

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EDWARD R. ROYBAL FEDERAL BUILDING
CHAMBERS OF AUDREY B. COLLINS, CHIEF JUDGE
255 East Temple Street, Suite 670
Los Angeles, CA 90012

August 2, 2010

Michael S. Smith
[redacted]
[redacted]

Michelle A. Carey
Chief Probation Officer
United States District Court
United States Courthouse
312 North Spring Street, 6th Floor
Los Angeles, California 90012-4701

Dear Mr. Smith and Chief Carey:

On July 27, 2010, I held a hearing on the July 6, 2010 Complaint filed by Mr. Smith under the United States District Court for the Central District of California's Employment Dispute Resolution Plan (the "EDR Plan"). I conducted this administrative hearing in my capacity as a hearing officer under the EDR Plan, and not in my capacity as a district judge. (EDR Plan, Chap. 8, § IX.C.1.) Though no material facts regarding Mr. Smith's claim were in dispute, I have found it helpful to set forth below an outline of the relevant facts involved, followed by my analysis of the possible remedies available to Mr. Smith.

Factual Background

Mr. Smith has worked for the United States Probation Office of the Central District of California for twenty years, since 1990. On June 17, 2008, he married his partner of twenty years, Greg Stegall, on the first day marriage was legally available to same-sex couples in the State of California. In December 2009, during the judiciary's "open enrollment" period for the 2010 plan year, Mr. Smith attempted to add Mr. Stegall as a family member beneficiary to his medical, dental, and vision insurance plans. On December 7, 2009, Mr. Smith completed a Federal Employees Health Benefit Program ("FEHB") "Health Benefits Election Form" identifying Mr. Stegall as his spouse, and seeking to change his medical insurance enrollment from the "Kaiser Permanente-High (Self Only)" option he had previously chosen to the

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“Kaiser Permanente-High (Self + Family)” option, under which both Mr. Smith and Mr. Stegall would have been insured. The next day, December 8, 2009, the completed form was faxed to the Administrative Office of the United States Courts (the “AO”).

Also on December 8, 2009, Mr. Smith attempted to add Mr. Stegall to the Federal Employee Dental and Vision Insurance Program (“FEDVIP”). Enrollment changes for FEDVIP are processed online, through the “BENEFEDS” website. In attempting to add Mr. Stegall, Mr. Smith received an error message from the website, explaining that “[y]our gender and the gender you selected for your spouse cannot be the same.” The website thus effectively prevented Mr. Smith from adding Mr. Stegall to his dental and vision insurance plans.

Though the process took somewhat longer, Mr. Smith was also prevented from adding Mr. Stegall to his medical insurance plan. On January 22, 2010, Cynthia Roth, Chief of the Benefits Division of the AO, wrote to Mr. Smith, advising him that, pursuant to the Defense of Marriage Act, Public Law 104-199, and Office of Personnel Management (“OPM”) regulations, same-sex partners did not “meet the definition of ‘spouse,’” and were thus not “eligible family members.” Ms. Roth went on to state, “[t]his means that, regardless of the legal recognition of such relationships provided under the laws of any state, same-sex spouses or partners cannot receive coverage under the FEHB program.”

Understandably unsatisfied with this outcome, Mr. Smith pursued the course of action available to him under the EDR Plan. He filed a formal request for counseling on February 22, 2010, asserting that the denial of insurance coverage to his spouse constituted impermissible discrimination on the basis of gender and/or sexual orientation, in violation of the EDR Plan. He requested that he “be given the same rights and benefits offered to all other legally married federal workers -- to be allowed to add [his] spouse to [his] FEHB medical plan and FEDVIP dental and vision plans.”

Counseling was performed by the Probation Office’s EDR Coordinator on February 26, 2010, in compliance with the EDR Plan. (EDR Plan, Chap. 8, § VI.) Having failed to resolve the issue during the counseling period, Mr. Smith next sought a “conference with the appointing officer,” which was held on April 1, 2010. (EDR Plan, Chap. 8, § VII.) Subsequently, he sought mediation of his claim, which took place on June 14, 2010, before a Ninth Circuit mediator. (EDR Plan, Chap. 8, § VIII.) The next step was to file a complaint “with the chief judge of the court of the

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employing office which is the respondent to the complaint,” which Mr. Smith did on July 6, 2010, bringing the matter to my attention. (EDR Plan, Chap. 8, § IX.)

At each stage of these proceedings, the Probation Office took the position, not that Mr. Smith’s claim had no merit, but that the Probation Office had no power to grant the relief Mr. Smith requested. That is, the Probation Office indicated that it could submit Mr. Smith’s paperwork, but that his request to add his husband to his FEHB and FEDVIP coverage was subject to the control of OPM, not the Probation Office.

Analysis

Based on OPM’s past practice, Probation’s position is not unfounded. Mr. Smith is not the first employee of the federal judiciary to seek FEHB and FEDVIP coverage for a same-sex spouse since such marriages became recognized in California. Chief Judge Alex Kozinski, of the Ninth Circuit Court of Appeals, acting as “chief judge of the court of the employing office which is the respondent to the complaint” with regard to complaints brought by circuit employees, has more than once found that the denial of FEHB and FEDVIP coverage to the same-sex spouse of a judicial employee constitutes discrimination based on gender and sexual orientation, in violation of the court’s guarantee of equal employment opportunity. *See, e.g., In re Golinski*, 587 F.3d 956, 957, 959 (9th Cir. 2009); *In re Golinski*, 587 F.3d 901, 902 (9th Cir. 2009). In addressing the claims of Ninth Circuit staff attorney Karen Golinski, Judge Kozinski initially ordered the AO to submit Ms. Golinski’s benefits forms to her chosen insurer, and the AO complied. However, OPM intervened, directing the insurer not to process Ms. Golinski’s request to add her wife to her plan. *In re Golinski*, 587 F.3d at 958. Judge Kozinski then ordered OPM to “rescind its guidance or directive” to the insurer; to “cease at once its interference with the jurisdiction of this tribunal”; and not to “interfere in any way with the delivery of health benefits to Ms. Golinski’s wife on the basis of her sex or sexual orientation.” *Id.* at 963-64. He also ordered the insurer to enroll Ms. Golinski’s wife, and awarded back pay to Ms. Golinski in an amount equal to “the cost of obtaining comparable private insurance for her wife” for the period in which she was denied the ability to insure her wife through the federal insurance plans. *Id.* at 960.

However, Judge Kozinski’s November 2009 order did not resolve the matter. The insurer appealed his decision within the administrative framework, and OPM essentially appears to have ignored his order. Ms. Golinski subsequently filed an action in the Northern District of California seeking mandamus relief against OPM,

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and further administrative proceedings have been stayed in light of the filing of this civil action. Though Ms. Golinski has moved for a preliminary injunction in her civil case, the issue has not yet been resolved.

In deciding Mr. Smith's claim, the EDR Plan directs that I "shall be guided by judicial and administrative decisions under the laws related to Chapters Two through Seven of this Plan and by decisions of the judicial council of the appropriate circuit under Section VIII of this Chapter." (EDR Plan, Chap. 8, § IX.C.2.f.) Though the EDR Plan at issue here is technically distinct from the EDR Plan that covers Ninth Circuit employees such as Ms. Golinski, there is no substantive difference between the employment discrimination provisions of the two plans. The EDR Plan was based on the Model Plan adopted by the Judicial Conference of the United States, and any differences from that Model Plan were required to be approved by the Ninth Circuit Judicial Council. (EDR Plan, Chap. 1, § 1.) Thus Judge Kozinski's analysis of Ms. Golinski's claims under the terms of the Ninth Circuit EDR Plan is, if not exactly binding here, extremely persuasive. It also comports with my reading of the EDR Plan.

The EDR Plan prohibits discrimination against employees based on both gender and sexual orientation. (EDR Plan, Chap. 2, § I.) As Judge Kozinski stated, "[t]he availability of health insurance for oneself and one's family is a valuable benefit of employment, and denial of such a benefit on account of sex and sexual orientation violates" the EDR Plan's anti-discrimination provision. *In re Golinski*, 587 F.3d at 902. Judge Reinhardt reached the same conclusion in evaluating a similar claim brought by a deputy federal public defender in the Central District under the Ninth Circuit's Employment Dispute Resolution Plan for Federal Public Defenders and Staff. *In re Levenson*, 560 F.3d 1145, 1146 (9th Cir. 2009). I see no difference between Mr. Smith's circumstances and the claims evaluated by Judges Kozinski and Reinhardt. Accordingly, I find that preventing Mr. Smith from adding his spouse to his FEHB and FEDVIP insurance plans, solely on the basis that his spouse is male, violates the EDR Plan.

Having found that a violation has occurred, the more difficult question is to determine what remedy I can offer Mr. Smith. For the reasons previously explained in detail by both Judges Kozinski and Reinhardt, Mr. Smith is unquestionably entitled to back pay, in an amount equal to the cost of obtaining comparable private insurance for his husband for the period in which he has been denied the ability to insure his husband through the federal insurance plans. *In re Golinski*, 587 F.3d at 959-60; *In re Levenson*, 587 F.3d 925, 937 (9th Cir. 2009). As in both *In re Golinski* and *In re*

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Levenson, the EDR Plan provides for an award of back pay for violations of the EDR Plan when the statutory criteria of the Back Pay Act are satisfied, which I find to be true in this case. 5 U.S.C. § 5596; EDR Plan, Chap. 8, § XI.B.6. Further, Mr. Smith “will be entitled to accrue back pay” until he “begins to receive FEHBA and FEDVIP coverage for his spouse.” *In re Levenson*, 587 F.3d at 937.

Undoubtedly Mr. Smith would prefer to receive coverage for his husband through the federal insurance program, as this would more truly comport with his original request that he “be given the same rights and benefits offered to all other legally married federal workers -- to be allowed to add [his] spouse to [his] FEHB medical plan and FEDVIP dental and vision plans.” Certainly such an outcome would be preferable from the standpoint of the federal judiciary, as insuring Mr. Smith’s husband through the FEHB and FEDVIP programs would likely be cheaper than paying for Mr. Stegall to continue his individual insurance coverage. However, no action I could take at the current time is likely to accomplish this any more expeditiously than the process already set in motion by Judge Kozinski. Accordingly, I will refrain from ordering either the AO or OPM to take any steps with regard to Mr. Smith’s insurance coverage, pending a resolution of the issues raised in the *Golinski* civil case. In the meantime, the Probation Office shall provide Mr. Smith with back pay in an amount equal to the cost of obtaining comparable private medical, dental, and vision insurance coverage for his spouse, from the time his December 2009 election to add his husband to his coverage would have been effective, until such time as Mr. Smith is allowed to add Mr. Stegall to his FEHB and FEDVIP coverage (assuming no intervening material changes in his employment or marital status). This includes amounts accrued from the first pay period of 2010 to the present, as well as amounts that may accrue in the future.

I shall not set an exact amount for this award of back pay at the present time. Based on the position of the Probation Office, I believe the parties can come to a mutual agreement on the appropriate amounts, both past and future, by meeting and conferring. However, I will retain jurisdiction over this matter, to resolve any disputes that may arise on this issue, or any other. Likewise, if OPM’s position changes, whether as a result of the *Golinski* case or otherwise, either party is free to bring that to my attention and request a modification of the terms of this order.

Pursuant to the EDR Plan, either party may petition for review of this decision by the Judicial Council of the Ninth Circuit, in writing, within 30 days of the date of this letter. (EDR Plan, Chap. 8, § X.)

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Thank you both for your cooperation in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Audrey B. Collins".

Audrey B. Collins
Chief United States District Judge