man, but as a particularly masculine kind of man, and that others at CRS, or members of Congress, would not take the plaintiff seriously because they too would view her as a man in women's clothing. *Id.* at 305-06.

The district court in *Schoer* went beyond the sex stereotyping claim and, disagreeing with *Ulane, Holloway, and Etsitty,* stated that discrimination because one is changing one's sex is discrimination "because of sex." The court reasoned that if an employee is fired because he converts from Christianity to Judaism, it would be a clear case of discrimination "because of religion", but in the case of changing one's sex, the courts get hung up on the word "transsexual." 577 F. Supp.2d at 306-07. The court rejected the implication from post-Title VII legislative history that failed amendments for sexual orientation and gender identity means that Title VII does not cover transsexuals. Rather, "another reasonable interpretation of that legislative non-history is that some Members of Congress believe that the *Ulane* court and others have interpreted 'sex' in an unduly narrow manner, that Title VII means what it says, and that the statute requires, not amendment, but only correct interpretation." *Id.* at 308. The court thus concluded, "In refusing to hire [plaintiff] because her appearance and background did not comport with

the decisionmaker's sex stereotypes about how men and women should act and appear . . . [defendant] violated Title VII's prohibition on sex discrimination."). *Id.* at 308.[14]

Assuming OFCCP can establish jurisdiction over Ms. Johnson's employer, an investigation into her complaint must focus on developing facts that fall within the narrow protections of a *Price Waterhouse* sex stereotyping claim. The only stereotyping evidence provided so far by Ms. Johnson are two comments by her supervisor: (1) she should dress more like another female employee; and (2) that she should learn to sit in a skirt. These statements are the opposite of a "sex stereotyping" claim recounted in the cases above in that she is being told to be *more* like the gender she is transitioning to. Moreover, they do not rise to the same egregious level as some of the statements discussed in the sex stereotyping cases above. The limited and preliminary facts provided by Ms. Johnson, assuming they are true, are not sufficient to prove a claim of sex stereotyping. OFCCP may uncover additional evidence of stereotyping through an in-depth investigation.[15]

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[14] This sexual stereotyping argument has been applied to discrimination against gay and lesbian individuals. For example, in *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009), the court reversed summary judgment for the employer, noting that there was a genuine issue of material fact as to whether the plaintiff was harassed based on gender stereotypes (e.g., because of sex) or based on his sexual orientation. In so doing, the court pointed to the following evidence:

> [The plaintiff] acknowledged that he has a high voice and walks in an effeminate manner. In contrast with the typical male at Wise, [the plaintiff] testified that he: did not curse and was very well-groomed; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot "the way a woman would sit." [Plaintiff] also discussed things like art, music, interior design, and decor, and pushed the buttons on his [machine] with "pizzazz." [The plaintiff's] effeminate traits did not go unnoticed by his co-workers, who [made various] comment[s] . . . . Finally, a co-worker deposited a feathered, pink tiara at [the plaintiff's] workstation. When the aforementioned facts are considered in the light most favorable to [the plaintiff], they constitute sufficient evidence of gender stereotyping harassment-namely, [the plaintiff] was harassed because he did not conform to Wise's vision of how a man should look, speak, and act-rather than harassment based solely on his sexual orientation.

Id. at 291-92.

[15] OFCCP must also investigate whether the Ms. Johnson's supervisor's and co-workers' conduct rises to the level of severe or pervasive conduct or resulted in an adverse employment action for a showing of unlawful harassment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). If harassment is found, OFCCP should determine who was the perpetrator of the harassment, as the standards for liability differ based on whether it was supervisors or co-workers. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Moreover, because Ms. Johnson is alleging that mostly (b) (7) (c) employees, not her own co-workers, are harassing her, OFCCP would need to find evidence supporting a theory of joint employer liability. *See* EEOC Notice No. 915.002 "Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms." (Dec. 12, 1997) at http://www.eeoc.gov/policy/docs/conting.html.

The facts provided so far by Ms. Johnson do not rise to the level of unlawful harassment. While an investigation may produce a more concrete linkage, the evidence she has provided so far shows that (1) she has had a lot of performance issues, some of which she admits to, and (2) she has a vague feeling that

Because the state of the law is in conflict about whether Title VII extends to transgendered individuals, whether those individuals are protected under E.O. 11246 is ultimately a policy call for OFCCP. In deciding whether to launch an investigation into Ms. Johnson's complaint, we recommend that OFCCP consider the following factors: (1) because the law is in flux, prevailing on such a claim is not a foregone conclusion; (2) the EEOC recognizes a sexual stereotyping claim for transgendered individuals but does not interpret Title VII as providing broader protection based on an individual's status as a transgendered person; and (3) the fact that the Federal Government as an employer has weighed in on the side of protecting its employees from discrimination on the basis of gender identity.[16]

CONCLUSION

As an initial matter, OFCCP should verify what company employs Ms. Johnson and whether that company itself has a federal contract or subcontract that meets the coverage thresholds. The fact that Ms. Johnson works in (b) (7) (c) for an allegedly (b) (7) (c) company does not exempt her employer from coverage under E.O. 11246, assuming it has a contract or subcontract and can meet the contract thresholds. Regarding her claim that she was discriminated against because she is transgendered, the law is in conflict about whether such a claim is cognizable under Title VII. However, courts in the more current cases and the EEOC seem more apt to extend Title VII coverage to transgendered individuals provided they can prove a sex stereotyping claim pursuant to *Price Waterhouse*.

Should you wish to discuss this matter further, please feel free to contact Consuela Pinto or Theresa Fromm.

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people are not respecting her and that she is being treated differently because she is a transgendered individual, but nothing more solid than that.

[16] OPM has issued guidance to federal agencies to help address common questions regarding the employment of transgendered workers, including those transitioning from one gender to another. See http://www.opm.gov/diversity/Transgender/Guidance.asp.