2005 WL 5628994 (C.A.8) (Appellate Brief)
United States Court of Appeals, Eighth Circuit.

David A. JOHNSON, on his own behalf and on behalf of all others similarly situated, Plaintiff-Appellant,
v.
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-Appellees.

No. 05-1184.
February 28, 2005.

Appeal From the United States District Court For the Southern District of Iowa, Davenport Division-Rock Island Location Case No. 3 03 CV10062 The Honorable Judge Ronald L. Longstaff, Presiding

Brief of Appellant David A. Johnson

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SUMMARY OF THE CASE

Plaintiff-Appellant David A. Johnson (Mr. Johnson), a Clerk IV employee of the University of Iowa, Iowa City, Iowa, in a civil class action lawsuit for damages and injunctive relief advances Federal and pendent State law claims. The University's *Operations Manual,* Section 22.8, captioned, "Parental Leave Policy," sets forth a clearly stated 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."

Notwithstanding that stated purpose, Mr. Johnson and all similarly-situated *biological* fathers are denied the use of any accrued paid sick leave for Parental Leave, although all other parents, including biological mothers and male and female adoptive parents, are allowed the use of accrued paid sick leave for that purpose. Mr. Johnson claims that, he, 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. This is the same amount of accrued paid sick leave time allowed for Parental Leave by parents who adopt children. Mr. Johnson claims that the denial of this benefit of employment to *biological* fathers violates: Title VII of the Civil Rights Act of 1964, as amended; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; the Iowa Civil Rights Act; and the Equal Protection Clause of the Constitution of the State of Iowa.

In an Order dated December 16, 2004, the Federal District Court for the Southern District of Iowa denied all of Mr. Johnson's claims, granting summary judgment to Defendants. Mr. Johnson now appeals that Order, and prays that the matter be remanded back to the District Court for a trial on the merits.

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JURISDICTIONAL STATEMENT

The District Court had original subject matter jurisdiction over this litigation pursuant to 28 U.S.C. §§ 1331 and 1441.

This civil class action lawsuit was brought by Plaintiff-Appellant David A. Johnson ("Mr. Johnson"). He seeks injunctive relief and monetary damages in claims advanced under the Constitution of the United States and under Ttile VII of the Civil Rights Act of 1964, as Amended. Pendent claims are also made by Mr. Johnson under the Iowa Civil Rights Act and the Constitution of the State of Iowa.

This Court has jurisdiction over the appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A). The appeal is taken from a December 16, 2004 Order of the Federal District Court for the Southern District of Iowa-Davenport Division, the Honorable Ronald L. Longstaff, Presiding, granting Defendants' Motion for Summary Judgment on all of Mr. Johnson's claims and denying Mr. Johnson's Motion for Partial Summary Judgment. Mr. Johnson timely filed his Notice of Appeal on December 29, 2004.

STATEMENT OF THE ISSUES

WHETHER THE FEDERAL DISTRICT COURT ERRED IN GRANTING DEFENDANTS-APPELLEES SUMMARY JUDGMENT ON ALL CLAIMS MADE BY PLAINTIFF-APPELLANT DAVID A. JOHNSON UNDER THE LAWS AND CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF IOWA?

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES BECAUSE, UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, THE UNIVERSITY OF IOWA'S PARENTAL LEAVE POLICY, BOTH FACIALLY AND AS APPLIED TO MR. JOHNSON AND TO SIMILARLY SITUATED BIOLOGICAL FATHERS, UNLAWFULLY DISCRIMINATES ON THE BASES OF "GENDER-PLUS" OR "SEX-PLUS" PARENTING STATUS AND GENDER STEREOTYPING.

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Shafer v. Board of Public Education of the School Dist. of Pittsburgh, 903 F.2d 243 (3rd Cir. 1990).

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

Civil Rights Act of 1964, Section 703(a)(as amended at 42 U.S.C. § 2000e-2(a) (Title VII)

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES BECAUSE UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE UNIVERSITY OF IOWA'S PARENTAL LEAVE POLICY, BOTH FACIALLY AND AS APPLIED TO MR. JOHNSON AND TO SIMILARLY SITUATED BIOLOGICAL FATHERS, UNLAWFULLY DISCRIMINATES ON THE BASES OF "GENDER-PLUS OR "SEX-PLUS PARENTING STATUS AND GENDER STEREOTYPING.

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III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES BECAUSE THE PARENTAL LEAVE POLICY VIOLATES THE IOWA CIVIL RIGHTS ACT, IOWA CODE § 216.6(1) (2003)

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Iowa Civil Rights Act (ICRA), Iowa Code § 216.6(1) (2003)

IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES BECAUSE THE PARENTAL LEAVE POLICY VIOLATES THE EQUAL PROTECTION CLAUSE OF ARTICLE 1, SECTION 6 OF THE IOWA CONSTITUTION

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IA CONST. Art. I, § 6

STATEMENT OF THE CASE

Plaintiff-Appellant David A. Johnson (Mr. Johnson), an employee of the University of Iowa, Iowa City, Iowa, alleges that, as applied to him and all similarly situated biological fathers, the Parental Leave Policy, as set forth in Section 28.2 of the University's *Operations Manual,* unlawfully prohibits the use of accrued paid sick leave to spend time with children newly brought into their families.

Mr. Johnson timely filed a complaint with the Iowa Civil Rights Commission (ICRC) and the Equal Employment Opportunity Commission (EEOC): each agency issued Administrative Releases (Right to Sue Letters).

On June 11, 2003, Mr. Johnson filed a Complaint in the Federal District Court, Southern District of Iowa, against his employer, against the University of Iowa, State Board of Regents and against three individuals acting in their official capacities: David Skorton M.D., Douglas K. True, and Susan C. Buckley. He alleged that the University's Parental Leave Policy violates Title VII of the Civil Rights Act of 1964, as amended at 42 U.S.C. § 2000e-2(a) (Title (VII), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Mr. Johnson seeks monetary relief for himself and other similarly situated biological fathers, as well as an injunctive order requiring the University to amend its Parental Leave Policy, to conform with applicable law.

On June 11, 2003, Mr. Johnson filed a Petition in Equity in the Iowa District Court for Johnson County, against Defendants University of Iowa and State Board of Regents, this time under Iowa Code Chapter 216, the Iowa Civil Rights Act, and under Article I, Section 6 of the Constitution of Iowa. Again, Mr. Johnson seeks monetary relief for himself and others similarly situated, as well as an injunctive order requiring the University to amend its Parental Leave Policy to conform with applicable law. On October 9, 2003 the Federal District Court entered an Order allowing its file to be merged with the pendent state law claims filed in the Iowa District Court for Johnson County.

On November 19, 2003, the Federal District Court entered an Order certifying the class of similarly-situated biological fathers who are or were employees of the University of Iowa and subject to the University's Parental Leave Policy.

On July 19, 2004, Defendants filed a Motion for Summary Judgment, seeking judgment in Defendants' favor as to all of Mr. Johnson's Federal and State law causes of action.

On the same day, Mr. Johnson filed a Motion for Partial Summary Judgment, seeking judgment in his favor as to all issues of liability (but not as to the issue of damages) on all claims made by him. Mr. Johnson also filed a Motion to Amend the earlier Order Certifying Class, to clarify the scope of that class's membership.

On December 16, 2004, the District Court, the Honorable Ronald L. Longstaff, Presiding, issued an Order granting Defendants' Motion for Summary Judgment on all claims, denying Mr. Johnson's Motion for Partial Summary Judgment on all claims, and rendering as moot Mr. Johnson's Motion to Amend the Order Certifying Class.

On December 29, 2004, Mr. Johnson filed Notice of Appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A).

STATEMENT OF THE FACTS

Plaintiff David Anthony Johnson (hereafter, sometimes, "Mr. Johnson") is a male, non-union merit staff employee of

Defendant University of Iowa (hereafter, and, collectively as to all named Defendants, sometimes referred to as "University"), working since June 1, 1999, at the Office of Registrar, classified as a Clerk IV. (Aplt. A. 101-102)[1]. He is married to another University employee, Ms. Jennie L. Embree, a Program Assistant at the University's College of Nursing. (Aplt. A. 101, 346).

The terms and conditions of both Mr. Johnson's and Ms. Embree's employment are governed by written rules published in the University's *Operations Manual,* a contractually-binding document. (Aplt. A. 229-245). At Chapter 22 of the *Operations Manual,* the University sets forth its policies regarding leaves and absences. (Aplt. A. 241-243). Pursuant to its provisions, absences are subject to the Family and Medical Leave Act ("FMLA"), and employees are, therefore, allowed up to 12 weeks of leave, paid or unpaid, in a calendar year, if the conditions set forth under the University's interpretation of the FMLA are met. If one University employee is married to another University employee, the 12-week leave limit is deemed by the University as cumulative between them, not additive. That is, such a couple is entitled to a total combined leave of 12 weeks--not 24 weeks-in any rolling 12 month period.

1. The Parental Leave Policy: All Parents Allowed Paid Parental Leave To the Extent Permitted By Law.

Section 22.3 of the *Operations Manual* directs that employees may accrue paid sick leave. (Aplt. A. 241-243). Section 22.8, captioned, "Parental Leave Policy" (hereafter, sometimes, "Policy"), includes, in relevant part, the following terms and conditions:

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).(Aplt. A. 241-242).

That the plain meaning of the Policy should allow biological fathers to utilize accrued paid sick leave to the same extent as other parents are allowed, is made clear by examining relevant University documents and by reviewing statements made by University administrators charged with the responsibility of formulating and implementing the Policy attest.

In a document captioned "Informational Guide," the University states that, pursuant to Section 22.8, "*leave is for* the biological mother to recover from childbirth and to spend time with the newborn child or for *either or both parents to spend time with a newly adopted child.*" (Aplt. A. 331-332). The University, at its own website, further explains that Section 22.8, "*allows new parents who are caregivers time off to spend with a child added to the family through birth or adoption and, to the extent permitted by state law, to be paid during the leave.*" (Aplt. A. 458). University administrators uniformly testify that the Policy is intended to provide support for the children and families of University employees. (Aplt. A. 124). Any leave taken under the Policy is explicitly for the purpose of child rearing. (Aplt. A. 254).

The Parental Leave Policy is not narrowly defined as a disability or a maternal leave policy. According to the Policy's express terms, a biological mother is not required to provide any proof of pregnancy-related disability in order to use accrued sick leave for the first six weeks after childbirth. Nor does the Policy require a biological mother to provide medical proof of her postpartum ability to work before returning to return to her employment during that time period. (Aplt. A. 241, 242).

2. The "Biological Father Exclusion."

Notwithstanding unambiguous, gender-neutral purpose of the Policy ("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."), as implemented by the University, all parents *except* biological fathers, are allowed to use accrued paid sick leave for Parental Leave. For example, while excluding parent-employees who happen to be biological fathers (say, for example, Mr. Johnson) from this benefit of employment the following parent-employees *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 (Aplt. A. 122); *adoptive mothers,* whether single, married, cross-gendered or a domestic partner. (Aplt. A. 119, 122); *adoptive fathers,* whether single, married, cross-gendered or a domestic partner. (Aplt. A. 121-122); and *parents who assume parental rights by surrogacy*--if they are not the biological father of the child. (Aplt. A. 119-220).

Further, University employees who are members of what might be characterized as "non-traditional" couple-relationships may use accrued paid sick leave for Parental Leave under the Policy, if, *and only if,* such employees are not *biological* fathers. That is to say: when a biological mother and her domestic partner adopt the biological mother's child each partner is entitled to the use of accrued paid sick leave for Parental Leave (Aplt. A. 124); each female domestic partner in a domestic partnership who adopts a child from a third party is entitled to her separate, respective use of accrued paid sick leave for Parental Leave; and, each male domestic partner in a domestic partnership who adopts a child from a third party is entitled to his separate, respective use of accrued paid sick leave for Parental Leave. (Aplt. A. 124, 260, 261).

The Policy's clearly-stated Purpose employs language that is both explicit and inclusive: the provision does not exclude biological fathers who are parents from having the benefits of the Policy conferred upon them. The University, nonetheless, purposely refuses to confer this benefit of employment to Mr. Johnson and all other similarly situated biological fathers.

What might, then, be called the "biological father exclusion" is exercised by this state employer, whether a particular biological father be single, married or a domestic partner. (Aplt. A. 101-108; 124-125; 259-261). The University's decision to allow *all* parents *except* for *biological fathers* the use of accrued paid sick leave for Parental Leave purposes results in a strange--and, in Mr. Johnson's opinion, unlawful-practice of having a state agency picking and choosing amongst similarly-situated employees as to which of them, as parents, it will, or will not, allow this earned benefit of employment.

3. The Strange Results Of The Decision To Exclude Biological Fathers From The Parental Leave Policy's Ambit.

The strangeness of the Policy's application can be easily illustrated. According to University of Iowa President David J. Skorton, for example, if two male domestic partners who are employees of the University and who are subject to the Policy were to have a child through a surrogacy, and if the child was the biological offspring of one of them, then, he admits, the *biological* partner of the surrogate child *would not* be allowed use of accrued paid sick leave for Parental Leave but the other domestic partner *would be* allowed the use of such Parental Leave benefits. (Aplt. A. 124). Even though both of them stand in equal status as parents of the same child.

That the University's exclusion of Mr. Johnson and similarly situated *biological* fathers, is based *solely* on their status as *biological* fathers, is clear, as is noted, again, by President Skorton, in his sworn deposition testimony:

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.

(Aplt. A. 124)

The disparity of treatment is not simply one made between biological fathers, on the one hand, and adoptive parents, on the other hand, but, rather, is a disparity of treatment under which *biological* parents are treated differently in their respective roles as mothers and fathers of children. Again, President Skorton explains:

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.

(Aplt. A. 125)

4. Political Processes, Exclusionary Results.

The disparity in which the benefits of employment are conferred by this employer, as expressed by the University's application of the Policy, results in the purposeful exclusion of *biological* fathers, *alone,* from using accrued paid sick leave for Parental Leave. This Policy outcome was the result of internal political discussion and debate within the University of Iowa administration prior to the occurrence of specific circumstances that gave rise to this lawsuit. (Aplt. A. 117, 118, 258-259, 263-264). Mr. Johnson's deprivation is not accidental. And he is not alone.(Aplt. A.) 248

That University of Iowa employees who are *biological* fathers are *uniquely* and *intentionally* disqualified from use of the accrued paid sick leave benefit for Parental Leave can be demonstrated further by looking at two comparison groups of similarly-situated employees: first, among similarly-situated employees of other institutions governed by Defendant Iowa State Board of Regents; and, second, by looking within a particular family unit comprised of bi-sexual, married parents, both of whom are University employees: Mr. David A. Johnson and Ms. Jennie L. Embree, for example.

As to the first group--that is, comparably-placed non-unionize Professional and Scientific staff and faculty members and employees within the State Board of Regents system--it is not disputed that such biological fathers employed by Iowa State University, in Ames, are allowed the use of five days of accrued paid sick leave upon the arrival of a new child in a family. (Aplt. A. 227-228).

The University of Iowa's disparate treatment of similarly-situated employees reaches into the intimate confines of individual family units themselves. As noted, Mr. Johnson's spouse, Ms. Jennie L. Embree, is part-time employee of the University's College of Nursing. At the time of the events giving rise to this lawsuit, she was a part-time employee, classified as a Professional Scientific employee, subject to the terms and conditions of Section 22.8 of the *Operations Manual,* and working 20 hours per week, as a Program Assistant. (Aplt. A. 102, 103).

5. An Unexpected Answer To Mr. Johnson's Question.

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. (Aplt. A. 103). The *Operations Manual* stipulates that married University employees are allowed to *share,* between them, a maximum of 12 weeks of leave time upon the birth of a child, an entitlement that, according to the University's interpretation of Federal law, is guaranteed under the Family and Medical Leave Act (FMLA). The *Operations Manual* is less-than-clear, however, as to how two married University employees-one of them working full-time, the other, part-time--are to make arrangements to share the combined 12-week annual leave period allowed to them by the University. Mr. Johnson and Ms. Embree both assumed, given the express language setting forth the Purpose of the University's Parental Leave Policy (e.g., "*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."),* that each of them, as parents, would be able to use their respective accrued paid sick leave hours to take time off from work to spend with their newborn child. (Aplt. A. 103).

By October 2002, Mr. Johnson had accrued more than forty hours of paid sick leave. (Aplt. A. 103). In that month, he attended a course taught by of the University's Human Resources Department ("H.R.") regarding leave policies. He learned, then, and for the first time, from the course instructors, that the University interpreted the Parental Leave Policy to mean that *biological* fathers of children newly added to families were precluded from using any accrued paid sick leave hours for Parental Leave purposes. All other parents *except biological* fathers qualified for this benefit of employment: all other parents could use accrued paid sick leave to have time off to spend with their children. (Aplt. A. 103-104)

Thinking that the course instructors had made a mistake in describing the Policy, as applied to him, Mr. Johnson directed written inquiries to a number of persons at the University, starting with Interim President Willard L. Boyd. (Aplt. A. 294). In response to Mr. Johnson's query, University officials affirmed the correctness of the H.R. course instructors' earlier statements: that, in fact, *biological* fathers, solely due to their status as *biological* fathers, were precluded by the University from using any accrued paid sick leave to have time off to spend with a children newly added to their families, notwithstanding the stated purpose of the Parental Leave Policy, and notwithstanding the fact that no state law prevented the use of accrued paid sick leave for this purpose. (Aplt. A. 105, 289, 295-296).

6. Biological Mothers Such As Ms. Embree, Are Allowed Paid Parental Leave But Not Biological Fathers Such As Mr. Johnson For The Same Child Are Allowed Paid Parental Leave.

In October and November of 2002, Ms. Embree's supervisor granted her permission to use accumulated paid sick leave at the time of the anticipated birth of her child. (Aplt. A. 106-107). As planned, Ms. Embree would continue to work 20 hours per week until the newborn's arrival. Thereafter, upon obtaining a medical release form from her physician, she would take four weeks of maternity leave, using accrued paid sick leave for that period. Then, upon returning to work, Ms. Embree would be compensated at her normal hourly rate for working part-time, or ten hours per week, and she would spend the other ten hours per week parenting her new child, but receiving compensation during her Parental Leave from her bank of accrued paid sick leave. (Aplt. A. 106-107, 287-288).

According to the written plan made with her employer, of the time spent at home after her return-to-work date, in her parenting capacity, one-half of it would be compensated, as Ms. Embree would be working 10 hours per week, whereas the other one-half would be compensated Parental Leave, as she drew upon her banked hours of accrued paid sick leave. Under this plan, Mr. Johnson would take the remainder of the 12 weeks' combined and shared leave, the maximum allowed to couples wherein both are University of Iowa employees. (Aplt. A. 106-107).

On XX/XX/XXXX, Ms. Embree, gave birth; she and Mr. Johnson became the parents of their first child. (Aplt. A. 106). As planned and approved by the University, Ms. Embree took four weeks of paid maternity disability leave from her 20-hour per week job, drawing on her own accrued paid sick leave for that purpose. She obtained the required medical release, five weeks post-partum, and returned to work 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. Seven weeks 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. (Aplt. A. 106-107).

In contrast to Ms. Embree's experience, her husband and her child's father, Mr. Johnson, was precluded by the from using *any* of his accrued hours of paid sick leave for Parental Leave. As a consequence, when he took two weeks' leave from his full time job upon the birth of his daughter, to spend time with the couple's child and to assist his wife in fulfilling their parenting duties, it was on an unpaid basis. (Aplt. A. 107, 290-293).

SUMMARY OF THE ARGUMENT

Mr. David A. Johnson, in this class action civil lawsuit, advances Federal claims under the Title VII of the Civil Rights Act of 1964, as amended, and under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. He also asserts pendent state law claims under the Iowa Civil Rights Act and the Equal Protection Clause of the Iowa Constitution, Article I, Section 6.

As an employee of the University of Iowa Mr. Johnson is subject to policies contained within the University's *Operations Manual,* Section 22.8, captioned, "Parental Leave." That Policy sets forth a clearly stated 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."

Mr. Johnson and all similarly-situated *biological* fathers are denied the use of any accrued paid sick leave for Parental Leave, although all other parents, including biological mothers and male and female adoptive parents, are allowed the use of accrued paid sick leave for Parental Leave. Mr. Johnson claims that, as a biological father of a newborn child parent, pursuant to the express terms and Purpose of Parental Leave Policy, he, 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 Compensated Parental Leave time allowed to parents who adopt children.

Mr. Johnson believes that, as to issues of liability there are no genuinely disputed facts. (The issue of damages is subject to evidence that must be placed before the fact finder and is, therefore, not ripe for determination on a Motion for Summary Judgment.) Both he and Defendants filed cross Motions for Summary Judgment.

The District Court denied all of Mr. Johnson's claims, granting summary judgment to Defendants on all claims. Mr. Johnson now appeals that Order.

On appeal, Mr. Johnson seeks all appropriate Orders: *reversing* the District Court's Order granting Defendants' Motion for Summary Judgment; *granting Mr.* Johnson's Motion for Partial Summary Judgment as to the issues of liability; and *remanding* the matter for further proceedings consistent with these determinations.

ARGUMENT AND APPLICABLE STANDARDS OF REVIEW

WHETHER THE FEDERAL DISTRICT COURT ERRED IN GRANTING DEFENDANTS-APPELLEES SUMMARY JUDGMENT ON ALL CLAIMS MADE BY PLAINTIFF-APPELLANT DAVID A. JOHNSON UNDER THE LAWS AND CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF IOWA?

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES BECAUSE, UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, THE UNIVERSITY OF IOWA'S PARENTAL LEAVE POLICY, BOTH FACIALLY AND AS APPLIED TO MR. JOHNSON AND TO SIMILARLY SITUATED BIOLOGICAL FATHERS, UNLAWFULLY DISCRIMINATES ON THE BASES OF "GENDER-PLUS" OR "SEX-PLUS" PARENTING STATUS AND GENDER STEREOTYPING.

STANDARD OF REVIEW:

The Court of Appeals' standard of review in reviewing summary judgment motions is *de novo. Carter v. St. Louis University,* 167 F.3d 398, 400 (8th Cir. 1999). The evidence must be viewed in the light most favorable to Mr. Johnson, the non-moving party, *Scusa v. Nestle U.S.A. Co.,* 181 F.3d 958, 964 (8th Cir. 1999), giving him the benefit of all reasonable inferences that can be drawn from the facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, (1986). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

ARGUMENT:

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).

A. The Policy Violates Title VII, Facially And As Applied, Because It Unlawfully Discriminates On The Basis Of Mr. Johnson's "Gender - Plus" Or "Sex-Plus" Status As A Male Who Is A Biological Father.

One recognized theory of employment discrimination liability utilized by the Courts charged with determining the legality of leave policies which are alleged to discriminate between different subgroups of men and women under Title VII is termed "gender-plus" or "sex-plus." The theory refers to a policy or practice under which an employer is not alleged to have discriminated against the class of men or women as a whole but, rather, has treated "differently a subclass of men or women" by distinguishing employees on the basis of sex (gender) *plus* another characteristic. 1 BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW 456* (3rd ed. 1996).

The "gender-plus" theory describes the conduct that gives rise to the present litigation: that *male* employees (the "gender" part of the theory) of the University of Iowa who are *biological* fathers (the "plus" part of the theory) are denied the use of an employment benefit that is allowed to all other parents-the right to use accrued paid sick leave for the purpose of having time off to spend with children who are newly added to their families.

Under the "gender-plus" discrimination theory an employer need not discriminate against all members of a gender in order for its different treatment of subclasses of men and women to be unlawful. *See: Phillips v. Martin Marietta Corp.,* 400 U.S. 542, 544 (1971) (Upholding 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).

The United States Supreme Court described the usefulness of the "gender-plus" approach, in appropriate Title VII cases: "[The law] 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." This is because, "Congress never intended to give an employer license to discriminate against some employees on the basis of ... sex merely because he favorably treats other members of the employees' group." *Connecticut v. Teal,* 457 U.S. 440, 455 (1982).

In *Shafer v. Board of Public Education of the School Dist. of Pittsburgh,* 903 F.2d 243 (3rd Cir. 1990), the Pittsburg Board of Education was found to have violated Title VII when enforcing terms of a collective bargaining agreement that had allowed female employees to take paid leave under certain specified conditions related to "childbearing" and "childrearing." Such leave was granted either for: "1) a period of sick leave combined with an unpaid leave for childbearing or childrearing for a maximum of one year," or, for, "2) maternity leave not exceeding one year." In neither instance was the showing of a disability related to pregnancy required in order for a female employee to obtain leave. A Title VII challenge arose when the Board of Education denied a three-month unpaid leave request made by a male employee who, under the policy, intended to care for his son. Upholding the male teacher's "sex-plus" challenge, the Court held, as a matter of law, that the leave policy violated Title VII insofar as the policy was not exclusively for the purpose of allowing women to recover from the birthing process, but, rather, was explicitly for childrearing *or* childbearing, insofar as it did not impose a requirement that the "female be disabled in order to obtain the unpaid leave." Such a policy discriminated against males who had child care responsibilities on the basis of sex and was, therefore, "*per se* void for any leave granted beyond the period of actual physical disability on account of pregnancy, childbirth or related conditions." Id., at 248.

1. Mr. Johnson was denied use of employment due to his "gender-plus" or "sex-plus" status: a male who is a biological father.

Mr. Johnson has offered direct and uncontroverted evidence that the University, as a matter of policy and practice,

discriminated against him, in his capacity as a *biological* father. The stated Purpose of the University's 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, to the extent allowed by law, to have the leave on a paid basis.

There is no state law in Iowa precluding a parent from being paid during such leave. And, at the time of his request, Mr. Johnson had banked a sufficient number of accrued paid sick leave hours to cover the duration of his requested paid Parental Leave time. Therefore, under the express terms of *Operations Manual,* Section 22.8, Mr. Johnson, upon the birth of his daughter, like Mr. Shafer in Pittsburg, should have been allowed to utilize at least some amount of his accrued paid sick leave for the purpose of caring for and bonding with his newborn child. He proposes that the amount of accrued paid sick leave that should have been allowed for this use is not less than the amount of time allowed by the University to all adoptive parents at the time of the arrival of their new children: forty hours.

2. The pattern of discrimination.

Notwithstanding the express language of the Policy, Defendants have purposefully excluded Mr. Johnson, and other similarly-situated males, from access to earned and accrued paid sick leave benefits for Parental Leave solely on the basis of their gender, plus their status as biological father. The same benefit is without dispute, offered to all other parents who are not biological fathers, including biological mothers and adoptive fathers and mothers. Diagramically, the limited reach and the unlawful limits of the University's Parental Leave Policy may be illustrated as follows:

Parental Use of Accrued Paid Sick Leave to be With a New Child

	Biological Parents	**Adoptive Parents**
FEMALE EMPLOYEES	YES	YES
MALE EMPLOYEES	NO	YES

As interpreted and applied by University of Iowa administrators, the Policy is not neutral; the practices do 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 certain 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.")

3. The discrimination is intentional even if defendants demonstrate no ill-will.

Even if it could be said that the University lacked ill-will or animus towards Mr. Johnson, specifically, or towards biological fathers, as a category of parents, such a fact would not excuse excluding such persons from receiving employment benefits simply based upon their reproductive capacity. In a case involving a challenged variation in workplace rules based on employees' reproductive capacity, the United States Supreme Court, in *Int'l Union, United Auto v. Johnson Controls,* 499 U.S. 187, 199 (1991), ruled that the offending 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. In such instances, the motivation for the discriminatory policy is 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.

Id., at 199-200.

The facts giving rise to Mr. Johnson's dilemma are strikingly analogous to those cases in which employers have been precluded, as a matter of law, from implementing policies whose explicit terms and application result in disparate gender-based discrimination. The *Operations Manual,* Section 22.8, provides 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 any "disability" allowance. The Policy, by its own terms, is, instead, for the explicit and primary purpose of providing accrued paid leave to parents with care giving responsibilities for their newly arrived children.

It cannot be genuinely disputed that biological fathers are parents. It is not contested, in this instance, that Mr. Johnson, upon the birth of his daughter, had care-giving responsibilities related to that child. Nor can it reasonably be disputed that the Parental Leave Policy, grants women-mothers such as, for example, Ms. Jennie L. Embree--who require less than the six weeks to recover from the births of their children the use of accrued paid sick leave for the purpose of caring for their newborn infants upon the conclusion of any presumptive disability periods. (Aplt. A. 101-107). Clearly, the Policy provides Parental Leave for biological mothers, leave that is not limited to, but, is in addition to, any 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)). 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.

B. The Policy violates Title VII, facially and as applied, because it Unlawfully Discriminates on the Basis of Overbroad Gender Stereotypes.

Under Title VII, gender-based distinctions that are rooted in "overbroad generalizations about the different talents, capacities, or preferences of males and females" will not suffice to withstand a challenge. *Knussman v. Maryland,* 272 F.3d 625, 636-37 (4th Cir. 2001). Under the Parental Leave Policy's unambiguous classification scheme, biological mothers, but not biological fathers, may use accrued paid sick leave for the purpose of caring for newborn children. By excluding biological fathers, only, from benefits intended to assist employees in a parenting role, the Policy perpetuates overbroad generalizations about the talents, capacities and preferences of men-and women-in family life. Classifications "that appear to rest on nothing more than conventional notions about the proper station in society for males and females have been declared invalid time and again by the Supreme Court." Id., at 636-37; *See also: Orr v. Orr,* 440 U.S. 268, 283 (1979) ("Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes.").

1. The policy violates Title VII because, in effect, it relegates males and females to traditional sex-based stereotypes.

By relegating, in effect, biological mothers to the role of sole or primary caretaker of their newborns, by allowing biological mothers, but not biological fathers, access to the use of accrued paid sick leave, the Policy risks reinforcing traditional gender roles. Such a practice inescapably rests upon "conventional notions" about men and women that no longer provide an

acceptable legal basis for differential employment rights in our society.

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, in many instances become the *de facto* primary caretakers of children and have used their leave from employment to fulfill this critical role. Two "presumptions" are inherent in the University's implementation of the subsection of the Parental Leave Policy that allows use of accrued paid sick leave to biological mothers, but not to biological fathers: first, that all women are universally disabled for a period of six weeks following birth; and, second, that a woman who gives birth is, and should be, the sole or primary care taker of a child immediately following birth and during the first days of a child's development. These presumptions interrupt and interfere with the ordered and balanced choices of biological parents of a child who might, for example, otherwise choose nontraditional parenting roles that would allow biological mothers the opportunity more fully to participate in the workplace and biological fathers the opportunity to bond more extensively and to provide greater care for their children during the early days and weeks of their newborn's lives.

2. Tipping the scale.

By favoring the parenting role of women who are biological mothers over the parenting role of men who are biological fathers, by, in effect, placing the thumb of the State on the balance of parental choices, the University's Parental Leave 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 United States Supreme Court, in *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721 (2003), a recent case underscoring the need for the corrective requirements of the Family and Medical Leave Act, criticized the types of stereotypes that underlie the unequal provision of family care leave often allowed to men and women by their employers. Describing the need for the FMLA, Mr. Chief 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.

Id. at 736.

As a matter of law, men and women may not be treated differently simply because of presumptions about the respective roles they play in family life. *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975). The University of Iowa's Parental Leave Policy, by excluding biological fathers from a benefit conferred for the sole purpose of taking on a caretaking role as a parent, does just that.

C. The District Court Re-Constructs an Unlawful Policy

In response to Mr. Johnson's challenge to it, the District Court appears to misunderstand entirely and, therefore, in effect, judicially to reconstruct the purpose and operation of the University's Parental Leave Policy. The *Operations Manual* sets forth no separate provision for pregnancy disability for biological mothers. Rather, the Policy provides parental *as well as* disability leave for biological mothers. And the Court need not rely upon Mr. Johnson's word alone or upon his interpretation of the Policy to come to that conclusion. The University's own published materials resolve any purported ambiguities with the following explanation: "[Parental] leave is for the biological mother to recover from childbirth *and to spend time with the*

newborn child or for either or *both parents to spend time with a newly adopted child.*" (Aplt. A. 331-332).

1. The District Court recasts the Parental Leave benefit as a disability benefit.

The District Court's apparent view that biological mothers receive post-partum disability leave, only, and not paid Parental Leave, under Section 22.8 of the *Operations Manual,* is not based on the Policy language and is contradicted by the very facts placed into the evidence of this case. That biological mothers may use accrued paid sick leave to take time off to spend with children newly added to their families is affirmed by Defendants' own sworn deposition testimony. (Aplt. A. 119-120, 125). That is why Mr. Johnson's spouse, Ms. Jennie Embree, pursuant to the Policy's language, in consultation with, and with her employer's express permission, upon the birth of her child, took *both* paid disability *and* paid Parental Leave, drawing on her accrued paid sick leave in each instance to do so. (Aplt. A.106).

2. As reconstructed by the District Court no parent gets Parental Leave under the Parental Leave Policy

The District Court's ruling, in effect, is premised on an interpretation of the Parental Leave Policy under which the Policy does not mean what the Policy explicitly says it means: that, there really is no such thing as paid leave for the purpose of permitting "parents with care giving responsibilities time off to care for a child newly added to the family." (Aplt. A. 241, 331-332).

If the Parental Leave Policy is correctly interpreted by the District Court-that is, if the Policy, as applied to biological parents, is really a pregnancy *disability* policy, *only*--then the Policy's caption, its stated purpose and the terms and conditions describing Parental Leave are meaningless as to *any* biological parent. No biological parent, the District Court infers, is entitled to receive *Parental* Leave.[2] Further, if the District Court's interpretation of the Policy is accurate, then we must presume that the University's own administrators do not know how to implement the institution's own Policy. For they, under oath, invariably described a variety of parents (*except* biological fathers) who *are* eligible to receive Parental Leave benefits under the Policy. (Aplt. A. 119-122).

The fulcrum of what the Court accurately describes as its "cursory analysis," consists of two assumptions: first, that, under the Policy, a biological mother is allowed disability leave, only: and, second, and that, by contrast, adoptive parents' leave, is for "wholly caregiving" purposes. Based on those dual assumptions, the District Court concludes that Mr. Johnson's Title VII claim must fail insofar as he, as a biological father, fits into neither group:

Under sections 22.8(b)(1)(a) and 22.8(b)(1)(b) of the policy, biological mothers do not receive the same amount or type of leave as adoptive parents. The policy characterizes the leave provided mothers as "pregnancy disability leave." The University allows any amount of this leave to be charged against accrued sick leave, but requires medical documentation for leave exceeding six weeks. The policy characterizes the leave provided adoptive parents as "adoption leave," and adoptive parents can only charge up to five days against accrued sick leave.

Adoptive parents are entitled to five days of leave, while biological mothers are entitled to six weeks leave without documentation and unlimited leave with documentation of extended pregnancy disability. By definition, neither adoptive parent has a disability resulting from pregnancy, while leave provided biological mothers is pursuant to pregnancy disability. On the face of the policy, adoptive leave is wholly caregiving leave, while pregnancy leave is disability leave.

(Aplt. A. 20-21).

3. The District Court fails to compare Mr. Johnson, in his capacity as a biological parent, to other similarly situated parents.

Although Mr. Johnson advances his claim in his capacity as a care giving *biological parent,* to the District Court, "[I]t does not make sense" to compare him, as a biological father, to the group of "biological mothers and adoptive parents" because adoptive parents receive different leaves than biological mothers, quantitatively and qualitatively. "Biological fathers will be

compared separately to biological mothers and separately to adoptive parents." (Aplt. A. 20-21). However, rather than to compare biological fathers, such as Mr. Johnson, to biological mothers or adoptive *parents* (of either gender) in their respective capacities as parents, the District Court found that the comparison must be made on another basis:

> With respect to adoptive parents, biological fathers are not discriminated against based on sex. Both male and female adoptive parents receive five days of adoption leave, and thus, adoption leave is granted on the basis of adoptive parent status, not sex. Therefore, there is no Title VII violation as to the Parental Leave policy granting adoption leave.

(Aplt. A. 21)

It is suprising, that in a challenge to a Parental Leave Policy the challenging parent is not compared to any other persons in their respective roles as *parents.*

4. The Parental Leave Policy violates the EEOC guidelines.

The EEOC has developed rather precise guidelines relating specifically to the unequal division of Parental Leave. According to this Federal agency's rules, Defendants' Parental Leave Policy, in granting leave to biological mothers, but not biological fathers, without a showing of maternal disability, is precisely the type of rule considered violative of the letter and spirit of Title VII. (Aplt. A. 340-236). The University's Parental Leave Policy, by its own terms, does not require a showing of pregnancy-related disability in order for a biological mother to take Parental Leave. (Aplt. A. 233-243). Furthermore, the Policy does not limit the leave taken by biological mothers to a medically documented disability, while at the same time its provisions do provide paid leave to biological mothers to spend time with their newborn children. (Aplt. A. 331-332).

The fact that the Parental Leave Policy also provides leave opportunities for temporary pregnancy disability does not alter the fact that leave for parenting a new, healthy child is available to women pursuant to the same Policy and that such Parental Leaves are utilized by women such as Ms. Embree pursuant to the policy's express provisions. (Aplt. A. 106, 124-125).

Defendants have chosen to provide Parental Leave benefits in a manner that, according to the EEOC's guidelines, facially, and as applied, violates the letter and frustrates the purpose of Title VII. The University was in a position to know of the offending Policy, to be aware of its intentionally exclusionary implementation, and to know of the direct harm caused to Mr. Johnson's legal interests--and to those biological fathers who are similarly situated. No possible bona fide occupational qualification defense is available to justify such discrimination, and none has been offered by Defendants. See *TWA v. Thurston,* 469 U.S. 111, 121 (1985); *Int'l Union, United Auto v. Johnson Controls,* 499 U.S. 187 (1991).

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES BECAUSE UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE UNIVERSITY OF IOWA'S PARENTAL LEAVE POLICY, BOTH FACIALLY AND AS APPLIED TO MR. JOHNSON AND TO SIMILARLY SITUATED BIOLOGICAL FATHERS, UNLAWFULLY DISCRIMINATES ON THE BASES OF "GENDER-PLUS OR "SEX-PLUS PARENTING STATUS AND GENDER STEREOTYPING.

STANDARD OF REVIEW:

The Court of Appeals' standard of review in reviewing summary judgment motions is *de novo. Carter v. St. Louis University,* 167 F.3d 398, 400 (8th Cir. 1999). The evidence must be viewed in the light most favorable to Mr. Johnson, the non-moving party, *Scusa v. Nestle U.S.A. Co.,* 181 F.3d 958, 964 (8th Cir. 1999), giving him the benefit of all reasonable inferences

that can be drawn from the facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, (1986). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

ARGUMENT:

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. *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.

A. The Parental Leave Policy Violates The Equal Protection Clause, Facially and As Applied Because is Unlawfully Discriminates On The Basis of Mr. Johnson's "Gender-Plus" or "Sex-Plus" Status as a Male Who is a Biological Father.

To be actionable under a "gender-plus" or "sex-plus" theory of discrimination, the relevant Equal Protection concern is whether the plaintiff provides evidence of purposefully sex-discriminatory acts." *Back v. Hastings on Hudson Union Free School District,* 365 F.3d 107, 118-119 (2nd Cir. 2004) ("The term "gender-plus" or "sex-plus" is simply a heuristic. It is, in other words, a judicial convenience to affirm that a plaintiff can, under certain circumstances, survive summary judgment even when not all members of a disfavored class are discriminated against."). The Equal Protection Clause "forbids sex discrimination no matter how it is labeled." Id., at 118; *See Also, 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).

In the present instance, the "sex-plus" characteristic involves the University of Iowa's impingement of Mr. Johnson's fundamental right, in his capacity as a biological parent, to care for his child, to maintain and develop a relationship with his child, and to enjoy the companionship of his child. Accordingly, the District Court, below, should have employed heightened scrutiny, to the University's Parental Leave Policy and, thereby, committed legal error when it failed to do so.

1. The Parent-Child Bond as a Fundamental Right

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 impediment or intrusion in the workplace. *See:* Joan C. Williams & Nancy Segal, Comment, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job,* 26 HARV. WOMEN'S L. J. 77 (2003), and cases cited therein.

More specifically, Courts addressing the issue recognize that a fundamental right may be implicated by matters involving the allowance of leave to care for and bond with children. In such instances, "[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,* at 107, 118, n6 (2nd Cir. 2004).

Clearly, a State agency's interference with a parent's bonding with and caring for a child implicates a fundamental right. Mr. Johnson has alleged that the University of Iowa's 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 any of his accrued paid sick leave to spend time with his infant daughter and to provide care giving responsibilities to her-a benefit of employment granted to all other parents, who are not biological fathers, and who are subject to the same Policy.

B. The Parental Leave Policy Violates Constitutional Guarantees of Equal Protection Because it Discriminates on the Basis of Gender and This Discrimination is Not Substantially Related to the Achievement of An Important Governmental Objective.

1. Threshold Standards under Equal Protection Analysis

The Equal Protection Clause of the Fourteenth Amendment generally prohibits State and local governments from treating similarly situated persons differently. This principal is applied to policies that confer or withhold benefits of employment. "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." *Hishon v. King & Spalding,* 467 U.S. 69, 75 (1984). When a fundamental right or suspect classification is implicated in providing or withholding a benefit, heightened scrutiny of the adverse action is required. Id., at 75.

Individuals have a clear right, protected by the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment. *Davis v. Passman,* 442 U.S. 228, 234-35 (1979). 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).

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 University's Parental Leave Policy, or one that has been shown to have had a disparate impact on fundamental interest, requires the reviewing Court to utilize a heightened scrutiny analysis. *Craig v. Boren,* 429 U.S. 190, 197 (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...is unwarranted if there are other indications of gender-disparate treatment or invidious and intentional discrimination." Id., at 725.

In the Eighth Circuit, in Equal Protection cases, even when the District Court finds that comparison groups are not similarly situated, the fact finder 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).

A contested policy is not rendered neutral because it confers 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 gender, our Federal Appellate courts have consistently emphasized that the ultimate issue concerns "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).

2. 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." (Aplt. A. 178). The parties do not dispute that Mr. Johnson, and similarly-situated biological fathers who are employees of the University, are parents with caregiving responsibilities. Yet, as the Policy is implemented by the University, biological fathers are precluded from using any paid accrued sick leave to care for their newborn children. All other parents, including adoptive parents and biological mothers, are allowed to draw on their "banked" accrued sick leave for Parental Leave if they so-desire.

Mr. Johnson was not permitted under the Policy to utilize any of his accrued paid 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).

Defendants' intent to exclude Mr. Johnson and similarly-situated biological fathers from the Parental Leave benefit cannot survive heightened scrutiny-absolutely nothing implicating any important governmental objectives is involved here nor has any evidence been presented by Defendants demonstrating that the Policy was in any fashion "substantially related to achievement of those objectives."

C. The District Court's Determination That The Parental Leave Policy Should Be Subjected To A Rational Basis Test-And Not To Heightened Scrutiny--Constitutes Error At Law. However, Even If This Court Were To Agree That The Policy Should Be Subjected To A Rational Basis Test, The Policy Violates Constitutional Guarantees Of Equal Protection Under The Fourteenth Amendment Because The Exclusion Of Biological Fathers As A Category Of Persons From The Use Of Paid Accrued Sick Leave For Childrearing, A Benefit Conferred Upon All Others Similarly Situated Employees, Is Arbitrary, Capricious And Not Rationally Related To Any Governmental Purpose.

1. The Rational Basis Test

At the very least, 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 Equal Protection Clause requires State actors, at the very minimum, to treat similarly situated persons in a substantially equivalent manner. *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920).

In applying the rational-basis standard the Eighth Circuit Court of Appeals recognizes what appears to be 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 (8th Cir. 1992). For example, this Court, relying upon the Supreme Court's guidance in *Harrah Independent School District v. Martin,* 440 U.S. 194 (1979), has described a constitutionally-based 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 (8th Cir. 1986). 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 329. The stated goal, or 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, to the extent allowed by law, to have the leave on a paid basis.

(Aplt. A. 105, 289, 295-296).

Mr. Johnson believes that the District Court's adoption of a "rational basis" analysis is misplaced, given the nature of the rights affected. However, even if one were to assume, for the purpose of argument, that a rational basis, limited-scrutiny approach is appropriate, it is not a legitimate for the State in achieving the goal of a policy to target for dissimilar treatment one group of parents who are, in all relevant aspects, similarly situated to all other groups of parents. Further, the means chosen to realize the goal in this particular instance to exclude biological fathers from the benefit of the Policy are too attenuated to withstand even the lowest threshold of a rational basis review.

The ultimate validity of the challenged Policy under rational basis review may be challenged by this query: Is the purported purpose of the Policy furthered in any objectively reasonable way by the classification scheme adopted which resulted in the

exclusion of biological fathers from the Policy's ambit? The undeniable answer to this question, in this instance, is "no." The State "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 446 (1985).

2. "Gender-Plus" and "Sex-Plus" Revisited.

In order to establish that biological fathers are, in fact, a protected class for Equal Protection analysis Mr. Johnson need not prove that all men are excluded from a benefit. Rather he need only demonstrate that biological fathers, as a subclass of men, are 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 (10th Cir. 1997) The subclass corresponding to the biological fathers subclass are biological mothers. Biological parenthood, is common to both subclasses. Biological mothers (for example, Ms. Jennie C. Embree) are eligible to apply accrued paid sick leave to Parental Leave. Biological fathers (for example Mr. Johnson) are not. Clearly, "but for" Mr. Johnson's gender, he would have received benefits under the Policy. The Policy is, therefore, gender-based and facially discriminatory. Lex K. Larson, EMPLOYMENT DISCRIMINATION, § 40.04, at 40-12 (2nd ed. 1996).

The bottom line is this allowing biological mothers to use accrued paid sick leave for Parental Leave, thereby assisting them to care for and be with children, while denying biological fathers the same or comparable use of the same accrued paid sick so that fathers, too, can assist in the care of children, constitutes a differentiation that bears *no* relation to *any* important State interest. Mr. Johnson contends that a Policy and practice so-conceived reinforces and promotes the age-old notion that a mother bears a closer relationship with her child than a father. A father's ability to stay home from his job; enables mothers to remain there.

Clearly, the classification scheme adopted by the University serves no "important governmental objectives" and the discriminatory means employed by it, in the Policy are not "substantially related" to the achievement of any stated objectives. *United States v. Virginia,* 518 U.S. 515, 533 (1996) (quoting *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724 (1982)). No legitimate public purpose exists for such a differentiation.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES BECAUSE THE PARENTAL LEAVE POLICY VIOLATES THE IOWA CIVIL RIGHTS ACT, IOWA CODE § 216.6(1) (2003)

STANDARD OF REVIEW:

The Court of Appeals' standard of review in reviewing summary judgment motions is *de novo. Carter v. St. Louis University,* 167 F.3d 398, 400 (8th Cir. 1999). The evidence must be viewed in the light most favorable to Mr. Johnson, the non-moving party, *Scusa v. Nestle U.S.A. Co.,* 181 F.3d 958, 964 (8th Cir. 1999), giving him the benefit of all reasonable inferences that can be drawn from the facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, (1986). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

ARGUMENT:

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).

Given this parallel analysis used by the Iowa Supreme Court in Iowa Civil Rights cases Mr. Johnson repeats his argument set forth in Part I of his Argument as if fully set forth herein.

IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS-APPELLEES BECAUSE THE PARENTAL LEAVE POLICY VIOLATES THE EQUAL PROTECTION CLAUSE OF ARTICLE 1, SECTION 6 OF THE IOWA CONSTITUTION

STANDARD OF REVIEW:

The Court of Appeals' standard of review in reviewing summary judgment motions is *de novo. Carter v. St. Louis University,* 167 F.3d 398, 400 (8th Cir. 1999). The evidence must be viewed in the light most favorable to Mr. Johnson, the non-moving party, *Scusa v. Nestle U.S.A. Co.,* 181 F.3d 958, 964 (8th Cir. 1999), giving him the benefit of all reasonable inferences that can be drawn from the facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, (1986). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

ARGUMENT:

Unlike the Iowa Supreme Court's analysis of ICRA which closely parallels Federal interpretation of Title VII, it is clear that in recent years the Iowa Supreme Court interpretation of the Equal Protection Clause of Iowa's Constitution provides stronger protection for civil rights than, in many instances are recognized under the Equal Protection Clause of the United States Constitution. The Equal Protection Clause of the Iowa Constitution appears 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, Section 6.

In 2004, the Iowa Supreme Court explained the nature and scope of Equal Protection analysis under the Iowa Constitution, in *Racing Association of Central Iowa v. Fitzgerald,* 675 N.W.2d 1 (Iowa 2004) (*Fitzgerald II*). There, the State's highest Appellate Court indicated that even though it independently applied Federal principles in its analysis of Equal Protection under the Iowa State Constitution, Federal decisions are considered persuasive, but "not binding" in the Court's 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.

Id., at 6.

Iowa's Equal Protection Clause requires that similarly-situated persons be treated alike. *In re Detention of Morrow,* 616

N.W.2d at 548 (2001). 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)).

A. 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. *Santi v. Santi,* 633 N.W.2d 312, 317 (Iowa 2001). As such, these liberty interests are "protected against unwarranted State intrusion." *Callender v. Skiles,* 591 N.W.2d 182, 190 (Iowa 1999).

When the challenged State action implicates a fundamental right, "the infringement on parental liberty interests... must be 'narrowly tailored to serve a compelling State interest.' " *Santi,* at 318. In such instances what is commonly known as "strict scrutiny," is applied, and the Iowa Supreme Court does not presume that State laws or rules are constitutional *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 Iowa's Equal Protection clause, it must be "narrowly tailored to serve a compelling state interest." *J.E.B,* at 649-650. In such instance, the Iowa Supreme Court may reject the State's asserted compelling interest in conserving fiscal resources, finding that such an assertion must be narrowly tailored than that. *J.E.B,* at 649-651.

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 Defendants in a manner unlike all other comparable parents, who are employed by the University of Iowa and Iowa State University, all of whom enjoy the use of accrued paid sick leave-that is, compensated sick leave hours that have already been earned by biological fathers, while in the service of their employer-to have time off to spend with children who are newly added to their families.

1. Independent Review Under *Fitzgerald II*

The Iowa Supreme Court outlined the substantive parameters of Iowa's Equal Protection clause, stipulating that Iowa's state courts must conduct their own independent analyses of the Iowa Constitution, and not be reliant upon analyses made of the Fourteenth Amendment to the United States Constitution, because a more rigorous and expansive standard of review required under the Iowa State Constitution. Under this type of scrutiny classification schemes involving regulations such to taxation, a subject traditionally left to the legislature may pass muster under Federal Equal Protection analysis but fail when tested by Iowa's own constitutional standard. *Fitzgerald* at 6-8.

The Iowa Supreme Court's analysis provides a rule of decision that, if properly applied, should result in a judicial determination that the contested Parental Leave Policy, as applied to biological fathers, is unlawful, under the Constitution of the State of Iowa.

2. Rational Basis Under *Fitzgerald II*

The Iowa Supreme Court in *Fitzgerald II* adopted succinct standards to analyze challenged regulatory schemes of State actors. Under it, one looks to Article I, Section 6 of the Iowa Constitution, and inquires "whether the classifications drawn in a statute are reasonable in light of its purpose." *Id.* at 7 (citations omitted).

The court indicated that its first inquiry was to determine whether the legislature was required to treat one comparably-placed entity differently from another. In doing so, it outlined guiding principles for its analysis. Policy distinctions require a "plausible policy reason" for the classification such that they serve a "legitimate governmental interest." Any claimed State interest must be "*realistically* conceivable." Once satisfied that the policy reason is realistically conceivable, the Court must then proceed to determine whether the policy justification has a basis in fact. Finally, the Court is required to consider

"whether the relationship between the classification ... and the purpose of the classification is so weak that the classification must be viewed as arbitrary." *Id.* at 7.

It is clear that it is not enough for the State to assert laudable goals in adopting a particular scheme; the policy reason offered for any classification must be credible. *Id.* at 7. A reviewing Court is both entitled and required to "probe to determine if the constitutional requirement of some rationality in the nature of the class singled out has been met." The Iowa Constitution recognizes and upholds a primary principle of equal protection under the law: that "all persons in like situations should stand equal before the law. No favoritism should be tolerated." Id. at 6-7.

The *Fitzgerald II* Court noted that any classification involving "extreme degrees of over-inclusion and under-inclusion in relation to any particular goal... cannot be said to reasonably further that goal." *Id.* at 10. That is, for a classification scheme to withstand challenge, "the relationship of classification to its goal [cannot] be so attenuated as to render the distinction irrational." *Id.* at 11. Any State agency policy-created discrimination must be based upon a "reasonable distinction" that is apparent; otherwise any differential scheme would be necessarily constitutional. *Id.* at 11. Thus, despite the traditional deference shown by the Court to legislative determinations, the rational basis test under the Iowa Constitution is not a meaningless one. *Id.* at 6-8. In fact, it is substantially less deferential than standards applied to the same scheme by the United States Supreme Court under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

3. Application of the *Fitzgerald II* Standard of Review

To pass State constitutional muster, even if one were to assume that policies promulgated by the University of Iowa are analogues to Acts of the Iowa General Assembly, the discrimination effectuated by the Parental Leave Policy must be justified by a credible legislative objective and also evidence a relationship between the adopted classification scheme and the legislative objective that "is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn,* 505 U.S. 1, 11 (1992).

The challenged policy is a rule in an employee manual explicitly designed to allow parents with care giving responsibilities time off to be with their children on a paid basis, using accrued sick leave. As such, any ostensible judgment by the University of Iowa, as a State agency, regarding the ends and means chosen, is not dispositive of the issue of the regulation's validity. *Mathews v. De Castro,* 429 U.S. 181, 185 (1976); *Bierkamp v. Rogers,* 293 N.W.2d 577, 581 (Iowa 1980). The classification scheme chosen to further even desirable or laudable stated ends must not be wholly arbitrary or invidiously discriminatory in its means.

Moreover, the University of Iowa is not a legislative body charged with making policy for the citizens of the State of Iowa. It can no more produce legislative findings than it can produce state law. The University of Iowa's self-serving statements about its own financial status or any other justifications it offers about an inequitable, and in fact, discriminatory, provision of benefits are entitled to no deference by the Court.

Favoritism of one group of parents over another, in their capacity as parents seeking to have time with their newly-arrived children, the result, in this case, of a seemingly inscrutable intra-institutional procedural process, is neither legally justified nor constitutionally permissible. Favoritism appears to be the sole rationale for Defendants' scheme. The policy itself, and those charged with implementing it admit that the Purpose of Parental Leave Policy, is to allow parents, "time to spend with the child." Nowhere in the Policy is a higher value placed on such activities as not to traveling, preparing for a child's placement, undergoing evaluative home visits or undertaking legal proceedings, etc., prior to or even following adoptive, or other, placements. (Aplt. A. 357). University administrators who formulated the Policy concede that no significant differences exist between biological and adoptive parents. (Aplt. A. 353). Defendants have simply chosen when conferring an accrued, earned benefit of employment, to differentiate between parents who are similarly situated in all relevant respects yet in a manner that does not further the underlying Policy's clearly stated Purposes. Where, as here, "the only basis for the classification is to deny a benefit to one group for no purpose other than to discriminate against that group, the statutory classification is not only mathematically imprecise, it is without a rational basis and arbitrary." *Fitzgerald II,* 675 N.W.2d at 14 (citing *Thompson v. KFB Ins. Co.,* 850 P.2d 773, 782 (Kan. 1993).

Defendants have utterly failed to meet the burden of showing that the gender-based classification inherent to the terms of the

Policy substantially furthers the express goals of the Policy: to allow parents paid leave to spend time with and attend to caretaking responsibilities of newly arrived children. This failure renders the policy unjustifiably discriminatory and unconstitutional. See *Weinberger,* 420 U.S. at 651 ("Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of... [the statute] ... is entirely irrational.)

CONCLUSION

On appeal, Mr. Johnson seeks all appropriate Orders: *reversing* the District Court's Order granting Defendants' Motion for Summary Judgment; *granting Mr.* Johnson's Motion for Partial Summary Judgment as to the issues of liability; and *remanding* the matter for further proceedings consistent with these determinations.

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant David A. Johnson requests 20 minutes for oral argument.

Appendix not available.

Footnotes

[1] Appellant's Separate Appendix hereinafter referred to as Aplt. A.

[2] Additionally, although not the focus of this lawsuit, it is noteworthy that Iowa law, under Iowa Code §216.6(2)(e)(2003), governing pregnancy discrimination in benefit distribution, arguably may require eight (8) weeks of pregnancy related disability leave in the event an employer does not require proof of disability. To the extent Iowa law specifies eight (8) weeks as the recognized period of disability related to pregnancy for purposes of its civil rights laws, the University of Iowa's FMLA leave policy requiring parents who are both employees of the University of Iowa to divide up their twelve (12) weeks of unpaid FMLA leave for the purposes of bonding with a new child would be in violation of Federal Law. See 29 C.F.R. § 825.202 (c) (1995) ("Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement...the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave ... For example, if each spouse took 6 weeks of leave to care for a healthy, newborn child, each could use an additional 6 weeks due to his or her serious health condition.... [M]any State pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods would also be considered FMLA leave for a serious health condition of the mother, and would not be subject to the combined limit.").