

FILED

APR 24 2013

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

**NOT FOR PUBLICATION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

IN THE MATTER OF ALISON CLARK

Case No. 13 - 80100

ORDER

Overview

Alison Clark, an assistant federal public defender in the Office of the Federal Public Defender for the District of Oregon (“FPD”), married Anna Campbell in British Columbia, Canada, on June 23, 2012.

A few weeks after her marriage to Campbell, Clark applied for benefits for Campbell under the Federal Employees Health Care Benefits (“FEHB”) program. The Administrative Office of the United States Courts (“AO”) promptly issued Clark a letter denying Clark’s request. The AO explained that it denied Clark’s application for benefits for Campbell pursuant to the Defense of Marriage Act (“DOMA”) and Office of Personal Management (“OPM”) regulations.

Clark filed a complaint under the Employment Dispute Resolution Plan (“Plan”) for Federal Public Defenders and Staff, alleging that she was

discriminated against on the basis of her sexual orientation. The Plan expressly prohibits such discrimination.

For the following reasons, I conclude that Clark was discriminated against on the basis of her sexual orientation in violation of both the Plan and the United States Constitution.

I. Facts

Alison Clark is an assistant federal public defender for the District of Oregon. Clark married Anna Campbell on June 23, 2012 in British Columbia, Canada. Clark and Campbell's marriage was not recognized by the state of Oregon pursuant to Measure 36, a state ballot initiative that was passed in 2004. Measure 36 amended the Oregon Constitution to define marriage as between only a man and a woman. Clark and Campbell's marriage was also not recognized by the United States government, pursuant to DOMA. 1 U.S.C. § 7. DOMA establishes that, for the purpose of determining federal laws, regulations, and benefits, "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 a wife." *Id.*

On July 12, 2012, Clark applied for benefits for Campbell under the FEHB program. The Federal Employees Health Benefits Act ("FEHBA") established the

FEHB program, which provides FPD employees and their family members the right to health benefits. 5 U.S.C. §§ 8901-8914. The FEHBA allows federal employees to elect coverage “either as an individual or for self and family.” 5 U.S.C. § 8901(a). The FEHBA 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).

DOMA establishes, however, that “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 husband and wife.” 1 U.S.C. § 7.

On July 20, 2012, the AO sent a letter to Clark denying her request for spousal health benefits. In its letter, the AO explained that FEHB follows DOMA’s definitions of “marriage” and “spouse,” and that it would continue to follow DOMA until it is repealed by Congress or declared unconstitutional. The AO also cited OPM regulations stating that “same sex partners” are not eligible family members. Thus, the AO concluded, “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.”

On August 1, 2012, Clark filed a complaint under the Plan, alleging that the denial of her spousal FEHB benefits amounted to sexual orientation discrimination. Clark argued that such discrimination violated both the Plan and the United States Constitution.

The purpose of the Plan is “to provide rights and protections to employees of the Federal Public Defender Offices . . . which are comparable to those provided to legislative branch employees under the Congressional Accountability Act of 1995.” EDR Handbook Ch. I, § 1. Under the Plan, “[d]iscrimination against employees based on race, color, religion, sex, . . . national origin, age, . . . disability, and sexual orientation is prohibited.” *Id.* at Ch. II, § 1. The Plan sets forth procedures for FPD employees to follow when reporting discrimination and filing other complaints.

Clark filed her complaint pursuant to procedures set forth in the Plan. First, Clark requested counseling with the EDR Coordinator. Counseling did not resolve the complaint. Clark waived her right to mediation, the next step under the Plan, after she was informed by the EDR Coordinator that mediation likely would not resolve her complaint. This complaint is now before the Ninth Circuit’s Standing Committee on Federal Public Defenders. As chair of the Committee, I am charged with reviewing and deciding this matter. *Id.* at Ch. IX, § 10.

II. Analysis

A. Clark's Rights Under the EDR Plan Were Violated

The AO's denial of Clark's request for spousal FEHB benefits was a violation of the Plan's express prohibition against discrimination based on sexual orientation. "Discrimination against employees based on race, color, religion, sex, . . . national origin, age, . . . disability, and *sexual orientation* is prohibited." *Id.* at Ch. II, § 1 (emphasis added). The only reason Clark was unable to make her spouse a beneficiary under the FEHB program was that, as a homosexual, she had a same-sex spouse. Therefore, the denial of Clark's request for spousal FEHB benefits was based on Clark's sexual orientation, and thus violates the Plan's prohibition of discrimination on the basis of sexual orientation.

B. The Oregon Constitution

Before Measure 36 was approved on November 2, 2004, Oregon law did not expressly limit marriage as between a man and a woman. The Oregon Revised Statutes enacted before Measure 36 arguably implied, however, that marriage in Oregon was only between a man and a woman. *See* Or. Rev. Stat. Ann. § 106.010 ("[M]arriage is a civil contract entered into . . . by males . . . and females. . ."); Or. Rev. Stat. Ann. § 106.150 ("[T]hat they take each other to be husband and wife"); Or. Rev. Stat. Ann. § 106.041 ("[T]o join together as husband and wife").

On March 3, 2004, the Multnomah County Board of Commissioners ordered the Records Management Division of Multnomah County to begin issuing marriage licenses to same-sex couples who applied for licenses from the county. Roughly 3,000 same-sex couples received marriage licenses from Multnomah County after being wed by officials authorized under Oregon law to perform marriages. Afterwards, the licenses were sent to the Oregon State Registrar, which maintains a central record of marriages performed in the state. The Registrar, however, refused to certify the marriage licenses on the basis that same-sex marriages do not conform with the provisions of Oregon Revised Statutes chapter 106. *Li v. State*, 338 Or. 376, 382, 110 P.3d 91, 94 (2005). On March 24, 2004, the American Civil Liberties Union (“ACLU”) brought a claim to allow same-sex marriages in the state.

While the ACLU case was working its way through the courts, the Defense of Marriage Coalition, an organization opposed to same-sex marriage, pushed for a constitutional amendment to the Oregon Constitution. The amendment, dubbed Measure 36, would expressly prevent same-sex couples from marrying.

On November 2, 2004, Measure 36 passed. Pursuant to Measure 36, the Oregon Constitution was amended to read: “It is the policy of Oregon, and its

political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.” Or. Const. art. XV, § 5a.

1. Equal Protection Analysis

“The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike.” *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation and internal quotation marks omitted). The Supreme Court has long held that the Fifth Amendment imposes the same obligation on the federal government. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

I believe that strict or heightened scrutiny applies to Clark’s claim. *See, e.g., Witt v. Dep’t of Air Force*, 527 F.3d 806, 818-21 (9th Cir. 2008) (applying heightened scrutiny to a discharged service member’s challenge to the “Don’t Ask, Don’t Tell” policy). It is not necessary, however, to determine whether such scrutiny applies here because Oregon’s failure to recognize Clark and Campbell’s marriage pursuant to Measure 36 fails under rational basis review.

Under rational basis review, any government action resting on a distinction between two separate classes “must be rationally related to a legitimate governmental purpose.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). By “insist[ing] on knowing the relation between the classification adopted and the object to be attained,” we “ensure that classifications are not

drawn for the purpose of disadvantaging the group burdened by the law.” *Romer v. Evans*, 517 U.S. 620, 633 (1996). Although rational basis review is generally deferential, it is not “toothless.” *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Under rational basis review, “[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives—such as a bare desire to harm a politically unpopular group—are not legitimate state interests.” *Cleburne*, 473 U.S. at 446-47 (citations omitted).

In *Romer*, the Supreme Court struck down a law that discriminated against homosexual individuals because the law could not be justified by any asserted state interest. Consequently, “the inevitable inference [was] that the disadvantage imposed [was] born of animosity.” 517 U.S. at 634-36. The Court’s reasoning in *Romer* makes clear that a classification treating homosexual individuals differently from heterosexual individuals cannot rationally be justified by the government’s animus toward homosexuality.

Under rational basis review, Measure 36 does not pass constitutional muster. Here, Oregon does not state any reason for preventing same-sex couples from marrying. Based on the arguments in defense of California’s similar ballot initiative, Proposition 8, I raise three possible governmental objectives behind

Measure 36. *See Perry v. Brown*, 671 F.3d 1052, 1086-96 (9th Cir. 2012) *cert. granted*, 133 S. Ct. 786 (2012). While these objectives may be legitimate, I find none to be rationally related to prohibiting same-sex marriages.

The first possible objective of Measure 36 is to encourage responsible procreation. Preventing same-sex couples from marrying, however, will have no effect on the procreation of opposite-sex couples in Oregon. Further, same-sex couples can and do procreate—through adoptions, surrogates, and artificial insemination. Denying same-sex couples the status of marriage will not discourage their procreation. Instead, it will lead to children being born out of wedlock to these couples. Thus, excluding same-sex couples from the institution of marriage is not rationally related to the promotion of responsible procreation.

A second possible objective of Measure 36 is to ensure that children will be raised in stable and enduring families. Even if it is true that children are better off if their parents are married, this objective is not furthered by banning same-sex marriages. First, banning same-sex marriage cannot reasonably be believed to improve the stability of families headed by opposite-sex spouses. *Id.* at 1089 (“It is implausible to think that denying two men or two women the right to call themselves married could somehow bolster the stability of families headed by one man and one woman.”). Moreover, without same-sex marriages, fewer couples

can be married and hence, there are fewer couples who can provide a stable, marital environment for their children.

A third possible objective of Measure 36 is to “proceed with caution” in changing the definition of marriage under Oregon law. *Id.* If Measure 36 had been a temporary suspension of same-sex marriage that would allow the state legislature or the people of Oregon to consider the issue thoroughly, Measure 36 may have been rationally related to the goal of proceeding with caution. *Id.* at 1090. But, as with California’s Proposition 8, “the purpose and effect of [Measure 36] was to *eliminate* the right of same-sex couples to marry in [Oregon] —not to suspend or study that right.” *Id.* (internal quotation marks omitted). As a permanent and wholesale ban of same-sex marriage, Measure 36 is not rationally related to the goal of proceeding with caution.

While other possible objectives for Measure 36 exist, I can see no objective that is rationally related to banning same-sex marriages, other than the objective of denigrating homosexual relationships. This objective amounts to a desire to harm a minority group and is therefore impermissible under *Romer* and *Cleburne*. *Romer*, 517 U.S. at 634-36; *Cleburne*, 473 U.S. at 446-47. Thus, Measure 36 reveals itself to be “wholly without any rational basis” and is therefore unconstitutional. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538 (1973).

2. Due Process Analysis

“Substantive due process cases typically apply strict scrutiny in the case of a fundamental right and rational basis review in all other cases.” *Witt*, 527 F.3d at 817. The Supreme Court has affirmed that marriage is “the most important relation in life” and that the right to marry is “one of the liberties protected by the Due Process Clause.” *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Cleveland Bd. Of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974). This right is “sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). Moreover, the right to marry has been recognized as “of fundamental importance *for all individuals*.” *Zablocki*, 434 U.S. at 384 (emphasis added); *see also Loving v. Virginia*, 388 U.S. 1, 12 (1967). As the Supreme Court explained in *Lawrence v. Texas*, “our laws and tradition afford constitutional protection to personal decisions relating to marriage” because of “the respect the Constitution demands for the autonomy of the person in making these choices Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.” 539 U.S. 558, 574 (2003).

I believe that Measure 36 should be reviewed under the strict scrutiny standard because it implicates the fundamental right of marriage. A strict scrutiny

analysis is unnecessary, however, because as explained above Measure 36 fails under rational basis review. Thus, Measure 36 violates the due process rights of same-sex couples, as well as their equal protection rights.

Clark and Campbell's validly executed marriage should therefore be recognized as a valid marriage in Oregon. I next consider whether, given Clark and Campbell's valid marriage, it is constitutionally permissible for the federal government to deny Clark's request for spousal FEHB benefits for Clark. I hold that it is not.

C. DOMA

Pursuant to DOMA, the AO interpreted FEHBA's definition of "spouse" to include only opposite-sex spouses. Under both the Equal Protection Clause and the Due Process Clause of the United States Constitution, FEHBA's application of DOMA so as to deny benefits to same-sex couples is unconstitutional.

1. Equal Protection Analysis

The House of Representatives report on DOMA listed three rationales behind the relevant section of the statute: "defending and nurturing the institution of traditional, heterosexual marriage"; "defending traditional notions of morality"; and "preserving scarce government resources." H.R. Rep. No. 664, H.R. REP. 104-664, 12 (1996).

The first interest is not rationally related to the denial of federal benefits to same-sex spouses. The denial of benefits does not nurture “traditional, heterosexual marriage” because it does not encourage homosexual couples to enter into heterosexual marriages. Moreover, if defending heterosexual marriage and “traditional notions of morality” means discouraging same-sex marriage, the rationale would be illegitimate. Discouraging same-sex couples to marry is equivalent to the “bare desire to harm an unpopular group,” which the Supreme Court found impermissible in *Cleburne* and in *Romer*. Thus, both the first and the second stated interest for DOMA’s definition of marriage fail under rational basis review.

Regarding the third interest of preserving scarce government resources, the First Circuit has found that DOMA runs counter to this interest. “[I]t is said that DOMA will save money for the federal government by limiting tax savings and avoiding social security and other payments to spouses. This may well be true, or at least might have been thought true; more detailed recent analysis indicates that DOMA is more likely on a net basis to cost the government money.”

Massachusetts v. U.S. Dep’t of Health & Human Servs., 682 F.3d 1, 14 (1st Cir. 2012) (citing Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (2004), available at

<http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-same-sexmarriage.pdf>). In its report, the Congressional Budget Office explained that recognizing same-sex marriages would actually *save* the federal government approximately \$1 billion each year because spending for Supplemental Security Income, Medicaid, and Medicare would be reduced. Cong. Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (2004), at 1.

Moreover, as the Supreme Court established in *Plyler v. Doe*, “a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources.” 457 U.S. 202, 227 (1982) (citations omitted); *see also Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590 (9th Cir. 2008) (“the question here is not simply whether administrative costs were a rational reason for denying Lazy Y’s bid. . . . The real question is whether there is a rational basis for this distinction.”). Here, there is no rational basis for distinguishing between same-sex couples and opposite-sex couples if the government’s objective is to cut costs. As a cost-saving measure, DOMA is vastly underinclusive because costs would be much more effectively reduced by limiting government benefits across the board, for example, for *all* spouses. Therefore, the third stated governmental interest for DOMA is not rationally related to the denial of spousal benefits to same-sex spouses.

Thus, the AO's application of DOMA to the FEHBA so as to deny benefits to Clark's same-sex spouse fails under rational basis review and is unconstitutional under the Equal Protection Clause of the Constitution.

2. Due Process Analysis

Analysis under the Due Process Clause yields the same result. As mentioned above, in *Loving*, the Supreme Court held that marriage is a fundamental right. 388 U.S. at 12. Therefore, under the Due Process Clause, strict scrutiny would seem to apply.

We need not decide whether strict scrutiny applies, however, because as we concluded in the Equal Protection section, the denial of benefits in this case fails under rational basis review. Thus, the denial of Clark's request for spousal health benefits violates the Due Process Clause of the Constitution as well.

III. Conclusion

The denial of Clark's request for spousal FEHB benefits for Campbell violates both the Plan and the United States Constitution. I therefore order the Director of the Administrative Office of the United States Court to submit Clark's FEHB Health Benefits Election form, which she signed and submitted on July 2, 2012, to the appropriate health insurance carrier. The AO should also process any

future beneficiary addition requests without regard to (1) the sex of a listed spouse and (2) whether a validly executed same-sex marriage is recognized by a state.

If OPM blocks this relief, I would alternatively grant Clark's request for monetary relief. The Plan establishes that "back pay and associated benefits" may be awarded to a successful complainant if the "statutory criteria of the Back Pay Act, 5 U.S.C. § 5596, are satisfied." EDR Handbook Ch. IX, § 12. Clark satisfies the criteria of the Back Pay Act because the violation of her rights was an "unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of . . . part of [her] pay, allowances, or differentials" within the meaning of the Act. 5 U.S.C. § 5596(b)(1); *see In re Levenson*, No 09-80172, slip op. at 15541 (9th Cir. Nov. 18, 2009). If this alternative relief is granted, I remand to the FPD to determine the amount of the award pursuant to *In re Levenson*.

I retain jurisdiction over this matter.

A handwritten signature in cursive script that reads "Harry Pregerson". The signature is written in dark ink and is positioned above the printed name and title.

Harry Pregerson
Circuit Judge, Chair of FPD Standing Committee