IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

KELLY D. GLOSSIP	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 10AC-CC00434
	)	
MISSOURI DEPARTMENT OF TRANSPORTATION AND HIGHWAY PATROL EMPLOYEES' RETIREMENT SYSTEM,	)	
	)	
Defendant.	)	

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Plaintiff's opposition brief generally attempts to divert attention from the true issues in this case, including through proffer of extrinsic evidence that this Court need not consider. The rational basis standard applies here, and Plaintiff has not defeated Defendant's showing that Sections 104.140.3 and 104.012 RSMo are valid under that standard as a matter of law.

Plaintiff advances two main contentions in his effort to avoid dismissal. First, despite conceding that "there is no fundamental right to receive survivor benefits" (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss at 42), Plaintiff asserts that heightened scrutiny nevertheless should apply to his claim. Second, Plaintiff argues that the subject statutes are not rationally related to a legitimate government interest. As established below, these

arguments fail to undermine the legal support for Defendant's motion to dismiss, since it is enough for the challenged statutes to survive constitutional challenge "if any state of facts can be reasonably conceived that would justify it." *Alderson v. State*, 273 S.W.3d 533, 537 (Mo. Banc 2009). Defendant has met that standard.

I. The subject statutes do not implicate a fundamental right and are not subject to strict scrutiny.

An economic benefit is at issue here, not a fundamental right. Rational basis review applies where a social or economic legislation is challenged on equal protection grounds and no fundamental right has been infringed. *Grand River Enter. Six Nations Ltd. v. Beebe*, 574 F.3d 929, 944 (8th Cir. 2009); *In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. banc 2003).

Notably, Plaintiff concedes that "there is no fundamental right to receive survivor benefits." (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss at 42). Yet, Plaintiff argues that a heightened level of scrutiny (applicable to a fundamental right) should apply insofar as denial of his claim for survivor benefits has somehow "indirectly" burdened alleged fundamental rights such as a "right to bodily integrity," "right to family integrity" and "right to sexual intimacy with a partner." (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss at 39-40). Such alleged fundamental rights, however, simply are not implicated by Plaintiff's claim for purely monetary benefits. Plaintiff's alleged right to

receive survivor benefits involves only an economic interest, not Plaintiff's interest in intimacy or association with his deceased partner. *See In re Marriage of Kohring*, 999 S.W.2d 228, 232 (Mo. banc 1999) (obligating divorced, but not married, parents to pay for children's college involves mere economic consequence or interest, not parental right to relationship with children).

II. The subject statutes satisfy the rational basis standard as a matter of law.

Plaintiff's contention that the rational bases identified by the state are "fundamentally irrational" fails as a matter of law. A classification is constitutional under the rational basis standard "if any state of facts can be reasonably conceived that would justify it." *Alderson v. State*, 273 S.W.3d 533, 537 (Mo. Banc 2009). Indeed, an equal protection challenge fails as a matter of law where the considerations supporting the challenged legislation present a rational basis question that is "at least debatable." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). Plaintiff, in fact, acknowledges that it is enough if a "legitimate purpose can be *hypothesized*." (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss at 46) (emphasis added).

Defendant's opening brief establishes that the Missouri legislature could plausibly hypothesize or conclude that surviving spouses are the most economically interdependent in comparison with unmarried couples. "[T]he

very fact that" the assumptions underlying the rationales for a statutory classification "are 'arguable' is sufficient, on rational basis review, to 'immunize' the legislative choice from constitutional challenge." *Heller v. Doe by Doe*, 509 U.S. 312, 333 (1993).

Defendant is not required to convince the court of the legislature's policy judgments. *Clover Leaf Creamery*, 449 U.S. at 464. Here, the question of the rational relationship between the state's interests in administrative efficiency in making objective beneficiary determinations, controlling costs, and preserving limited retirement system resources for those most likely to be economically dependent on a deceased member is "at least debatable." Plaintiff therefore cannot, as a matter of law, overcome the presumption that the subject statutes are constitutional. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985).

Despite Plaintiff's proffer of extrinsic evidence in opposition to Defendant's motion, this Court can find that the rational basis question presented is "at least debatable" by using common sense, without resort to such evidence. Indeed, even where

> It could be that the assumptions underlying these rationales are erroneous... the very fact that they are "arguable" is sufficient, on rational-basis review, to "immunize the legislative choice from constitutional challenge.

Heller v. Doe by Doe, 509 U.S. at 333 (internal quotations omitted).

Accordingly, Defendant objects to Plaintiff's proffer of extrinsic evidence in response to Defendant's motion. In determining whether to grant a motion to dismiss, "the court is limited to examining the pleading, on its face, for sufficient statements constituting a viable claim." *Brown v. Simmons*, 270 S.W.3d 508, 510 (Mo. App. S.D. 2008). This court cannot apply a different standard in deciding a motion to dismiss where the non-movant alone has attempted to introduce evidence outside the pleadings. *Kinney v. Schneider Nat'l Carriers*, 213 S.W.3d 179, 183 (Mo. App. W.D. 2007); *Brown* at 510-11; Rule 55.27(a) This Court thus should exclude consideration of Plaintiff's extrinsic evidence, as well as Plaintiff's motion for summary judgment, from its adjudication of Defendant's motion to dismiss.[1]

To underscore that Plaintiff's proffered evidence is immaterial – and without acquiescing in any way to Plaintiff's proffer of that evidence – Defendant notes that Plaintiff cites the fact that some governmental entities permit an unmarried domestic partner to obtain certain benefits through submission of an affidavit regarding the relationship between the employee partner and non-employee partner. The issue here, however, is not whether a different system for regulating benefits can be administered easily or

[1] Consistent with this position, Defendant filed on August 17, 2011 a motion to stay briefing and ruling on Plaintiff's recently filed motion for summary judgment, pending ruling on MPERS' earlier filed motion to dismiss.

objectively in comparison to the challenged statutory system. Rather, it is whether the statutory system is conceivably or debatably rational. As a matter of law, it is. In this regard, it is at least debatable that a State's reliance upon marriage (or an offspring relationship) to determine eligibility is a plausibly objective and efficient approach, especially when compared to reliance upon an affidavit attesting to a non-marital relationship. Ultimately, the non-marital relationship espoused under an affidavit can terminate in an instant, unlike a marriage. The Court need not examine extrinsic evidence to reach that simple conclusion.[2]

III. The subject statutes otherwise do not involve a suspect classification or require heightened scrutiny.

The Court should decline Plaintiff's invitation to expand interpretation of the equal protection clause of the Missouri constitution to determine the level of scrutiny to apply to Plaintiff's claim for monetary benefits. In fact, the equal protection clause of the Missouri and federal

[2] Plaintiff admits that both nationally and in Missouri, the percentage of same-sex couples with both partners employed is greater than the percentage of dual earner married spouses. (Am. Pet., Para. 54). This concession by Plaintiff likewise is enough to sustain rationality of the subject statutes as a matter of law, since it is plausible that the Missouri legislature enacted the subject statutes to provide benefits to those most likely to be economically dependent upon a deceased member. Under Missouri law, spouses are legally responsible for each others' support and necessary expenses. *St. Luke's Episcopal-Presbyterian Hosp. v. Underwood*, 957 S.W.2d 496, 498 (Mo. App. E.D. 1997). By contrast, unmarried couples are under no such obligation. The legislature "is presumed to have acted with a full awareness and complete knowledge of the present state of the law, including judicial and legislative precedent." *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 259 S.W.3d 23, 31 (Mo. App. W.D. 2008) (internal quotations omitted). Thus, spouses' legal obligation to support each other financially is an additional basis upon which the legislature could rationally conclude that married couples are the most economically interdependent in comparison to unmarried spouses.

constitutions are "coextensive." *Bernat v. State*, 194 S.W.3d 863, 867 (Mo. banc 2006). Thus, the more stringent equal protection clause of the Alaska constitution at issue in *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 787 (Ala. 2005), cited by Plaintiff, is inapposite.

Likewise, Plaintiff's reliance on cases involving parents' fundamental right to relationships with their children, *State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. banc 1978), *see M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996), and the Missouri Constitution's more expansive protection of the fundamental right to vote, *Weinschenk v. State*, 203 S.W.3d 201, 211-12 (Mo. banc 2006), is misplaced. Plaintiff's claim involves an economic benefit, not a fundamental right.

Despite Plaintiff's urging otherwise, homosexuality is not a suspect classification for equal protection purposes. *Richenberg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996); *Lofton v. Sec'y of Dept. of Children and Family Serv.*, 358 F.3d 804, 818 (11th Cir. 2004). The Supreme Court's decision to decriminalize consensual sexual conduct between homosexual adults, in *Lawrence v. Texas,* 539 U.S. 558 (2003), did not rely on the equal protection clause. *Id.* at 578; *see also Citizens for Equ. Prot. v. Bruning*, 455 F.3d 859, 868 n.3 (8th Cir. 2006). The *Lawrence* decision thus does not support Plaintiff's contention that heightened scrutiny should apply to his claims. The majority opinion in *Lawrence* held that sexual intimacy in a non-marital

relationship involved a protected liberty interest. However, the Supreme Court specifically declined to address whether any government is required to give formal recognition to any relationship between homosexual individuals. *Lawrence*, 539 U.S. at 578; *Bruning*, 455 F.3d at 868 n.3 (8th Cir. 2006). "[T]he Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes." *Bruning*, 455 F.3d at 866.

Ultimately, the inherent dignity of homosexual individuals or value of their contributions to society simply are not at issue here. The Fourteenth Amendment is not a refuge from debatable public policy decisions. *Personnel Admin. v. Feeney*, 442 U.S. 256, 281 (1979). Plaintiff's alternate suggestion that sexual orientation should be treated as a "quasi-suspect classification" under the Missouri Constitution also is mistaken. The Missouri Supreme Court has rejected quasi-suspect classes as a viable concept under Missouri law. *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 63 (Mo. banc 1989). The subject statutes are not subject to heightened scrutiny.

IV. Section 104.140.3 is not a special law.

Plaintiff's reliance on *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. banc 2006) is misplaced. That decision invalidated a statute as a special law because it involved a fixed subclass of cities that adopted a tax ordinance before the Hancock amendment. *Id.* at 184-85. Thus, the classification at issue was based on close-ended characteristics. Section

104.140.3, in contrast, is not a special law, because its beneficiary classification is open-ended. (*See* Def.'s Mem. in Support of Mot. to Dismiss at 10 for further discussion).

V. Plaintiff is not entitled to injunctive relief.

Plaintiff states that he is not seeking preliminary injunctive relief from the Court, but rather a permanent injunction. (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss at 60). "The elements of a claim for permanent injunctive relief include: (1) irreparable harm, and (2) lack of adequate remedy at law." *City of Greenwood v. Martin Marietta Materials, Inc.*, 311 S.W.3d 258, 265 (Mo. App. W.D. 2010). Plaintiff cannot satisfy either of these elements.

Injunctive relief is an extraordinary remedy that should not be granted where there is an adequate remedy at law. *Id. quoting City of Kansas City v. New York-Kansas Bldg. Assocs.*, 96 S.W.3d 846, 855 (Mo. App. W.D. 2002). Where a monetary award would adequately compensate for an injury, an adequate legal remedy exists. *City of Greenwood*, 311 S.W.3d at 265-66; *Guy Carpenter & Co., Inc. v. John B. Collins Assocs, Inc.*, 179 Fed.Appx. 982, 983 (8th Cir. 2006). Here, Plaintiff's claim centers on denial of his claim for survivor benefits. That claim ultimately can be satisfied by the payment of a sum or sums of money.

CONCLUSION

WHEREFORE, for the foregoing reasons and the reasons stated in Defendant's Suggestions in Support of Motion to Dismiss, Defendant respectfully requests that the Court dismiss Plaintiff's claims with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2011, the above and foregoing document was served via ☒ U.S. first class mail ☐ hand-delivery ☐ facsimile ☐ email, to:

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