

CASE NOTES

Schroer v. Billington: Title VII Protection from Gender Discrimination in the Workplace

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I. INTRODUCTION

Diane Schroer, a highly qualified applicant who received an offer for a terrorism specialist position with the Library of Congress’s Congressional Research Service (CRS), was unfairly denied her position after she underwent a male-to-female gender transition.¹ Schroer was diagnosed with gender identity disorder prior to her decision to apply for a position with CRS.² She initially applied for the position under her legal name at the time, “David J. Schroer.”³ Because Schroer had not yet begun to present herself as a woman when she applied for the analyst position with CRS, she attended her interview dressed in masculine attire.⁴ Due to her impressive qualifications and twenty-five-year military career, the CRS selection committee unanimously recommended Schroer for the position and extended her an offer in December of 2004.⁵

After Schroer accepted the position and completed the necessary paperwork, she spoke with one of the CRS staff members, Charlotte Preece, regarding her intention to transition from male to female prior to her start date because “[s]he believed that starting work at CRS as a woman would be less disruptive than if she started as a man and later began presenting [herself] as a woman.”⁶ Preece then discussed the matter of Schroer’s gender transformation with her colleagues and decided to revoke Schroer’s offer of employment primarily under the belief that her gender transition would impair Schroer’s ability to maintain her security clearance.⁷ The District Court of the District of

1. *Schroer v. Billington*, 577 F. Supp. 2d 293, 295 (D.D.C. 2008).

2. *Id.*

3. *Id.*

4. *Id.* at 295-96.

5. *Id.* at 296.

6. *Id.*

7. *Id.* at 297-99 (noting that Preece was also concerned about whether Schroer would be able to maintain her contacts with the military, whether Members of Congress would give her

Columbia *held* that CRS's revocation of Schroer's job offer constituted discrimination "because of sex" in violation of Title VII. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

II. BACKGROUND

It is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."⁸ This provision of the United States Code, commonly referred to as Title VII of the Civil Rights Act of 1964, explicitly prohibits discrimination "because of . . . sex."⁹ By prohibiting employers from considering an employee's gender when making hiring decisions, the statute "eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice."¹⁰ Therefore, employers are permitted to hire the most qualified applicant for a position regardless of whether the applicant is male or female, but they are expressly forbidden from hiring or refusing to hire an applicant because the applicant is male or female.¹¹

Although Title VII generally protects employees from sex discrimination, its scope is nevertheless limited and does not cover situations where both male and female employees are required to adhere to professional dress requirements that place equal burdens on both genders.¹² Courts also restrict Title VII's scope over the issue of transsexuality to situations where the employee who happens to be a transsexual individual is discriminated against for being male or female rather than for being a transsexual.¹³ Although several bills banning employment discrimination on the basis of sexual orientation were introduced in 2007, Congress chose not to enact the bills, and instead courts have broadened their interpretation of Title VII with regard to nonconformist sexual identity.¹⁴

credibility when testifying before Congress, whether she would be a trustworthy employee, and whether she would be able to adequately concentrate on her work following her gender transition).

8. 42 U.S.C. § 2000e-2(a)(1) (2006).

9. *Id.*; *Schroer*, 577 F. Supp. 2d at 295.

10. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989).

11. *See id.*

12. *See id.*; *see Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1080-82 (9th Cir. 2004).

13. *See Ulane v. E. Airlines*, 742 F.2d 1081, 1084-85 (7th Cir. 1981); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2005).

14. *Schroer*, 577 F. Supp. 2d at 308.

In *Price Waterhouse v. Hopkins*, the Supreme Court of the United States held that Title VII covers claims of employment discrimination based on “sex stereotyping,” which occurs when an employer punishes an employee for the employee’s nonconformity with perceived gender stereotypes.¹⁵ The plaintiff in *Price Waterhouse* was a female senior manager at Price Waterhouse who refused to wear makeup or traditional feminine professional attire at work, and the accounting firm denied her partnership because the staff viewed her behavior as overly aggressive and nonconformist with respect to feminine professional norms.¹⁶ In the past, women seeking partnership with the firm were evaluated based on their work ethic and femininity, which the Court analyzed as sex-based evaluation, particularly because the employer expressed dislike for women who lacked traditionally feminine traits.¹⁷ Although the employer argued that the plaintiff lacked the appropriate interpersonal skills for a promotion to partner, the Court rejected its argument and determined that in situations where “an employee’s flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.”¹⁸ Therefore, the Court found that Price Waterhouse engaged in sex stereotyping by deciding whether or not to hire the plaintiff as a partner on the basis of her gender, especially because the employer determined that, as a woman, the plaintiff was overly aggressive.¹⁹

Conversely, the United States Court of Appeals for the Ninth Circuit held in *Jespersen v. Harrah’s Operating Co.* that a company dress code policy that required women to style their hair, wear makeup, and color their nails did not violate Title VII because the dress code placed an equal burden on male employees to dress in professional masculine attire.²⁰ In *Jespersen*, the female plaintiff was fired from her position with the company because of her personal decision not to wear makeup at work, although the company’s “Personal Best” policy also banned male employees from wearing stereotypically feminine accessories such as makeup or nail polish.²¹ Because the company’s dress code required both male and female employees to adhere to its gender-differentiated standards based on traditional masculine and feminine characteristics, the

15. *Price Waterhouse*, 490 U.S. at 251.

16. *Id.* at 235.

17. *Id.* at 236, 256.

18. *Id.* at 256.

19. *Id.* at 250.

20. 392 F.3d 1076, 1083 (9th Cir. 2004).

21. *Id.* at 1077-78.

Ninth Circuit held that the company did not violate Title VII by firing the plaintiff for her failure to comply with the “Personal Best” policy.²²

The United States Courts of Appeals for the Seventh, Ninth, and Tenth Circuits have all held that Title VII employment discrimination is limited to situations where the alleged discrimination occurs because the employee is male or female, but the statute does not extend to circumstances that involve nonconformist gender identity.²³ For example, in *Ulane v. Eastern Airlines*, the Seventh Circuit held that Title VII only applies to situations that involve employment discrimination based on traditional notions of sex in masculine and feminine norms.²⁴ The court determined that the plaintiff, a transsexual individual, failed to provide sufficient evidence that she was discriminated against for being a female, and her transsexual gender identity was not protected under the statute.²⁵ The Seventh Circuit stated that the language in Title VII indicated that Congress created the statute in 1964 to protect men and women in the traditional sense and that the court could not interpret the statute broadly beyond its text without acting as a legislative body.²⁶

Similarly, in *Holloway v. Arthur Andersen & Co.*, the Ninth Circuit held that Title VII did not protect transsexuals from employment discrimination because the legislative objective behind the statute was “to ensure that men and women are protected equally.”²⁷ The court stated that the plaintiff’s claim was not actionable under Title VII because the plaintiff was discriminated against for being a transsexual who changed her sex from male to female, rather than a traditional woman who was discriminated against for being female.²⁸

However, in *Etsitty v. Utah Transit Authority*, the Tenth Circuit held that Title VII may protect transsexuals from discrimination in circumstances where the employees are “discriminated against because they are male or because they are female” but not solely on the basis of their transsexuality.²⁹ In *Etsitty*, the plaintiff claimed that she was terminated from her position because of her gender transition from male to female and her failure to conform to masculine stereotypes expected

22. *Id.* at 1083.

23. *Ulane v. E. Airlines*, 742 F.2d 1081, 1085-86 (7th Cir. 1981); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221-22 (10th Cir. 2005).

24. 742 F.2d at 1085.

25. *Id.* at 1087.

26. *Id.* at 1085.

27. 566 F.2d at 663.

28. *Id.* at 664.

29. 502 F.3d 1215, 1222 (10th Cir. 2005).

by her employer.³⁰ The Utah Transit Authority (UTA), the plaintiff's former employer, argued that it fired the plaintiff solely on the basis of her choice to frequent the women's restroom while wearing her uniform, which led her employer to worry about potential liability against UTA for having a biological male employee using public women's bathrooms.³¹ The court concluded that UTA's decision to terminate the plaintiff's employment did not violate Title VII because the employer's concern about potential liability constituted "a legitimate, nondiscriminatory reason for [the plaintiff's] termination."³²

III. COURT'S DECISION

In the noted case, the district court addressed the issue of whether Schroer successfully proved that the Library of Congress's Congressional Research Service (CRS) "intentionally discriminated against her because of a protected characteristic:" her sexual orientation.³³ To determine whether Schroer was discriminated against based on her transsexuality, the court considered two issues: (1) whether CRS's stated reasons for revoking Schroer's offer were its "true reasons" or "pretext[s] for discrimination"; and (2) whether CRS's conduct violated Title VII by engaging in sex stereotyping or discrimination against Schroer "because of . . . sex."³⁴

Upon consideration of the first issue of whether CRS's reasons for denying Schroer employment were pretexts for discrimination, the court found that none of the so-called legitimate reasons CRS asserted for refusing to hire Schroer withstood scrutiny.³⁵ The Library of Congress's stated concerns—(1) security clearance concerns, (2) trustworthiness and distraction concerns, (3) credibility and contacts concerns—failed to meet the requirements for legitimate concerns and were therefore pretexts for discrimination.³⁶

The Library of Congress's primary concern was whether Schroer would be able to receive her "security clearance in a timely manner" due to her gender transition and name change from "David Schroer" to

30. *Id.* at 1219-20.

31. *Id.* at 1224.

32. *Id.*

33. *Schroer v. Billington*, 577 F. Supp. 2d 293, 300 (D.D.C. 2008) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)).

34. *Id.* at 300 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (internal quotations omitted)).

35. *Id.*

36. *Id.*

“Diane Schroer.”³⁷ Although “the ability to maintain or receive security clearance is a requirement for the terrorism specialist position,” the Library of Congress failed to sufficiently investigate the fact that Schroer held a security clearance at her prior employment with the military, and it failed to consider how her gender transition would impact the security clearance process.³⁸ Under the clearance process for employment at the Library of Congress, CRS “recognizes as a matter of reciprocity the security clearance held by an individual at a prior government agency.”³⁹

Here, Preece was aware that Schroer had a prior security clearance from her work experience with the military; however, she failed to provide Cynthia Wilkins, CRS’s agent responsible for granting security clearances, with any information for her to determine whether security clearance reciprocity would apply to Schroer.⁴⁰ Wilkins performed general research into sexual behavior guidelines and discovered two potential issues facing Schroer’s application: (1) “that sexual behavior that causes an individual to be vulnerable to blackmail or coercion may be cause for a security concern,” and (2) psychological disorders including gender identity disorder “are to be evaluated as part of the person’s entire background.”⁴¹ However, because Schroer had previously disclosed her transsexuality to the Library of Congress, her sexual behavior would not present any potential threats of blackmail or coercion.⁴² Furthermore, in cases where a prospective employee is diagnosed with gender identity disorder, as long as the Library’s “Health Services is satisfied that the disorder raises no security concerns,” an individual holding a prior security clearance may be granted reciprocity.⁴³ Based on the Library’s failure to comply with its own protocol regarding prospective employees with prior security clearances, the Library’s statements reflecting its concerns about the timeline for Schroer’s security evaluation were not credible.⁴⁴

The Library’s second concern was whether Schroer would be a trustworthy employee and whether her transition from male to female would negatively impact her ability to focus at work.⁴⁵ The court concluded that the Library’s alleged concerns with Schroer’s

37. *Id.*

38. *Id.* at 300-01.

39. *Id.* at 300.

40. *Id.* at 301.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 302.

45. *Id.*

trustworthiness were pretextual because there were no other factors in Schroer's life that would prevent her from working to the best of her ability or from adequately focusing on her position as a terrorism specialist.⁴⁶ In addition, Preece's concerns about Schroer's trustworthiness were unfounded and highly contradictory because Preece thanked Schroer for being honest about her sexual identity when she rescinded Schroer's offer.⁴⁷ The court determined that if Preece was truly concerned about Schroer's ability to focus on her job, she should have taken additional steps such as asking questions about Schroer's planned surgeries, discussing Schroer's ability to focus with her previous employers, or discussing other concerns with Schroer's therapist.⁴⁸ As a result, the court determined that the Library's concerns about Schroer's trustworthiness and ability to focus at work were unfounded and purely pretextual.⁴⁹

The Library's third concern, "that Schroer might lack credibility with Members of Congress, and that she might be unable to maintain contacts in the military," was facially discriminatory because these assertions stemmed exclusively from Schroer's gender transition from male to female.⁵⁰ The court determined that the Library's deference to presumed biases of Members of Congress and military officers constituted discrimination to the same extent as actual discrimination based on the employer's personal biases against transgendered individuals.⁵¹ The court reasoned that the Library should have contacted Schroer's military references and spoken with her former colleagues if it was truly concerned that the military would hold strong biases against Schroer because of her gender nonconformism.⁵² Because the Library failed to offer convincing evidence that the military or Congress would not find Schroer as credible as her male counterpart, the court determined that the Library's concern was unsupported and facially discriminatory.⁵³

The second issue the court considered was whether the Library's revocation of Schroer's offer constituted a violation of Title VII's prohibition on sex discrimination due to (1) "unlawful discrimination

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* (citing *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1270 (8th Cir. 1981)).

52. *Id.*

53. *Id.*

based on [Schroer's] failure to conform with sex stereotypes" and (2) "discrimination on the basis of gender identity that is literally discrimination 'because of . . . sex.'"⁵⁴

The court first addressed the issue of sex stereotyping by noting that various federal courts have held "that punishing employees for failure to conform to sex stereotypes is actionable sex discrimination under Title VII."⁵⁵ Schroer based her sex-stereotyping theory on the decision in *Price Waterhouse v. Hopkins*, where the Supreme Court held that an employer engages in sex stereotyping when it acts on the belief that a woman must behave in a particular manner with regard to her office behavior or professional attire.⁵⁶ By comparing Schroer's situation to that of the plaintiff in *Price Waterhouse*, the court determined that both Price Waterhouse and CRS engaged in discrimination against employees for failure to conform to gender stereotypes, thus resulting in "discrimination that would not have occurred but for the victim's sex."⁵⁷ The court found that "[s]ex stereotyping based on a person's gender nonconforming behavior is impermissible discrimination, irrespective of the cause of that behavior."⁵⁸

Further, the court distinguished Schroer's case from *Jespersen v. Harrah's Operating Co.*, where the Ninth Circuit held that the plaintiff's failure to comply with the company's "Personal Best" grooming policy by refusing to wear makeup and feminine professional attire, which resulted in her dismissal, did not violate Title VII.⁵⁹ Unlike the general office dress code in *Jespersen*, CRS did not revoke Schroer's offer of employment based on a broad gender-specific dress policy.⁶⁰ Rather, Schroer argued that direct and compelling evidence was available to show that CRS's decision to revoke her offer of employment was tainted by sex stereotypes, and that proof of disparate treatment required by *Jespersen* was not necessary.⁶¹

Schroer argued that CRS's hiring decision was affected by staff members' difficulty in understanding the basis for her gender transition from male to female, particularly due to Schroer's inherently "masculine"

54. *Id.*

55. *Id.* at 303; *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Medina v. Income Support Div.*, 413 F.3d 1131 (10th Cir. 2005).

56. *Schroer*, 577 F. Supp. 2d at 303 (citing *Price Waterhouse*, 490 U.S. at 250).

57. *Id.* at 303 (quoting *Smith v. Salem*, 378 F.3d 566, 574 (6th Cir. 2004)).

58. *Id.* at 304 (quoting *Smith*, 378 F.3d at 575).

59. *Id.* (citing *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109 (9th Cir. 2006)).

60. *Id.* at 304.

61. *Id.* at 304-05.

career experience in the military.⁶² Preece expressed concern that CRS staff members and Members of Congress would not take Schroer dressed in feminine attire as seriously as her male counterpart because people would view her “as a man in women’s clothing.”⁶³ Due to Schroer’s transgendered identity, the court determined that her sex-stereotyping argument would be more difficult to uphold because transsexuality in and of itself is generally unprotected by Title VII, according to most federal courts.⁶⁴ However, Preece offered testimony that Members of Congress would have trouble reconciling Schroer’s female identity with her “masculine” credentials, which Schroer believed to constitute prototypical sex stereotyping.⁶⁵ Based on the CRS staff members’ testimony and the facts surrounding Schroer’s revoked offer, the court found that Title VII applied to Schroer’s case, regardless of whether CRS “perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.”⁶⁶

Next, the court considered whether the Library’s discrimination on the basis of Schroer’s nonconformist gender identity constituted discrimination “because of sex.”⁶⁷ Schroer offered into evidence the expert testimony of Dr. Walter Bockting, a medical school professor, that gender identity is one of nine factors that determine a person’s sex.⁶⁸ However, the court refused to place any importance on Dr. Bockting’s scientific definition of sex because scientific controversies do not fall within the court’s competence.⁶⁹ Instead, the court focused on the scope of Title VII and whether the language in the statute allowed leeway in situations where a transsexual employee was the victim of discrimination, even though most circuits were generally blinded by the term “transsexual” and refused to consider these types of cases because of their failure to fall under the cookie-cutter “male” and “female” discrimination requirements.⁷⁰

The court analyzed prior cases such as *Ulane*, *Holloway*, and *Etsitty*, where the circuit courts found that discrimination “based on changing one’s sex is not discrimination because of sex” according to

62. *Id.* at 305.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 306.

68. *Id.*

69. *Id.*

70. *Id.* at 307.

their strict interpretation of the language in the statute.⁷¹ However, the court rejected the reasoning behind these cases, particularly the holding in *Ulane* for its unjustifiably rigid interpretation of Title VII in defining “sex” in exclusively anatomical terms.⁷² Rather, because the Library refused to hire Schroer after she informed Preece, the CRS hiring coordinator, that she was going to change her sex from male to female, the court determined that the Library’s repudiation of Schroer’s offer of employment satisfied the requirement for discrimination “because of sex.”⁷³ The court based its interpretation of the language in Title VII on a recent trend in other courts to interpret the statute in a broader fashion, which would allow Schroer’s situation, where she was discriminated against because of her newfound feminine demeanor, to satisfy the language of Title VII.⁷⁴

Therefore, the district court held that the Library of Congress violated Title VII by reneging Schroer’s offer of employment because of her decision to transition from male to female as well as her inability to conform to the Library’s perceived notion of male and female gender stereotypes.⁷⁵

IV. ANALYSIS

Before Schroer rightfully and openly disclosed her transsexuality to her then-future employer, the Library of Congress was more than pleased to offer her a terrorism specialist position with CRS.⁷⁶ Schroer significantly surpassed all other applicants for the position thanks to her academic credentials, her twenty-five years of military service, and her experience serving as Colonel of the United States Special Operations Command.⁷⁷ Because CRS revoked its offer to an otherwise exceptional candidate upon disclosure of her planned gender transition, Schroer was clearly denied employment with CRS because of her decision to transition physically and socially from male to female, even though she was the most qualified candidate for the position.⁷⁸ The court’s holding in this case is significant because it broadens Title VII’s interpretation of what type of “male” or “female” employee is protected from

71. *Id.* (citations omitted).

72. *Id.* at 308.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 306.

77. *Id.* at 295.

78. *Id.* at 308.

employment discrimination.⁷⁹ The court's broadened interpretation heralds a major departure from other circuits' rigid interpretations of Title VII protection that is limited exclusively to the traditional notion of "males" and "females."⁸⁰

The district court correctly interpreted the language of Title VII to include employment discrimination against transsexuals because of their newfound male or female identity, which can be interpreted as discrimination "because of sex."⁸¹ Even though various courts previously interpreted Title VII in a narrow manner, excluding discrimination against transsexual persons, the Supreme Court has noted that courts should refrain from "inferring the intent of an earlier Congress" and should interpret statutes in the fairest manner possible.⁸² The district court's decision was a victory for Schroer and should have a positive influence on other courts' interpretations of Title VII claims of employment discrimination against transsexuals "because of" their new sex as a man or woman.⁸³

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79. *See id.* at 307.

80. *See id.* at 308.

81. *Id.*

82. *Id.* (quoting *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

83. *See id.*

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