

RECENT CASE DEVELOPMENTS

Legitimacy of Cost Concern for Health Insurance Coverage of Gender-Affirming Surgeries: Comparison of the Interest in Keeping Insurance Cost Down versus the Cost-Effectiveness of Including Gender-Affirming Surgeries in Employer Health Insurance Plans

Angelo Atangan

Boston University, Boston, MA, USA
Email: aatangan@bu.edu

Abstract

This RCD discusses the recent development in *Lange v Houston County*. In this case, the United States District Court for The Middle District Of Georgia Macon Division found that an Exclusion Policy, prohibiting health insurance coverage of gender-affirming surgery for an employee, Anna Lange, violated Title VII of the Civil Rights Act. On appeal, the Defendants argued that the District Court erred in its decision and relied on the cost burden of gender-affirming surgery as one of their defenses. This RCD highlights that cost is a common defense tactic used by defendants in these cases. However, the author argues that these concerns are unfounded and meritless given the cost-effectiveness of including gender-affirming surgeries in health insurance plans, as highlighted in the RCD.

Keywords: Health; insurance; coverage; gender-affirming; transgender; surgery; cost; money

Summary

On June 2, 2022, the United States District Court for The Middle District Of Georgia Macon Division (“the District Court”) decided that Houston County’s (“the County”) Exclusion Policy (“the Exclusion”) denying health insurance coverage of gender transition surgery for Plaintiff, Anne Lange (“Lange”) violated the Equal Protection Clause and Title VII, but did not violate Title I of the American Disability Act (“ADA”).¹ The District Court found material dispute in the facts regarding Lange’s Equal Protection claim, denying both motions for summary judgment from Lange and the Defendants.² On Lange’s Title VII claim, Lange was granted partial summary judgment³ and was afforded compensatory damages of \$60,000 via a jury verdict on September 27, 2022.⁴ Additionally, the District Court granted Permanent Injunctive and Declaratory relief on October 3, 2022, based on Lange’s Title VII claim.⁵

¹*Lange v. Houston Cnty.*, Ga., 608 F. Supp. 3d 1340, 1354-1363 (M.D. Ga. 2022).

²*Id.* at 1356.

³*Id.* at 1361.

⁴Verdict Form from Jury, at 1, *Lange v. Houston Cnty.*, Ga., 608 F. Supp. 3d 1340 (M.D. Ga. 2022) (No. 5:19-cv-00392).

⁵Order Granting Permanent Injunctive and Declaratory Relief, at 1-2, *Lange v. Houston Cnty.*, Ga., 608 F. Supp. 3d 1340 (M.D. Ga. 2022) (No. 5:19-cv-00392).

The Defendants appealed, and they urged the Eleventh Circuit to reverse the District Court's order blocking them from enforcing their Exclusion via permanent injunctive and declaratory relief.⁶ The Defendants then filed a motion for stay pending appeal, which the District Court denied on March 1, 2023.⁷

While awaiting an appeal trial, the Department of Justice ("DOJ") filed an amicus brief on March 12, 2023.⁸ DOJ attorneys asked the Eleventh Circuit to affirm the District Court's decision based on two key arguments: (1) the County's health insurance plan violates Title VII "because of its Exclusion, prohibiting medical treatments only when they are needed to provide gender-affirming care;" and (2) the County acted "as a public employer's 'agent' under Title VII because it provides and administers health insurance benefits to the Sheriff Talton's employees."⁹

Background

Lange's Employment and Her Transition Experience with the County's Health Insurance Plan and the Exclusion

Lange has been with the County Sheriff's Office for the past fifteen years.¹⁰ As a transgender woman, Lange suffers from gender dysphoria, which caused her significant personal and emotional suffering.¹¹ Lange began treating her gender dysphoria in 2017 by receiving hormone replacement therapy and top feminization surgery.^{12,13} Despite receiving various treatments, Lange continued to experience significant emotional pain and distress due to the mismatch "between her female gender identity and her remaining male physical characteristics."¹⁴ This led her to determine, with the advice from her endocrinologist, psychologists, and surgeon, "that a vaginoplasty was the next step in treating her gender dysphoria."¹⁵

Following this determination, Lange asked a representative of the County's health insurance plan if the plan would cover her gender reassignment surgery.¹⁶ However, the representative told Lange her

⁶Notice of Appeal from Defendants, *Lange v. Houston Cnty., Ga.*, 608 F. Supp. 3d 1340 (M.D. Ga. 2022) (No. 5:19-cv-00392).

⁷Order Denying Motion for Stay Pending Appeal, *Lange v. Houston Cnty., Ga.*, 608 F. Supp. 3d 1340 (M.D. Ga. 2022) (No. 5:19-cv-00392).

⁸Brief for Appellee, *Lange v. Houston Cnty., Ga.*, 608 F. Supp. 3d 1340, (M.D. Ga. 2022) (No. 5:19-cv-00392).

⁹*Id.* at 10, 21.

¹⁰*Lange*, 608 F. Supp. 3d at 1346.

¹¹*Id.*; see Kareen M. Matouk & Melina Wald, *Gender-affirming Care Saves Lives: Growing legislative attempts to limit, ban, or criminalize access to this critical model of medical care endangers the health and well-being of transgender and nonbinary youth*, COLUM. UNIV. DEP'T OF PSYCHIATRY (Mar. 30, 2022), <https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives> [<https://perma.cc/L8PS-SE8D>]; see also Anthony N. Almazan & Alex S. Keuroghlian, *Association Between Gender-Affirming Surgeries and Mental Health Outcomes*, JAMA SURGERY (Apr. 28, 2021), <https://jamanetwork.com/journals/jamasurgery/fullarticle/2779429> [<https://perma.cc/H6VF-E7D>].

¹²*Lange v. Houston Cnty., Ga.* *supra* note 1, at 1346.

¹³See *Service Update*, PLANNED PARENTHOOD (2023), <https://www.plannedparenthood.org/planned-parenthood-great-northwest-hawaii-alaska-indiana-kentuck/patients/health-care-services/hrt-hormone-therapy-for-trans-and-non-binary-patients#:~:text=What%20is%20hormone%20therapy%3F,align%20with%20their%20gender%20identity> [<https://perma.cc/BM7W-V4KP>] (last visited Apr. 29, 2023) ("hormone [replacement] therapy consists of either feminizing (estrogen) or masculinizing (testosterone) hormones. Many transgender people take hormone therapy as part of a gender transition to help their bodies and appearance align with their gender identity ... Hormones are helpful in making your appearance more masculine or feminine. Beginning gender affirming hormone therapy has many similarities to going through puberty. Although hormones taken in adulthood can help to keep your bones healthy, they can't alter your skeletal shape or your height"); see also *Transfeminine Top Surgery: Feminizing Chest Surgery*, AM. SOC'Y OF PLASTIC SURGEONS (2023), <https://www.plasticsurgery.org/reconstructive-procedures/transfeminine-top-surgery#:~:text=What%20is%20transfeminine%20top%20surgery,as%20a%20single%20stage%20procedure> [<https://perma.cc/QUH5-FR7S>] (last visited Apr. 29, 2023) ("The goal of transfeminine top surgery, or feminizing chest surgery, is to enhance the size and shape of the breasts to create a more feminine appearance to the chest. Top surgery is performed as a single stage procedure).

¹⁴*Lange v. Houston Cnty., Ga.* *supra* note 1, at 1346.

¹⁵*Id.*

¹⁶*Id.*

surgery was excluded from coverage under the County's health plan's Exclusion Policy.¹⁷ The Exclusion contained sixty-eight medical procedures and twenty-nine pharmacy benefits, and it expressly excluded coverage for "sex change" surgery.¹⁸ These exclusions survived during a renewal process in 2016 despite Anthem's, the County's third-party health insurance administrator, nondiscrimination mandate and removal recommendation.¹⁹

Denial of Lange's Sex Change Surgery

The County defended keeping the Exclusion, claiming that the Exclusion is to keep the overall plan cost down and that removing one exclusion would open the floodgates to additional requests to remove other exclusions.²⁰ As a result, Lange was denied pre-authorization for her surgery.²¹ She appealed, but the denial was upheld on January 23, 2019.²² Lange brought the issue to the County Commissioners in hopes of having the Exclusion lifted and her surgery covered but was told by the County Attorney that the Commissioners were currently not open to amending the plan and recommended avoiding further discussion of the issue in light of possible future litigation.²³ Lange then brought suit against the County and her employer, Sherrif Talton, on October 2, 2019.²⁴

How the district court decided each claim and the following orders for the plaintiff and appeals by the defendant

Agency Question

Before diving into the Equal Protection, Title VII, and ADA claims, the District Court discussed whether the County is a state agent and thus subject to Title VII and ADA and whether Sheriff Talton acted as an "arm of the state," immunizing him from Lange's Equal Protection and ADA claims under the Eleventh Amendment.

The District Court concluded, through reliance on the Eleventh Circuit's decision in *Williams v. Cty. of Montgomery*, that the County acted as Sheriff Talton's agent.²⁵ The *Williams* Court held that the Board was an agent of the City because it exercised acts traditionally reserved to the employer - establishing a payment plan and formulating a minimum standard for jobs.²⁶ Given that Title VII and ADA liability extends to employers and the employer's agents, the *Williams* Court held that the Board and the City are subject to Title VII and ADA liability.²⁷ In Lange's case, the County operated as an agent of Sheriff Talton by administering and providing Sheriff Talton's employees with health insurance plans, an act usually

¹⁷*Id.*

¹⁸*Id.* at 1347.

¹⁹*Id.* Anthem's Nondiscrimination in Health Programs and Activities Rule stated that "in recognition of regulations issued under PPACA section 1557, the exclusion for Gender Identity Disorders and Sex Change Surgery will be removed from our plans." However, even with this recommendation, the County chose not to accept the nondiscrimination mandate and decided to keep the Exclusion. For health insurance plans that the abided and removed exclusion for "sex change surgery," Anthem provides guidelines for when a surgery is "medically necessary" and covered by the plan. According to the District Court, "it is undisputed that Lange's prescribed vaginoplasty is medically necessary under Anthem's Guideline."

²⁰*Id.* at 1348.

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.* at 1351.

²⁶*Id.* (citing an Eleventh Circuit decision holding that the Montgomery City-County Personnel Board acted as an agent of the City of Montgomery and both entities were held liable for violating Title VII's prohibition of racial discrimination. The Board performed employer-like functions, such as "creating a pay structure, establishing job requirements, assessing employee performance, and reinstating workers," which traditionally belong to an employer. As a result, the court concluded that Title VII liability applied to both the Board and the City).

²⁷*Id.*

performed by employers, under Sheriff Talton's directive.²⁸ Therefore, as an agent, the County is subject to liability for violation of Title VII and the ADA.²⁹

As to Sheriff Talton, the District Court concluded that he is immune from Section 1983, which allows plaintiffs to seek relief when deprived of any rights reserved by the constitution and laws of the US.³⁰ A state official being sued with a Section 1983 claim can raise two defenses: (1) they are not considered a suable "person" under Section 1983; (2) they are protected by the Eleventh Amendment's sovereign immunity.³¹ In the case of Sheriff Talton, his personhood and immunity depended on whether he acted as "an arm of the state" when providing healthcare benefits to his employees.³² Because it was clear to the District Court that the County was administering the health insurance plan under Sheriff Talton's delegation in his capacity as a state officer, they determined that he was acting on his own behalf as an "arm of the state."³³ Therefore, the District Court found Sheriff Talton immune from Lange's ADA claim.³⁴ Additionally, The District Court extended this analysis to conclude that Sheriff Talton is immune from Lange's Equal Protection claim.³⁵

ADA Claim

Title I of the ADA interdicts specific forms of disability discrimination in employment contexts. However, not all disabilities fall within the scope of the ADA.³⁶ For example, the ADA expressly excludes gender identity conditions not associated with physical impairments.³⁷ As a response, Lange argued that because gender dysphoria is not explicitly listed under 42 U.S.C. § 12211(b), gender dysphoria is not excluded from disability discrimination.³⁸ Lange added that even if the District Court finds gender dysphoria to fall under the ADA exclusion, she possessed enough evidence to determine that her condition stemmed from a physical impairment.³⁹ Nevertheless, the District Court ruled against Lange because it found both arguments to lack any merit.⁴⁰

Initially, the District Court determined that the ADA's exclusion of gender identity included gender dysphoria. Lange, however, argued against the exclusion based on the interpretive canon of *expressio unius est exclusio alterius*, which suggests that the mention of one item of a particular group implies the exclusion of another.⁴¹ Nevertheless, the District Court stated that this canon only applies if it is "reasonable to believe that Congress considered the unnamed possibility" and intended to exclude it.⁴² The District Court determined that gender dysphoria was not mentioned in the ADA's exclusion only because it did not exist at the time of the Act's writing.⁴³ Therefore, there was no proof that Congress intended to exclude gender dysphoria, or thought about excluding it, from the term "gender identity disorder."⁴⁴ The District Court concluded that "gender identity disorders" encompasses gender

²⁸*Id.*

²⁹*Id.*

³⁰*Id.* at 1353.

³¹*Id.*

³²*Id.*

³³*Id.*

³⁴*Id.*

³⁵*Id.*

³⁶42 U.S.C. § 12111(b)(1).

³⁷*Id.*

³⁸*Lange v. Houston Cnty., Ga. supra* note 1, at 1361.

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.*; see also *Expressio Unius est Exclusio Alterius*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius> (last visited Apr. 29, 2023) [<https://perma.cc/SW2T-D6UW>] ("a principle in statutory construction: when one or more things of a class are expressly mentioned others of the same class are excluded").

⁴²*Id.*

⁴³*Id.* at 1362.

⁴⁴*Id.*

dysphoria.⁴⁵ Lange’s only way to pursue her ADA claim was to provide proof that her gender dysphoria resulted from a physical impairment.⁴⁶

The District Court proceeded to elaborate on the insufficiency of Lange’s second argument that her gender dysphoria was a result of physical impairment.⁴⁷ Lange relied on the possible interplay between the endocrine and neurological systems as illustrated by an expert’s recitation of the potential role of sex hormones as a contributing factor to gender dysphoria.⁴⁸ However, the expert qualified his testimony to say that this interaction was not wholly understood.⁴⁹ This was not enough evidence to convince the District Court that Lange’s gender dysphoria satisfied the definition of a physical impairment under the ADA.⁵⁰ As a result, the District Court dismissed her ADA claim and granted the Defendants’ motion for summary judgment.⁵¹

Equal Protection Claim

The District Court found that the County’s Exclusion did not facially discriminate based on sex. The District Court compared the County’s Exclusion to the exclusion in *Geduldig v. Aeillo*.⁵² The Supreme Court in *Geduldig* established that excluding medical procedures that only apply to one sex from an insurance policy does not constitute sex-based discrimination because it only distinguishes between pregnant and nonpregnant individuals.⁵³ Because of the exclusive nature of pregnancy to women, and the inclusion of both sexes in the nonpregnant group, the Supreme Court concluded a “lack of identity” between pregnancy and sex.⁵⁴ Therefore, the classification was deemed to be based on a medical condition and not sex.⁵⁵ In Lange’s case, the Exclusion operates uniformly for both trans men and trans women, and while transgender individuals are “entitled to protection under the Equal Protection Clause as a separate and distinct class from that of males and females,” the Exclusion creates two groups similar to the ones in *Geduldig*—those that want gender-affirming surgery and those that do not.⁵⁶ The Exclusion subjects both transgender and non-transgender employees, indicating a “lack of identity” between transgender status and the Exclusion.⁵⁷ As a result, the District Court did not find the Exclusion to be facially discriminatory based on sex under the Equal Protection Clause.⁵⁸

Although facially neutral under *Geduldig*, Lange argued the Exclusion violated the Equal Protection Clause because it has “a disproportionate impact on transgender individuals and [was] motivated by discriminatory intent.”⁵⁹ The District Court mentioned the eight-factor test from *League of Women Voters of Fla., Inc. v. Fla. Sec’y of State* to analyze Lange’s argument but only discussed six. By going

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.* (“At least one commentator has suggested that “physical condition” means just that—a manifest physical condition that causes one’s gender identity disorder. Thus, “the presence of a physical condition related to gender identity disorder, such as having undescended testicles, missing ovaries, hermaphroditic conditions, genetic anomalies, or an androgen receptor disorder” would qualify as a disability under the Act. Jones, ‘Section 504 of the Rehabilitation Act of 1973: A Double-Edged Sword for the Protection of Students with Gender Identity Disorder,’ 25 WIS. J.L. GENDER & Soc’y 353 (2010).”).

⁵¹*Id.*

⁵²*Id.* at 1354.

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹*Id.* at 1355.

through these six factors, the District Court determined that there was a material dispute in the facts, and consequently, the summary judgment motions from both parties were denied.⁶⁰

Title VII Claim

The District Court exclaimed that an Equal Protection Clause claim is a question of fact, which is distinct from Title VII claims which can be decided as a matter of law.⁶¹ According to the District Court, distinctions based on sexual orientation and gender stereotyping fall under the purview of sex discrimination as per Title VII.⁶² This is because discriminating against an individual for being homosexual or transgender necessarily entails discrimination based on sex, as aptly expounded by the Supreme Court in *Bostock v. Clayton Cnty., Georgia*.⁶³

The District Court further elaborated that the denial of healthcare coverage based on sex unequivocally violates Title VII, as healthcare benefits are considered a form of “compensation, terms, conditions, or privileges of employment” under the scope of Title VII.⁶⁴ The District Court observed that the Exclusion constitutes facial discrimination against members of a protected class, resulting in a violation of Title VII, irrespective of the employer’s intention.⁶⁵ A synopsis of the pertinent facts demonstrated that the Exclusion precludes coverage for medical procedures and treatments that would be covered under different circumstances unrelated to gender affirmation.⁶⁶ According to the District Court, the only employees impacted by the Exclusion are transgender people seeking a sex change, a fact that is undisputed by the defendants.⁶⁷ Therefore, the District Court granted Lange’s motion for summary judgment against the County and Sheriff Talton in part.⁶⁸

The issue of proper relief for Lange’s Title VII claim went to a jury trial on September 27, 2022, where the jury found Lange suffered mental and emotional harm due to her denied care and was awarded \$60,000 in compensatory damages.⁶⁹ In addition, Lange filed an amended complaint in October 2022 requesting permanent injunctive and declaratory relief concerning her Title VII summary judgment win.⁷⁰ As a response, the District Court reaffirmed its position that the County’s Exclusion violated Title VII and proceeded to issue a permanent injunction to prevent the Defendants from further enforcing the Exclusion.⁷¹ In the same order, the District Court mandated the Defendants to apprise Anthem of its decision and to allow Anthem to process claims related to Lange’s vaginoplasty, including costs for supplies, services, and any other medical care deemed necessary.⁷²

The Defendants appealed this order of Permanent Injunctive and Declaratory relief⁷³ and subsequently filed a motion for stay pending appeal on October 17, 2022.⁷⁴ The Defendants’ Memorandum in

⁶⁰*Id.*

⁶¹*Id.* at 1356.

⁶²*Id.*

⁶³*Id.*

⁶⁴*Id.* at 1357.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰Order Granting Permanent Injunctive and Declaratory Relief, at 1-2, *Lange v. Houston Cnty., Ga.*, 608 F. Supp. 3d 1340 (M.D. Ga. 2022) (No. 5:19-cv-00392).

⁷¹*Id.*

⁷²*Id.*

⁷³Notice of Appeal from Defendants, *Lange v. Houston Cnty., Ga.*, 608 F. Supp. 3d 1340 (M.D. Ga. 2022) (No. 5:19-cv-00392).

⁷⁴Motion for Stay Pending Appeal from Defendants, *Lange v. Houston Cnty., Ga.*, 608 F. Supp. 3d 1340 (M.D. Ga. 2022) (No. 5:19-cv-00392).

support of their motion for stay went through the traditional four-factor inquiry from *Nken v. Holder*.⁷⁵ The District Court responded to each of the Defendants' claims in their decision to deny the motion for stay dated March 1, 2023.⁷⁶ Below are the *Nken* factors and the District Court's discussion of the Defendant's and the District Court's explanation for denying the Defendant's motion for stay.

Whether the stay applicant has made a strong showing that he is likely to succeed on the merits

Because the other three factors were already found by the District Court to weigh heavily against a stay, the Defendants must demonstrate a high likelihood of success on the merits of their appeal.⁷⁷ The Defendants argued that the District Court erred in its determination that the Exclusion was facially discriminatory under Title VII on two grounds: the Exclusion is included in an insurance coverage package available to all employees, and it only excluded specific treatments for transgender employees.⁷⁸ They also argued that the Exclusion was lawful since it excludes only some treatment for employees who identify as transgender.⁷⁹ The District Court, however, found these arguments to be without merit and that the Defendants had not provided any substantial explanation as to why the Exclusion was not facially discriminatory.⁸⁰ Therefore, this factor weighed strongly against granting a stay.⁸¹

Whether the applicant will be irreparably injured absent a stay

The District Court concluded that the Defendants would not be irreparably injured absent a stay.⁸² The standard used to determine irreparable harm is the one from *Redding v. Fanning*, stating that a movant must show that the injury cannot be undone through monetary remedies.⁸³ In this case, the Defendants relied on *Garcia-Mir v. Meese* and argued that the decision provided authority for a stay.⁸⁴ They placed themselves in the same shoes as the government in *Garcia-Mir* and argued they would suffer irrevocable harm because the exact cost of a vaginoplasty is unknown.⁸⁵ In support of this claim, the Defendants used a tawdry news article titled "How Ben Got His Penis," which provided an estimated cost of \$200,000 for procedures unrelated to vaginoplasty.⁸⁶ As a response, the District Court corrected the defense counsel, as it was an undisputed fact, on the record, that Lange's vaginoplasty would cost around \$25,600.⁸⁷ Additionally, the Defendants contended that allowing Lange's surgery would open up the floodgates for other transgender employees, and the cost would be too much to bear.⁸⁸ The District Court pointed out that this fact is contrary to Anthem's statement that utilization of gender-affirming care was low.⁸⁹ Given these unfounded arguments, the District Court concluded that this factor weighed strongly against a stay.⁹⁰

⁷⁵Memorandum In Support Of Defendants' Motion For Stay Pending Appeal, at 2, *Lange v. Houston Cnty., Ga.*, 608 F. Supp. 3d 1340 (M.D. Ga. 2022) (No. 5:19-cv-00392).

⁷⁶Order Denying Motion for Stay Pending Appeal, *Lange v. Houston Cnty., Ga.*, 608 F. Supp. 3d 1340 (M.D. Ga. 2022) (No. 5:19-cv-00392).

⁷⁷*Id.*

⁷⁸*Id.*; see also Order Denying Motion for Stay Pending Appeal, *Lange v. Houston Cnty., Ga.*, 608 F. Supp. 3d 1340 (M.D. Ga. 2022) (No. 5:19-cv-00392).

⁷⁹*Id.* at 8.

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.* at 5.

⁸³*Id.* at 4.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.* at 5.

⁸⁷*Id.*

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰*Id.*

Whether issuance of the stay will substantially injure the other parties interested in the proceeding

This factor weighed strongly against a stay, given that the Defendants rightfully concede that Lange can show substantial injury if a stay is granted.⁹¹

Where the public interest lies

The District Court found no benefit to the public interest if they were to grant a stay.⁹² The Defendants argued that a stay is warranted because the cost of compliance with the injunction is not inconsiderable.⁹³ However, as discussed in factor 2, the cost is relatively minimal, and in reality, the public interest is better served with the permanent injunction in place since employees get to receive the necessary medical care they need.⁹⁴ Because of these, the District Court found this factor to weigh against a stay.⁹⁵ Given that all the *Nken* factors weigh strongly against a stay, the District Court denied the Defendants' motion for a stay pending appeal.⁹⁶

DOJ's Amicus brief in support of affirming the lower court's decision

On March 17, 2023, Attorneys from the Department of Justice submitted a brief as amicus curiae to support the Plaintiff and urged the Eleventh Circuit to affirm two critical aspects of the lower court's summary judgment decision.⁹⁷

The DOJ argued that the Eleventh Circuit must affirm that employers violate Title VII if their health insurance plans deny coverage for medically necessary gender-affirming care to transgender employees, especially if such care would be covered if used for other medical reasons.⁹⁸ The County's Exclusion effectively discriminates based on sex, as it denies medical care exclusively when it is used to align an individual's sex characteristics with their gender identity rather than their assigned sex at birth.⁹⁹ Multiple courts have upheld that the exclusion of coverage for gender-affirming care constitutes unlawful sex discrimination, using arguments akin to those of the District Court in Lange's case.¹⁰⁰ The DOJ maintained that none of the Defendants' contentions supporting the Exclusion of gender-affirming care coverage hold any merit.¹⁰¹ For these reasons, the DOJ urged the Eleventh Circuit to affirm the District Court's conclusion that the Exclusion is facially discriminatory.¹⁰²

The DOJ's second argument discussed the District Court's finding that the County acted as Sheriff Talton's agent and was therefore liable under Title VII.¹⁰³ The Defendants argued that it was erroneous for the District Court to conclude this way because it would be an "expansive application" of the statute.¹⁰⁴ As a response, the DOJ highlighted that the application of Title VII, the relevant case law, and EEOC guidance support the notion that an entity providing and managing health insurance benefits to an employer's employees can be held liable under Title VII as an agent of that employer.¹⁰⁵ This legal principle applies to both public and private employers and follows from the straightforward application

⁹¹*Id.* at 6.

⁹²*Id.*

⁹³*Id.* at 7.

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶*Id.* at 9.

⁹⁷Brief for Appellee, *Lange v. Houston Cnty., Ga.*, 608 F. Supp. 3d 1340, (M.D. Ga. 2022) (No. 5:19-cv-00392).

⁹⁸*Id.* at 9.

⁹⁹*Id.*

¹⁰⁰*Id.* at 13.

¹⁰¹*Id.* at 15.

¹⁰²*Id.*

¹⁰³*Id.* at 22.

¹⁰⁴*Id.*

¹⁰⁵*Id.*

of Title VII's text and standard agency principles.¹⁰⁶ Therefore, the DOJ encouraged the Eleventh Circuit to affirm the District Court's ruling that the County was an agent of the employer, Sheriff Talton, under Title VII.¹⁰⁷

Discussion

The issue of transgender rights and gender-affirming care has become a topic of intense debate in the US in the last five years. One area of concern is the exclusion of gender-affirming care for employees, as seen in *Lange v. Houston Cnty., Ga.* Despite the difficulties faced by the transgender community, legal victories can be found in court cases involving transgender plaintiffs successfully challenging the exclusion of gender-affirming surgeries from their health insurance plans and courts deciding in favor of these plaintiffs. These victories not only help to inform future litigation strategies but also provide a platform for attorneys and the public to recognize that opponents of gender-affirming coverage care have meritless concerns.

In defense of the Exclusion, Houston County cited cost as their primary concern, arguing that the cost of allowing gender-affirming surgery for employees like Lange would be too great a financial burden.¹⁰⁸ Similar arguments were presented in other cases, such as *Fain v. Crouch* and *Kadel v. Folwell*, where cost considerations were proposed as a legitimate governmental interest to support the exclusion of gender transition-related surgeries.¹⁰⁹ However, these arguments have been refuted by studies suggesting that gender-affirming treatments and surgeries are ultimately cost-effective and comparable to surgery for other diagnoses.¹¹⁰ Accordingly, the courts in *Lange*, *Fain*, and *Kadel* all found this line of argument to be non-effective, resulting in them concluding that exclusions of medical procedures based on the plaintiff's transgender status is facially discriminatory.¹¹¹

The John Hopkins Bloomberg School of Public Health, the Commonwealth of Massachusetts Group Insurance Commission, and the University of Colorado found that gender confirmation surgeries yield notable reductions in gender dysphoria, while transgender individuals who lack access to these surgical interventions have higher chances of suffering from depression, HIV, drug abuse, and suicidal ideation.¹¹² Cost-benefit analysis of gender-affirming care indicates that the expenses related to these

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 9.

¹⁰⁸*Lange v. Houston Cnty., supra* note 1, at 1348; *see also* Order Granting Permanent Injunctive and Declaratory Relief, at 7, *Lange v. Houston Cnty., Ga.*, 608 F. Supp. 3d 1340 (M.D. Ga. 2022) (No. 5:19-cv-00392).

¹⁰⁹*See Fain v. Crouch*, 618 F. Supp. 3d 313, 322 (S.D.W. Va. 2022) ("Defendants put forth cost considerations as a legitimate governmental interest to support the exclusion ... Defendants can point to no evidence in the record to support the assertion that providing coverage for surgical treatment of gender dysphoria is too costly. In fact, Defendants concede that they have not conducted or ever obtained any cost analysis information to rebut Plaintiffs' claims. The only evidence in the record points to the contrary—that the surgical treatment of gender dysphoria is ultimately cost-effective and comparable to surgery for other diagnoses"; *see also Kadel v. Folwell*, No. 1:19CV272, 2022 WL 3226731, 3 (M.D.N.C. Aug. 10, 2022) ("Defendants raise two justifications for the relevant exclusions. First, they argue that the exclusions limit health care costs ... While such a justification may be sufficient under the rational basis test, *see Geduldig*, 417 U.S. at 496, 94 S.Ct. 2485, a state may not "protect the public fisc by drawing an invidious distinction between classes of its citizens" under heightened scrutiny, *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974). That is especially true here, as the estimated \$300,000–\$900,000 saved by the exclusion per year pales in comparison to NCSHP's billion-dollar cash balance and saves each of the Plan's 740,000 members about one dollar each. Such a paltry limit on health care costs is not an important governmental interest.").

¹¹⁰William V. Padula et al., *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, 31 J. OF GEN. INTERNAL MED., 394 (2015); *see also Are Transgender-Inclusive Health Insurance Benefits Expensive?* (last visited Apr. 29, 2023), HUM. RTS. CAMPAIGN, <https://www.thehrfoundation.org/professional-resources/are-transgender-inclusive-health-insurance-benefits-expensive> [<https://perma.cc/W39D-JVU9>].

¹¹¹*See* Order Denying Motion for Stay Pending Appeal, *Lange v. Houston Cnty., Ga.*, 608 F. Supp. 3d 1340 (M.D. Ga. 2022) (No. 5:19-cv-00392); *see also Fain v. Crouch, supra* note 109; *Kadel, supra* note 109, at 22.

¹¹²Padula, *supra* note 110.

treatments, including customary postoperative care, primary care, and ongoing maintenance care, are less expensive than the prolonged treatment costs of detrimental health consequences resulting from inadequate healthcare access due to insurance plans not covering gender confirmation surgeries.¹¹³ Comparing the actual price of gender confirmation surgeries to the inflated numbers presented by Defendants in *Lange*, *Fain*, and *Kadel* demonstrates the inflammatory nature of the Defendants' estimates.¹¹⁴ Though costs of gender confirmation surgeries vary greatly, the actual numbers do not match the estimates depended on by the defendants: female-to-male transition procedure like chest reduction costs around \$3,000 to \$10,000, and a phalloplasty for the same patient would cost about \$29,000, while male-to-female procedures such as chest feminization are priced around \$5,000 to \$10,000 and a vaginoplasty costing about \$25,600.¹¹⁵¹¹⁶ When totaled, the cost of transgender care ranges between \$30,000 and \$45,000 per year of quality of life in the first five years, and then it drops to \$7,000 to \$10,000 per year after ten years.¹¹⁷ These numbers are much lower than the threshold number U.S. policymakers typically consider as cost-effective when looking at medical services, which is \$100,000 per year.¹¹⁸

Furthermore, research from the UCLA School of Law's Williams Institute emphasizes employee's low utilization rates of healthcare benefits related to gender transition while simultaneously offering benefits for both employees and employers.¹¹⁹ In the same research, employers also reported minimal or negligible expenses incurred from including gender confirmation services in their healthcare insurance coverage and from the utilization of such benefits once they have been implemented.¹²⁰

While litigation costs associated with denying coverage for gender-affirming surgeries can far outweigh the actual amount employers would need to pay if they simply included these services in their health insurance plans, it seems like Defendants would rather pay forty times the amount of gender confirmation surgery to keep the Exclusion alive rather than allow their employees to live their truth.¹²¹ Gender-affirming surgeries vary in cost, but it is a cost-effective treatment option for employees who need these services, and it is a beneficial move for employers to include such treatments in their health insurance plans. As discussions regarding transgender rights and gender-affirming care persist, it is critical to consider the evidence substantiating these treatments' cost-effectiveness and reject arguments founded on unjustified concerns.

Angelo Atangan is a rising 3L at Boston University School of Law. In law school, Angelo is involved in student organizations as a treasurer for Education Law and secretary for OutLaw. In addition, Angelo was a staff editor for the American Journal of Law and Medicine and will be the Communications Editor for the 2023-2024 school year. Before law school, Angelo worked as a community advocate focused on implementing Stage 1 Child Care throughout California through community education, training, and collaboration with the Department of Education and the Department of Social Services.

¹¹³*Id.*

¹¹⁴*Lange v. Houston Cnty.*, *supra* note 1, at 1348; *Fain v. Crouch*, *supra* note 109; *Kadel*, *supra* note 109, at 22 (all estimating the cost of gender confirmation surgeries to be over \$200,000).

¹¹⁵Taylor Medine, *How To Afford Transgender Surgery Expenses*, FORBES (Nov. 11, 2022, 2:00 PM) <https://www.forbes.com/advisor/personal-loans/transgender-surgery-cost/> [<https://perma.cc/6BMH-9RPC>].

¹¹⁶Ronni Sandroff, *Paying for Transgender Surgeries*, INVESTOPEDIA (Mar. 16, 2022) <https://www.investopedia.com/paying-for-transgender-surgeries-5184794> [<https://perma.cc/28MP-97ST>].

¹¹⁷Padula, *supra* note 110, at 398.

¹¹⁸*Id.*

¹¹⁹Jody L. Herman, *COSTS AND BENEFITS OF PROVIDING TRANSITION-RELATED HEALTH CARE COVERAGE IN EMPLOYEE HEALTH BENEFITS PLANS*, 2 (2013).

¹²⁰*Id.*

¹²¹*Id.*

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