IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

MARGARET FONBERG,

Complainant,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,

Respondent.

EDR Case No. _____

OPINION AND ORDER

The matter before me is the complaint of Margaret Fonberg against the District of Oregon ("the District"), brought under the District's Employment Dispute Resolution Plan ("EDR Plan"). Fonberg's complaint presents the issue of whether the District's denial of Fonberg's application to add her partner to her health care benefits, based on the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-14, and the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7 (2006), constitutes unlawful discrimination. I have concluded that no material factual disputes exist and a hearing is not required. See EDR Plan § 8.07c.1. Accordingly, the filings and this decision constitute the required "verbatim record" of the hearing. *Id.* at § 8.02c.2.D.

FACTUAL AND PROCEDURAL BACKGROUND

Fonberg, a law clerk for the Honorable Thomas M. Coffin, United States Magistrate Judge, is an employee of the District. Fonberg has held the position with Judge Coffin since May 2009; she worked for Judge Coffin previously, from May 2007 through August 2007, and has held law clerk positions in other jurisdictions. Declaration of Margaret Fonberg ("Fonberg Decl.") ¶ 3.

Fonberg is in a committed, long-term relationship with a woman she considers her spouse. Fonberg Decl. ¶ 2. They have a domestic partnership registered under the Oregon Family Fairness Act, Or. Rev. Stat. ch. 106. *Id.* Under Oregon law, domestic partnership confers rights "on equivalent terms, substantive and procedural," to marriage. Or. Rev. Stat. § 106.340(1). They are not legally married because a recently-enacted amendment to the Oregon Constitution limits marriage to one man and one woman. Or. Const. art. XV, § 5a. The Oregon Family Fairness Act does not purport to control federal decisions about the extension of compensation or benefits to same-sex spouses. Or. Rev. Stat. § 106.340(5).

As a judicial employee, Fonberg is entitled to health insurance benefits under the FEHBA. FEHBA permits federal employees to elect coverage "either as an individual or for self and family," 5 U.S.C. § 8905(a), and defines "member of family" as "the spouse of an employee or annuitant," or "an unmarried dependent child under 22 years of age." 5 U.S.C. § 8901(5). Health insurance benefits for herself and her family are a valuable part of Fonberg's compensation.

Section 3 of DOMA provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or

> interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.

1 U.S.C. § 7.[1]

Fonberg attempted to enroll her domestic partner in her employer-offered BlueCross BlueShield family plan during the 2009 Annual Enrollment Period, by submitting a Health Benefits Election Form changing her coverage from self to self plus one. Fonberg Decl. ¶¶ 13-14. The Human Resources Administrator for the District processed Fonberg's election form, but the United States Office of Personnel Management ("OPM")[2] declined Fonberg's request. *Id.* at ¶¶ 16-17. The District, through the Office of the Clerk, concluded that the definition of "spouse" in DOMA, as applied to the FEHBA, precluded the provision of federal health benefits to Fonberg's partner. Stipulation of Facts by Complainant and Clerk of Court ("Stipulation") ¶ 8.

Fonberg filed a claim against the District under its EDR Plan on December 17, 2009. Stipulation ¶ 9; Fonberg Decl. ¶ 18. The initial counseling session was unsuccessful, as was mediation. Stipulation ¶¶ 10, 11; Fonberg Decl. ¶¶ 19-21. Under the EDR Plan, a complaint against the District is Fonberg's sole remedy for employment discrimination claims not resolved in mediation. EDR Plan § 1.08. Fonberg filed the complaint on August 2, 2010.

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[1] DOMA also contains the following provision:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such a relationship.

28 U.S.C. § 1738C (2006).

[2] OPM is an independent establishment in the executive branch that contracts for federal employees' health care. 5 U.S.C. §§ 1101. 8903(1).

ISSUE PRESENTED

Fonberg asserts that her rights under the District's EDR Plan, which governs her employment, have been violated by the District's denial of family health insurance benefits and its failure to reimburse her for the loss of compensation resulting from that denial.

The EDR Plan incorporates claims arising under the Equal Employment Opportunity and Non-Discrimination Plan, United States District Court for the District of Oregon, adopted in June 1996 ("EEO Plan"). The EEO Plan prohibits sex discrimination and discrimination based on factors unrelated to job performance. See EDR Plan § 1.04 (incorporating EEO Plan claims into dispute resolution procedures of EDR Plan); EEO Plan §§ 1.03(i) (authorizing a discrimination complaint when employee "has been denied employment, promotion, [or] advancement, or has been affected in any other aspect of employment, because of [a] personal characteristic unrelated to job performance"); 1.02(a) (prohibiting discrimination based on factors unrelated to job performance); 1.03(b) (defining gender discrimination to include marital status or parenthood); 2.01 (providing coverage to all court employees, including law clerks).[3]

Fonberg asserts that the District has discriminated against her on the basis of sex and sexual orientation, because 1) Fonberg and her partner, possessing the procedural and substantive rights of marriage under Oregon law, are similarly situated to married heterosexual employees who receive health insurance benefits for their spouses, except for their gender; 2) the denial of benefits to her is based on sexual stereotyping or perceived atypical gender behavior, which can

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[3] Section 1.02(a) of the EEO Plan provides, in relevant part:
Discrimination based on factors unrelated to job performance is harmful and disrespectful to individuals, undermines working relationships, and compromises the integrity of the Court. The Court will not tolerate any such discrimination.

constitute sex discrimination under such cases as Frontiero v. Richardson, 411 U.S. 677 (1973) (requiring female, but not male, members of the uniformed services to prove dependence of their spouses on basis of "husband as breadwinner" stereotype), Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (rejection of female partnership candidate, whose appearance and behavior were considered too masculine, was discrimination on basis of sex stereotyping), Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001) (male employee discriminated against for not comporting with stereotypical ideas of how a man should behave), and Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212 (D. Or. 2002) (remarks about lesbian employee being "the man" or the one who "w[ore] the dick" or "wore the pants" constituted sex discrimination); and 3) the denial of benefits constitutes unequal treatment based on factors unrelated to job performance.

DISCUSSION

Although DOMA on its face "does not purport to preclude Congress or anyone else in the federal system from extending benefits to those who are not included within [its] definition[s]," Smelt v. County of Orange, 447 F.3d 673, 683 (9th Cir. 2006), FEHBA and DOMA together appear to do so. In fact, given the broad range of federal laws to which marital status is relevant, DOMA cuts a very wide swath.[4] See Gill v. Office of Personnel Management, 699 F. Supp.2d

[4] For example, DOMA precludes same-sex spouses from filing joint tax returns, 26 U.S.C. § 6013 (2006); same-sex spouses of federal employees are excluded from the Federal Employees Compensation Act, which compensates the widow or widower of an employee killed in the performance of duty, 5 U.S.C. § 8101(6), (11); same sex spouses are the only surviving widows and widowers who would not have automatic ownership rights in a copyrighted work after the author's death, 17 U.S.C. § 304(a)(C)(ii)(2006); same-sex spouses lack federal protection against enforcement of due-on-sale clauses, which allow a lender to declare the entire balance due and payable if the holder of the mortgage dies and the spouse inherits the property, 12 U.S.C. § 1701j-3(d)(2006); same-sex spouses are denied the benefit of the Family and

374, 379 (D. Mass. 2010) (noting that DOMA "drastically amended the eligibility criteria for a vast number of different federal benefits, rights, and privileges that depend upon marital status," citing a 1999 report of the General Accounting Office concluding that DOMA implicated at least 1,049 federal laws, and a 2004 follow-up study finding that 1,138 federal laws tied benefits, protections, rights, or responsibilities to marital status).

In their role as presiding officers in EDR proceedings, two Circuit Judges in this jurisdiction have confronted the question of whether the denial of federal employee benefits to same-sex spouses under DOMA constitutes employment discrimination. In the Matter of Karen Golinski, 587 F.3d 901 (9th Cir. 2009) (Judge Kozinski); In the Matter of Brad Levenson, 560 F.3d 1145 (United States Judicial Council 2009) (Judge Reinhardt).

In Golinski, a staff attorney at the Court of Appeals, who had married her partner during the brief period that same-sex marriage was legal in California, challenged the denial of an application to add her wife to her health insurance. Judge Kozinski concluded that the FEHBA did not expressly state whether FEHBA coverage was available *only* to those family members within the definition of § 8901(5); he therefore adopted a construction of FEHBA that left OPM "free to contract for 'family' benefits for individuals who do not qualify as spouses under federal law, but who are considered spouses under state law." 587 F.3d at 903.

Medical Leave Act of 1993, which provides for up to 12 weeks per year of unpaid leave for "care for the spouse," 29 U.S.C. § 2612(a)(1)(C)(2006); and same-sex spouses are unable to receive benefits under the Social Security Act's Old Age, Survivors, and Disability Insurance Program, 42 U.S.C. § 402(b)-(c)(2006). See Andrew Koppelman, *DOMA, Romer, and Rationality,* 58 Drake L. Rev. 923, 926 (2010). DOMA also precludes same-sex spouses from inheriting a spouse's estate without liability for federal estate tax under 26 U.S.C. § 2056(a), the subject of a lawsuit recently filed in the Southern District of New York, Windsor v. United States, No. 1:10-cv-8435 (S.D.N.Y.)

Judge Kozinski observed that his construction of the statute "not only harmonizes the statutory scheme with our EEO plan, it avoids difficult constitutional issues," since interpreting FEHBA and DOMA to exclude same-sex spouses would require him first to "have to decide whether such an exclusion furthers a legitimate governmental end," or "reflects no more than an invidious design to stigmatize and disadvantage same-sex couples," a "hard question," in view of Romer v. Evans, 517 U.S. 620 (1996) and Lawrence v. Texas, 539 U.S. 558 (2003). Golinski, 587 F.3d at 903.

Judge Kozinski noted that in Romer, the Supreme Court struck down an amendment to the Colorado Constitution that prohibited civil rights protection for gays, lesbians and bisexuals because the stated basis for the amendment was "moral disapproval of homosexual conduct." 587 F.3d at 903, *quoting* Justice Scalia's dissenting opinion in Lawrence, 539 U.S. at 644. The Romer Court held that a law which "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else" lacks a rational basis. *Id.* at 635, *quoted in* Golinski, 587 F.3d at 903. Judge Kozinski described Lawrence as a case with narrow facts, but broad reasoning and potential scope, because Lawrence

> rests explicitly on the proposition that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and that one's sexual orientation therefore enjoys protection from punishment. [Lawrence, 539 U.S. at 574.] The Court went on to "counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects." *Id.* at 567.

587 F.3d at 903-04 (parallel citations omitted). Judge Kozinski thought the "bounds of Lawrence's holding . . . unclear," as the court had recognized in Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008), a "Don't Ask, Don't Tell" case. Golinski, 587 F.3d at 904.

Judge Kozinski ordered OPM to provide Golinski with benefits. OPM refused to do so. Golinski v. OPM, No. C 4:10-00257-SBA (N.D. Cal.).

Judge Reinhardt took a different approach in Levenson, a case in which a deputy federal public defender requested that his husband be added as a family member beneficiary of his federal benefits. Levenson and his husband had been partners for 15 years, having registered a domestic partnership in 2000, and legally married in California on July 12, 2008. 560 F.3d at 1146. Levenson's request was denied on the basis of a memorandum prepared by the Office of the Circuit Executive stating that the provision of benefits to same-sex spouses was prohibited by DOMA. *Id.* Levenson asserted that the denial violated both the Ninth Circuit's EDR Plan, which explicitly prohibits discrimination on the basis of both sex and sexual orientation, and the Constitution.

Judge Reinhardt disagreed with Judge Kozinski's view that the FEHBA is ambiguous, concluding instead that the "only reasonable reading of that statute is that it does not permit coverage of persons falling outside its definition of family member." 560 F.3d at 1149. Judge Reinhardt therefore felt compelled to reach the constitutional issue.

Judge Reinhardt concluded that the denial of benefits to Levenson could not survive even a rational basis review,[5] under such cases as City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447 (1985) ("[A] bare desire to harm a politically unpopular group" cannot provide a rational basis for governmental discrimination) and Romer (Colorado constitutional amendment

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[5] Even in the ordinary equal protection case calling for this most deferential of standards, the court must determine that there is a relation between the classification adopted and the object to be attained, Mathews v. de Castro, 429 U.S. 181, 185 (1976), so that the court can ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law. Romer, 517 U.S. at 633.

raised "the inevitable inference that the disadvantage imposed [was] born of animosity" toward gay people as a class). Levenson, 560 F.3d at 1150.

Judge Reinhardt cited the House report on DOMA, which identified three interests advanced by the statute: "the government's interest in defending and nurturing the institution of traditional, heterosexual marriage;" "the government's interest in defending traditional notions of morality;" and "the government's interest in preserving scarce government resources." H.R. Rep. No. 104-664, at *12-*18, *quoted in* Levenson, 560 F.3d at 1150. Judge Reinhardt found the first interest irrelevant because "[g]ay people will not be encouraged to enter into marriages with members of the opposite sex by the government's denial of benefits to same-sex spouses, and the denial will not discourage same-sex couples from entering into same-sex marriages, so the denial could not be said to "nurture" or "defend" the institution of heterosexual marriage. As for the second interest,

> if the denial is designed to "defend" traditional notions of morality by discouraging same-sex marriage, it does so *only* by punishing same-sex couples who exercise their rights under state law, and thus exhibits the "bare desire to harm" same-sex couples that is prohibited under City of Cleburne and Romer. In addition, denying married same-sex spouses health coverage is far too attenuated a means of achieving the objective of "defending traditional notions of morality," as it also is with respect to achieving the objective of "defending and nurturing the institution of traditional, heterosexual marriage." More important, Romer and [Lawrence] strongly suggest that the government cannot justify discrimination against gay people or same-sex couples based on "traditional notions of morality" alone. See Lawrence, 539 U.S. at 571, 578 (finding criminal law barring homosexual sodomy constitutionally invalid despite "powerful voices" that "for centuries" have "condemn[ed] homosexual conduct as immoral"); Romer, 517 U.S. at 644 (Scalia, J., dissenting) (noting that the Colorado constitutional amendment held unconstitutional by the majority expressed the "moral disapproval of homosexual conduct" of Colorado's citizens).

560 F.3d at 1150 (emphasis in original). Judge Reinhardt found that the third interest could "be disposed of quickly," since the denial of health insurance to same-sex spouses that "incidentally

saves the government an insignificant amount of money" does not provide a rational basis for a policy that, as a cost saving measure, is "drastically underinclusive," as well as "founded upon a prohibited or arbitrary ground." *Id.*, *citing* Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 590-91 (9th Cir. 2008).

Judge Reinhardt concluded that DOMA, at least as applied to same-sex couples who had been legally married under state law, was unconstitutional.[6]

Golinski and Levenson differ from this case because, in the former two cases, the employee had been legally married in California. I do not think this factual distinction impedes the applicability of these cases, because same-sex marriages are no longer legal in California; it is fortuitous that Golinski and Levenson received the benefit of a legal marriage, because they and other similarly situated individuals would not do so now. Fonberg is also forbidden to marry her partner in Oregon. DOMA precludes same-sex couples from receiving federal benefits regardless of whether they have entered into legal marriages, civil unions, or domestic

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[6] See also Perry v. Schwarzenegger, 704 F. Supp.2d 921 (N.D. Cal. 2010) (holding amendment to California Constitution restricting valid marriage to one between a man and a woman unconstitutional) and Gill:

> This court simply cannot say that DOMA is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which this court could discern a relationship to legitimate government interests. Indeed, Congress undertook this classification for the one purpose that lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves. And such a classification, the Constitution clearly will not permit.

699 F. Supp.2d at 396.

On February 23, 2011, the Attorney General wrote a letter to the Hon. John Boehner, Speaker of the United States House of Representatives, stating that the President had determined Section 3 of DOMA, as applied to same-sex couples who were legally married under state law, violated the equal protection component of the Fifth Amendment to the United States Constitution and that, pursuant to 28 U.S.C. § 530D, the Department of Justice would not defend the constitutionality of DOMA in two cases pending in the Second Circuit, Windsor, supra, and Pedersen v. OPM, No. 3:10-cv-1750 (D. Conn.).

partnerships.

Additionally, under the Oregon Family Fairness Act, Fonberg and her partner have, by virtue of their domestic partnership, the legal and substantive benefits of marriage. I can find no principled distinction between a couple that has all the legal and substantive benefits of marriage under state law, such as Fonberg and her partner, and couples such as Levenson and his partner, Golinski and her partner, who achieved the status of legal marriage during a brief moment of opportunity in California that has now been extinguished for all same-sex couples regardless of the substance of their relationship.

The Arizona District Court decision in Collins v. Brewer, 727 F. Supp.2d 797 (D. Ariz. 2010) is instructive with respect to same-sex couples who are legally barred from marriage. In Collins, the court was confronted with the question of whether a statute ("Section O") that eliminated family coverage for non-spouse domestic partners was unconstitutional as applied to same-sex domestic partners.

The court found that Section O, although not discriminatory on its face, "unquestionably imposes different treatment on the basis of sexual orientation," 727 F. Supp.2d at 803, *quoting* Levenson, 560 F.3d at 1147, and "makes benefits available on terms that are a legal impossibility for gay and lesbian couples." 727 F. Supp.2d at 803. The court held that, because the spousal limitation in Section O imposed different burdens on the basis of sexual orientation, Section O was subject to scrutiny under the Equal Protection Clause and, further, that the complaint stated a plausible equal protection claim under the "more searching" rational basis standard applied to a classification that harms politically unpopular groups or personal relationships. *Id., citing, inter alia,* Lawrence, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire

to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

The Collins court examined and rejected the proffered rationales for Section O--cost savings, administrative efficiency, a preference for allocating scarce funds to the individuals identified in Section O, and the state's interest in favoring marriage and families with children–and concluded that the absolute denial of benefits to employees with same-sex domestic partners was not "rationally and substantially related to these governmental interests." *Id.* at 807.[7] Moreover, the court was unable to "identify any other governmental interests that might be served by denying plaintiffs the same access to family medical coverage afforded to heterosexual State employees." *Id.*

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[7] The court found that the cost savings were negligible, and that even if the state's interest were "simply saving money, the companion goal of promoting marriage would seem to do the opposite," because promoting marriage would require the state to provide health benefits to more people. 727 F. Supp.2d at 805. The court also found "little or no continuing administrative burden" on the state in providing coverage to plaintiffs and their partners, all of whom had already met the eligibility requirements for coverage. With respect to the argument that the funds were better spent on heterosexual spouses, the court held that the state's justification raised "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected, namely toward same-sex domestic partners who by law cannot become spouses. . . . Romer makes clear that a simple desire to treat gays and lesbians differently is not, in and of itself, a proper justification for government actions." 727 F. Supp.2d at 806, *citing* Romer, 517 U.S. at 620, 635. The court rejected the notion that Section O was justified by the state's interest in favoring marriage and families with children, because the state had made gays and lesbians ineligible to marry.

In Gill, 699 F. Supp.2d at 388-391, the court rejected, under the least exacting rational basis standard, Congress's articulated interests in enacting DOMA (encouraging responsible procreation and child-bearing, defending and nurturing the institution of traditional heterosexual marriage, defending traditional notions of morality, and preserving scarce resources). The government disavowed these justifications for litigation purposes, proffering instead the arguments that DOMA was a means of preserving the status quo pending the resolution of the debate in the states over whether to sanction same-sex marriage and an incremental response to a new social problem. The court rejected these justifications under the rational basis standard as well.

In Collins, heterosexual domestic partners had only to marry in order to continue receiving family health coverage, while same-sex couples were powerless to alter their status because the Arizona Constitution prohibited both same-sex marriages and the recognition of same-sex marriages celebrated in other jurisdictions. Fonberg finds herself in the same *Catch-22*, so burdened by DOMA and the Oregon Constitution because of her status as a lesbian that she cannot, under any conceivable circumstance, obtain the same employment compensation as similarly situated employees whose status is not so burdened.[8]

I conclude that the denial of benefits to Fonberg and her partner constitutes sex discrimination and, even assuming that discrimination on the basis of sexual orientation does not constitute sex discrimination in this case as well,[9] discrimination on the basis of a factor unrelated to job performance. As Fonberg argues, if either she or her partner were male, not female, Fonberg's compensation would include insurance benefits for her partner. Thus, the denial of benefits clearly constitutes discrimination on account of sex. Moreover, sexual

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[8] As the court said in Gill,

> [I]t is only sexual orientation that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled. And this court can conceive of no way in which such a difference might be relevant to the provision of the benefits at issue. . . . To . . . divide the class of married individuals into those with spouses of the same sex and those with spouses of the opposite sex is to create a distinction without meaning. And where, as here, "there is no reason to believe that the disadvantaged class is different, in *relevant* respects" from a similarly situated class, this court may conclude that it is only irrational prejudice that motivates the challenged classification.

Gill, 699 F. Supp. at 396 (internal citation omitted) (emphasis in original).

[9] In Golinski and Levenson, the EDR Plans at issue expressly prohibited discrimination based on sexual orientation as well as sex. There is no express prohibition against discrimination based on sexual orientation in the District's EDR Plan.

orientation "bears no relation to ability to perform or contribute to society." Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality). *See also* Minutes of United States Judicial Council (Nov. 22, 1996) and OPM, *Addressing Sexual Orientation Discrimination in Federal Civilian Employment: A Guide to Employees' Rights* 1, 4 (June 1999) (recognizing policy of executive branch deeming sexual orientation discrimination as discrimination on the basis of conduct that does not affect employee performance).

The District's refusal to offer benefits to Fonberg's partner is an unlawful employment practice that effectively compensates her at a lower rate than her co-workers.

Under the District's EDR Plan, my authority as Chief Judge permits me to "order a necessary and appropriate remedy" when a substantive right under the EDR Plan has been violated. EDR Plan § 8.09a. Among the remedies listed in the EDR Plan are back pay and "associated benefits," and "equitable relief." *Id.* at §§ 8.09b.6, 8.09b.8.

On September 14, 2010, the Ninth Circuit Judicial Conference adopted a policy statement that 1) EDR proceedings are strictly administrative and are not "cases and controversies" under Article III of the Constitution; 2) judges presiding in EDR matters are functioning in an administrative rather than a judicial capacity; 3) judges' decisions in EDR matters must be in conformance with all statutes and regulations that apply to the judiciary, and judges in the EDR context have no authority to declare such statutes or regulations unconstitutional or invalid; and 4) judges presiding in EDR matters may not compel the participation of or impose remedies upon agencies or entities other than the employing office which is the respondent in such matters. See Report of the Proceedings of the Judicial Conference of the United States (September 14, 2010) at 25, available at http://jnet.ao.dcn.img/assets/4580/10-Sep_Report_Proceedings.pdf.

The third and fourth directives mean that I have no authority to declare DOMA unconstitutional or invalid as applied to Fonberg, and no authority to make any order or directive to OPM.

Fonberg requests the relief of an adjustment to her compensation in the form of a reimbursement allowance for the benefits Fonberg and her partner are forced to purchase because of their exclusion from FEHB benefits, and back pay from January 4, 2010 reflecting such compensation until the reimbursement program is implemented. I conclude that the remedy Fonberg seeks is necessary and appropriate equitable relief.[10] Such relief is consistent with President Obama's June 17, 2009, directive to executive agencies to extend benefits to federal employees in same-sex domestic partnerships or marriages within the authority of existing law.[11] DOMA does not prevent the District from providing compensation outside the scope of the statutory benefits provided by FEHB, because such compensation is not subject to DOMA's definition of "spouse." It is also consistent with the Congressional Accountability Act of 1995, which extended to Congressional employees the protection of Title VII and other labor laws. "In enacting the CAA Congress initially considered extending the statute's coverage to employees of the judicial branch but, mindful of the importance of judicial autonomy, ultimately decided against such action." Levenson, 560 F.3d at 1145, *quoting* Dotson v. Griesa, 398 F.3d 156, 173 (2d Cir. 2005).

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[10] Back pay is considered an equitable remedy, Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975), as is front pay. See Gotthardt v. Nat'l R.R. Passenger Corp., 191 F.3d 1148 (9th Cir. 1999).

[11] Available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09.

The District is ordered to provide Fonberg a reimbursement allowance for the cost of providing Fonberg's partner with health insurance coverage comparable to that offered spouses of other similarly-situated judicial employees. The District is further ordered to provide the allowance retroactively from January 4, 2010, until the reimbursement program is implemented.

IT IS SO ORDERED.

Dated this 8th day of July, 2011.

Ann Aiken
Chief Judge, District of Oregon

TRUE COPY STATEMENT

IT IS CERTIFIED that this document is a true, exact and complete copy of the original and was hand delivered to Margaret Fonberg on this date

DATED this _____ day of July 2011.

Cherie Nelson
Human Resources Director,
U.S. District Courts, District of Oregon

CERTIFICATE OF SERVICE

IT IS CERTIFIED THAT a true, exact and complete copy of the Margaret Fonberg v. United States District Court for the District of Oregon, Opinion and Order was personally received by Margaret Fonberg on this date.

DATED this _____ day of July 2011.

Margaret Fonberg
Law Clerk to Magistrate Judge Thomas Coffin