UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THERESA BASSETT and CAROL KENNEDY, PETER WAYS and JOE BREAKEY, JOLINDA JACH and BARBARA RAMBER, DOAK BLOSS and GERARDO ASCHERI DENISE MILLER and MICHELLE JOHNSON,

Plaintiffs,

v

RICHARD SNYDER, in his official capacity as Governor of the State of Michigan,

Defendant.

No. 2:12-cv-10038

HON. DAVID M. LAWSON

MAG. MICHAEL J. HLUCHANIUK

DEFENDANT'S REPLY BRIEF

A. Equal Protection Claim

Defendant states in further reply, Plaintiffs' response to the motion to dismiss this equal protection claim rests on four cornerstones each lacking foundation, factual and legal merit.

1. Rational basis scrutiny is the proper review for this equal protection claim based on sexual orientation discrimination.

The first tenuous cornerstone of Plaintiffs' argument is the level of scrutiny they accord their equal protection claim. Plaintiffs allege and argument they are a suspect classification to be accorded strict scrutiny contrary to the law of this circuit as most recently reaffirmed. The Sixth Circuit "has not recognized sexual orientation as a suspect classification." *Davis v. Prison Health Servs.*, 679 F.3d 433; 2012 WL 1623216 *3 (6th Cir. 2012).

Plaintiffs also argue their claim is entitled to the same heighted scrutiny erroneously recognized and applied by the Ninth Circuit majority in *Diaz v. Brewer,* 656 F.3d 1008 (9th Cir. 2011) a decision that was substantially criticized by the *en banc* dissent. *Diaz v. Brewer,* 676 F.3d 823 (2012). The dissent's analysis is consistent with the law of this circuit.

Like the Ninth Circuit decision, Plaintiffs' argument ignores the proposition that a law is not unconstitutional *solely* because it has a disproportionate impact. *Washington v. Davis,* 426 U.S. 229, 239 (1976); *City of Cuyahoga Falls v. Buckeye County,* 538 U.S. 188, 194 (2003). Like the Ninth Circuit, Plaintiffs avoid this fundamental proposition and argue that *U.S. Dept. of Agriculture v. Moreno,* 413 U.S. 528 (1973) requires a different result because the statute disproportionately affects gays and lesbians, a particular group that may be unpopular. *Davis,* 565 F.3d at 1013. Yet *Moreno* did not rest only on the challenged law's adverse effect – it applied the equal protection principles to strike down a law motivated by discriminatory purpose. Plaintiffs have not and cannot sustain such proofs here. Thus, application of the Ninth Circuit's reasoning in this case is both inconsistent with the fundamental principles of equal protection analysis and with the law of the Sixth Circuit.

2. Plaintiffs are similar in all relevant respects to other single public employees who will also lose health care coverage benefits under P.A. 297.

A second cornerstone of Plaintiffs' argument rests on the allegation they are similarly situated to married public employees whose spouses are provided health care coverage. Plaintiffs are not similarly situated to married public employees and their spouses. First, they do not have a legally recognized relationship under Michigan law. Second, the existence of a relationship similar to marriage is *not* the basis on which health care coverage benefits are available to unmarried public employees and their designated adult recipient. Basing eligibility for this benefit on a relationship similar to marriage is precluded by the State's constitution. Const. 1963, art. 1, sec. 25; *National Pride at Work v. Granholm,* 481 Mich. 56; 748 N.W. 2d 524 (2008). Thus, the exitence of a relationship similar to marriage is irrelevant to this analysis.

Rather, Plaintiffs are similarly situated in all relevant respects to those unmarried public employees who have an opposite-sex partner, or who provide this health coverage benefit to

another qualifying adult with whom they have no partner relationshp – a roommate or friend or other plutonic relationship that qualifies for eligibility. Opposite-sex partners who have a life-partnership like Plaintiffs do not have a legally recognized relationship either. Michigan abolished common-law marriage January 1, 1957. Any finanical or other arrangements made by such partners, like Plaintiffs, are voluntary, not imposed by law as may occour with marriage.

Plaintiffs argue P.A. 297 singles them out because, unlike these opposite-sex partners, they cannot continue health coverage benefit by marrying. This argument erroneously presumes that all public employees provide this benefit to a partner they would or could marry. Yet, a male public employee may be providing the benefit to an eligible male roommate absent a romantic or "life-partner" relationship. A female public employee may be housing her child's spouse and providing health care coverage to that eligible adult indivdual. They cannot marry in order to keep the benefit. One or both members of an opposite-sex relationshp may not want to marry in oder to keep this benefit. P.A. 297 impacts and effects all single public employees equally whether he or she is a realtionship or not. Plaintiffs are similarly situated to these single public employees and their eligible adult recipients of health care coverage in all relevant respects. No discriminatory purpose exists; no dispaarate impact is caused by P.A. 297.

3. P.A. 297 is rationally related to a legitimate state interest.

The third cornerstone of Plaintiffs' response argues that because the State's cost savings related to the elimination of domestic health care benefits is diminimus, P.A. 297 serves no rational basis. Yet, Plaintiffs' argument ignores the fact P.A. 297 is but one piece of a broader legislative scheme designed to reduce local government costs and increase fiscal stability. Many of these recent legislative initiatives are directed at correcting, changing and implementing public employer-employee obligations. P.A. 297 is not an isolated, singular legislative act. It is part of the whole legislative process meant to address signficant cost issues that impact not only

individual local governments but the State as a whole when fiscal instability occurs. This legislation looks to the future, as much preventative as prescriptive. P.A. 297 serves a role in this greater plan; is rationally related to this purpose; and withstands rational scrutiny.

4. P.A. 297 is not motivated by animus.

Fourth, Plaintiffs argue P.A. 297 is motivated by animus. Plaintiffs first allege the Act's lack of any rational conection to a legitimate state interest creates an inference of animus. Defendant has more than demonstrated a rational connection to a legitimate state interest in support of the Act. Plaintiffs fail to meet their burden and the strong presumption of validity to be given the law. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314-315 (1993).

Second, Plaintiffs allege the Act's title and plain language, historical background and sequence of events leading up to passage demonstrate and intent to disadvantage gay and lesbian families who cannot marry and restore the benefit. Yet nothing in the title or plain language of the Act specifically singles out or identifies gay and lesbian families for discriminatory treatment. The Act works a disqualification equally against straight single employees and their eligible adult recipients and opposite-sex partner families. The straight non-public employee loses health care coverage. Not all single public employees and their eligible adult recipients can marry. The opposite-sex couples would have to marry in order to restore health coverage benefits, a relationship one or both may not want.

Third, Plaintiffs rely on statements attributed to individual legislators, an unrealiable source for determining legislative intent under an equal protection analysis. *Isle Royale Boaters Assoc., et. al.* v. *Norton*, 330 F.3d 777, 784, 785 (6th Cir. 2003). Further, the actual statements referenced by Plaintiffs do not support an inference of animus in passing P.A. 297. Rather, for the most part, they indicate a dislike of the "domestic partner benefits," not of the recipients of the benefits. Significantly, indvidiual legislators are presumed to know Michigan law prohibits

partner benefits based on a relationship similar to marriage; and that under the broader concept adopted by local governments, and the State itself, these benefits applied to a wide variety of single public employees and their "eligible adults," not just same-sex couples. Additionally, the history of events leading up to P.A. 297 indicates the legislature failed to rejct the OEAI benefit adopted by the Michigan Civil Service Commission in January 2011, shortly before passage of P.A. 297 – an action that dispels any inference of animus.

B. Due Process Claim

Plaintiffs assert the State's ban on health care benefits for OEAIs burdens their exercise of the fundamental right to form and sustain intimate relationships. (R. 45, Response Brief p. 45). Yet, neither Plaintiffs' Complaint nor their Response Brief offer any explantion as to how this fundamental right is burdened under P.A. 297. Indeed, many, if not all of Plaintiffs' relationships were formed before the respective public employers provided health coverage to domestic partners and certainly before the enactment of P.A. 297. Further, P.A. 297 does not prohibit, proscribe or prevent the forming of such a relationship. Nor does P.A. 297 operate against Plaintiffs because they are exercising this fundamental right. Plaintiffs argument again ignores the fact eligiblity for this benefit was not based on the existence of a committed partner relationship. Thus, no fundamental right is implicated by P.A. 297 and this substantive due process claims fails as a matter of law.

CONCLUSION

Defendant, therfore, prays the Court grants the motion to dismiss this complaint, enters judgment for the State and awards any additional relief it determines appropriate.

Respectfully submitted,

BILL SCHUETTE
Attorney General

s/ Margaret A. Nelson
Margaret A. Nelson (P30342)
Mark E. Donnelly (P39281)
Attorney for Defendant
Michigan Department of Attorney General
Public Employment, Elections & Tort Div
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such.

s/Margaret A. Nelson
Margaret A. Nelson (P30342)
Mark E. Donnelly (P39281)
Attorney for Defendant
Michigan Department of Attorney General
Public Employment, Elections & Tort Div
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434
Primary E-mail: nelsonm9@michigan.gov
(P30342)