

Eleventh Circuit: Plan's Gender-Affirming Surgery Exclusion Does Not Violate Title VII

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Lange v. Houston Cnty., 2025 WL 2602633 (11th Cir. 2025)

Available at <https://media.ca11.uscourts.gov/opinions/pub/files/202213626.enb.pdf>

A federal appellate court has held that the exclusion of health plan coverage for gender-affirming surgery is not sex discrimination under Title VII. The lawsuit was brought by a transgender employee who had been denied coverage for surgery recommended by her physician to treat gender dysphoria. A federal trial court ruled that the plan exclusion constituted discrimination based on sex and permanently enjoined the employer from any further application of the exclusion. On appeal, a three-judge panel of the Eleventh Circuit upheld that order, citing the Supreme Court's *Bostock* decision and holding that discrimination based on transgender status necessarily entails discrimination based on sex. The panel concluded that because transgender individuals are the only plan participants who qualify for gender-affirming surgery, the exclusion of such surgery discriminates against transgender participants based on their sex in violation of Title VII. The employer then petitioned for a rehearing by the full Eleventh Circuit; the court agreed to a rehearing and vacated the panel's prior opinion.

In a divided opinion, the full Eleventh Circuit has now reversed the trial court (and, effectively, the Eleventh Circuit panel), holding that the exclusion does not facially discriminate on the basis of sex. Relying on the Supreme Court's *Skrmetti* decision, the court reasoned that the exclusion did not violate Title VII because the plan denied coverage of a "sex change operation" for anyone, regardless of biological sex. Further, the court held that the exclusion did not discriminate on the basis of transgender status because, like the state law challenged in *Skrmetti*, it was a "classification based on medical use." The court explained that "the procedures that make up a sex change" would be covered for other purposes, such as for cancer or reconstructive surgery following a car accident, without regard to whether the employee who needed those procedures was transgender. The court concluded that while the exclusion "may or may not be appropriate as a matter of health care policy," it was not facially discriminatory based on a protected status.

EBIA Comment: Plan coverage of gender-affirming care has become a contentious issue, and courts are divided on the application of Title VII and other nondiscrimination laws. Earlier this month, a trial court held that a similar plan exclusion violated Affordable Care Act Section 1557, concluding that it was not bound by *Skrmetti*, which was a fundamentally different type of case brought under the U.S. Constitution's Equal Protection Clause. That court, like the dissenting judges in this Eleventh Circuit case, instead relied on the "but-for" causation standard used by the Supreme Court in its *Bostock* decision to determine that firing employees based on sexual orientation or gender identity constitutes illegal discrimination on the basis of sex. For more information, see EBIA's Group Health Plan Mandates manual at Sections XXI.C ("EEOC's Position on Title VII and Health Coverage"), XXI.D ("Court Decisions Applying Title VII to Health Coverage"), and XXI.M.1 ("Interaction of Title VII and Affordable Care Act Section 1557"). See also EBIA's Health Care Reform manual at Section XXXIV.A ("Section 1557 Nondiscrimination: Grounds Prohibited Under Federal Laws") and EBIA's Self-Insured Health Plans manual at Section XIII.D ("Benefits Must Not Be Discriminatory").

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