For Opinion See 431 F.3d 325

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, in his official capacity; Douglas K. True, in his official capacity; Susan Buckley, in her official capacity, Defendants-Appellees.
No. 05-1184.
2005.

Appeal from the United States District Court for the Southern District of Iowa The Honorable Ronald E. Longstaff, Chief Judge

Brief of the Appellees

Thomas J. Miller, Attorney General of Iowa, Mark E. Schantz, General Counsel, 120 Jessup Hall, University of Iowa, Iowa City, Iowa 52242, 319-335-2841, George A. Carroll, Assistant Attorney General, Hoover Building, 2nd Floor, Des Moines, Iowa 50319, 515-281-8330, Attorneys for Appellees.

SUMMARY AND NOTICE REGARDING ORAL ARGUMENT

This appeal is from an Order entered by Chief Judge Longstaff granting Defendant/Appellees' Motion for Summary Judgment. Plaintiff/Appellant had brought a facial challenge to the University of Iowa's Parental Leave Policy, alleging (1) that it is gender discrimination to permit a biological mother to use six weeks of sick leave for pregnancy disability while not permitting a biological father five days of child care leave; and, (2) that providing five days of child care leave for adoptive parents without providing the same benefit to biological parents is a violation of equal protection.

Appellees believe that the issues in this case, properly stated, can be resolved by the Court without oral argument. Should the Court grant Appellant's request for oral argument, Appellees request equal time.

TABLE OF CONTENTS

SUMMARY AND NOTICE REGARDING ORAL ARGUMENT ... ii

TABLE OF CONTENTS ... iii

TABLE OF AUTHORITIES ... v

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION ... 1

STATEMENT OF FACTS ... 1

I. SUMMARY OF UNIVERSITY BENEFITS RELATED TO LEAVE ... 1

A. *Paid Leave* ... 2

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

B. *Unpaid Leave* ... 4

C. *Health Insurance* ... 5

II. SUMMARY OF UNIVERSITY BENEFITS RELATED TO PARENTING ... 6

III. ADDITIONAL LEGISLATIVE FACTS ... 7

STANDARD OF REVIEW ... 8

STATEMENT OF THE CASE ... 8

STATEMENT OF ISSUES ... 10

I. WHETHER A UNIVERSITY POLICY THAT PERMITS A NATURAL MOTHER TO USE SICK LEAVE TO FINANCE A SIX-WEEK ABSENCE FROM WORK DUE TO THE MEDICAL DISABILITY ASSOCIATED WITH PREGNANCY, BUT AUTHORIZES NO USE OF SICK LEAVE FOR CAREGIVING BY NATURAL FATHERS, VIOLATES TITLE VII OF THE CIVIL RIGHTS ACT OR IOWA CODE § 216.6(1) ... 10

II. WHETHER A UNIVERSITY POLICY THAT PERMITS ADOPTIVE PARENTS TO USE SICK LEAVE TO FINANCE A FIVE-DAY ABSENCE FROM WORK FOR CAREGIVING PURPOSES, BUT DOES NOT AUTHORIZE THE USE OF SICK LEAVE TO FINANCE CAREGIVING BY NATURAL PARENTS, VIOLATES THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES OR IOWA CONSTITUTIONS ... 11

SUMMARY OF ARGUMENT ... 11

ARGUMENT ... 12

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE UNIVERSITY PARENTAL LEAVE POLICY DOES NOT CLASSIFY ITS EMPLOYEES BY GENDER AND THEREFORE DOES NOT VIOLATE TITLE VII OR THE IOWA CIVIL RIGHTS ACT ... 12

A. *The Language of the Policy* ... 12

B. *The Schafer Decision is Not to the Contrary* ... 16

II. THE DISTRICT COURT CORRECTLY HELD THAT THE UNIVERSITY'S ADOPTIVE LEAVE POLICY DOES NOT DENY A NATURAL FATHER EQUAL PROTECTION OF THE LAW. 18

A. *There is no Fundamental Right Involved in This Policy.* ... 19

B. *The District Court Properly Concluded that the Adoptive Leave Provisions of Subsection b(1)(b) of the Parental Leave Policy Satisfy the Rational Basis Test* ... 20

C. *The University Can Reasonably Believe That Adoptive Parents Have a Superior Equitable Claim to Paid Leave.* ... 22

D. *Equal Protection and the Iowa Supreme Court* ... 25

CONCLUSION ... 26

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

TABLE OF AUTHORITIES

CASES

Abraham v. Graphic Art Int'l Union, 660 F.2d 811 (D.C. Cir. 1981) 10, 17

Bower v. Owens, 476 U.S. 340 (1986) ... 21

Carter v. St. Louis University, 167 F.3d 398 (8th Cir. 1999) ... 8

Coleman v. B-G Maintenance Management, 108 F.3d 1199 (10th Cir. 1997) ... 16

Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428 (6th Cir. 2004) ... 16

Harris v. McRae, 448 U.S. 297 (1980) ... 11, 20

Idaho Department of Employment v. Smith, 434 U.S. 100 (1977) ... 11, 21

Jefferson v. Hackney, 406 U.S. 535 (1972) ... 21

Martinez v. NBC, Inc., 49 F.Supp.2d 305 (S.D.N.Y. 1998) ... 11, 16

Parham v. Hughes, 441 U.S. 347 (1979) ... 10, 15

Racing Association of Central Iowa v. Fitzgerald, 648 N.W.2d 555 (Iowa 2002) ... 25

Racing Association of Central Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004) ... 25

Schweiker v. Hogan, 457 U.S. 569 (1982) ... 21

Schafer v. Board of Public Education, 903 F.2d 243 (3rd Cir. 1990) ... 16

U. S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) ... 11, 22

STATUTES AND MISCELLANEOUS

Iowa Code Chapter 216 ... 9, 10, 18

EEOC Compliance Manual, ¶ 4818 ... 11, 14, 23

Tribe, Laurence, *American Constitutional Law* (2d ed. 1988), p. 782 ... ... 11, 19

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had jurisdiction of this case pursuant to 28 U.S.C. §§ 1331 and 1441. The Circuit Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF FACTS

I. SUMMARY OF UNIVERSITY BENEFITS RELATED TO LEAVE

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

The University of Iowa ("University") is an institution of higher education with approximately 13,700 full-time employees (App. p. 50; Aff. D. True). The University provides a comprehensive benefits package for these employees, including health and dental insurance, paid leave for absences and retirement plans. Total employee benefits at the University cost $267 million, or 34.5% of its payroll. The national average benefit ratio is 28.1% of payroll. Vacation and sick leave costs at the University represent $67.1 million, or 8.68% of total payroll. The national average for these costs is 6.5% of payroll. The University spent $17.6 million in variable costs for sick leave use alone (App. p. 71; Interrogatory Response Jayne).

The leave issue in this case may be informed by a brief review of the broader context of University policy relating to absences. This discussion is drawn from Chapters III-22 and III-23 of the University *Operations Manual* ("UOM") (App. pp. 231-44).

A. *Paid Leave.* UOM § III-22.2 makes clear that the University's general expectation of its employees is to report to work regularly and on schedule, but goes on to recognize that there are absences which may be necessary or justifiable. For many years, the State of Iowa and the University of Iowa have had "sick leave" policies for their employees that assume some or all of the risk of being unavoidably absent from work and losing compensation for those absent days. Currently, sick leave credits accrue at the rate of 12 hours per month of service for full-time employees (App. p. 233). Originally, paid leave was available only for absences due to medically-related disabilities. At least since the 1970s, pregnancy has been considered a medically-related disability. Biological mothers are entitled to leave for any period of pregnancy-related temporary disability for which they have sufficient accrued sick leave. Based on current medical practice, a pregnancy leave of no more than six weeks would not require documentation of disability. Beyond six weeks, written medical evidence is required (App. pp. 233-34).

Over the years and in response to employee requests that they be permitted to apply sick leave credits to other situations, the University has allowed employees to use sick leave credits for other kinds of absence. Those additional justifications include (1) emergency leave, which permits an employee a maximum of five days per calendar year for the care and necessary attention of ill or injured members of the employee's immediate family; (2) funeral leave, which permits an employee a maximum of three days for each occurrence of death in the employee's immediate family; (3) service as a pallbearer, which permits a maximum of one day for each service at the funeral of a person not a member of the employee's immediate family; and, (4) adoption, which permits a newly adoptive parent a maximum of five days'absence to be charged against sick leave (App. p. 234).

B. *Unpaid Leave.* University policy also permits employees to request *unpaid* leave to the extent that accrued sick leave is insufficient to cope with the medical condition or other qualifying event. The University has also adopted policies to implement the requirements of the Federal Family and Medical Leave Act of 1993 ("FMLA"). As relevant to this matter, the University will grant up to twelve weeks of unpaid leave during any twelve-month period for (1) the birth and first year care of a child; (2) the adoption or foster placement of a child in the employee's home; (3) the care of a spouse, child or parent with a serious health condition; or, (4) the employee's own serious health condition. These requirements are set forth in UOM § III-22.7. (App. pp. 238-41.)

The University also allows its non-organized staff (employees such as Plaintiff-Appellant Johnson) to accrue vacation so that they may be paid for time off. In his position, Mr. Johnson accrued 12 days of vacation per year. Subject to reasonable notice in scheduling vacation to meet work needs, employees may also use vacation credits to compensate for absences for any of the reasons for which they might use accrued sick leave.

Shortly before the adoption of the FMLA in 1993, the bargaining organization for the University's Merit employees re-

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

quested that covered employees who were adoptive parents be permitted to use five days of sick leave to deal with a variety of absences related to the adoption process. Additional benefits for biological parents were not sought by the bargaining organization and were not included in the collective bargaining agreement. In the general case, the University often will provide its faculty and its non-organized staff with additional benefits which have been negotiated by its organized employees. That occurred for adoptive leave shortly after its provision to organized employees (App. p. 72; Interrogatory Response Jayne).

C. *Health Insurance.* All non-organized employees are provided access to one of the University's health insurance plans. All the plans compensate a female employee who is a biological mother, or a male employee whose spouse is a biological mother, for the greater portion of the medical expenses related to childbirth.

II. SUMMARY OF UNIVERSITY BENEFITS RELATED TO PARENTING

The following table describes diagrammatically the benefits for which biological mothers, biological fathers, adoptive mothers and adoptive fathers are eligible under University policy.

Table I

Eligibility for (1) Maternity Leave, (2) Parental Leave, (3) Vacation, (4) FMLA, Unpaid Leave and (5) Health Insurance for Childbirth

	Biological Parents		Adoptive Parents	
	Maternity Leave	YES	Maternity Leave	NO
Female	Parental Leave	NO	Parental Leave	YES
Employees	Vacation	YES	Vacation	YES
	FMLA	YES	FMLA	YES
	Health Insurance	YES	Health Insurance	NO
	Maternity Leave	NO	Maternity Leave	NO
Male	Parental Leave	NO	Parental Leave	YES
Employees	Vacation	YES	Vacation	YES
	FMLA	YES	FMLA	YES
	Health Insurance	YES	Health Insurance	NO

III. ADDITIONAL LEGISLATIVE FACTS

Adopting a child involves a substantial commitment of time, from 27 to 41 hours for an in-state adoption. If the adoption is out-of-state, an additional one or two weeks may be required. Even more time can be involved for an international adoption. A majority of the adoptions at the University where leave has been requested have been international (App. pp. 92, 68; Interrogatory Response Barnes; Aff. J. Gorman).

The appropriations to the University's base budget from the State of Iowa decreased from 2000 to 2004 by $74.9 million. Increases in benefit costs related to sick leave proposed in 2002 and 2003 were rejected in substantial part because of the budget situation and the University's need to reduce expenses (App. 49; Aff. D. True).

University records indicate that 248 male employees became biological parents between June 1, 2001, and April 14,

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

2004. The total cost of five days'leave for these employees would have been approximately $323,000, or an annual cost in excess of $112,000. By way of contrast in calendar years 2002 and 2003, 54 employees received adoptive leave, 26 males and 28 females (App. pp. 68, 72; Aff. J. Gorman; Interrogatory Response Jayne).

The University's health insurance plan spends $2.2 million annually on natural birth costs, or approximately $6,700 per childbirth (App. p. 72; Interrogatory Response Jayne).

STANDARD OF REVIEW

This Court reviews orders granting summary judgment *de novo. Carter v. St. Louis University,* 167 F.3d 398, 400 (8th Cir. 1999). *De novo* review is also appropriate because this matter, by mutual certification, involved no issues of adjudicative fact. Appellant's facial challenge only involved the interpretation of University policy and consideration of those legislative facts relevant to rational basis review, all questions of law for the Court.

STATEMENT OF THE CASE

After exhausting his administrative remedies, Plaintiff-Appellant David A. Johnson ("Johnson") filed a Complaint in the United States District Court for the Southern District of Iowa against Defendants alleging that the University's parental leave policy on its face violates Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

On the same day, Johnson filed a Petition in Equity in the Iowa District Court for Johnson County attacking the facial validity of the University's parental leave policy under Iowa Code Chapter 216 (the Iowa Civil Rights Act), and the Equal Protection Clause of the Iowa Constitution, Article I, § 6. The U. S. District Court later entered orders merging the federal claims with pendent state law claims and certifying a class of similarly-situated biological fathers.

Upon completion of discovery, the parties filed cross-motions for summary judgment on July 19, 2004, both parties certifying there were no disputed issues of material fact. After briefing, District Court Chief Judge Ronald L. Longstaff, on December 19, 2004, issued an Order ("Order") granting Defendants' Motion for Summary Judgment on all claims.

The District Court ruled that a policy which provides medical disability leave for natural mothers and no caregiver leave for natural fathers does not rest on an unlawful gender classification, in part because these two forms of leave are not comparable. The Court further ruled the University had a rational basis for providing child-care leave for adoptive parents but not for natural parents, and that accordingly, the policy did not deny Johnson equal protection of the law within the meaning of either the federal or state constitutions.

STATEMENT OF ISSUES

I. WHETHER A UNIVERSITY POLICY THAT PERMITS A NATURAL MOTHER TO USE SICK LEAVE TO FINANCE A SIX-WEEK ABSENCE FROM WORK DUE TO THE MEDICAL DISABILITY ASSOCIATED WITH PREGNANCY, BUT AUTHORIZES NO USE OF SICK LEAVE FOR CAREGIVING BY NATURAL FATHERS, VIOLATES TITLE VII OF THE CIVIL RIGHTS ACT OR IOWA CODE § 216.6(1).

Authorities:

Parham v. Hughes, 441 U.S. 347 (1979).

Abraham v. Graphic Art Int'l Union, 660 F.2d 811 (D.C. Cir. 1981).

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Martinez v. NBC, Inc., 49 F.Supp.2d 305 (S.D.N.Y. 1998).

EEOC Compliance Manual, ¶ 4818.

II. WHETHER A UNIVERSITY POLICY THAT PERMITS ADOPTIVE PARENTS TO USE SICK LEAVE TO FINANCE A FIVE-DAY ABSENCE FROM WORK FOR CAREGIVING PURPOSES, BUT DOES NOT AUTHORIZE THE USE OF SICK LEAVE TO FINANCE CAREGIVING BY NATURAL PARENTS, VIOLATES THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES OR IOWA CONSTITUTIONS.

Authorities:

Harris v. McRae, 448 U.S. 297 (1980).

U. S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (U.S. Ind. 1980).

Idaho Department of Employment v. Smith, 434 U.S. 100 (1977).

L. Tribe, *American Constitutional Law* (2d ed. 1988).

SUMMARY OF ARGUMENT

The University's parental leave policy does not involve a gender classification and cannot, therefore, involve gender discrimination.

The classifications involved in the policy are (1) between those employees who have disability associated with pregnancy and those who do not, and (2) between male and female adoptive parents and male and female biological parents.

The undisputed fact that the demand on the time and finances of adoptive parents is significantly greater than those for biological parents provides a rational basis for permitting adoptive parents but not biological parents to utilize five days of accumulated sick leave to finance time off in connection with the acquisition of a child.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE UNIVERSITY PARENTAL LEAVE POLICY DOES NOT CLASSIFY ITS EMPLOYEES BY GENDER AND THEREFORE DOES NOT VIOLATE TITLE VII OR THE IOWA CIVIL RIGHTS ACT.

A. *The Language of the Policy*

Appellant's claim is a facial challenge to the lawfulness of the University's parental leave policy (UOM § III-22.8). It may be helpful to set out the pertinent portions of this policy:
22.8 PARENTAL LEAVE POLICY
(Amended 5/99; 8/00)
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.*

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

(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 accrued 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 to be charged to vacation time, compensatory time, or 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.]

App. pp. 62-63.

As the District Court noted, this policy consists of a general purpose clause and two distinct eligibility clauses (Order, p. 20). Each of those clauses contains what we lawyers call a "classification." The classification in Subsection b(1)(a) is between those persons who suffer medical disability associated with pregnancy and those who do not. That this is the case is reflected in the language of University policy which permits the leave to last only as long as the disability is presumed or proven to exist. Returning to work full time ends the entitlement to disability benefits (App. pp. 396-97).

Relying on the general language in the purpose clause, Appellant attempts to avoid this conclusion by characterizing Subsection b(1)(a) disability leave as "child care" leave. While the District Court recognized that the natural mother will likely spend time caring for her new child while recovering from pregnancy-related disability (Order, p. 18, n. 5), child care is plainly not the basis for allowing the leave. On the face of the policy, it is clear that a natural mother can utilize sick leave only if and so long as she is presumed or found to be disabled, fully or partially (Order pp. 20-21).

The EEOC Compliance Manual, ¶ 4818, provides guidance on parental leave and is quite helpful in clarifying that disability leave needs to be distinguished from parental leave for purposes of compliance with Title VII. "Parental Leave" is defined as:
Leave to care for a child of any age, or to develop a healthy parent-child relationship, or to help a family adjust to the presence of a newborn or adopted child. *It must be distinguished from pregnancy disability leave, which is a form of medical leave allowed to female employees who cannot work because of pregnancy or related medical conditions.* [Emphasis added]

The Guidance goes on to state:
Title VII does not require that any particular fringe benefits be provided: it requires only equal treatment of employees, once the employer has decided to provide such benefits. *Hishon v. King & Spalding,* 467 U.S.69, 75, 34 EPD ¶34, 387 (1984); 29 C.F.R. § 1604.9. Thus, a policy denying parental leave to all employees or severely restricting such leave is not, in the absence of additional facts, disparate treatment and probably would not be deemed to be unlawful under Title VII. A policy of refusing all parental leave may fall especially harshly on adoptive parents of either sex.[FN7] Nevertheless, it is difficult to perceive any Title VII implications. It is unlikely that denial of leave will be regarded as disadvantaging either male employees or female employees simply because a particular type of leave is desired more frequently by one class or the other.

FN7. Natural parents would at least have the mother home with the new baby for the few weeks of the mother's

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

disability.

The analysis developed above has long been reflected in the case law. For example, *Parham v. Hughes,* 441 U.S. 347 (1979), involved a statute which permitted only fathers of illegitimate children who had taken the steps necessary to legitimate the children to sue for their wrongful deaths. In upholding the statute against a claim of gender discrimination, the Court stated:

In cases where men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situations, this Court has upheld its validity.

441 U.S. at 355.

More recently, in *Martinez v. NBC, Inc.,* 49 F.Supp.2d 305 (S.D.N.Y. 1998), a female employee claimed gender discrimination because the employer allegedly was not accommodating breast-feeding adequately. Observing that men are physiologically incapable of pumping breast milk, the District Court said:

The drawing of a distinction among persons of one gender on the basis of criteria that are immaterial to the other is not the sort of behavior covered by Title VII.

49 F.Supp. at 309. See also *Derungs v. Wal-Mart Stores, Inc.,* 374 F.3d 428 (6th Cir. 2004)[FN1].

FN1. In this regard, the Court may also wish to review *Coleman v. B-G Maintenance Management,* 108 F.3d 1199 (10th Cir. 1997), cited by Appellant. The holding of the case is that in a "gender plus" claim, plaintiffs can never be successful if there is no corresponding subclass of the opposite gender. See *Coleman* at 1204.

B. *The Schafer Decision is Not to the Contrary.*

The *Schafer* case (*Schafer v. Board of Public Education,* 903 F.2d 243 (3rd Cir. 1990), holds that an employer may not provide females with child care leave on a different basis than it provides such leave to males. The EEOC and the University agree with that holding. But in *Schafer,* the employer provided a leave of one year for females and no leave for males for child care without any showing that pregnancy disability persists for one year. Here, the University offered expert testimony that its six-week presumption of disability is based on the current state of medical knowledge and the D.C. Circuit has taken judicial notice of that proposition as well. See *Abraham v. Graphic Art Int'l Union,* 660 F.2d 811, 819 at n. 64 (D.C. Cir. 1981).

It is also apparent that the University leave provided in Subsection b(1)(b) for the child care needs of adoptive parents is provided equally to male and female adoptive parents (App. p. 16), and there is no basis in the policy language for Appellant's accusation that the University is guilty of "gender stereotyping."

Neither natural fathers nor natural mothers are given paid leave for child care purposes.[FN2] Once that is understood, gender drops from the picture and Title VII and Iowa Code Chapter 216 have no relevance to judicial review of the University's policy.

FN2. Appellant continues to claim that his wife was allowed to use her pregnancy leave for parental leave. He claims that his wife was working half-time at the time of childbirth, that she did not work at all for four weeks, and then returned to work quarter-time (half of half-time) for weeks five and six. He says she was to receive a total of 10 hours' sick leave for the last two weeks. That would mean she was working quarter-time and getting quarter-time sick leave. Viewed as leave for *partial* disability, that practice would be entirely consistent with the University's interpretation of the policy applied on a *pro rata* basis. Please note that there is no "gap" that might support an inference that the biological mother return to work full-time--indicating she was no longer medically

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

disabled--and then later was allowed to use additional days of sick leave for absence attributable only to child care. The University does not allow the use of sick leave for parental leave (App. pp. 396-97). Ms. Embree's case is not a counter example as the trial court specifically held: "The critical difference between Appellant and Embree is that Embree was in the process of recovering from pregnancy disability and Appellant was not." (Order, p. 26.)

II. THE DISTRICT COURT CORRECTLY HELD THAT THE UNIVERSITY'S ADOPTIVE LEAVE POLICY DOES NOT DENY A NATURAL FATHER EQUAL PROTECTION OF THE LAW.

Equal protection claims involving entitlement to benefits are generally analyzed under the "rational basis" test. Appellant devotes little effort to refuting the District Court's conclusion that University policy is rationally related to a legitimate purpose. Most of the attention is devoted to a claim that "strict scrutiny" rather than the rational basis test should be applied because the classification in the adoptive leave policy allegedly affects a fundamental right.

A. *There is no Fundamental Right Involved in This Policy.*

Appellant produces no constitutional authority even for the proposition that there is a constitutional right to *unpaid* leave to be absent from work to take care of one's child. And there is no such authority. But a so-called right for time off to care for a child is not what is involved here; University policy clearly provides unpaid leave for natural and adoptive parents of both genders. As the District Court correctly noted, Appellant's real claim is for *paid leave* for child care purposes and there is no authority whatsoever for treating that claim as involving a fundamental right (Order, p. 28). In that regard, it should be noted that while Congress in enacting the FMLA made generous provisions for unpaid leave for a variety of family purposes, it quite plainly stopped well short of requiring employers to provide *paid* time off.

The District Court also correctly concluded that the authority cited by Appellant below is inapposite (Order, p. 28). See, e.g., Tribe, *American Constitutional Law* (2d ed. 1988), p. 782. Professor Tribe articulates the point made by the District Court by quoting *Harris v. McRae,* 448 U.S. 297, 318 (1980), in the following passage:

Even when the Constitution forbids government to interfere with an individual's choice between two alternatives--such as the choice between abortion and childbirth, or that between public and private education-it does not follow that government may not put its thumb on the scale by subsidizing one alternative but not the other. Were that not the case, the subsidy of public schooling would entail a constitutional duty to subsidize the private alternatives that, under *Pierce v. Society of Sisters,* the government must leave parents free to choose. "It cannot be that because government may not prohibit the use of contraceptives, or prevent parents from sending their child to a private school, government, therefore, has an affirmative obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools." Whatever one thinks of the validity of educational voucher plans, one surely cannot argue that the Constitution compels government to institute them.

Because there is no fundamental right involved here, it follows that Appellant is not entitled to strict-scrutiny review of the University parental leave policy.

B. *The District Court Properly Concluded that the Adoptive Leave Provisions of Subsection b(1)(b) of the Parental Leave Policy Satisfy the Rational Basis Test.*

As previously noted, Subsection b(1)(b) of UOM § 22.8 permits adoptive parents to use five days of sick leave credit for child care leave. Subsection b(1)(b) does not provide that leave to natural mothers or fathers. The classification involved in this section of the policy, then, is between natural and adoptive parents.

Appellant's claim has been that once the University articulates a purpose underlying a benefit, it must provide that same

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

benefit to any employee who could make effective use of it. Appellant has never provided any authority for that proposition and the United States Supreme Court has consistently rejected it, recognizing that the judiciary should generally defer to the legislative and executive branches in making the difficult line-drawing and financial judgments that inevitably occur in providing benefits to employees and citizens. See, e.g., *Jefferson v. Hackney,* 406 U.S. 535 (1972) (acceptable to provide lower AFDC benefits than benefits afforded the aged and infirm); *Idaho Department of Employment v. Smith,* 434 U.S. 100 (1977) (rational basis for distinguishing between day students and night-school students in awarding unemployment benefits); *Schweiker v. Hogan,* 457 U.S. 569 (1982) (accepting distinction between medically needy and categorically needy for purpose of medical benefits); *Bower v. Owens,* 476 U.S. 340 (1986) (accepting distinction between remarried widowed spouse and divorced widowed spouse in determining amount of Social Security benefits).

The rationale behind these rulings was well-articulated by the Supreme Court in *U. S. Railroad Retirement Board v. Fritz,* 449 U.S. 166, 179 (1980), where Fritz challenged provisions of the Railroad Retirement Act. The court stated:
Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether these reasons in fact underlay the legislative decision," *Flemming v. Nestor,* 363 U.S., at 612, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing. The "task of classifying persons for...benefits...inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line." *Mathews v. Diaz,* 426 U.S. 67, 83-84 (1976), and the fact the line might have been drawn differently at some point is a matter for legislative, rather than judicial, consideration.

These cases consistently recognize that other branches of government, in light of financial limitations, must be allowed the flexibility to address problems one step at a time, focusing on a subset of the problem viewed presently as most acute. That is precisely what occurred here.

C. *The University Can Reasonably Believe That Adoptive Parents Have a Superior Equitable Claim to Paid Leave.*

The University provided significant expert testimony concerning considerations of legislative fact underlying the University's parental leave policy. As previously noted, the EEOC Compliance Manual, § 4818, agrees with this testimony. Appellant provided no expert testimony or other factual basis for questioning those propositions. As the District Court recognized (Order, pp. 30-31), the demands on the time and the finances of adoptive parents are significantly greater than those for natural parents. Put differently, without adoptive leave, adoptive parents would have significantly more time off *without pay* than is the case for natural parents. That differential is accentuated by the fact that the University provides other benefits that assist in deferring the costs of childbirth for natural parents, particularly health insurance and pregnancy disability leave. The following table provides a conceptual description of the relative treatment of the two classes of parents by University benefit policy.

Table 2

Eligibility for (1) Parental Leave, (2) Maternity Leave, and (3) Health Insurance for Childbirth

		Biological Parents	Adoptive Parents
	Parental Leave	1. NO	1. YES
Female	Maternity Leave	2. YES	2. NO
Employees	Health Insurance	3. YES	3. NO
	Parental Leave	1. NO	1. YES

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

Male	Maternity Leave	2. NO	2. NO
Employees	Health Insurance	3. YES	3. NO

It is also important to note that this approach to child care benefits was brought to University administration by employee groups. In the first instance, that organized employees sought this benefit only for adoptive parents, despite the fact there are many more natural parents than adoptive parents in the bargaining unit, is profound testimony to the reality of the relative needs of the two groups. It was also certainly rational for the University to extend that approach to benefits to other similarly-situated employee groups and rational to take cost into account in determining whether either to increase the benefit for adoptive parents or add some form of child care benefit for natural parents.

D. *Equal Protection and the Iowa Supreme Court.*

Appellant claimed below that *Fitzgerald II [Racing Association of Central Iowa v. Fitzgerald,* 675 N.W.2d 1 (Iowa 2004)] presented a change in approach by the Iowa Supreme Court to its application of the federal rational basis test. This may well be disputed[FN3] but the District Court applied the supposedly more stringent Iowa test and concluded it was rational to recognize the equities of adoptive parents and that the policy was a rational means of meeting that objective. Appellant suggests nothing that would or could indicate that the District Court erred in this regard.

FN3. The Iowa Supreme Court ordinarily applies the federal rational basis test with the same deferential approach utilized by the federal courts. It purported to do so in *Fitzgerald I,* 648 N.W.2d 555 (Iowa 2002). After the United States Supreme Court reversed the Iowa Court's application of the federal test, the Iowa Supreme Court, expressly eschewing the adoption of a separate test under the Iowa Constitution, reversed the United States Supreme Court by engaging in an "independent application" of the federal test. Whether such a course can be reconciled with the Supremacy Clause of the United States Constitution must be considered an open question.

CONCLUSION

For the foregoing reasons, the Order of the District Court should be affirmed and the case remanded for entry of judgment for the Defendants-Appellees.

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, in his official capacity; Douglas K. True, in his official capacity; Susan Buckley, in her official capacity, Defendants-Appellees.
2005 WL 5628993 (C.A.8) (Appellate Brief)

END OF DOCUMENT

© 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.