

FILED

MAY 11 2010

MOLLY C. DWYER
CLERK, U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE COMPLAINT OF WORKPLACE
DISCRIMINATION

No. 10-80075

ORDER

An employee has been denied the right to enroll her wife in the health insurance benefits program that covers spouses of court employees because she and her spouse are of the same sex. The employee asserts that this is prohibited workplace discrimination and asks for back pay and an order directing enrollment of her wife for benefits. I am charged with resolving her complaint. U.S. Court of Appeals for the Ninth Circuit, Employment Dispute Resolution Plan 3 (1997) (hereinafter EDR Plan).

The employee has been and is being discriminated against based on her sex and sexual orientation. In re Golinski, 587 F.3d 956, 959 (9th Cir. 2009); In re Golinski, 587 F.3d 901, 902 (9th Cir. 2009). No statute authorizes this discrimination, even assuming one could. In re Golinski, 587 F.3d at 902–03. The employee is therefore entitled to enroll her wife for benefits without regard to her

sex or sexual orientation. Id. at 904. Until that occurs, the employee is entitled to back pay in an amount equal “to the benefits she would have received, but has been denied, under the FEHBP.” In re Golinski, 587 F.3d at 960; see also In re Golinski, No. 09-80173 (9th Cir. Mar. 5, 2010) (order authorizing ongoing back pay).

I therefore order as follows:

(1) Within 30 days, the Administrative Office of the United States Courts (“AO”) shall submit the employee’s Health Benefits Election form 2809 to her designated insurer. In re Golinski, 587 F.3d at 963. The AO shall process any future benefit forms without regard to the sex of the listed spouse. Id.

(2) Within 30 days, the Office of Personnel Management (“OPM”) shall rescind any guidance or directive to the designated insurer (and any other plan) that the employee’s wife is not eligible to be enrolled as her spouse under the terms of the FEHBP because of her sex or sexual orientation, and that the plans would violate their contracts with OPM by enrolling the employee’s wife as a beneficiary. Id.

(3) OPM shall not interfere with the jurisdiction of this tribunal. Id. Specifically, OPM shall not advise the employee’s designated insurer that providing coverage for the employee’s wife violates DOMA or any other federal law. Nor shall OPM interfere in any way with the delivery of health benefits to the employee’s wife on the basis of her sex or sexual orientation. Id. at 963–94.

(4) The designated insurer shall enroll the employee’s wife within 30 days of receipt of the appropriate forms from the AO, without regard to her sex or sexual orientation. Id. at 964.

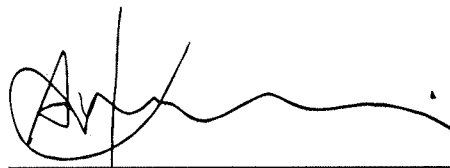
(5) I refer this matter to the Appellate Commissioner for a hearing on the employee’s claim for back pay. Id. at 963. Within 35 days, the Commissioner shall file a report and recommendation on the award the employee should receive.

Id. Unless objections are lodged with the Commissioner within 30 days after he files his report and recommendation, it shall become a final order by, for and of this tribunal, the same as if I had entered an order from which no appeal was taken. In re Golinski, No. 09-80173 (9th Cir. Mar. 5, 2010) (order authorizing ongoing back pay). The Circuit and Court of Appeals Executive shall then promptly complete, and forward to me to sign, any paperwork necessary for the Court to satisfy its liability for the amounts awarded. Id. If objections are filed, I will resume jurisdiction. Id.

(6) After the conclusion of the initial back pay proceeding, I authorize the employee to move for additional back pay before the Appellate Commissioner until she's permitted to enroll her wife for the benefits afforded an opposite-sex spouse of a court employee. Id. Unless objections are lodged with the Commissioner within 7 days of his recommendations on any motions the employee elects to file, the Commissioner's recommendations shall become a final order by, for and of this tribunal, the same as if I had entered an order from which no appeal was taken. Id. Should the Commissioner order additional relief, the Circuit and Court of Appeals Executive shall promptly complete, and forward to me to sign, any paperwork necessary for the Court to satisfy its liability for the amounts awarded. Id. If objections are filed, I will resume jurisdiction. Id.

I authorize the employee to take appropriate action to secure compliance with this order, such as by petition for enforcement or mandamus. In re Golinski, 587 F.3d at 964.

May 11, 2010
Date



Alex Kozinski
Chief Judge

The Clerk shall send this order to the Administrative Office of the United

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States Courts and serve the order, the employee's name and a copy of our EDR plan on the Office of Personnel Management and the designated insurer in the manner described by Fed. R. Civ. P. 4(h), (i). If OPM or the designated insurer wishes, it may appeal so much of this order as concerns it using the procedures outlined in the plan. See EDR Plan at 9; Dep't of Agric., Food and Nutrition Servs. v. FLRA, 879 F.2d 655, 658-59 (9th Cir. 1989), vacated in part on other grounds, 895 F.2d 1239 (9th Cir. 1990). Any other individual or party aggrieved by this proceeding may similarly appeal.