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CLERK U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA

**DAVID A. JOHNSON, on his own behalf  
and on behalf of all others similarly  
situated,**

**PLAINTIFF,**

**VS.**

**UNIVERSITY OF IOWA, STATE BOARD  
OF REGENTS, DAVID J. SKORTON,  
M.D., in his official capacity, DOUGLAS  
K. TRUE, in his official capacity, and  
SUSAN C. BUCKLEY, in her official  
capacity,**

**DEFENDANTS.**

**CIV. No. 3 03 CV10062**

**PLAINTIFF'S BRIEF  
IN SUPPORT OF  
MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT RE:  
LIABILITY**

COMES NOW Plaintiff, David A. Johnson, by and through his  
attorney, James C. Larew, pursuant to F.R.Civ.P. 56 and L.R. 56.1, and for  
his BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY  
JUDGMENT RE: LIABILITY, hereby states as follows:

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## I. INTRODUCTION

The University of Iowa, at Section 22.8 of its *Operations Manual*, sets forth the following Parental Leave Policy:

### 22.8 PARENTAL LEAVE POLICY

a. Purpose. *To permit parents who have care giving responsibilities to have time off to spend with a child newly added to the family and, to the extent permitted by state law, to be paid during such leave. To adapt an employee's work schedule and/or duties to help reduce conflict with parental obligations.*

b. *Entitlement to Leave.*

(1) Twelve-Month Faculty, Professional, Scientific, and Non-Organized Merit System Staff.

(a) *Biological mothers* are entitled to leave for any period of pregnancy-related temporary disability, *to be charged against sick leave*. Based on current medical practice, a leave of six weeks or less would not require the employee to provide disability documentation. If an employee's accumulated sick leave is insufficient to cover the period of disability, the employee will, at the employee's request, be granted a leave of absence without pay. Any request for absence beyond the period of disability is considered as a leave of absence without pay or as vacation.

(b) *A newly adoptive parent, including a domestic partner, is entitled to one week (5 days) of paid adoption leave to be charged against accrued sick leave*. Departments are encouraged to arrange for additional leave as necessary. Departments should work with prospective adoptive parents seeking to adopt through an adoption agency with specific requirements for parental leave, to the extent the adoption leave is not sufficient to undertake an

adoption. Time not charged to accrued sick leave may be charged to accrued vacation or taken as leave without pay.

(Emphasis added.) (Exhibit 7, App. 141-143)

Plaintiff David A. Johnson (hereafter, sometimes, "Mr. Johnson"), in his capacity as Clerk IV employee of the Office of Registrar of the University of Iowa, is subject to the terms and conditions of the Parental Leave Policy. He is lawfully married to a woman, Jennie L. Embree, who is also an employee of the University of Iowa. Her work as a Program Assistant at the College of Nursing is also governed by the terms and conditions of the *Operations Manual*, including its Parental Leave Policy. (Exhibit 1, Affidavit of David A. Johnson, ¶¶ 1-10, App. 2-3)

In the Fall of 2002, in anticipation of the arrival of their first child, Mr. Johnson and Ms. Embree referred to the *Operations Manual* and began planning how they would be able to share in their parenting activities and duties. Upon the birth of their child, Ms. Embree would be a half-time employee of the University of Iowa, working 20 hours per week; Mr. Johnson would be a full time employee of the institution. (Exhibit 1, Affidavit of David A. Johnson, ¶¶ 10-12, App. 3)

The *Operations Manual* clearly directs that married employees of the University of Iowa are allowed to *share*, between them, a maximum of 12 weeks of leave time upon the birth of a child, an entitlement that is guaranteed under the Federal Family and Medical Leave Act (FMLA). The

applicable provisions in the *Operations Manual*, however, are less-than-clear as to how two these University of Iowa employees—one of them full-time, the other of them part-time—were to make arrangements to share the combined 12-week leave period allowed to them. However, Mr. Johnson and Ms. Embree both assumed, given the express language of the University of Iowa's Parental Leave Policy, that each of them, as parents, would be able to use their respective accrued paid sick leave hours for the purpose of taking time to spend with their newborn child. (Exhibit 1, Affidavit of David A. Johnson, ¶¶ 11-12, App. 3)

In October, 2002, Mr. Johnson attended a course taught by employees of the University of Iowa's Human Resources Department regarding leave policies. He learned, then, and for the first time, that the instructors interpreted the Family Leave Policy to mean that *biological* fathers of children newly added to families were *precluded* from using accrued paid sick leave hours for parental leave purposes. All other parents except biological fathers appeared to have this benefit of employment: they could use accrued paid sick leave to have time off to spend with their children. (Exhibit 1, Affidavit of David A. Johnson, ¶¶ 13-15, App. 3-4)

Thinking that the course instructors had made a mistake in interpreting the Parental Leave Policy, Mr. Johnson directed written inquiries to a number of persons at the University of Iowa, starting with its

Interim President, Willard L. Boyd. (**Exhibit 17**, E-Mail from David A. Johnson to Willard L. Boyd, October 15, 2002, App. 194)

The responses Mr. Johnson received from the University of Iowa officials affirmed the initial opinions of the Human Resources Department course instructors' opinions: that *biological fathers*, solely due to their status as *biological fathers*, were, and, apparently, alone of all types of parents, precluded from using accrued paid sick leave to have time off to spend with a child newly added to the family, notwithstanding the stated purpose of the Parental Leave Policy—to allow parents to have time with children newly added to their families—and notwithstanding the fact that no state law prevented the use of accrued paid sick leave for this purpose. (**Exhibit 1**, Affidavit of David A. Johnson, ¶¶ 17-20, App. 5; **Exhibit 15**, E-Mail from Jan Gorman to David Johnson, October 22, 2002, App. 189; **Exhibit 18**, E-Mail from David A. Johnson to Susan C. Buckley, October 23, 2002 and E-Mail from Susan C. Buckley to David A. Johnson, App. 195-196)

Indeed, it is apparently undisputed that all parents—whether they be single or married or in domestic partnerships, whether their children be biological or adoptive—except biological fathers, are conferred this benefit under the Parental Leave Policy: the use of at least five days' paid accrued sick leave to permit them to have time off to spend with a child newly added to their respective families.

For example, according to Defendants, the following parent-employees, *as individuals*, whose terms and conditions of employment are subject to Chapter 22 of the *Operations Manual*, are eligible to use accrued paid sick leave for Parental Leave to have time off to spend with a child newly added to the family if the employees have care giving responsibilities:

- Biological mothers, whether single, married, cross-gendered or a domestic partner (**Exhibit 2**, Deposition of David Skorton, MD, 33:16-25, 34:1-25, 35:1-9, App. 22)
- Adoptive mothers, whether single, married, cross-gendered or a domestic partner. (**Exhibit 2**, Deposition of David Skorton, MD, 13-15, 23:19-25, 24:1-10, 32:23-25, 33:1-8, App. 19-22)
- Adoptive fathers, whether single, married, cross-gendered or a domestic partner. (**Exhibit 2**, Deposition of David Skorton, MD, 29:20-25, 30:1-7, 33:9-12, App. 21-22)
- Parents who assume parental rights by surrogacy, if they are not the biological father of the child. (**Exhibit 2**, Deposition of David Skorton, MD, 24:20-25 to 25:1-4, App. 19-20)

Further, as intended by the University of Iowa, and as applied by it, the following parent-employees, *each as part of a couple*, whose terms and conditions of employment are *each* subject to Chapter 22 of the *Operations Manual*, are *each* eligible to his or her own respective use accrued paid sick

leave for Parental Leave to have time off to spend with a child newly added to the family if each such employee has care giving responsibilities:

- A biological mother and her domestic partner who adopts the biological mother's child each are entitled to the use of accrued paid sick leave for Parental Leave (**Exhibit 2**, Deposition of David Skorton, MD, 44:8-17, App. 24).
- Both female domestic partners in a domestic partnership who adopt a child from a third party are entitled to their separate, respective use of accrued sick leave for Parental Leave (**Exhibit 2**, Deposition of David Skorton, MD, 44:8-17, App. 24, **Exhibit 9**, Deposition of Lee Anna Clark, 33-39, App. 160-161)
- Both male domestic partners in a domestic partnership who adopt a child from a third party are entitled to their separate, respective use of accrued sick leave for Parental Leave. (By contrast, if male domestic partners were to have a child through a surrogacy, and if the child was the biological offspring of one of them, then the biological partner of the surrogate child would not be allowed use of accrued sick leave for Parental Leave but the other domestic partner would be allowed the use of such Parental Leave benefits.) (**Exhibit 2**, Deposition of David Skorton, M.D., 44:8-17, App. 24).

The Parental Leave Policy on its face, as applied and as intended by the University of Iowa, excludes *biological fathers*, in all instances: whether

they be single, married or a domestic partner. (**Exhibit 2**, Deposition of David Skorton, MD, 43: 14-22, 44:1-17, 45:17-25, 46:1-5, App. 24-25; **Exhibit 9**, Deposition of Lee Anna Clark, 32:10-19, 36:6-25, 37-38, App. 159-161)

For a University of Iowa employee such as Mr. Johnson, this exclusion of employment benefits otherwise allowed for *parents* is based *solely* on that person's status as a *biological father*, as noted by University of Iowa President David Skorton, in his sworn deposition:

Q. You would agree with me that on its face, and as applied, that the parental leave policy confers benefits, or withhold benefits, to children and families based upon whether the father of the child whose birth is the cause of the parental leave is the biological father or not?

A. Yes.

Q. As far as you are familiar with the case, Dr. Skorton, are you aware of any reason other than the fact that David Johnson was a biological father of his daughter that he was denied the ability to use accrued sick leave benefits?

A. No.

Q. That was the sole reason, as far as you know?

A. As far as I know.

Q. You would agree with me that except for biological fathers, all other parent employees of the University of Iowa who are biological or adoptive parents of newborns, and who are subject to the provisions of the parental leave policy as set forth in section 22.8, are eligible to apply five days of accrued sick leave to the parental leave?

A. I believe that is correct.

(**Exhibit 2**, Deposition of David Skorton, MD, 43:13-25, 44:1-17, App. 24)

The disparity of treatment is not simply one between biological fathers, on the one hand, and adoptive parents, on the other hand, but, rather, it is a disparity of treatment under which biological parents are treated differently in their respective roles as mothers and fathers of children, as noted by President David Skorton, in his sworn deposition:

Q. Would you agree with me that women who reproduce a child, but not men who reproduce a child, are conferred the benefits as provided under the parental leave policy to care for that child as set forth in operations manual 22.8?

A. Yes.

Q. Would you agree that under the University of Iowa parental leave policy biological mothers, adoptive mothers, and adoptive fathers are conferred the benefit of using accrued sick leave towards paid leave to care for a child?

A. Yes.

(Exhibit 2, Deposition of David Skorton, 45:17-25, 46:1-5, App. 25)

Upon the birth of their child, consistent with the purpose and language of the Parental Leave Policy, and as approved by Human Resources personnel in the College of Nursing in advance of that event, Mr. Johnson's spouse, Ms. Embree, took four weeks of maternity leave, from her 20-hour per week job, drawing on her own accrued paid sick leave 20 hours per week for that purpose. Her employer required Ms. Embree to obtain a medical release to return to work (despite the language of the University leave policy to the contrary), five weeks post-partum, and she did so. Ms. Embree returned to work in the fifth week post-partum, on a part time (ten hours per week)

basis. She was, in addition, compensated ten hours per week for parental leave for that week. The same arrangement applied for the sixth week post-partum. On the seventh week after the birth of their child, Ms. Embree returned to work and took no further paid Parental Leave time. She has remained as a Program Assistant, working twenty hours per week, from that date until the present moment. (**Exhibit 1**, Affidavit of David A. Johnson, ¶¶ 23-24, App. 6-7)

By contrast, as to Ms. Embree's husband and the child's father, Mr. Johnson, the University of Iowa's preclusion of his use of *any* of his accrued 80 hours of paid sick leave meant that when he took two weeks' leave from his full time job upon the birth of his daughter to spend time with the child and to assist his wife in fulfilling their parenting duties, it was on an unpaid basis. (**Exhibit 1**, Affidavit of David A. Johnson, ¶ 25, App. 7)

Mr. Johnson's multiple informal, written approaches to the University of Iowa, requesting a change in this strange, unlawful policy produced no results. He filed the present action, as a consequence, both in an effort to obtain relief for his family, and also to correct a systemic injustice that adversely affects all similarly situated biological fathers and their families.

In response to Defendants' deprivation of an earned benefit of his employment that is allowed to all other University of Iowa employees who become parents, except for biological fathers, Mr. Johnson advances Federal and pendent State law claims. Simply stated, as a parent, pursuant to the

express terms and Purpose of the University of Iowa's Parental Leave Policy, Mr. Johnson and other biological fathers who are similarly situated should be allowed to use no less than five days (forty hours) of paid accrued sick leave to spend time with children who are newly added to their families: the same amount of time allowed to parents who adopt children.

Mr. Johnson believes that Defendants' conduct violates both Federal and State Constitutional and statutory provisions. Under Federal law, Mr. Johnson claims violations of Title VII of the Civil Rights Act of 1964, as amended, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Because Defendants' conduct has been intentional and has persevered even after notice has been provided concerning the discrimination against biological fathers, Mr. Johnson has also advanced a claim under 42 U.S.C. § 1983. Pendent State law claims include ones alleging violations of Iowa's Civil Rights statute, Iowa Code Chapter 216, and the Equal Protection Clause of the Constitution of the State of Iowa.

Mr. Johnson avers that as to each and every one of his pending claims there are no genuinely disputed facts regarding issues of liability and, for that reason, he seeks summary judgment as to liability in his favor, against all named Defendants.

As to the issue of damages, Mr. Johnson concedes that there are matters, on at least two separate fronts, that are not appropriately subject to

summary judgment consideration. First, as to his own claims, Mr. Johnson seeks, in addition to payment of wages and benefits for 40 hours, monetary damages for the deprivation suffered by him. A fact finder, after hearing all of the relevant evidence, will need to make the damages determination. Second, the Court certified a class action in this matter in response to Mr. Johnson's efforts to obtain relief for similarly situated biological fathers. Because the exact membership of that class has not yet been determined, Mr. Johnson believes that the issue of damages in connection with the class cannot be ascertained as a part of his present Motion for Partial Summary Judgment Re: Liability.

Further, as a part of this litigation, Mr. Johnson seeks an Order enjoining the University of Iowa from further actions, under its Parental Leave Policy, to provide to biological fathers who are subject to the Parental Leave Policy the same right to use 40 hours' paid accrued sick leave upon the arrival of newborns that is provided to all other similarly situated parents who are not biological fathers. However, the claim for injunctive relief is not a part of this Motion for Partial Summary Judgment.

## II. ARGUMENT

### A. SUMMARY JUDGMENT IS APPROPRIATE TO DETERMINE ALL LIABILITY ISSUES IN THIS CASE

Plaintiff David A. Johnson seeks summary judgment as to all issues of liability, under all Federal and State law claims in this litigation. Rule 56, in pertinent part, requires that,

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c) (emphasis added).

When applying these standards, “the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but rather is to determine whether there are genuine issues for trial.” Inglis v. Buena Vista Univ., 235 F. Supp. 2d 1009 , 1016-17 (N.D. Iowa 2002); Quick v. Donaldson Co., 90 F.3d 1372, 1376-77 (8th Cir. 1996); Johnson v. Enron Corp., 906 F.2d 1234, 1237 (8th Cir. 1990).

An issue of material fact is genuine if it has a real basis in the record. Hartnagel v. Norman, 953 F.2d 394 (8th Cir. 1992)(citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)); accord Lockhart v. Cedar Rapids Comm. Sch. Dist., 963 F.

Supp. 805, 814 n.3 (N.D. Iowa 1997)(citing *Matsushita*, 475 U.S. at 586-87). As to whether a factual dispute is "material," the United States Supreme Court has explained, "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, (1986).

Initially, "the moving party bears the initial responsibility of informing the court of the basis for its motion and identifying the parts of the record showing a "lack of a genuine issue." Inglis v. Buena Vista Univ., 235 F. Supp. 2d 1009 , 1016-17 (N.D. Iowa 2002 (citing Hartnagel, 953 F.2d at 395; *see also* Rose-Maston v. NME Hospitals, Inc., 133 F.3d 1104, 1107 (8th Cir. 1998). When the moving party meets this burden, "the party opposing summary judgment 'must do more than simply show there is some metaphysical doubt as to the material facts.'" Inglis, 235 F.Supp. at 1016 (citing Matsushita, 475 U.S. at 586. The opposing party is instead required to go beyond the pleadings and by "depositions, answers to interrogatories, and admissions on file," and affidavits and the designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Rabushka ex. rel. United States v. Crane Co., 122 F.3d 559, 562 (8th Cir. 1997).

If the opposing party fails to make a sufficient showing of an essential element of a claim for which that party has the burden of proof, then the

movant is "entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323; *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997).

**B. "GENDER-PLUS" DISCRIMINATION IS PROHIBITED BY LAW, UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND UNDER 42 U.S.C. 1983**

The term "gender plus" or "sex plus," "refers to a policy or practice by which an employer classifies employees on the basis of sex *plus* another characteristic." 1 BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 456 (3<sup>rd</sup> ed. 1996). In cases in which an employer discriminates "because of" gender and also another characteristic, "the employer does not discriminate against the class of men or women as a whole but, rather, treats differently a subclass of men or women." *Id.* The legal theory is applied, in appropriate cases, to gender-based employment discrimination claims arising under Title VII, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and under 42 U.S.C. 1983.

The relevant Equal Protection concern in these cases is not whether a claim is characterized as "sex plus" or "gender plus," but rather, whether the plaintiff provides evidence of purposefully sex-discriminatory acts." *Back*, 365 F.3d at 118-119 (footnote omitted)("The term "sex plus" or "gender plus" is

simply a heuristic. It is, in other words, a judicial convenience developed in the context of Title VII to affirm that plaintiffs can, under certain circumstances, survive summary judgment even when not all members of a disfavored class are discriminated against.” Back, 365 F.3d at 118 (finding “sex plus” discrimination is “certainly actionable in a § 1983 case.”); *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975)(holding that a statute treating widowers less favorably than widows violates the Equal Protection Clause). The Equal Protection Clause “forbids sex discrimination no matter how it is labeled.” Back, 365 F.3d at 118

Parental Leave Policy adopted by the University of Iowa and State Board of Regents and developed and administered by University of Iowa officials denies biological fathers the right to use any of their accrued paid sick leave for the purpose of having time off to spend with children who are newly added to their families. Defendants appear further to concede that no state law precludes the use of accrued paid sick leave by biological parents for this purpose.

Defendants appear to contend, despite these uncontested facts, that the Parental Leave Policy is not discriminatory on the basis of sex because adoptive fathers, i.e. other men, are provided benefits under the policy. Such a position, if this is the one maintained by Defendants, belies the fact that an employer need not discriminate against all members of a gender in order for actions that treat subclasses of men and women differently to be unlawful.

Phillips v. Martin Marietta Corp., 400 U.S. 542, 544, 91 S. Ct. 496, 27 L. Ed. 2d 613 (1971); Fisher v. Vassar College, 70 F.3d 1420, 1448 (2d Cir. 1995) (Fisher I) ("The Supreme Court has adopted the proposition that sex considered in conjunction with a second characteristic -- "sex plus" -- can delineate a "protected group" and can therefore serve as the basis for a Title VII suit."), on reh'g in banc, 114 F.3d 1332 (2d Cir. 1997), cert. denied, 522 U.S. 1075, 118 S. Ct. 851, 139 L. Ed. 2d 752 (1998).

So-called "sex plus" discrimination has been widely recognized by the courts, pursuant to both Title VII and Section 1983, as viable legal theories, in appropriate cases. Smith v. AVSC Int'l, Inc., 148 F. Supp. 2d 302 (S.D. N.Y. 2001). The "sex plus" or "gender plus" theory of recovery emerged out of the Phillips ruling, which upheld a sex discrimination challenge to an employer policy which singled out a particular sub-class of women—women with pre-school aged children—for adverse treatment. Courts have recognized this theory of discrimination in a variety of instances and contexts. See Sprogis v. United Airlines, 444 F.2d 1194, 1194-1198 (7th Cir. 1971)(finding challenge to employer policy requiring women to be unmarried in order to be employed was actionable under Title VII); Jefferies v. Harris Cty. Community Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980) (recognizing sex plus race rendered black women a protected subclass under Title VII and agreeing that "an employer should not escape from liability for discrimination against black females by a showing that it does not

discriminate against blacks and that it does not discriminate against females. . . [D]iscrimination against black females can exist even in the absence of discrimination against black men or white women.”); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987)(finding sex plus race claim actionable under Title VII); Hall v. Missouri Highway and Transportation Commission, 995 F. Supp. 1001, 1005 (E.D. Mo. 1998)(acknowledging the validity of a sex-plus age theory of liability under Title VII); Graham v. Bendix Corp., 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) (same).

In Connecticut v. Teal, 457 U.S. 440, 455 (1982), the Supreme Court stated that “Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired.” The Court emphasized that “Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.” Id. (emphasis added). Thus, the “sex plus” conceptualization of liability is necessary to effectuate the purpose of Title VII and Section 1983 based discrimination claims because “free to add non-sex factors, the rankest sort of discrimination . . . can be worked by employers.” Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown, C.J., dissenting from denial of rehearing en banc). It is apparent a long history of employer practices that “any meaningful regime of anti-discrimination law must encompass such claims.” Back, 365 F.3d at 119.

To make out a claim for the violation of equal protection on the basis of sex, the plaintiff must prove that he or she “suffered purposeful or intentional discrimination on the basis of gender.” Back, 365 F.3d at 118; *see also* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-65 (1977). Purposeful or intentional discrimination does not require a showing that the discrimination was exclusively on the basis of sex, however. To be actionable, “sex plus” discrimination must be premised on either a demonstration by the plaintiff class of a corresponding subclass of members of the opposite sex or concern a constitutionally protected activity such as marriage or childrearing. Jefferies v. Harris County Community Action Association, 615 F.2d 1025, 1032-1035 (5<sup>th</sup> Cir. 1980); Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7<sup>th</sup> Cir. 1971).

In this case the challenged Parental leave Policy discriminates on the basis of a “sex plus” characteristic—namely, sex plus biological parenthood and a fundamental right—namely the right of a parent to care for his child, maintain and develop a relationship with his child, and to the companionship of his child.

**C. PLAINTIFF DAVID A JOHNSON IS ENTITLED TO PARTIAL SUMMARY JUDGMENT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, BECAUSE THE UNIVERSITY OF IOWA’S PARENTAL LEAVE POLICY, BOTH FACIALLY AND AS APPLIED TO HIM AND TO SIMILARLY SITUATED BIOLOGICAL FATHERS, UNLAWFULLY DISCRIMINATES ON THE BASIS OF GENDER PLUS PARENTING STATUS**

Section 703(a) of the Civil Rights Act of 1964, as amended at 42 U. S. C. § 2000e-2(a) (Title (VII)), “prohibits sex-based classifications in terms and conditions of employment, in hiring and discharging decisions, and in other employment decisions that adversely affect an employee's status.” Int'l Union, United Auto Workers. v. Johnson Controls, 499 U.S. 187, 197-200 (1991). When a discriminatory policy is the vehicle of the adverse employment activity, direct evidence of discrimination is present. Id. When direct evidence of discrimination is present, the burden shifting paradigm known as the “McDonnell Douglas” test is *inapplicable*. Teamsters v. United States, 431 U.S. 324, 358, n.44 (1977); Trans World Airlines, Inc. v. Thurston Et Al. 469 U.S. 111, 121-122 (1985).

The “sex plus” theory of discrimination has been utilized by courts charged with determining the legality of leave policies which discriminate between different subgroups of men and women under Title VII of the Civil Rights Act of 1964, as amended. In Shafer v. Board of Public Education of the School Dist. of Pittsburgh, 903 F.2d 243 (3<sup>rd</sup> Cir. 1990), the Board of Education pursuant to a collective bargaining agreement, provided a leave policy which allowed female employees to take “1) a period of sick leave combined with an unpaid leave for childbearing or childrearing for a maximum of one year, or 2) maternity leave not exceeding one year” without a showing of a disability related to pregnancy, i.e. did not impose a requirement that the leave be related to pregnancy. Shafer, 903 F.3d at 248.

The Board of Education denied a three-month unpaid leave request by a male employee to care for his son pursuant to this policy. Upholding the “sex plus” challenge made by the male employee to the policy, the Court held as a matter of law that the leave policy violated Title VII. In support of this conclusion, the court found that the leave policy was not exclusively for the purpose of allowing women to recover from the birthing process, but was explicitly for child rearing or childbearing, and that the policy did not impose a requirement that the “female be disabled in order to obtain the unpaid leave.” *Id.* These facts rendered the leave policy discriminatory against males with child care responsibilities on the basis of sex and “per se void for any leave granted beyond the period of actual physical disability on account of pregnancy, childbirth or related conditions.” *Id.*

Mr. Johnson brings to this Court a factual record which demonstrates, with direct evidence, that he, as a biological father, along with all others similarly situated to him as class members, have been and continue to be discriminated against as a matter of official University of Iowa policy and practice. Under the terms of the Parental Leave Policy, *Operations Manual* Section 22.8, Mr. Johnson should have been allowed to use up to forty hours of his accrued paid sick leave—an amount allowed to all adoptive parents—for the purpose of spending time with and parenting his child. After all, on November 16, 2002, the date of his child’s birth, Mr. Johnson was a University of Iowa merit, non-union employee who, while in the service of his

employer, had earned more than eighty hours of accrued sick leave. As of that date, he was a parent with care giving responsibilities.

Defendants, under the University of Iowa *Operations Manual*, Section 22.8, the "Parental Leave Policy," expressly exclude Mr. Johnson and other similarly-situated biological fathers from access to earned and accrued paid sick leave benefits referred to in that policy—a policy whose *express Purpose* is to support parental relationships with children—on the basis of their *gender*, in conjunction with their status as *biological fathers*. The same benefit is offered to all other similarly situated parents who are not biological fathers. Specifically, on the face of the policy and as applied, biological fathers as a class are excluded entirely from the usage of accrued sick leave for the purpose of child care or childrearing for those children who are newly added to families, while biological mothers as well as adoptive fathers and mothers, that is, all other parents, are allowed the usage of their accrued sick leave for this purpose.

Because the stated Purpose of the Parental Leave Policy is to provide all *parents who have care giving responsibilities to have time off to spend with a child newly added to the family*, and because there is no state law precluding a parent to be paid during such leave, Mr. Johnson, upon the birth of his daughter, was qualified for parental leave, and, in turn, should have been allowed to utilize up to four hours of his accrued paid sick leave for the purpose of caring for and bonding with his newborn child.

The University of Iowa, however, denied Mr. Johnson the usage of his accrued paid sick leave for the purposes described by the Parental Leave Policy—that is, having time to spend with his child and assuming care giving responsibilities for his child. The denial was based solely on Mr. Johnson's status a biological father of a newborn child.

Such a Policy, as interpreted and applied by University of Iowa administrators, is not neutral. It does not merely have a discriminatory effect on male employees. It classifies persons on the basis of gender and reproductive capacity, and uses that classification scheme as a basis of denying one classification of parent benefits of employment allowed to other classifications. It is therefore, under Title VII, directly discriminatory.

Abraham v. Graphic Arts International Union, 660 F.2d 811, 819 (D.C.C. 1981) (“An employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy it does have. Title VII outlaws employment discrimination traceable to an employee's gender, and it takes little imagination to see an omission may in particular circumstances be as invidious as positive action.”)

Furthermore, even if it could be said that Defendants lacked of any ill-will or animus towards Mr. Johnson, specifically, or towards biological fathers, as a category of parents, such a fact does not excuse their exclusion from benefits to those who are similarly situated in terms of their reproductive capacity based upon their reproductive capacity. Concluding

that a challenged policy was not neutral because it did not apply to the reproductive capacity of the company's male employees in the same way as it applied to that of female employees the United States Supreme Court, in Int'l Union, United Auto v. Johnson Controls, 499 U.S. 187, 199 (1991), forcefully relegated the motivation for the discriminatory policy irrelevant to a Title VII analysis:

[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.

Int'l Union, United Auto v. Johnson Controls, 499 U.S. 187, 199-200 (1991).

The present facts, and their consequences, are strikingly analogous to prior cases in which employers have been precluded, as a matter of law, from implementing policies whose explicit terms result in disparate gender-based discrimination. The *Operations Manual*, Section 22.8, the Parental Leave Policy, provides explicitly that the leave allowances permitted under it are for the purpose of assisting parents in their *childrearing* capacities. The Policy is not limited to pregnancy related disability. In fact, the provision defining the terms of leave for biological mothers under this Policy does not require *any* showing of continuing disability, nor does it require the more administratively feasible demonstration of a woman's fitness to return to work prior to the six week "disability" allowance. The Policy, by its own

terms, is, instead, for the explicit and primary purpose of providing paid leave to parents with care giving responsibilities.

It cannot be genuinely disputed that biological fathers are parents. Nor can it be genuinely disputed, in this instance, that Mr. Johnson, upon the birth of his daughter, had care-giving responsibilities. The Policy, as drafted and as applied, for example, in the present instance, grants women who require less than the six weeks to recover from the birth of their children paid leave in the form of accrued sick leave for the purpose of caring for their newborn prior to the conclusion of their presumptive disability period. (Exhibit 1, Affidavit of David A. Johnson, ¶¶ 1-25, App. 1-7) Clearly, the Policy provides parental leave for women that is not limited to their period of disability due to the birth process. In doing so, the policy discriminates against biological fathers who are similarly situated in terms of their care-giving responsibilities as parents.

In sum, the University of Iowa's Parental Leave Policy "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 711 (1978) (quoting *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1971)). Clearly, the University of Iowa's Parental Leave Policy, as applied to biological fathers,

constitutes sex discrimination and, as such, is forbidden under Title VII of the Civil Rights Act of 1964, as amended.

- i. The Policy Violates Title VII, Facially and As Applied, Because it Unlawfully Discriminates on the Basis of Gender Plus Stereotypes

Historically, arguably, because most employers, like the University of Iowa, have not provided paid leave to fathers for childrearing purposes, and because most families cannot afford to take unpaid leave for any extended period, mothers, the class granted paid leave, have become the *de facto* caretakers of children and have used their leave to fulfill this critical role. Thus, the “presumption” inherent to the subsection of the policy governing leave to biological mothers is not only that women are universally disabled for a period of six weeks following birth, but also that a woman who gives birth is and should be the sole or primary care taker of the child immediately following birth and during the first days of a child’s development, whether or not she and the father of the child would otherwise choose nontraditional parenting roles which would allow mom the opportunity to more fully participate in the workplace and dad the opportunity to bond with and care for his child during the first days of life. By favoring the parenting role of women who are biological mothers over the parenting role of men who are biological fathers, the policy reinforces debilitating stereotypes and interferes with the fundamental right of a parent to care for and enjoy the companionship of his child, in contravention of the intent of Title VII. The

approach to parental leave adopted by the University of Iowa in its Operations Manual, specifically the exclusion of biological fathers from its purview, in practice promotes and reinforces gender stereotypes about the roles men and women play in domestic life. The United States Supreme Court understands and has recently made explicit that these stereotypes underlie the unequal provision of family care leave to men and women by private and public employers and are pervasive enough to require Congress to take prophylactic measures, such as the passage of the Family Medical Leave Act of 1993 (FMLA), to counter them. Relating the reasons for the Court's conclusions about the need for the FMLA, Justice Rehnquist opined:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 736 (2003).

It is simply unconstitutional and contrary to law to treat men and women differently simply because of presumptions about the respective roles they play in family life. See Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). The University of Iowa Policy, by excluding biological fathers from a benefit

conferred for the purpose of taking on a caretaking role as a parent, does just that.

**D. PLAINTIFF DAVID A JOHNSON IS ENTITLED TO PARTIAL SUMMARY JUDGMENT UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE THE UNIVERSITY OF IOWA'S PARENTAL LEAVE POLICY, BOTH FACIALLY AND AS APPLIED TO HIM AND TO SIMILARLY SITUATED BIOLOGICAL FATHERS UNLAWFULLY DISCRIMINATES ON THE BASIS OF GENDER PLUS PARENTING STATUS**

Plaintiff David A Johnson alleges that Defendants have violated his right to equal protection of the laws of the land, as guaranteed to him under the Section 1 of the Fourteenth Amendment to the Constitution of the United States. Under the familiar analyses performed by our Courts in equal protection cases, Mr. Johnson's claim is subject to heightened scrutiny because Defendants' actions adversely affect his ability to exercise his fundamental rights as a parent.

**i. Parent-Child Bond as a Fundamental Right**

Furthermore, the Parental Leave Policy, by denying him an opportunity to utilize his accrued sick leave in order to care for his newborn child at the time and shortly after birth, interferes with Mr. Johnson's right to bond with and care for his child. It is well established in federal law that the right to maintain and develop a parent-child relationship is a fundamental liberty interest that is protected against unwarranted state

intrusion. See Troxel v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49, 56 (2000)(an individual parent's interest in obtaining or maintaining custody of a child "is perhaps the oldest of the [recognized] fundamental liberty interests"); M.L.B. v. S.L.J., 519 U.S. 102, 119, 117 S. Ct. 555, 565, 136 L. Ed. 2d 473, 489 (1996)(holding in a case resulting in a divided opinion, that nonetheless the U. S. Supreme Court is unanimous in its view that " 'the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.'" (quoting Santosky v. Kramer, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting)); See, e.g., Stanley v. Illinois, 405 U.S. 645, 651 (1972)("It is plain that the interest of a parent in the *companionship*, care, custody, and management of his or her children 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'" (citation omitted)) (emphasis added); Wisconsin v. Yoder, 406 U.S. 205, 232, (1972)("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Quilloin v. Walcott, 434 U.S. 246, 255, (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J. R., 442 U.S. 584, 602 (1979) ("Our jurisprudence

historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); Santosky v. Kramer, 455 U.S. 745, 753 (1982)(discussing "the fundamental liberty interest of natural parents in the care, custody, and management of their child").

Numerous courts have found that a fundamental right is in fact at issue in the allowance of leave to care for and bond with children and suggested that "[b]ecause individuals have a due process right to be free from undue interference with their procreation, sexuality, and family, . . . a strict level of scrutiny must be applied to any state action that discriminates on the basis of childbearing or family care." Back v. Hastings on Hudson Union Free School District, 365 F.3d 107, 118, n6 (2<sup>nd</sup> Cir. 2004); *see, e.g.*, Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972); Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965); Pierce v. Soc'y of Sisters, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L. J. 77, 152& n.506 (2003).

Clearly, the interference with a parent's bonding with and care for a child implicates a fundamental right. Mr. Johnson has alleged that the Parental Leave Policy created an obstacle to the maintenance and

development of his own parent-child relationship by denying him, in his capacity as a biological father of a newborn child, the use of his accrued paid sick leave to spend time with his daughter and to provide care giving responsibilities to her—a benefit of employment granted to all other similarly situated parents who are subject to the same Policy.

ii. The Policy Violates Constitutional Guarantees of Equal Protection and /or Due process Because it Discriminates on the Basis of Gender and This Discrimination is Not Substantially Related to the Achievement of An Important Governmental Objective

a. Threshold Standards under Equal Protection Analysis

The Equal Protection Clause generally “prohibits state and local governments from treating similarly situated persons differently.” Rector v. City & County of Denver, 348 F.3d 935, 949 (10th Cir. 2003). In Hishon v. King & Spalding, 467 U.S. 69 (1984), the United States Supreme Court held that “[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all.” *Id.* at 75.

When a fundamental right or suspect classification is implicated in the provision of a benefit, heightened scrutiny of the adverse action is required. *Id.* Individuals “have a clear right, protected by the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment.” Back v. Hastings on Hudson Union Free School District, 365 F.3d 107, 117 (2<sup>nd</sup>

Cir. 2004); *see* Davis v. Passman, 442 U.S. 228, 234-35, 60 L. Ed. 2d 846, 99 S. Ct. 2264 (1979); Rodriguez v. Bd. of Educ., 620 F.2d 362, 366 (2d Cir. 1980). “Gender-based distinctions ‘must serve important governmental objectives and must be substantially related to achievement of those objectives’ in order to withstand judicial scrutiny under the Equal Protection Clause.” Caban v. Mohammed, 441 U.S. 380, 388 (1979) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976); *see also* Reed v. Reed, 404 U.S. 71 (1971).

In the context of public employment rights, substantive due process and equal protection doctrines frequently overlap. Charles v. Baesler, 910 F.2d 1349, 1356 (6<sup>th</sup> CA 1990). The substantive component of the due process clause of the Fourteenth Amendment “incorporates many, if not all, of the Constitution’s specific civil rights protections, including the right to equal protection of the law.” Id.

Once proven, “[d]iscrimination based on gender . . . can only be tolerated if the state provides an ‘exceedingly persuasive justification’ for the rule or practice.” Back, 365 F.3d at 118; *see also* United States v. Virginia, 518 U.S. 515, 524 (1996). A challenge to a facially discriminatory policy based on “sex plus” parental status, such as the Parental Leave Policy promulgated by the University of Iowa, or one which has been shown to have a disparate impact on members of a protected class, requires that the reviewing Court utilize a heightened scrutiny analysis. Craig v. Boren, 429 U.S. 190, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976). Such scrutiny is required because “[a]

classification relying explicitly upon gender peculiarly suggests that the state is pursuing an improper purpose, one that furthers or contains 'fixed notions concerning the roles and abilities of males and females.'" Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982). While generally, equal protection analysis requires that the Fourteenth Amendment be applied only to groups that are similarly situated, "[e]nding the inquiry at this point, however, is unwarranted if there are other indications of gender-disparate treatment or invidious and intentional discrimination.

The Eighth Circuit has indicated that, even when the comparison groups are not found to be similarly situated, the District Court must proceed to consider whether differential treatment has a rational relationship to a legitimate state interest. Bills v. Dahm, 32 F.3d 333, 336 (8th Cir. 1994). In such instances, Equal Protection claims must be reviewed to ensure that there had been no invidious discrimination based upon an intent to discriminate. Ricketts v. City of Columbia, 36 F.3d 775, 781 (8th Cir. 1994). Pargo v. Elliott, 894 F. Supp. 1243, 1253-54 (S.D. Iowa 1995). Parham v. Hughes, 441 U.S. 347, 348, 60 L. Ed. 2d 269, 99 S. Ct. 1742 (1979) (determining that although the mother and father were not similarly situated with regard to a statute that denied a biological father the right to recover in a wrongful death action for an illegitimate child, that the statute was nonetheless required to a rational relationship to a legitimate state interest.)

A contested policy is not rendered neutral because it renders benefits to some males, nor even because biological fathers may be found not to be similarly situated to other groups. Ultimately, in determining whether an employee has been discriminated against in violation of the law "because of *such individual's . . . sex*," the courts have consistently emphasized that the ultimate issue is "the reasons for *the individual plaintiff's* treatment, not the relative treatment of different *groups* within the workplace. As a result, discrimination against one employee cannot be cured, or disproven, solely by favorable, or equitable, treatment of other employees of the same race or sex." Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001)(citations omitted).

iii. Heightened Scrutiny

The challenged Parental Leave Policy, on its face, has been established for the following purpose: "To permit parents who have caregiving responsibilities to have time off to spend with a child newly added to the family." (Exhibit 3, Section 22.8, App. 78). It is not disputed that biological fathers are, admittedly, parents with caregiving responsibilities under the policy. (Exhibits 2, Skorton, 21:10-16, Gorman, 56:7-21, Buckley 6:24-77;18) Yet, as implemented by the University of Iowa, biological fathers are precluded from taking paid Parental Leave in the form of accrued sick leave to care for their newborn children. All other parents, including adoptive parents and biological mothers, are allowed to take paid Parental Leave, drawing on accrued sick leave, for this purpose.

Mr. Johnson was not permitted under the Parental Leave Policy as written and as interpreted by University of Iowa officials, to utilize any of his accrued sick leave for the purpose of caring for his newborn child even though it is not disputed that Mr. Johnson: was a parent who had care giving responsibilities; wanted to have time off to spend with his newborn daughter; and had accrued adequate paid sick leave to cover the Parental Leave period that is at issue (five work days, or forty hours).

iv. The Economic Circumstances of An Employer are Not  
Compelling Reasons Sufficient to Allow the Employer to  
Violate a Person's Fundamental Liberty Interests

It would appear that Defendants' justification for excluding biological fathers—and only biological fathers—from using accrued paid sick leave for the purpose of Parental Leave is that such a practice would impose economic costs on the University of Iowa.

The proposition is an interesting, if speculative one. The University of Iowa's fellow Regents institution of higher learning, Iowa State University, backed by its own President, has undertaken studies in support of its proposal to allow all employees who are parents—whether male or female, whether married or not, whether biological or adoptive—*six weeks* of paid parental leave upon the arrival of new children in their families. The study, published to State Board of Regents at the same time this lawsuit was filed, concluded that such a policy would be cost effective to Iowa State University. (Exhibit 12, Iowa State University Policy on Leave for the Arrival of

Children, App. 175-183). This expansion of benefits, if approved, will provide biological fathers more rights to paid parental leave than they presently enjoy (and, in contrast to comparably-employed persons at the University of Iowa): the use of up to five days of paid accrued sick leave. (Exhibit 6, E-Mail from Jerilyn Rasmusson, Benefits Office, Iowa State University, to David Johnson, October 23, 2002, App. 127-128, "We differ slightly [from the University of Iowa], following is how we administer FMLA/Birth for P&S/Faculty positions:...Biological fathers—meets the qualification for FMLA, 5 days of sick leave & vacation—up to accrued amounts.")

However, even if, for the purpose of argument, one were to *assume* that Mr. Johnson's much more modest request—that biological fathers at the University of Iowa be treated like all other parents at the University of Iowa and like biological fathers at Iowa State University, by being allowed to use five days of accrued sick leave for the purpose of Parental Leave—would impose some cost upon the University of Iowa, such an assumption based on institutional fiscal self-interest is not compelling, when balanced against a parson's parental rights. M.L.B. v S.L.J., 519 U.S. 102 (1996)

- v. Even if the Court Were to Determine that the Parental Leave Policy Should be Subjected to a Rational Basis Test—and Not to Heightened Scrutiny—The Policy Violates Constitutional Guarantees of Equal Protection and/or Due Process Pursuant to the Fourteenth Amendment Because the Exclusion of Biological Fathers as a Category of Persons From the Use of Accrued Sick Leave for Childrearing, a Benefit Conferred Upon All Others Similarly Situated, is Arbitrary, Capricious and Not Rationally Related to Any Governmental Purpose

a. Rational Basis

A government's classification must be rationally related to a legitimate government interest in order to be constitutional. Riddle v. Mondragon, 83 F.3d 1197, 1207 (10th Cir. 1996). The Fourteenth Amendment Equal Protection Clause of the United States Constitution requires the states to treat similarly situated persons in a substantially equivalent manner. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

In applying the rational-basis standard the Eighth Circuit has apparently recognized a substantive due process right to be free from what the court has called “truly irrational” action. Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1104 (8<sup>th</sup> Cir. 1992). For example, the Eighth Circuit, relying upon the Supreme Court’s guidance in Harrah Independent School District v. Martin, 440 U.S. 194 (1979)(per curiam), has recognized protection from “arbitrary and capricious” deprivations of contractual rights that impinge upon liberty interests in a public employment context.” Moore v. Warwick Public School Dist. No. 29, 794 F.2d 322, 329 (8<sup>th</sup> Cir. 1986); *See also* Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). The Harrah Court examined the actions of a school board in refusing to renew the contract of a tenured teacher for refusing to comply with new continuing education requirements. While ultimately deciding that the school

board had stated a statutorily authorized rational for the non renewal following notice and a hearing, the Court also recognized that "the Due Process Clause of the Fourteenth Amendment not only accords procedural safeguards to protected interests, but likewise protects substantive aspects of liberty against impermissible governmental restrictions." Harrah, 440 U.S. at 197. While it is the burden of the plaintiff challenging the rule or regulation "to show that there is no rational connection" between the state agency's action and its stated interest" it also necessary that the stated interest be legitimate and the regulation reasonable. Id. at 198; Moore v. Warwick Public School Dist. No. 29, 794 F.2d 322, 329 (8<sup>th</sup> Cir. 1986).

vi. "Gender Plus" Revisited

Establishing that biological fathers are, in fact , a protected class for equal protection analysis requires a simple equation: "when one proceeds to cancel out the common characteristics of the two classes being compared ([e.g., . . .] married men and married women), as one would do in solving an algebraic equation, the cancelled out element proves to be that of married status, and sex remains the only operative factor in the equation." LEX K. LARSON, EMPLOYMENT DISCRIMINATION §40.04, at 40-12 (2<sup>nd</sup> ed. 1996). This means that the protected class, in this case biological fathers, need not include all men, but instead must demonstrate that they, biological fathers as a subclass of men, were treated unfavorably as compared to a corresponding subclass of women. See Coleman v. B-G Maintenance Management of

Colorado, Inc., 108 F.3d 1199, 1204 (10<sup>th</sup> Cir. 1997) As discussed above, the class corresponding to the biological father subclass are biological mothers. Canceling out the additional characteristic, biological parenthood, common to both leaves the clear evidence that “but for” Mr. Johnson’s gender, he would have received benefits under the policy. The policy is gender-based and facially discriminatory.

Thus, the question before the court is whether the granting of paid parental leave for the care of children to biological mothers while denying paid parental leave for the care of children to biological fathers is a differentiation that bears a relation to some important state interest. In essence, as discussed above, the policy in practice reinforces and promotes the age-old notion that a mother bears a closer relationship with her child than a father by requiring fathers to stay on the job, and requiring mothers to be at home, in order for a family to partake of the paid leave benefit. The policy denies the use of paid leave in the form of accrued sick leave to biological fathers who are parents with caretaking responsibilities, despite the explicit definition of the beneficiaries of the leave policy as “parents with caretaking responsibilities.” No legitimate purpose exists for such a differentiation.

Furthermore, in the lives of real world families, the policy irrationality is more than clear. A cursory look at the consequences of the application of this policy to couples in non-traditional families bears this out. (See depo transcripts ) The policy would deny the biological parent in a male same sex

relationship the benefit of any paid leave in the form of accrued sick leave, but would grant the adoptive parent in that relationship five days of leave. If the women in a same-sex relationship were to have a child using a surrogate to carry the child using the egg of one of the women and the sperm of a donor, the woman with the biological connection to the child would potentially be entitled to six weeks of parenting leave with none of that time used for any temporary disability due to child birth.

vii Summary Judgment for Liability Against Each Named Defendant Should Be Entered Pursuant to 42 U.S.C. § 1983

Mr. Johnson has alleged that three individuals who are officers of the University of Iowa, David Skorton, MD, Mr. Douglas K True and Ms. Susan C. Buckley, are liable for the violation of guarantees of Equal Protection secured by the Federal Constitution because, as individuals, they are responsible for the promulgation, interpretation and enforcement of the Parental Leave Policy that is the subject matter of this litigation.

An individual cannot be held liable for damages under § 1983 "merely because he held a high position of authority," but he can be held liable if he was personally involved in the alleged deprivation. See Black v. Coughlin, 76 F.3d 72, 74 (2d Cir. 1996). Personal involvement can be shown by:

evidence that: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant

created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference . . . by failing to act on information indicating that unconstitutional acts were occurring.

*See Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995).

In determining whether an official is entitled to immunity despite such involvement, "courts undertake a two-pronged analysis. First, the court must see if a deprivation of constitutional magnitude has been alleged. If so, the court must determine if that right was so clearly established that a reasonable public official would have known his or her conduct violated the Constitution at the time of the act." *Weiler v. Purkett*, 137 F.3d 1047, 1050 (8<sup>th</sup> Cir. 1998).

Evidence of "deliberate indifference" may demonstrate that "the defendant intended the discrimination to occur." *Gant ex rel. Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 141 (2d Cir. 1999). "Deliberate indifference can be found when the defendant's response to known discrimination 'is clearly unreasonable in light of the known circumstances.'" *Id.* (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999)). While this standard is not "a mere reasonableness standard that transforms every . . . decision into a jury question." *Id.* (internal quotation marks omitted), decisions to maintain an

exclusionary policy with knowledge regarding the nature and effect of the exclusionary policy arguably evidence such indifference.

In this instance, each of the named Defendants—David J. Skorton, MD, Douglas K. True, and Susan C. Buckley—are appropriately named. Each person has the administrative power, both in a general institutional rule making sense, and in their ability to afford an individual such as Mr. Johnson, the relief that Mr. Johnson seeks in this instance. Each named Defendant is aware of the nature of Mr. Johnson's complaint. Each named Defendant takes the position that biological fathers should be precluded from use of accrued sick leave for Parental Leave under the University of Iowa's Parental Leave Policy.

Defendant David J. Skorton, MD, is President of the University of Iowa. As a part of his duties and responsibilities, Dr. Skorton approves rules governing the University of Iowa, including the Parental Leave Policy.

(Exhibit 2, Deposition of David Skorton, MD, 6:2-16, 7:2-25, 8:1-7, App. 15) is aware of the Parental Leave Policy and its facial exclusion of biological fathers from their use of accrued paid sick leave to have time off to spend with children newly added to families. He is aware of concerns expressed by staff and faculty about the policy as to its inequitable treatment of biological fathers. He has the administrative power to resolve cases involving the application of University of Iowa rules in particular instances such as, for example, the application of the Parental Leave Policy to individual biological

fathers who are adversely affected by the University of Iowa's implementation of the same. Dr. Skorton is not aware of any University of Iowa study that justifies the exclusion of biological fathers from benefits conferred to all other parents under the Parental Leave Policy. He has the power to convene administrators for the purpose of reviewing and revising the rule, but has not done so.

Defendant Douglas K. True is Vice President for Finance at the University of Iowa. As a part of his duties, Mr. True is responsible for the formulation and approval of policies governing the Human Resources Department at the University of Iowa, including the Parental Leave Policy. As Vice President for Finance, Mr. True has the power to resolve disputes concerning the application of the Parental Leave Policy in particular cases. (Exhibit 3, Deposition of Douglas K. True, 5:9-23, 12:24-25, 13:1-25, 14:1-14, App. 32-34) Mr. True is aware of the Parental Leave Policy and its facial exclusion of biological fathers from their use of accrued paid sick leave to have time off to spend with children newly added to families. He is aware of concerns expressed by staff and faculty about the policy as to its inequitable treatment of biological fathers. Mr. True has the power to convene administrators for the purpose of reviewing and revising the Parental Leave Rule, but has not done so.

Defendant Susan C. Buckley is Associate Vice President for Finance and Operations and Director of Human Resources at the University of Iowa.

As a part of her duties, Ms. Buckley is responsible for formulation of and day-to-day implementation of human resource policies at the University of Iowa, including the Parental Leave Policy. In this capacity, Ms. Buckley has the power to resolve disputes concerning the application of the Parental Leave Policy in particular cases. (**Exhibit 4**, Deposition of Susan Buckley, 35:14-25, 36-49, App. 112) Ms. Buckley was aware of Mr. Johnson's complaint about application of the Parental Leave Policy to his own circumstances in October, 2002, but has chosen not to provide remedies that are within her power to offer.

**E. PLAINTIFF DAVID A JOHNSON IS ENTITLED TO  
PARTIAL SUMMARY JUDGMENT UNDER THE IOWA  
CIVIL RIGHTS ACT, IOWA CODE CHAPTER 216**

Iowa Courts, in considering a plaintiff's discrimination claims brought pursuant to federal law and comparable state-law claims, generally make no distinction between them. Inglis v. Buena Vista Univ., 235 F. Supp. 2d 1009. 119 (N.D. Iowa 2002). This perspective results from the Iowa Supreme Court's recognition that federal precedent is applicable to discrimination claims under the Iowa Civil Rights Act (ICRA) pursuant to Iowa Code Chapter 216. See Vivian v. Madison, 601 N.W.2d 872, 873 (Iowa 1999) ("The ICRA was modeled after Title VII of the United States Civil Rights Act."); cf. Fuller v. Iowa Dep't of Human Servs., 576 N.W.2d 324, 329 (Iowa 1998) (recognizing that the ICRA's prohibition on disability discrimination is the state-law "counterpart" to the ADA, and that, "in considering a disability

discrimination claim brought under Iowa Code chapter 216, we look to the ADA and cases interpreting its language. We also consider the underlying federal regulations established by the Equal Employment Opportunity Commission (hereinafter 'EEOC'), the agency responsible for enforcing the ADA.") (internal citations omitted). Iowa courts, therefore, have traditionally turned to federal law for guidance in evaluating the ICRA. King v. Iowa Civil Rights Comm'n, 334 N.W.2d 598, 601 (Iowa 1983).<sup>1</sup>

There are two methods a plaintiff may use to establish discrimination in employment under the ICRA, Iowa Code Chapter 216 (1995). Ritz v. Wapello County Bd. of Supervisors, 2002 Iowa App. LEXIS 867, \*4-6 (Ia. App. 2002); Vaughan v. Must, Inc., 542 N.W.2d 533, 538 (Iowa 1996). First, "under the direct evidence or mixed-motive standard, a plaintiff must produce 'direct evidence that an illegitimate criterion, such as gender, 'played a motivating part in [the] employment decision.'" Id.; see also Cronquist v. City of Minneapolis, 237 F.3d 920, 924 (8th Cir. 2002)(quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989)). "Direct evidence demonstrates a specific link between the challenged employment action and the alleged animus." Michaelson v Waitt Broadcasting, Inc., 187 F. Supp. 2d

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<sup>1</sup> At the same time, Federal law, however, is not controlling. Iowa courts look to the analytical framework adopted and used by the federal courts in assessing federal law and do not substitute the language of the federal statutes for the clear words of the ICRA. Hulme v. Barrett, 449 N.W.2d 629, 631 (Iowa 1989); accord Board of Supervisors of Buchanan County v. Iowa Civil Rights Comm'n, 584 N.W.2d 252, 256 (Iowa 1998)("In deciding gender discrimination disputes, we adhere to the Title VII analytical framework.")

1059, 1068 (N.D. Iowa 2002) Once direct evidence has been presented, the employer has the burden of establishing, by a preponderance of the evidence, that it would have made the same decision even in the absence of an improper motive. Boelman v. Manson State Bank, 522 N.W.2d 73, 78 (Iowa 1994). The holding of Price Waterhouse holding was modified by 42 U.S.C. § 2000e-5(g)(2), so that “once a plaintiff meets the initial burden regarding direct evidence he or she is entitled to declaratory or injunctive relief and attorney's fees.” Roberts v. Swift & Co., 198 F. Supp. 2d 1049, 1060 (S.D. Iowa 2002). Ritz 2002 Iowa App. LEXIS 867 at \*5. “Evidence a defendant would have made the same employment decision regardless of discriminatory intent cannot defeat a claim altogether, it can only defeat certain remedies such as damages or equitable relief.” Ritz 2002 Iowa App. LEXIS 867 at \*5(citations omitted).

**F. PLAINTIFF DAVID A. JOHNSON IS ENTITLED TO  
PARTIAL SUMMARY JUDGMENT UNDER THE EQUAL  
PROTECTION CLAUSE OF THE CONSTITUTION OF  
THE STATE OF IOWA**

The Equal Protection Clause enshrined in the Iowa Constitution states as follows:

All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

Iowa Const. Art. I, § 6.

The Iowa Supreme Court recently explained the nature and scope of equal protection analysis under the Iowa Constitution. Racing Association of Central Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004); *see also* J.E.B. v. K.C. (In re S.A.J.B.), 679 N.W.2d 645, 647-651 (2004). In Racing Association, the court independently applied federal principles in its analysis of equal protection under the Iowa State Constitution, but cautioned that

federal decisions are persuasive, but not binding, on this court in its consideration of claims based on the Iowa Constitution. . . . Independent application . . . might result in a dissimilar outcome from that reached by the Supreme Court in considering the federal constitutional claim. This result is particularly possible in view of the "the ill-defined parameters of the equal protection clause."

Racing Association, 675 N.W.2d at 6 (quoting Miller v. Boone County Hosp., 394 N.W.2d 776, 781 (Iowa 1986)).

The Iowa Supreme Court, thus, while guided by the analyses of federal courts, does not dependent upon the interpretation of federal courts to determine the scope of the Iowa Constitution. Delaware v. Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979) (United States Supreme Court may review state court decision "where the state constitutional holding depended upon the state court's view of the reach of [the federal constitution]").

i. Differentiation Between Biological Fathers and Biological Mothers in their Parenting Responsibilities is Unlawful

The Equal Protection Clause of the Iowa Constitution requires that similarly-situated persons be treated alike. In *re Detention of Morrow*, 616 N.W.2d at 548(2001); See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985); *Hack v. Auger*, 228 N.W.2d 42, 43 (Iowa 1975). Heightened scrutiny is required of a classification impinging upon a fundamental right or discriminating on the basis of a prohibited classification, such as gender status. *Caban v. Mohammed*, 441 U.S. 380, 388 (1979) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). Ultimately, the classification itself must be reasonable. *Hack*, 228 N.W.2d at 43.

ii. Parental Rights as Fundamental Rights under the Iowa Constitution

The Iowa Supreme Court has repeatedly held, consistent with federal authority, that "parental rights are fundamental rights" under the Iowa Equal Protection Clause. *J.E.B.*, 679 N.W.2d at 648-649; See, e.g., *Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001) ("*The parenting right is a fundamental liberty interest that is protected against unwarranted state intrusion.*" (emphasis in original, citation omitted.)); *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999); *In re Bruce*, 522 N.W.2d 67, 72 (Iowa 1994); *Olds v. Olds*, 356 N.W.2d 571, 574 (Iowa 1984); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (a parent's interest in custody of his or her child "is perhaps the

oldest of the [recognized] fundamental liberty interests"); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 119 (1996)(reviewing the history of parental rights and determining that even in cases which have resulting in divided opinions, the United States Supreme Court "was unanimously of the view that 'the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment" (quoting Santosky v. Kramer, 455 U.S. 745, 774 (1982)(Rehnquist, J., dissenting)).<sup>2</sup>

When the challenged state action implicates a fundamental right, "to withstand challenge under our state constitution, the infringement on

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<sup>2</sup> That Iowa law treats parental rights as fundamental and treats biological and adoptive parents on an equal basis is made even more clear upon a review of applicable provisions of the Code of Iowa that address these rights. For example, the Iowa Code mandates that all parents with a legal relationship to their children have equal rights, and that the State of Iowa is bound to enforce those rights. Iowa Code § 600A.2(14)(2003)(defining a parent-child relationship as "the relationship between a parent and a child recognized by the law as conferring certain rights and privileges and imposing certain duties. The term extends *equally to every child and every parent*, regardless of the marital status of the parents of the child.")(emphasis added). Accordingly, in every applicable context, the Code of Iowa does not differentiate between the rights of parents based upon gender, marital or sexual orientation status in termination of parental rights proceedings, dissolution and support proceedings, adoption proceedings, in estate administration proceedings, or in block grant funding for early educational intervention requiring the involvement of parents. Iowa Code § 600A.1(2003); Iowa Code § 600A.2 (3) & (13) (2003); Iowa Code § 598.41(2003); Iowa Code § 598.21(2003); Iowa Code § 232.111(2003); Iowa Code § 232.38 (2003); Iowa Code § 600.4 (2003); Iowa Code § 256D (2003). Plaintiff is unaware of any statutory provision in the Code of Iowa that intentionally differentiates between the rights of parents in the conferring of rights and privileges based upon gender. This list is illustrative, only, and is not intended to be exhaustive.

parental liberty interests implicated by the statute must be 'narrowly tailored to serve a compelling state interest.'" Santi, 633 N.W.2d at 318 (quoting State v. Klawonn, 609 N.W.2d 515, 519 (Iowa 2000)); *see also* In re A.C., 415 N.W.2d 609, 615-16 (Iowa 1987). "When this stringent review of legislation, commonly known as "strict scrutiny," is applied, we will not presume legislation constitutional." J.E.B., 679 N.W.2d at 649(quoting In re Detention of Williams, 628 N.W.2d 447, 452 (Iowa 2001)).

To determine whether a state scheme implicating a fundamental right is consistent with principles of equal protection under the Iowa Constitution, the policy, rule or regulation must be "narrowly tailored to serve a compelling state interest." J.E.B., 679 N.W.2d at 649-650.

The J.E.B. court concluded, in analyzing a challenge to the state's statutory scheme of denying counsel to indigent defendants facing involuntary termination under Iowa Code section 600A while granting counsel to indigent parents in Iowa Code Section 232 proceedings, "no narrowly tailored compelling state interest" existed to justify the differential treatment and determined that "the statutory framework thus fails to withstand strict scrutiny, and runs afoul of the Iowa Equal Protection Clause." J.E.B., 679 N.W.2d at 649-650.; *see also* Iowa Const. art. I, § 6; In re K.A.S. v. T.D.K., 499 N.W.2d 558, 566 (N. Dakota 1993); ("denying an indigent parent court-appointed counsel in a [private termination proceeding] serves no compelling state interest and would deny that parent equality of

the privilege of counsel which is granted, upon the same terms, to other indigent parents"). The court rejected the state's asserted compelling interest in conserving fiscal resources, finding that the exclusion of involuntary indigent respondents was not narrowly tailored nor based upon any legitimate articulated reason, and dismissing the suggestion that the state was not an active participant in private adoptions. J.E.B., 679 N.W.2d at 649-651.

Referring to In re K.A.S., involving a substantially similar statutory scheme and challenge to it, the J.E.B. favorably evaluated the conclusion of the North Dakota Supreme Court that,

....the legislative framework is unconstitutionally underinclusive, insofar as the legislature has withheld the privilege of counsel at public expense to parents facing involuntary 600A terminations." J.E.B. 649 N.W.2d at 651.( citing K.A.S., 499 N.W.2d at 566 ("excluding indigent parents in an adoption proceeding from the class of indigent parents entitled to counsel creates an impermissible, underinclusive legislative classification, because the classification does not include all who are similarly situated").

At the University of Iowa, employees who are biological fathers and who are subject to the terms and conditions of the Parental Leave Policy are treated by the State in a manner unlike all other comparable parents, at the University of Iowa and Iowa State University, all of whom enjoy the use of accrued paid sick leave for to allow the biological father to have time off to spend with their children who are newly added to their families. Ostensibly, the basis for impinging on this fundamental right of parenting is fiscal and

budgetary. Even if that assertion were assumed to be true, however, fundamental rights cannot be “trumped” and balanced away by those who might have grander views as to how those resources—in this instance, compensated sick leave hours that have already been earned by biological fathers, while in the service of their employer—might be spent.

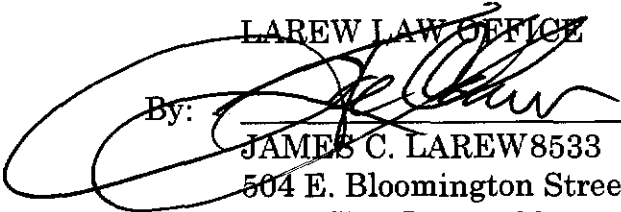
### **III. CONCLUSION**

For all of the reasons stated herein, based on the undisputed material facts and the requirements of both Federal and Iowa law, Plaintiff David A. Johnson respectfully requests this Court to enter all appropriate Orders granting to him summary judgment on the issue of liability, under each and every claim advanced by him in this lawsuit.

Mr. Johnson prays for any and all other relief to which he may be entitled, under the circumstances including, but not limited to, an award of costs and attorneys fees related to these matters.

Respectfully submitted,

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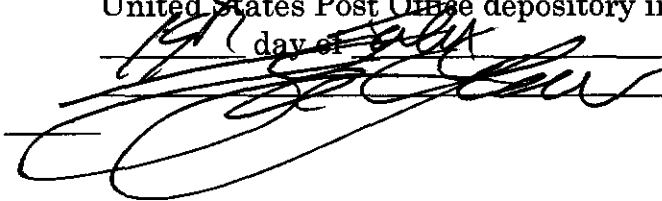
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Certificate of Service

The undersigned, a member of the bar of this state, hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at his or her respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Iowa City, Iowa, on the

  
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day of ~~July~~ 2004.

2004.