

THE DOMA DECISIONS IN THE 9TH CIRCUIT

I have had several people ask me off blog about the “opinions” on the Defense Of Marriage Act (DOMA) that have surfaced recently in the 9th Circuit. I may write more later; but for now I want to lay out the sequence of facts and actions and start the discussion.

The current issue really took flight last month when 9th Circuit Chief Judge Alex Kozinski entered an order dated November 19, 2009 on the matter of Karen Golinski, a staff attorney for the 9th Circuit Court of Appeals. Judicial branch employees such as Golinski are Federal employees and therefore have their benefits administered by the Office of Personnel Management (the same folks Obama and Harry Reid want to administer their poor excuse of a substitute for the Public Option). Based upon the OPM’s stated position, the contracted benefits carrier (Blue Cross/Blue Shield) refused to provide health benefits for her same sex legal spouse, Amy Cunninghis.

From Judge Kosinski’s November 19 Order:

Karen Golinski has been denied a benefit of federal employment because she married a woman rather than a man. I previously determined that violates this court’s guarantee of equal employment opportunity. To avoid a difficult constitutional problem, I harmonized the Defense of Marriage Act (DOMA), 1 USC §7; the statutes creating the benefit program at issue, the Federal Employees Health Benefits Program (FEHBP), 5 USC §8901 et seq.; and this court’s commitment to equal employment opportunity.

I then entered [an] order

...

No “party or individual aggrieved” by my

decision appealed it.

The Administrative Office of the United States Courts (AO) complied with my order and submitted Ms. Golinski's form 2089 to the Blue Cross and Blue Shield Service Benefit Plan, Ms. Golinski's health insurance carrier. That's as it should be; the AO is subject to the "supervision and direction" of the Judicial Conference of the United States, 28 USC §604(a), and I exercised authority delegated by the Judicial Conference when I ordered relief. After the AO submitted Ms. Golinski's form, I thought this matter had concluded.

The Executive Branch, acting through the Office of Personnel Management (OPM), thought otherwise. It directed the insurance carrier not to process Ms. Golinski's form 2089, thwarting the relief I had ordered. (citations omitted)

That is the basic tale of Golinski and Kozinski. Since the November 19 Order the above language was taken from, the situation has become even more exacerbated by the intransigence of the Obama Administration and its OPM which, either comically or tragically depending on one's view, is headed by John Berry who the Administration made a big show of touting as its highest ranking openly gay official.

The irony just oozes. After further refusal and contempt of his clear order, which the Administration *never appealed*, Judge Kozinski entered another Order Tuesday further blistering the Administration and all but instructing Karen Golinski to sue them.

But that is not the only such matter percolating in the 9th Circuit. In a separate matter involving Brad Levenson, a member of the Federal Public Defender's Office of Central California, an office also under the same benefits plan, a

different 9th Circuit Judge, Stephen Reinhardt, has also indicated dissatisfaction with the position of the government as directed by the Obama Administration. In a decision dated November 18, 2009, just a day before Kozinski's Order in *Golinski*, Reinhardt wrote:

Brad Levenson, a deputy public defender in the Office of the Federal Public Defender for the Central District of California ("FPD"), is legally married, under California law, to Tony Sears. Nevertheless, Levenson has not been permitted to enroll Sears as a family member beneficiary of his federal health, dental, and vision benefits (hereinafter "federal benefits") because both spouses are of the same sex. In a previous order, I determined that the denial of benefits on this ground violates the Ninth Circuit's Employment Dispute Resolution Plan for Federal Public Defenders and Staff ("EDR Plan"), which expressly prohibits discrimination on the basis of sex and sexual orientation. I also determined for similar reasons that the denial of benefits violates the United States Constitution. As a further remedy for those violations Levenson now requests an order directing the FPD to enter into separate contracts with private insurers in order to provide Sears with benefits comparable to those provided in the existing federal plans, or alternatively, a monetary award pursuant to the Back Pay Act. For the reasons set forth below I have determined that an order directing the FPD to enter into separate health insurance contracts would not be a "necessary and appropriate" remedy within the scope of the EDR Plan. A back pay award, however, would be appropriate under the circumstances. Accordingly, I grant Levenson's alternative request for monetary award, and remand the matter to

the FPD to determine the actual amount awarded.

In both of these cases, *Golinski* and *Levenson*, the “plan” they were under was contractual and stipulated the only remedy and forum available for prosecuting claims of employment discrimination, which mandated first a “counseling” which was effectively a discussion with OPM representatives, followed by mediation, followed only after unsuccessful exhaustion of the first two avenues, by the ability to petition the 9th Circuit Judicial authority. The latter allows the matter to be heard by a judge, but clearly in an administrative authority as opposed to pursuant to their Article III formal judicial authority. And therein lies the rub and why the Obama Administration feels empowered to contemptuously thumb their nose at the resultant orders.

In case there is any question what Judge Reinhardt thinks of DOMA and its effects on members of the LGBT community under the circumstances:

As I concluded in my previous order, the application of DOMA to FEHBA so as to deny Levenson’s request that his same-sex spouse receive federal benefits violates the Due Process Clause of the Fifth Amendment. In reaching that conclusion, I believe it likely that some form of heightened Constitutional scrutiny applies to Levenson’s claims.

For the uninitiated, Reinhardt finds DOMA *clearly unconstitutional* and, because it discriminates against protected classes, must be judged under a particularly burdensome standard, which it cannot, and does not, meet. A striking and quite correct analysis.

It is somewhat scandalous, if not outright scurrilous, that the Obama Administration, which ran hard on relief to the GLBT community and

protection and equal protection of their rights, would hide behind the DOMA they once scorned to deny equal protection to Karen Golinski and Brad Levenson. But that is just how they roll.

The question now is what avenue for remedy will Golinski and Levenson pursue? That is still unclear, but it ought to be very interesting. The other thing that simply cannot be emphasized enough is how remarkable the decisions of Judge Stephen Reinhardt and Chief Judge Alex Kozinski are. They have not hidden behind illusory outs or carefully kept their powder dry. Both judges have observed unconstitutional provisions and acts, egregious positions by the Obama Administration that openly claimed otherwise to get elected, and denial of equal protection to worthy citizens, and they flat out called it for what it is.

And make no mistake, those of us who live and practice in the 9th Circuit can attest to how different a place on the ideological spectrum these two are. Stephen Reinhardt is a proud old school hard liberal appointed by Jimmy Carter; Kozinski was a young and fairly radical conservative when appointed by Ronald Reagan and openly complained that the 9th was too wild eyed liberal when he joined. Their decisions here may not have precedential value as reported Article III cases, but when these two are on the same page calling foul, as they have done on the acts of the Obama Administration against Ms. Golinski and Mr. Levenson, it is a powerful marker that something very wrong is afoot. And so it is.