U.S. OFFICE OF SPECIAL COUNSEL

U.S. Office of Special Counsel
Report of Prohibited Personnel Practice
OSC File No. MA-11-3846
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I. INTRODUCTION

This report contains the investigative findings of the U.S. Office of Special Counsel (OSC) in File Number MA-11-3846, a complaint of prohibited personnel practice (PPP) filed by a Configuration Management Specialist with the Department of the Army, [redacted]. Throughout this report, the complainant is referred to as Jane Doe.[1] As detailed below, OSC concludes that the Agency's discrimination against Doe on the basis of her gender identity, including her gender transition from a man to a woman, constituted a PPP under 5 U.S.C. § 2302(b)(10) (discrimination based on conduct not adverse to work performance).

The underlying prohibited actions also likely constitute a PPP of sex discrimination under section 2302(b)(1) (discrimination based on sex). *See Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, *11 (Apr. 20, 2012) (holding sex discrimination includes discrimination against transgender individuals based on gender identity or expression). OSC's standard policy is to defer matters covered by Title VII of the Civil Rights Act of 1964 (Title VII) to the Equal Employment Opportunity (EEO) process established in the agencies and by the Equal Employment Opportunity Commission (EEOC). *See* 5 C.F.R. § 1801.1. As Doe has availed herself of the relevant EEO process, OSC will not conduct a separate section 2302(b)(1) analysis. Nonetheless, EEO law and federal policies relating to discrimination based on sex, including gender identity and expression, provide an important backdrop to this report. Specifically, this body of law and policy circumscribes the permissible considerations that an agency may make when determining whether conduct adversely affects work performance for purposes of section 2302(b)(10). Thus, although OSC makes no determination regarding Doe's sex discrimination claim, OSC relies on pertinent EEO law for appropriate context.

II. FACTUAL BACKGROUND[2]

Doe has worked as a civilian employee with [redacted] at [redacted] in [redacted], [redacted], since November 2004. She began as a Configuration Management Specialist and is now employed as a Quality Specialist. In 2010, Doe was selected to work on a [redacted] project with [redacted], a government contractor. During this assignment, Doe held the position of [redacted] at a [redacted] facility in [redacted] and traveled frequently to that site. Two other [redacted] officials were assigned to the [redacted] contract at the [redacted] facility during the same time period: [redacted], [redacted], and [redacted], [redacted],

[1] We have redacted the name of the complainant to protect her privacy.

[2] The factual background relevant to Doe's PPP complaint flows from the 2010-11 time period when Doe underwent her male-to-female gender transition. The facts contained in this report are not exhaustive, as two written reports produced through the EEO process have already provided a comprehensive recitation of the relevant facts: the EEO Report of Investigation and the Agency Final Decision. OSC has considered these two reports, in addition to our own investigative work, in preparing this report.

[redacted]. [redacted] was Doe's second-line supervisor, and [redacted] was [redacted] supervisor.

In 2010, while assigned to the [redacted] contract, Doe began the process of transitioning from a man to a woman. As early as 2007, Doe had told [redacted], [redacted] and Doe's first-line supervisor, of her intersex medical condition and anticipated gender transition. It was not until April 2010, however, that Doe communicated to [redacted] that she intended to legally change her name and begin dressing and presenting as a woman. Thereafter in 2010, Doe obtained a court-decreed name change, submitted a name change request with her employer, and obtained a passport with her new name and gender listed as female.

Starting in October 2010, after she notified the Agency of her official name change, Doe's work emails and correspondence contained her new name. This triggered questions about the change from other [redacted] and [redacted] employees. On October 26, management convened a meeting with Doe to address work issues concerning her gender identity. [redacted] and [redacted] discussed a workplace "transition plan" with Doe. As part of the plan, the three addressed the issue of which restroom Doe would use going forward. [redacted] later explained that "we were clear that we would support [Doe] and wanted [Doe] to be treated fairly, but also wanted [Doe] to recognize the two way street of ensuring the rights of the rest of the workforce were recognized as well." [redacted] EEO Response to Witness Participation in an Informal Complaint, p. 1 ([redacted] Response).

On November 22, 2010, Doe sent an email to the entire staff at [redacted], which included several other employees on the [redacted] contract, explaining her name change and gender transition. In this email, Doe also indicated that she would be using the executive, single-stall restroom (executive restroom) at [redacted], instead of the common female restroom (female restroom), for some initial time period.

A. Ongoing Restriction of Doe's Restroom Usage

Management expected that Doe would use the executive restroom until she underwent a final medical procedure related to her gender transition.[3] All parties appear to agree that Doe voluntarily accepted this arrangement at the October 26, 2010 meeting.

Unlike the female restroom, the executive restroom was a limited-facility restroom, and contained no showers, locker room, or feminine hygiene products. The decision to restrict Doe to the executive restroom was made, at least in part, in "an effort to allow employees to become accustomed to [Doe] and no longer feel uncomfortable." EEO Report of Investigation, p. 2. In fact, in reviewing and approving the transition plan, [redacted] and [redacted] were "informed that some female workers stated they did not feel comfortable" with Doe using the female restroom. *Id.* at 6. Another [redacted] official stated that it was "his belief that other

[3] This medical procedure is variously referred to in the record as a gender reassignment surgery, a final surgery, and, generically, as a medical procedure. It is unclear whether Doe actually planned to have such a procedure, and whether or not such a procedure ever occurred.

females would be uncomfortable with [Doe] using the same facilities prior to her transition surgery" and that he therefore "did not want to create an issue." *Id.* at 7.

In various correspondences, [redacted] and other management personnel expressed their desire to ensure Doe's comfort, too. For example, at the transition plan meeting, [redacted] made clear that he wanted to support Doe in her transition and that he wanted her to be treated fairly. In an October 22, 2010 email, [redacted] told Doe that he wanted to work with Doe the best he could to make sure that she was treated with the utmost respect and consideration in rolling out the transition plan. In a February 1, 2011 email, [redacted] again told Doe that he wanted to ensure that she was treated fairly and sincerely hoped that her upcoming site visit to [redacted] would go well. [redacted] also emphasized that the comfort of other employees should be considered when Doe made choices about which restroom to use at [redacted].

Following the October 26, 2010 meeting, Doe regularly used the executive restroom, as agreed, with the exception of three occasions between January 2011 and March 2011. On the first two occasions, Doe used the female restroom when the executive restroom was out of order. On the third occasion, she used the female restroom when the executive restroom was being cleaned. After the first two occasions, [redacted] told Doe that someone had reported seeing her use the female restroom and that "she was making people uncomfortable and he wished that she would continue to use the front restroom (executive restroom)." *Id.* at 2. [redacted] then asked Doe about her gender transition surgery and told her that she "needed to continue to use the front restroom (executive restroom) until she had the surgery." *Id.* at 3. Doe responded that she was "legally a female" and that "she used the female restroom." *Id.* at 2. After using the female restroom on the third occasion, [redacted] again approached Doe and told her that she was making other employees uncomfortable and that she needed to continue using the executive restroom.

[redacted], [redacted] Human Resources Specialist, testified that around November or December 2010 (after the transition plan meeting was held and after Doe sent the all-staff email explaining her gender transition), [redacted] sought guidance from [redacted] regarding Doe's use of the restrooms at [redacted]. [redacted] told [redacted] that management "could offer the use of the private bathroom to [Doe], but [Doe] did not have to use it and management could not infringe on [Doe's] right to use the regular bathroom." Agency Final Decision, p. 7.

B. [redacted]'s Repeated Use of Doe's Birth Name and Male Pronouns

Doe testified that [redacted], her second-line supervisor, typically misused her name and pronoun in moments of anger or in the company of others, and always with a negative connotation. Although some dispute exists over exactly how many times [redacted] engaged in this practice, it is evident that the use of Doe's birth name and male pronouns was sometimes intentional and continued for a lengthy time period after Doe's email announcement regarding her name change and gender transition. In fact, [redacted] referred to Doe as "Sir" in an email dated July 26, 2011—nine months after Doe initially made clear her intention to be treated, and referred to, as a woman.

Additionally, Doe stated that [redacted] referred to her as "Sir" on approximately ten other occasions, all of which occurred after [redacted] knew of Doe's desire to be identified as a woman. Doe also recalled that [redacted] repeatedly referred to her by her birth name, and also used "he" to refer to her, in at least two team meetings. Another employee witnessed [redacted] calling Doe by her birth name, followed by a "smirk[]," sometime after Doe had announced her name change and gender transition in the all-staff email. EEO Report of Investigation at 6.

C. [redacted]'s Efforts to Limit Doe's Workplace Conversations

[redacted] management singled out Doe for alleged inappropriate or unprofessional conversations taking place between her and other employees about her transgender status and gender transition. Sometime after the October 26, 2010 transition plan meeting, [redacted] indicated that he received reports of Doe discussing highly personal information and making "unwelcome comments" that he considered inappropriate. [redacted] Response at 2. He then communicated with Doe on several occasions, both in email and in person, in an effort to limit further conversations between Doe and other employees.

On November 8, 2010, several employees met with [redacted] and told him that Doe had been discussing detailed information regarding her gender transition. Doe was presumably not present at this meeting. Later that same day, [redacted] emailed Doe and asked her to "[p]lease hold down the office chatter on the personal status. I'm getting a lot of people telling me you're approaching them with information." *Id.* at Encl. 3. On January 19, 2011, [redacted] asked Doe to stop by his office to discuss an upcoming visit to [redacted] because he had received a complaint from the [redacted] and [redacted] indicating that Doe had inappropriately shared personal information with other employees. Then, on February 1, 2011, [redacted] warned Doe to "please be mindful of your surroundings and conversations with others during the [redacted] visit…. Just [be] mindful that some of the individuals you're working with may not fully understand all that you have undergone and the reasons you're using the female restrooms." *Id.* at 2.

Although [redacted] expressed his concern for the comfort of other employees, it should be noted that he consistently declared his intention of creating a fair work environment for Doe throughout the communications outlined above. In several emails, [redacted] expressed well wishes for Doe, ensured her that she would be treated with fairness and respect, and thanked her for her cooperation and understanding with regard to workplace tensions around her gender transition.

III. ANALYSIS

Under section 2302(b)(10), an agency shall not "discriminate … against an employee … on the basis of conduct which does not adversely affect the performance of the employee … or the performance of others." 5 U.S.C. § 2302(b)(10). This prohibition protects federal employees in the conduct of their personal lives without the threat of discrimination when that conduct is unrelated to work performance. Thus, the scope of section 2302(b)(10) is very wide, prohibiting

discrimination on the basis of any and all conduct not adversely affecting the work performance of the employee at issue or other employees.

To prove a violation of section 2302(b)(10), the complainant must show by "preponderant evidence that he[/she] engaged in conduct that did not adversely affect his[/her] performance and that the agency intentionally discriminated against him[/her] for that conduct." *MacLean v. Dep't of Homeland Sec.*, 116 M.S.P.R. 562, 575 (2011), *vacated and remanded on other grounds*, 714 F.3d 1301 (Fed. Cir. 2013), *cert. granted*, 134 S. Ct. 2290 (2014). The Merit Systems Protection Board recently indicated that, depending on the facts and circumstances in a case, a section 2302(b)(10) claim may follow one of two legal proof routes: (1) the prohibition against retaliation for exercising appeal rights and filing grievances found at section 2302(b)(9); or (2) a traditional claim of discrimination governed by the principles of Title VII. *See MacLean*, 116 M.S.P.R. at 574.

OSC finds that the facts and circumstances in this case are more analogous to a traditional Title VII claim than to a section 2302(b)(9) claim. We thus consult EEO law to consider the general legal framework for analyzing Doe's discrimination claim under section 2302(b)(10). *Id.* As explained below, OSC finds sufficient evidence in the record to conclude that the Agency unlawfully discriminated against Doe on the basis of her gender identity, including her gender transition from a man to a woman—conduct which did not adversely affect her performance or the performance of others.

A. Discrimination Under the Title VII Framework

Under Title VII, it is unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify … employees … in any way which would deprive or tend to deprive any individual of employment opportunities." 42 U.S.C. § 2000e-2(a). Complainants may bring Title VII claims for discrete discriminatory acts and for discriminatory harassment or hostile work environment claims. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002). While some of the acts complained of by Doe may constitute discrete discriminatory acts in and of themselves, OSC analyzes Doe's complaint as one of discriminatory harassment, looking at the cumulative effect of the series of related acts over a particular time period. *Id*.

Here, the Agency inappropriately restricted Doe's restroom usage, repeatedly failed to use her proper name and pronouns, and subjected her and her workplace conversations to increased review and scrutiny. To determine whether these acts, taken collectively, resulted in unlawful discriminatory harassment against Doe, a transgender woman, some background information on gender identity and gender transition may be helpful.

"Gender identity" refers to an individual's internal sense of being male or female. *See* U.S. Office of Personnel Management, *Guidance Regarding the Employment of Transgender*

Individuals in the Federal Workplace, p. 1 (hereinafter, *OPM Guidance*).[4] The way an individual expresses his or her gender identity is frequently called "gender expression," which may be communicated through behavior, clothing, hairstyles, voice, and other characteristics. *Id*. "Transgender" individuals are people with a gender identity that is different from the sex assigned to them at birth. *Id*. Undergoing a "gender transition" is a complex and individualized process that may involve counseling; changing names on official documents; using hormone therapy; and undergoing certain medical procedures. *Id*. Every transgender individual's process or transition is different, and there is no "right" way to transition genders. *Id*.; *see also* American Psychological Association, *Answers to Your Questions about Transgender People, Gender Identity, and Gender Expression* (2011), pp. 1-3.[5]

Generally, to prove discriminatory harassment under Title VII, a complainant must show that the offensive conduct affecting terms and conditions of employment is sufficiently severe or pervasive to interfere with the employee's job performance and create a hostile work environment—even absent actual or threatened economic injury. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Determining the threshold for when acts of harassment become illegal "is not, and by its nature cannot be, a mathematically precise test." *Id.* at 22. Instead, one must assess the totality of the circumstances surrounding the alleged harassment, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating; and whether it unreasonably interferes with an employee's performance. *Id.* at 23.

OSC finds that a similar construction should be applied to section 2302(b)(10) claims alleging discriminatory harassment. Indeed, by specifically including "any other *significant change* in duties, responsibilities, or *working conditions*" within the definition of "personnel actions" under section 2302(b), Congress provided the statutory tools for employing an applicable framework consistent with the Title VII standard for harassment claims. 5 U.S.C. § 2302(a)(2)(A)(xii) (emphasis added). We note, however, that it is not necessary to prove that a "personnel action" was taken or not taken to establish a section 2302(b)(10) claim. *See Special Counsel v. Russell*, 28 M.S.P.R. 162, 169 (1985). Instead, one must only show that the alleged harassment is "related to the authority to take, recommend, or approve a personnel action." *Id*. Thus, any action that constituted "an abuse of the supervisor-subordinate relationship" may be sufficient to prove a section 2302(b)(10) claim. *Id*. at 168.

Here, reviewing the totality of the circumstances, OSC finds that the acts at issue were sufficiently frequent, pervasive, and humiliating to constitute discriminatory harassment. That is, the Agency's intentional limitations on Doe's restroom usage significantly changed her working conditions, as did her supervisor's repeated use of her birth name and male pronouns and her manager's targeted restriction of the content of her conversations with coworkers. We also find that the harassment stemmed from an abuse of the supervisor-subordinate relationship by Agency officials with the authority to take, recommend, and approve the actions at issue. For

[4] Available at http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/.

[5] Available at http://www.apa.org/topics/sexuality/transgender.pdf.

example, [redacted] approved and enforced the transition plan which limited Doe's restroom usage, and further attempted to control Doe's conversations to those he deemed professional and appropriate. At the very least, [redacted]'s position in the chain of command "gave him the appearance of authority" to take these actions. *See Acting Special Counsel v. Sullivan*, 6 M.S.P.R. 526, 545 (1981) (finding statutory authority even in the absence of a formal delegation of power).

We now examine each of the discriminatory harassment acts in more detail. First, OSC concludes that the Agency significantly affected Doe's working conditions by continuously denying her use of a restroom available to all other female employees over a period of several months. Specifically, the record contains at least three instances in which Doe used—and then was counseled against future use of—the female restroom at [redacted]. Each of these instances occurred during the initial time period in which Doe agreed to use the executive restroom. However, Doe should have been free to use the restroom of her choice, even if it meant not adhering to the initial agreement with [redacted] management. According to the *OPM Guidance*, a transitioning employee should be allowed access to restrooms and locker room facilities consistent with his or her gender identity. *See OPM Guidance* at 3. Doe explained that she self-identified and was presenting as a woman when she used the female restroom. Moreover, even after the Human Resources Department instructed the Agency to allow Doe to use the restroom of her choice, the Agency failed to share this information with Doe or to modify the initial agreement.

[redacted]'s efforts to enforce the agreement were particularly troublesome, given that Doe used the female restroom when the executive restroom was out of service or being cleaned; had she chosen to not use the female restroom on these occasions, she would have had no restroom to use at all. This would have been a clear violation of the Department of Labor's Occupational Safety and Health Administration guidelines that require agencies to make access to adequate sanitary facilities as free as possible for all employees.[6] Furthermore, [redacted]'s counseling of Doe following each use of the female restroom intruded on Doe's privacy, was inappropriate, and subjected Doe to significant discomfort and humiliation. Although the *OPM Guidance* states that it is sometimes appropriate to create alternative restroom arrangements, it also states that employees should never be required to undergo or to provide proof of any particular medical procedure in order to have access to a particular restroom. *See OPM Guidance* at 3 ("transitioning employees should not be required to have undergone or to provide proof of any particular medical procedure (including gender reassignment surgery) in order to have access to facilities designated for use by a particular gender"). Ample evidence in the record confirms that [redacted] management intentionally assigned Doe to the executive restroom in order to bar her from using the female restroom until she underwent a final medical procedure, and that [redacted] inappropriately monitored the status of the medical procedure and Doe's gender transition to enforce this prohibition.

[6] Available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22932.

In addition, the initial agreement regarding restroom usage itself may have violated the spirit of the *OPM Guidance*, which is intended to ensure that all transitioning employees are treated with dignity and respect in the federal workplace. The Agency contends that it entered into, and subsequently enforced, the agreement because coworkers would feel uncomfortable with Doe using the female restroom. We acknowledge that while certain employees may object to allowing a transgender individual to use the restroom consistent with his or her gender identity, coworker (or even supervisor) anxiety or confusion alone cannot justify discriminatory working conditions. Indeed, allowing the preferences or prejudices of coworkers to dictate the working conditions of another employee reinforces the very stereotypes and biases that Title VII is intended to overcome. *See, e.g.*, *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 176-77 (9th Cir. 1981) (finding discrimination when female employee fired because employer's foreign clients would only work with male employees); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants); *Macy*, 2012 WL 1435995 at *11 (Title VII prohibits sex discrimination whether motivated by hostility, gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort).

Equally significant, the Agency's agreement with Doe on restroom usage had the effect of isolating and segregating Doe and treating her differently from employees of her same gender. *Cf.* 42 U.S.C. § 2000e-2(a)(2) (making it unlawful to "segregate" employees in ways that deprive or tend to deprive them of equal employment opportunities); EEOC, *Questions and Answers on Religious Garb in the Workplace*, Ex. 8 (limiting employees who wear religious attire that might make customers uncomfortable to "back room" positions constitutes religious segregation in violation of Title VII).[7] Doe experienced these effects on a daily basis for many months, and they served as a constant reminder that she was deprived of equal status, respect, and dignity in the workplace.

Compounding Doe's unequal treatment was [redacted]'s repeated misuse of her birth name and male pronouns when referring to her. The EEOC has specifically recognized that intentional misuse of a transgender individual's name or pronoun can "cause harm to the employee" and may constitute "sex based discrimination and/or harassment." *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729, *2 (May 21, 2013). The *OPM Guidance* further states that "[m]anagers, supervisors, and coworkers should use the name and pronouns appropriate to the employee's new gender." *OPM Guidance* at 3. It continues:

> Further, managers, supervisors, and coworkers should take care to use the correct name and pronouns in employee records and in communications with others regarding the employee. Continued intentional misuse of the employee's new name and pronouns, and reference to the employee's former gender by managers, supervisors, or coworkers may undermine the employee's therapeutic treatment, and is contrary to the goal of treating transitioning employees with dignity and respect.

[7] Available at http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm.

Id. Citing the *OPM Guidance*, the EEOC in *Jameson* found that the complainant stated a claim for sex-based harassment because her supervisor "repeatedly referred to her as 'he.'" *Jameson*, 2013 WL 2368729 at *2. Doe, like the complainant in *Jameson*, was subject to repeated misuse of her name and pronoun. The misuse continued for many months after Doe's gender transition, with indications that it was at times done intentionally and with ill intent.

Finally, [redacted]'s attempts to control Doe's workplace conversations contributed to creating adverse working conditions for Doe. These communications were chilling and had the effect of further isolating and differentiating Doe from her colleagues. While OSC recognizes an agency's right to delineate bounds for the appropriateness of workplace conversations, such standards need to be applied uniformly. Here, the record suggests that the Agency intentionally monitored Doe's conversations with unusual scrutiny, and that this scrutiny resulted in large part because some employees were generally uncomfortable with Doe (and not just with what she said, but also with her transgender status and with her gender transition). There is no evidence to suggest that any other employees were similarly cautioned about the content of their workplace conversations.

In sum, the daily restriction of Doe's restroom usage, combined with [redacted]'s repeated misuse of Doe's name and pronoun and the singling out of Doe for increased control of her conversations with coworkers, constituted discriminatory harassment under the guiding principles of Title VII. In addition, OSC finds that these acts reflected a significant change in Doe's working conditions under section 2302(b)(10).

B. Discrimination Based on Conduct Not Adverse to Work Performance

Section 2302(b)(10) requires a showing that the Agency's discrimination is based on conduct "which does not adversely affect the performance" of the employee or other employees. 5 U.S.C. § 2302(b)(10). As explained above, Doe's conduct included undergoing a gender transition which, among other things, included using the restroom consistent with her gender identity. Our investigation found no evidence that this conduct had a discernible or detrimental impact on her or other employees' work performance.

With respect to Doe, it is the Agency's conduct—such as employing and enforcing the restrictions on Doe's restroom usage—that actually caused Doe significant discomfort and humiliation. Yet, even when faced with these adversities, Doe consistently received high performance ratings during her employment at [redacted]. As for any adverse effects on other employees, some of Doe's coworkers were apparently uncomfortable with her transgender status and with her use of the female restroom. Some even complained about the tenor of Doe's comments regarding her transition. However, none of them ever alleged that his or her work performance suffered as a result of Doe's gender transition or her use of the female restroom. *Cf. Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (school's policy of allowing transgender women to use female restroom did not create hostile work environment under Title VII). Moreover, it would contravene basic notions of fairness, equality, and the merit

system principles to justify imposing adverse working conditions on Doe merely to appease the discomfort or bias of others. *See Glenn v. Brumby*, 663 F.3d 1312, 1320-21 (11th Cir. 2011) (finding direct evidence of discrimination from employer's testimony that he found transgender employee's dress unsettling and unnatural); *see also Macy*, 2012 WL 1435995 at *10 n.15 (noting discrimination found in cases where offending act was based on desire to accommodate other employees' prejudice or discomfort).

Indeed, EEO law and federal policy establish firm boundaries that apply to all federal agencies who act in response to conduct that adversely affects work performance. Section 2302(b)(10) permits employers to respond, but only if the grounds for the responsive action are appropriate and otherwise legally permissible; after all, the statute must be applied in a manner that does not eviscerate other existing legal protections.

Accordingly, section 2302(b)(10) must be applied in a way that is consistent with existing EEO law and federal policy to promote a uniform standard in the federal workplace. As discussed above, the EEOC has unambiguously held that discrimination against an employee because he or she is transgender or is undergoing a gender transition constitutes sex discrimination under Title VII. *See Macy*, 2012 WL 1435995 at *11. Similarly, the President has prohibited federal employment discrimination based on gender identity. *See* Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014). Therefore, an agency may not take an action against a transgender employee for conduct that is otherwise protected by EEO law and federal policy. Our analysis thus begins and ends with the presumption that Doe has a right to be protected from discriminatory acts that are based on her gender identity. Consequently, any discriminatory harassment based on the fact that Doe engaged in conduct, such as restroom usage that necessarily followed from her gender transition, is prohibited discrimination based on conduct that does not adversely affect work performance. *See* 5 U.S.C. § 2302(b)(10).

IV. CORRECTIVE ACTION

Despite what was perhaps the best of intentions, the Agency made significant adverse changes in Doe's working conditions by repeatedly singling her out, and discriminating against her, on the basis of her gender identity, including her gender transition from a man to a woman. As a result, OSC finds reasonable grounds to conclude that the Agency committed a PPP in violation of 5 U.S.C. § 2302(b)(10). OSC therefore recommends that appropriate remedial training in PPPs—especially as they relate to transgender employees—be given to [redacted] supervisors at [redacted]. This will ensure that the merit system principles are followed and that the Agency creates a fair and inclusive environment for all of its employees.

In addition, because the reaction of Doe's coworkers to her status as a transgender individual, and in particular to her use of the female restroom, was arguably insensitive and unwarranted, OSC recommends that the Agency provide appropriate workplace diversity and sensitivity training, especially as it relates to lesbian, gay, bisexual, and transgender (LGBT) individuals, to [redacted] employees at [redacted]. While many of Doe's coworkers may have been navigating new terrain with respect to creating a welcoming workplace for LGBT

colleagues, it is exactly those individuals who will benefit most from additional education on an increasingly important issue of workplace diversity and inclusion.

OSC did not find that Doe suffered economic harm requiring a backpay remedy, or that she otherwise suffered an adverse action that would require correcting. We note that the facts in this case arose before Congress created a compensatory damages remedy under section 107(b) of the Whistleblower Protection Enhancement Act of 2012 (WPEA). Compensatory damages under the WPEA are not retroactive. *See King v. Dep't of the Air Force*, 119 M.S.P.R. 663, 668 (2013). We make no finding as to her ability to recover damages under Title VII.