STATE OF MICHIGAN

COURT OF APPEALS

ATTORNEY GENERAL,

Plaintiff-Appellant,

v

CIVIL SERVICE COMMISSION and STATE PERSONNEL DIRECTOR,

Defendant-Appellees,

UNITED AUTO WORKERS and UNITED AUTO WORKERS LOCAL 6000,

Amicus Curiae.

UNPUBLISHED
January 8, 2013

No. 306685
Ingham Circuit Court
LC No. 11-000538-CZ

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order of the circuit court granting defendants' motion for summary disposition and denying plaintiff's motion for same.[1] This dispute concerns the constitutionality of defendants' decision to extend eligibility in the State Health Plan (SHP) to "other eligible adult individuals" (OEAI benefits), who were co-residents of state employees and nonexclusively represented employees (NEREs). We affirm.

The underlying gravamen of plaintiff's challenge is that this case entails a violation of the "Michigan Marriage Amendment," Const 1963, art 1, § 25, and our Supreme Court's decision in *National Pride at Work v Governor*, 481 Mich 56; 748 NW2d 524 (2008). Apparently, it is plaintiff's underlying belief that defendants' decision, after extensive negotiation with the unions, to permit unmarried employees to share their health care benefits with another unrelated person is an attempt to circumvent Michigan's prohibition against recognizing any "agreement" other than "the union of one man and one woman in marriage" as "a marriage or similar union

[1] Plaintiff unsuccessfully sought leave from our Supreme Court to bypass this Court's opportunity to consider the issues presented in this appeal. *Attorney General v Civil Serv Comm*, 491 Mich 875; 809 NW2d 569 (2012).

for any purpose." Const 1963, art 1, § 25. Our Supreme Court has recently held in *Nat'l Pride at Work* certain "domestic partnership policies" specifically and explicitly intended to confer benefits on same-sex partners violated the Marriage Amendment. The policies at issue here, however, are significantly different.

Critically, *Nat'l Pride at Work* entailed policies that were specifically and explicitly intended to confer benefits on same-sex partners in close relationships with the employees. See *Nat'l Pride at Work*, 481 Mich at 63-67. Our Supreme Court concluded that the domestic partnerships under discussion were being treated as "marriage[s] or similar union[s]" within the meaning of the Marriage Amendment. *Id*. at 86-87. However, although our Supreme Court concluded that the Marriage Amendment precluded recognition of domestic partnerships for purposes of providing health-care benefits, our Supreme Court did *not* resolve that health-care benefits are a specific benefit of marriage or that the Marriage Amendment somehow precludes employers from offering health-care benefits to people other than spouses of employees. See *id*. at 78 n 18. Consequently, there is no absolute prohibition against same-sex domestic partners receiving benefits through their relationship with an employee *so long as* that receipt is not based on the employer's recognition of that relationship as a "marriage or similar union."

In contrast to the policies under discussion in *Nat'l Pride at Work*, the policy at issue here is, in relevant part, as follows:

> Where the employee does not have a spouse eligible for enrollment in the [SHP], the Plan shall be amended to allow a participating employee to enroll one Other Eligible Adult Individual, as set forth below:
>
> To be eligible, the Individual must meet the following criteria:
>
> 1. Be at least 18 years of age.
>
> 2. Not be a member of the employee's immediate family as defined as employee's spouse, children, parents, grandparents or foster parents, grandchildren, parents-in-law, brothers, sisters, aunts, uncles, or cousins.
>
> 3. Have jointly shared the same regular and permanent residence for at least 12 continuous months, and continues to share a common residence with the employee other than as a tenant, boarder, renter or employee.
>
> Dependents and children of an Other Eligible Adult Individual may enroll under the same conditions that apply to dependents and children of employees.
>
> In order to establish that the criteria have been met, the employer will require the employee and Other Eligible Adult Individual to sign an Affidavit setting forth the facts which constitute compliance with those requirements.

This policy is unambiguously completely gender-neutral. Furthermore, while it does not allow married employees to share their benefits with anyone other than spouses and does not allow employees to share their benefits with close blood relations, it does not depend on the employee being in a close relationship of any particular kind with the OEAI beyond a common residence.

The Marriage Amendment prohibits recognizing certain kinds of agreements as "marriage[s] or similar union[s];" it does not in any way prohibit incidentally benefiting such agreements, particularly where it is clear that an employee here could share benefits with a wide variety of other people.[2]

Plaintiff also asserts a violation of the Michigan Equal Protection Clause. Const 1963, art 1, § 2. The scope and standard of the Michigan Equal Protection Clause are coextensive with those rights protected by the federal Equal Protection Clause. *Doe v Dep't of Social Servs*, 439 Mich 650, 670-674; 487 NW2d 166 (1992); see US Const, Am 14. While equal protection generally requires that similarly situated individuals be treated similarly, "it is well established that even if a law treats groups of people differently, it will not necessarily violate the guarantee of equal protection." *Id.* at 661. Accordingly, not all discriminatory classifications will be held to violate the Equal Protection Clause. *Harvey v State*, 469 Mich 1, 6-7; 664 NW2d 767 (2003). Unless the action infringes on a fundamental right, discriminates against a "suspect" classification (such as race, ethnicity or national origin), or discriminates against a "quasi-suspect" classification invoking intermediate scrutiny (gender or illegitimacy), the state action is analyzed under rational basis review. *Id.* at 7, 12.

"[M]arital status classifications have never been accorded any heightened scrutiny under the Equal Protection Clause," as it is not a suspect class and the state may have good reason for discriminating on the basis of marital status. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 328 n 34; 806 NW2d 683 (2011). Indeed, "[s]uspect classes are those that have been subjected to a history of purposeful unequal treatment, or have been relegated to a position of political powerlessness requiring protection." *Wysocki v Kivi*, 248 Mich App 346, 366; 639 NW2d 572 (2001). Although the right to marry is a protected fundamental right, the OEAI benefits policy in no way impairs public employees' right to marry. *Loving v Virginia*, 388 US 1, 12; 87 S Ct 1817; 18 L Ed 2d 1010 (1967); *Zablocki v Redhail*, 434 US 374, 383-387; 98 S Ct 673; 54 L Ed 2d 618 (1978). The Civil Rights Act (CRA), MCL 37.2101 *et seq.*, did not expand the list of suspect classifications granting heightened scrutiny in the Michigan Equal Protection Clause to include marital status. *Dep't of Civil Rights ex rel Forton v Waterford Twp of Parks and Recreation*, 425 Mich 173, 189-190; 387 NW2d 821 (1986) (noting that CRA expanded the scope, not the standard, of the guarantees in the Equal Protection Clause).

[2] For example, an employee could share benefits with a same-sex boyfriend or girlfriend, but the same employee could also share those benefits with an opposite-sex boyfriend or girlfriend, or with a nonromantic best friend, or a mere housemate. We would not think it impossible, or even unlikely, that any two people of any sex might share a friendship close enough to give rise to a shared domicile and a desire to share health care benefits. Considering the present state of the economy and prevalence of shared housing for reasons that may involve simple economics, we think it unreasonable to predict same-sex domestic partnerships to necessarily be the most-benefitted group under this policy.

Likewise, the United States Supreme Court has acknowledged several familial association rights that were protected under the federal Constitution, including: (1) the right to parent children without interference from the state; (2) the right of family members to reside together; and (3) the right to procreate. *Zablocki*, 434 US at 386; *Moore v City of East Cleveland, Ohio*, 431 US 494, 504-506; 97 S Ct 1932; 52 L Ed 2d 531 (1977); *Meyer v Nebraska*, 262 US 390, 402-403; 43 S Ct 625; 67 L Ed 1042 (1923). However, close relatives are not a suspect/quasi-suspect classification that warrants heightened judicial scrutiny. *Lyng v Castillo*, 477 US 635, 638; 106 S Ct 2727; 91 L Ed 2d 527 (1986). The *Lyng* Court also held that discriminatory economic policies against close relatives regarding the provision of benefits does not implicate fundamental rights, unless doing so directly and substantially prevents family members from living together. *Id.* at 638-639. Additionally, close relatives are not a class of persons that has suffered a history of "purposeful unequal treatment," or are in "a position of political powerlessness." *Wysocki*, 248 Mich App at 366.

The policy at issue is strictly gender-neutral and does not in any way implicate race, ethnicity, national origin, or illegitimacy. The policy does not invoke any fundamental right. Consequently, we review defendants' policy under rational basis review.

Plaintiff argues that the policy at issue here violates equal protection by excluding married employees from sharing their benefits with persons other than their spouses and by excluding employees from sharing their benefits with blood relatives. Quite bluntly, we agree wholeheartedly that those restrictions strike us as absurd and unfair. The restrictions excluding married employees from sharing their benefits with persons other than their spouses and excluding employees from sharing their benefits with blood relatives strike us as ridiculous. For example, at oral argument, the situation was posed that an employee could share his or her benefits with a fraternity brother but not an actual brother. Likewise, if a married employee's spouse has his or her own health benefits, that employee would be precluded from sharing his or her benefits with, say, an adult child, or, for that matter, anyone else. Indeed, the assistant attorney general conceded at oral argument that if "everyone was in," the policy would be acceptable. These restrictions are nothing short of ridiculous.

However, our subjective determination of absurdity is not the standard by which we review a policy for an equal protection violation. Under the rational basis standard of review, a state's action will be upheld so long as it is rationally related to advancing a legitimate state purpose. *Id.* at 7. Because statutes or rules are presumed constitutional under rational basis review, the challenger has the burden of showing the action was arbitrary and rationally unrelated to the state interest. *Id.* The state actor's actual motivations are irrelevant, and the action will be constitutional so long as it is supported by "any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Id.*

Significantly, "[t]o prevail under this highly deferential standard of review, a challenger must show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute." *People v Idziak*, 484 Mich 549, 571; 773 NW2d 616 (2009) (quotations omitted). "Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice." *Id.* (quotation omitted). Rather, "[a] rational basis exists for the legislation when any set of facts, either known or that can be reasonably conceived, justifies

the discrimination." *Morales v Parole Bd*, 260 Mich App 29, 51; 676 NW2d 221 (2003). Such finding may be based on "rational speculation unsupported by evidence or empirical data." *FCC v Beach Communications, Inc*, 508 US 307, 316; 113 S Ct 2096; 124 L.Ed.2d 211 (1993). "[I]n other words, the challenger must 'negative every conceivable basis which might support' the legislation." *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 558; 629 NW2d 402 (2001), quoting *Lehnhausen v Lake Shore Auto Parts Co*, 410 US 356, 364; 93 S Ct 1001; 35 L Ed 2d 351 (1973) (emphasis added). Consequently, our subjective assessment of a policy as seemingly absurd is irrelevant: the question is only whether the policy could plausibly be said to possibly advance any legitimate government interest, an exceedingly low standard.

Under this exceedingly low standard, it is not the place of the courts to second-guess the "wisdom, need, or appropriateness of the" state action. *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174 (2004). As noted above, this is even more important because we agree that defendants had to "draw the line" at some point. *Fritz*, 449 US at 179. Defendants' policy was crafted through negotiation and bargaining with the unions, and pursuant to the negotiations the policy excluded married persons and close relatives. The exclusion of the cited groups from the OEAI benefits policy does not clearly demonstrate that the policy is arbitrary or unrelated to the state's interests. The policy appears to serve the negotiated, bargained-for needs of the individuals affected, and so we conclude that the policy passes muster under rational basis scrutiny. We do hope, however, that defendants will see fit and be able to strengthen the policy by eliminating the exceptions we have discussed.[3]

Plaintiff also contends that defendants lack the constitutional authority to implement the OEAI benefits policy. We disagree.

The Michigan Constitution delegates plenary and exclusive authority to defendants in order to set compensation and conditions of employment for public employees. Const 1963, art 11, § 5; *AFSCME Council 25 v State Employees Retirement Sys*, 294 Mich App 1, 15; 818 NW2d 337 (2011). Defendants' authority to set compensation is within the scope of their constitutionally delegated authority, which is only subject to other constitutional limitations, like equal protection, that were established when the Michigan Constitution was adopted. *AFSCME Council 25*, 294 Mich App at 8; *Hanlon v Civil Serv Comm*, 253 Mich App 710, 718; 660 NW2d 74 (2002).; Const 1963. When the people of Michigan ratified the Michigan Constitution in 1963, the rights guaranteed under the Equal Protection Clause did not include "marital status," so this limitation is not constitutionally binding on defendants. Because the CRA is a matter of statutory law, it lacks the authority to impair defendants' authority. MCL 37.2102, 1976 PA 453. Holding otherwise would allow the Legislature to circumvent the Michigan Constitution and bypass defendants' constitutional mandate.

[3] It is worth pointing out that the restriction on OEAIs being co-residents of the employees has not been challenged as in any way unreasonable. One could make the argument, at least in theory, that the policy discriminates against people in long-distance relationships. However, again, defendants do have to "draw the line" somewhere.

Plaintiff also argues that the OEAI benefits do not constitute "compensation" under Const 1963, art 11, § 5. This Court has defined "compensation" under this constitutional provision as meaning "something given or received for services, debt, loss, injury, etc." *AFSCME Council 25*, 294 Mich App at 23. Although our Supreme Court has never decided whether health insurance qualifies as compensation, it has held in a different context that some fringe benefits (including pensions, clothing allowances, and life insurance premiums) are "compensation" because they were "not a gratuity, but a part of the stipulated compensation" pursuant to their contracts. *Kane v City of Flint*, 342 Mich 74, 80-83; 69 NW2d 156 (1955).

This Court previously held in an older case that "hospitalization, medical, and dental insurance should not be included" as compensation. *Gentile v Detroit*, 139 Mich App 608, 618; 362 NW2d 848 (1984). Although this decision is no longer binding on this Court pursuant to MCR 7.215(J)(1), it is nevertheless persuasive in terms of interpreting the meaning of "compensation." However, both *Kane* and *Gentile* have limited value in resolving this legal question, as those cases involved the definition of "compensation" as used in their respective city ordinances. *Kane*, 342 Mich at 76; *Gentile*, 139 Mich App at 612-613.

Relying on the only published authority in Michigan interpreting the meaning of "compensation" in our Constitution, the OEAI benefits qualify as compensation because they are provided in exchange for services rendered by public employees. This is consistent with the dictionary definition found in Random House Webster's College Dictionary (2001 ed) of "something given or received for services, debt, loss, injury, etc." It is also consistent with the dictionary definition found in Black's Law Dictionary (8th ed) of "[r]enumeration and other benefits received in return for services rendered; esp., salary or wages" but noting that such disparate things as stock options, profit sharing, vacations, medical benefits, and disability can also be compensation. We perceive no reason to artificially limit the definition. These benefits were obviously of value to the employees, because they were specifically negotiated for by the unions—consequently, they certainly appear to be part of what the workers expect to receive in exchange for their labor. As noted earlier, it is reasonable to believe that eligibility in the SHP would attract potential employees or retain existing ones. Therefore, these benefits are not gratuities or perks, but are rather compensation for services rendered.

In summary, we find that the benefits-sharing policy at issue in this case is within defendants' authority to implement, does not violate equal protection and does not violate the Marriage Amendment. The trial court is therefore affirmed.

/s/ Amy Ronayne Krause
/s/ Stephen L. Borrello