

DIRECTIVE (DIR) 2014-02

Directives (DIRs) provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. Directives do not change the laws and regulations governing OFCCP's programs and do not establish any legally enforceable rights or obligations.

Effective Date: August 19, 2014

1. SUBJECT: Gender Identity and Sex Discrimination
2. PURPOSE: To clarify that existing agency guidance on discrimination on the basis of sex under Executive Order 11246, as amended, includes discrimination on the bases of gender identity and transgender status.
3. REFERENCES: *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995 (EEOC) (2012), also available at <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt> (last accessed August 12, 2014), on remand, DOJ Final Agency Decision, Agency Complaint No. ATF-2011-00751, DJ No. 187-9-149 (July 8, 2013).
4. AFFECTED POLICY:
 - A. 41 CFR § 60-1.1; 60-1.4(a)(1); 60-1.4(b)(1); 60-1.8; 60-1.10; 60-1.20(a); 60-3.1 – 60-3.18; and 60-20.1 – 60-20.6.
 - B. Federal Contract Compliance Manual (FCCM) § 1F05; 2H; 2J05; 2L02; 2L03; 3A; 3H03; 3H04; 3I03; 3J; 3L; 6E03; 6E04; 6E06; and 6E10.
5. BACKGROUND: As the Secretary of the U.S. Department of Labor (DOL) has said:

Our workforce and our entire economy are strongest when we embrace diversity to its fullest, and that means opening doors of opportunity to everyone and recognizing that the American Dream excludes no one.¹

Consistent with this statement, on June 30, 2014, the Secretary announced that DOL is updating its enforcement protocols and nondiscrimination guidance to clarify that DOL provides the full protection of the federal nondiscrimination laws that it enforces to individuals on the bases of gender identity and transgender status. This directive is, therefore, issued to clarify the Office of Federal Contract Compliance Programs' (OFCCP) interpretation of the nondiscrimination obligation.

¹ Secretary Thomas Perez, U.S. Department of Labor, Work in Progress: The Official Blog of the U.S. Department of Labor, Justice and Identity, <http://social.dol.gov/blog/justice-and-identity/> (June 30, 2014) (last accessed August 12, 2014).

OFCCP enforces Executive Order 11246, as amended, a law that prohibits federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, or national origin.² OFCCP interprets the nondiscrimination obligations under Executive Order 11246 in accordance with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII), which prohibits employers from discriminating on the same protected bases.³ This means that OFCCP enforces the nondiscrimination obligations under Executive Order 11246 by following Title VII and the case law principles that have developed interpreting that statute. Additionally, since the Equal Employment Opportunity Commission (EEOC) is the lead federal agency responsible for administering and enforcing Title VII, pursuant to Executive Order 12067, OFCCP generally defers to the EEOC's interpretations of Title VII law.

Under current Title VII case law principles, discrimination based on gender identity or transgender status, as defined below, is discrimination based on sex. In its decision in *Macy v. Holder*, 2012 WL 1435995, the EEOC unanimously concluded that discrimination because a person is transgender is sex discrimination in violation of Title VII. The complainant in *Macy*, a transgender woman working as a police detective, alleged that she was denied a job with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) when she informed the ATF that she was in the process of transitioning from male to female. The EEOC concluded that discrimination on these grounds was discrimination “on the basis of sex,” citing both the text of Title VII and multiple federal court decisions interpreting the statute.

First, the EEOC identified sex stereotyping as one way in which a transgender employee, job applicant, or former employee⁴ could prove sex discrimination. Specifically, disparate treatment of a transgender employee because he or she does not conform to the gender stereotypes associated with his or her biological sex is a form of sex discrimination—a theory frequently upheld by federal courts.⁵ The EEOC noted that

² Executive Order 11246 was amended by Executive Order 13672, effective July 21, 2014, to add sexual orientation and gender identity to the list of categories protected from discrimination. E.O. 13672 will apply to contracts entered into on or after the effective date of the implementing regulations.

³ See OFCCP, FCCM § 2H01 (July 2013), available at http://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf (last accessed August 12, 2014); see also *OFCCP v. Honeywell*, 77-OFC-3, Sec’y of Labor Dec. and Order on Mediation, June 2, 1993, at 14 and 16 & Sec’y of Labor Dec. and Remand Order, March 2, 1994; *OFCCP v. Illinois Institute of Technology*, 80-OFC-11, Sec’y Final Order, December 23, 1982; *OFCCP v. Firestone*, 80-OFC-15, Sec’y Dec., July 13, 1980, *rev’d on other grounds*, *Firestone v. Marshall*, 507 F. Supp. 1330 (E.D. Tex. 1981).

⁴ Hereafter, this Directive uses the term “employee” to refer to applicants for employment and current and former employees.

⁵ Among the cases the EEOC relied on were *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (termination of a transgender employee constituted discrimination on the basis of gender non-conformity and sex-stereotyping discrimination under Equal Protection Clause); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (affirming jury instructions allowing a claim for sex discrimination under Title VII as sex stereotyping in favor of a transgender woman), and *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (“discrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989),] who, in sex-stereotypical

Title VII prohibits discrimination based on gender, which “encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.” *Macy*, 2012 WL 1435995 at *6.

The EEOC explained that treating a person differently because the person is transgender is by definition sex discrimination because it is “related to the sex of the victim” in violation of Title VII.⁶ This is true regardless of whether the discrimination was motivated by sex stereotyping or by some other reason related to the employee’s gender identity, such as discomfort with the idea of a transition. The EEOC additionally noted that Ms. Macy would have had a claim of sex discrimination if the employer was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was a woman.

The EEOC, therefore, concluded that gender identity and transgender status did not need to be specifically addressed in Title VII in order to be protected bases of discrimination, as they are simply part of the protected category of “sex” under Title VII.⁷

Consistent with *Macy* and the Title VII case law on which it is based, this directive deals with discrimination on the basis of gender identity only as a form of sex discrimination. It does not address gender identity as a stand-alone protected category, which (along with sexual orientation) is the subject of Executive Order 13672. As noted above, Executive Order 13672 amends Executive Order 11246 effective immediately, and will apply to contracts entered into on or after the effective date of the implementing regulations.

terms, did not act like a woman”). In addition to these appellate cases, “[t]here has likewise been a steady stream of district court decisions recognizing that discrimination against transsexuals on the basis of sex stereotyping constitutes discrimination because of sex.” *Macy*, 2012 WL 1435995 at *9.

⁶ See also *Schroer v. Billington*, 577 F. Supp.2d 293, 308 (D. D.C. 2008) (finding the defendant’s “refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of . . . sex’”) (emphasis in the original).

⁷ See also EEOC, “Clarification of processing complaints of transgender individuals added to Title VII/ Section 1614 Claims of Sex Discrimination by LGBT Employees,” available at http://www.eeoc.gov/federal/directives/lgbt_complaint_processing.cfm (last accessed August 12, 2014). The EEOC’s decision also aligns with a number of federal agencies’ interpretations of sex discrimination and gender identity under the civil rights statutes that they enforce. See Department of Education, *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (last accessed August 12, 2014), p. 5 (interpreting Title IX’s sex discrimination prohibition as “extend[ing] to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity”); OPM, “Nondiscrimination Provisions-Proposed Rule,” 78 Fed. Reg. 54434 (September 4, 2013) (proposing to amend various nondiscrimination sections appearing in 5 C.F.R. to categorize gender identity discrimination as a form of sex discrimination); Department of Health and Human Services, “Request for Information Regarding Nondiscrimination in Certain Health Programs and Activities,” 78 Fed. Reg. 46558, 46559 (August 1, 2013) (including gender identity as “sex discrimination” under Section 1557 of the Affordable Care Act).

6. **ROLES AND RESPONSIBILITIES:** It is the responsibility of compliance officers (COs) to conduct complaint investigations and compliance evaluations related to transgender status and gender identity in accordance with this directive.

7. **POLICY:** In accordance with *Macy v. Holder* and the Title VII case law on which it is based, OFCCP continues to fully investigate and seek to remedy instances of sex discrimination that occur because of an employee's gender identity or transgender status. OFCCP continues to accept and investigate individual and systemic complaints alleging sex discrimination against transgender employees. In the case of individual allegations of gender identity discrimination, and pursuant to the Memorandum of Understanding between EEOC and OFCCP,⁸ OFCCP will request that it initially retain such complaints to ensure effective enforcement of this Directive. OFCCP continues to seek to remedy any findings of sex discrimination against transgender employees that are discovered by OFCCP compliance officers during scheduled compliance evaluations of federal contractors or subcontractors. When investigating whether a federal contractor or subcontractor discriminated against an employee because of his or her gender identity, the agency continues to adhere to the existing Title VII framework for proving sex discrimination, as outlined in the FCCM.

8. **ATTACHMENTS:** None.



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⁸ EEOC-OFCCP Memorandum of Understanding, §7(c) (November 9, 2011), available at http://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm (last accessed August 12, 2014).