For Opinion See 408 F.Supp.2d 728

United States District Court, S.D. Iowa.
Davenport Division
David A. JOHNSON, on his own behalf and on behalf of all others similarly situated, Plaintiff,
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.
No. 3 03 CV10062.
July 21, 2004.

Defendants' Brief in Support of Motion for Summary Judgment

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INTRODUCTION

Plaintiff, David A. Johnson, in his Complaint filed on or about June 17, 2003, alleges that Defendants violated Plaintiff's right to be free from discrimination based upon sex or gender, under federal and state law and denial of equal protection under the United States and Iowa Constitutions. The graveman of Plaintiff's claim appears to be University policies which permit an adoptive parent to use five days of accrued sick leave for justifiable absences from work related to adoption while not affording a biological father permission to use sick leave for absences from work for child-rearing purposes is unlawful.

STANDARD OF REVIEW

Summary judgment is appropriate when the Court after viewing all of the adjudicative facts, and inferences drawn from those facts, in the light most favorable to the non-moving party, and giving that party the benefit of all reasonable inferences that can be drawn from the facts, concludes there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *See Dropsinki v. Douglas County, Neb.*, 298 F.3d 704, 706 (8th Cir. 2002); *P.H. v. Sch. Dist. of Kansas City. Mo.* 265 F.3d 653, 658 (8th Cir. 2001) (nonmoving party, "is entitled to all reasonable inferences-those that can be drawn from the evidence without resort to speculation.") (quoting *Sprenger v. Fed. Home Loan Bank of Pes Moines*, 253 F.3d 1106, 1110 (8th Cir. 2001) (internal quotations omitted); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, (1986). The court's function at the summary judgment stage of the proceedings is not to "to weigh evidence in the summary judgment record to determine the truth of any factual issue; we merely determine whether there is evidence creating a genuine issue for trial." *Bell v. Conopco. Inc.,* 186 F.3d 1099, 1101 (8th Cir. 1999) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-51, (1986)).

According to Rule 56(e), once the moving party files a properly supported motion for summary judgment, the burden shifts to the nonmoving party to point out genuine issues of material fact that would preclude judgment as a matter of law for the moving party. *See* Fed.R.Civ.P. 56(e); *Bennett v. Dr Pepper/Seven Up. Inc.*, 295 F.3d 805, 808-09 (8th Cir. 2002); *Naucke v. City of Park Hills*, 284 F.3d 923, 927 (8th Cir. 2002) (explaining, "a nonmovant must present more than a scintilla of evidence and must advance specific facts to create a genuine issue of material fact for trial.") (citing *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997), quoting *Rolscreen Co. v. Pella Prods. Of St. Louis. Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)); *Bailey v. U.S. Postal Serv.*, 208 F.3d 652, 654 (8th Cir. 2000) (nonmoving party "may not rest upon 'mere allegations or denials' contained in its pleadings, but must, by sworn affidavits and other evidence, 'set forth specific facts showing that there is a genuine issue for trial.' ") (quoting Fed.R.Civ.P. 56(e)); *Mathews v. Trilogy Communications. Inc.,* 143 F.3d 1160, 1164 (8th Cir. 1998) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, (1986)). Moreover, the party opposing summary judgment "must make a sufficient showing on every essential element of its claim on which it bears the burden of proof." *P.H.* 265 F.3d at 658 (quoting *Buettner v. Arch Coal Sales Co.,* 216 F.3d 707, 718 (8th Cir. 2000), *cert. denied*, 531 U.S. 1077, (2001)). The consequence of a nonmoving party's failure of proof concerning an essential element of the case "renders all other facts immaterial," and in such a case, no genuine issue of fact exists. *Celotex Corp. v. Catrett.* 477 U.S. at 327. The court looks to the substantive law to determine if an element is 'essential' to the underlying case. Id Therefore, the movant is entitled to summary judgment where the factual dispute does not affect the outcome of the case under the governing law. *See Jackson v. Arkansas Dept. of Educ. Vocational & Tech. Educ. Div.,* 272 F.3d 1020, 1025 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002) (citing *Anderson*, 477 U.S. at 248).

SUMMARY OF RELEVANT FACTS[FN1]

FN1. See Defendants' Statement of Uncontroverted Facts for complete recitation of the material facts.

The University of Iowa (hereinafter "the University") is an institution of higher education with approximately 13,726

full-time employees. (App. p. 3; Aff. D. True). The University provides a comprehensive benefits package including health and dental insurance, paid leave for absences and retirement plans. Total employee benefit costs at the University are $267 million or 34.5% of its payroll. The national average benefit ratio for all workers in the United States is 28.1% of payroll. Vacation and sick leave costs at the University annually are $67.1 million or 8.68% of its payroll. The national average for the same is 6.5% of payroll. The University experiences annually $17.6 million in variable costs for sick leave use alone. (App. p. 24; Interrogatory Response Jayne).

A. *Permissible Absence Form Work Generally*

It may help the Court in its understanding of the parental leave issue to locate it in the broader context of University policy relating to absences. To this end, Chapters III-22 and III-23 of the University Operations Manual ("UOM") are attached to this brief as Exhibit A.

1. *Paid Leave*

Section III-22.2 makes clear that the University's general expectation of its employees is to report to work regularly and on schedule. The policy goes on to recognize that there are absences which maybe 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 is being unavoidably absent from work and losing compensation for those days absent. Currently, sick leave credits accrue at the rate of 12 hours per month of service for full-time employees. Originally, paid leave was available only for absences due to medically-related disabilities. The University has also long treated a pregnancy-related condition as a medically-related disability and 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, but beyond that, written medical evidence is required.

Over the years, and apparently reflecting employee requests that they be permitted to apply sick leave credits to other situations, the University has permitted 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; (4) adoption - a new adoptive parent is permitted a maximum of five days' absence to be charged against sick leave. Sick leave may also be used in connection with certain on-the-job injuries.

University policy also permits some permanent employees who have accumulated a minimum of 240 hours of sick leave to exchange the monthly sick leave accrual for vacation time at a rate of 12 hours of sick leave for 4 hours of vacation.

2. *Unpaid Leave*

The University 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. In addition, the University has adopted polices 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 12 weeks of unpaid leave during any 12 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, The specific requirements of FMLA leave are set

forth in Section III-22.7 of the UOM, and included here as part of Exhibit A.

3. *Vacation*

The University also allows professional and scientific staff involved in this matter to accrue vacation so they may be paid for time off. Vacation days accrue at the rate of 24 days annually 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 have used accrued sick leave (in addition to actual vacation).

In accordance with these policies, all parents, should they not have accursed sick leave or if the reason for their absence is not an eligible use of accrued sick leave, may use unpaid leave or vacation to spend additional time with their children.

4 *"Parental" Leave*

The term "parental" leave is sometimes used to cover both benefits related to the birth (or acquisition) of a child and benefits related to child rearing. Sometimes it is used only to include child-rearing leave. In the broader sense of the term, then, medical leave provided biological mothers for the birth of a child is also parental leave. Under the Pregnancy Discrimination Act of 1979 ("PDA"), the University is obligated to include pregnancy as a qualifying medical condition if it permits other employees leave for other medical disabilities. Failure so to do constitutes a violation of Title VII.

As previously noted, both biological and adoptive parents may use unpaid FMLA leave for the birth and first-year care of a child or the adoption of foster placement of a child in an employee's home, as well as caring for a child with a serious health condition. All of these may be seen as forms of parental leave.

Shortly before the adoption of the FMLA in 1993, the bargaining organization for the University's merit employees requested 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 will provide its faculty and its professional and scientific staff with additional benefits negotiated by its organized employees, and that occurred shortly thereafter with the adoptive leave benefit.

The adoptive leave policy recognizes that five days may not be sufficient to permit paid absences for the days required of adoptive parents, either by the sheer mechanics of the adoption process or the specific requirements of an adoption agency and encourages departments to find other means of assisting employees who are adoptive parents.

5. *Health Insurance*

All professional and scientific employees are provided under the University's "cafeteria plan" with sufficient credits to enroll in one of the University's health insurance plans. All of 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.

B. *Summary of University Benefits Related to Parenting*

As the above narrative indicates, the University provides a wide range of benefits to new parents, biological and adoptive, in the form of excused absence from work and in the form of reimbursement for expenses related to childbirth. The following table describes diagrammatically the benefits for which biological mothers, biological fathers, adoptive moth-

ers 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 or Child-Rearing

	Biological Parents		Adoptive Parents	
	Maternity Leave	YES	Maternity Leave	NO
	Parental Leave	NO	Parental Leave	YES
Female	Vacation	YES	Vacation	YES
Employees	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

The University provides no other economic benefits to adoptive parents other than for use of accrued sick leave. Currently, an adoption costs approximately $12,500 with additional expense for travel and overall greater expense for international adoption. (App. p. 49; Interrogatory Response Barnes). On the other hand, a biological father's spouse has her health care costs for birth covered by the University's self-funded health care plan.

C. *Additional Legislative Facts*

Adopting a child generally involves substantial time commitments. Pre and post-procedural requirements adoption involve between 27-41 hours. If the adoption is out-of-state, an additional one or two weeks may be required. And even more time can be involved for an international adoption, which are believed to be the majority of the adoptions where leave has been requested. (App. pp. 21, 45; Interrogatory Response Barnes; Interrogatory Response Gorman).

Employee benefits generally and compensated time away from work in particular are major sources of expenses at the University. The annual cost of vacation and sick leave is $67.1 million or approximately 8.68% of the University of Iowa's total payroll. This exceeds the national average of 6.5% of payroll, as reported by the United States Department of Labor. (App. p. 24; Interrogatory Response Jayne).

Total employee benefits cost the University of Iowa approximately $267 million, or 34.5% of total payroll. This contrasts with the national average benefit ratio of 28.1% of payroll. Average sick leave absence alone over the past 5 years is $17.6 million. (App. p. 24; Interrogatory Response Jayne).

Appropriations to the University's base budget from the State of Iowa have decreased from 2000-2004 by $74.9 million. Increases in benefit costs related to sock 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. 2; Aff. D. True).

The record indicates that there were 248 male employees that became biological parents between June 1, 2001 and April 14, 2004. The total cost of five (5) days leave for these employees would have been $322,992.47 or an annual cost of $112,345. (App. p. 25; Interrogatory Response Jayne). In calendar years 2002-2003, 54 employees received adoptive

leave, 26 males and 28 females. (App. p. 21; Aff. J. Gorman).

The University health insurance plan spends $2.2 million annually on natural birth costs or approximately $6700 per childbirth. (App. p. 25; Interrogatory Response Jayne).

The University's parental leave policy may be used by adoptive parents for a variety of reasons relating to justified absences from work, including time away before and after being awarded the adopted child. Among these reasons are agency orientation meetings, home study with agency case workers, adoptive preparation class, creation of family profile for matching process, additional counseling as needed, post-placement visits, legal consultation, travel to and from origin of adopted child, waiting period in location of adopted child under the interstate compact or international requirements. (App. p. 21; Aff. J. Gorman).

ARGUMENT

A. THE UNIVERSITY OF IOWA'S ADOPTIVE LEAVE PLAN DOES NOT VIOLATE TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 OR THE IOWA CIVIL RIGHTS ACT.

Title VII states that it is an unlawful employment practice for an employer to:
"limit, segregate or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individuals... sex....

42 U.S.C. §2000e-2(a)2.

Title VII and Parental Leave

The non-discrimination in employment provisions of Title VII clearly relate to classifications regarding fringe benefits. See *Newport News Shipbuilding and Dry Dock Co. v. EEOC* 462 U.S. 669 (1983). The legal analysis under state law is similar to federal law. *Montgomery v. John Deere Co.,* 169 F.3d 556, 558 n.3 (8th Cir. 1999).

The EEOC Compliance Manual, 4818, provides Guidance on Parental Leave. "Parental Leave" is defined for Title VII purposes 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.
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. 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.
[7] Natural parents would at least have the mother home with the new baby for the few weeks of the mother's disability.

Under the University benefits plan, all employee parents may avail themselves of vacation (paid leave) or unpaid leave if they wish to spend time at home with a newly-arrived child. A biological father may also take unpaid leave under the

Family Medical Leave Act. (App. p. 3; Aff D. True). In addition, adoptive parents, but not biological parents, may use accumulated sick leave to finance up to five days of paid leave.

A simple 2x2 table, however, makes immediately clear that the University plan is facially neutral with respect to gender, *i.e.*, no *classification* of employees by gender is involved with respect to the provision of this benefit.

Table II

Paid Sick Leave To Be With New Child

	Biological Parents	*Adoptive Parents*
Female Employees	NO	YES
Male Employees	NO	YES

Some females and some males (adoptive parents) are eligible for the benefit; some females and some males (biological parents) are ineligible. Under this analysis, Plaintiff has failed to demonstrate any facial discrimination. In the end, the challenged classification involves biological parents and adoptive parents. These classifications do not violate Title VII. Nor has Plaintiff offered either allegation or evidence, statistical or otherwise, that the distinction between biological and adoptive parents disadvantage males. Data from 2001-2004, limited though it may be, indicates both genders utilize adoptive leave at about the same rate. "Adoptive" is simply not a surrogate for "female." The Title VII analysis should end there.

B. A POLICY DISTINGUISHING BETWEEN ADOPTIVE AND BIOLOGICAL PARENTS DOES NOT VIOLATE EQUAL PROTECTION.

Equal Protection doctrine has spawned at least two and probably three strands requiring different standards of judicial review. "Invidious" or "suspect" classifications, such as race, may survive only if they withstand "strict scrutiny." Judicial review of gender classifications generally involves "intermediate scrutiny." Unless a classification is in some manner suspect or the policy affects a "fundamental right," the Supreme Court has long required that the judicial branch proceed with deference to the elected branches of government by reviewing non-suspect classifications only against a "rational basis" standard. Because there is nothing "suspect" about the classification between "adoptive" and "biological" parents and because parental leave is not a fundamental right, the rational basis test is the applicable standard of review here.

A. Application of the Rational Basis Test

In *Fitzgerald v. Racing Ass'n.,* 539 U.S. 103, 107 (2003), the Court most recently described the rational basis test as follows:

"[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification of its goal is not so attenuated as to render the distinction arbitrary or irrational.

Id (quoting *Nordlinger v. Hahn.* 505 U.S. 1, 11 (1992)).

Defendant would specifically direct the Court's attention to the term "legislative fact" in the quotation from *Fitzgerald*. This expression shows up elsewhere in constitutional and administrative law, Professor Bernard Schwartz explains it this

way:
‘Adjudicative facts' are simply the facts of the particular case. They are the facts about particular individuals and their businesses, activities, and properties. They involve individualized fact-finding which answers the questions of who did what, when, where, how, why, and with what motive or intent; they are the facts which are best developed in a trial, and are the kinds of facts that go to the jury in a jury trial. Legislative facts do not relate to particular parties; they are generalized facts which relate more broadly and may, as Justice Holmes once phrased it, serve as a ground for laying down a rule of law.

B. Schwartz, *Administrative Law*, § 71 (1976).

Here, as in *Fitzgerald,* the issue is whether the general legislative facts about adoptive parents, biological parents and University benefits establish a plausible basis for the classification between adoptive and biological. That is an issue for this Court in resolving the legal issue. Those issues do not need to satisfy an ordinary civil burden of proof and need not be “undisputed,” in the sense that term applies to adjudicative facts in summary judgment proceedings.

Based on these principles, the court must determine whether the challenged benefit plan is based on plausible distinctions between the identified groups. *See Fitzgerald*, 539 U.S. at 107 (requiring “ ‘a plausible policy reason for the classification’ ” (citation omitted)). Mathematical exactness between the goal of the statute and the means selected by the legislature to achieve that goal is not required. See *Hushes v. Alexandria Scrap Corp.*, 426 U.S. 794, 814 (1976) (“[I]n the [economic] area ... the Equal Protection Clause does not demand a surveyor's precision” in creating classifications.).

Several cases involving challenges to economic benefits are particularly instructive with respect to application of the test. *Idaho Department of Employment v. Marlene G. Smith*, 434 U.S. 100 (1977), the Petitioner challenged a ruling of the Idaho Supreme Court that the denial of unemployment benefits to otherwise eligible persons who attend school during the day violates the Equal Protection Clause of the Fourteenth Amendment. Idaho Code § 73-1312(a) (1973) states that “no person shall be deemed to be unemployed while he is attending a regular established school excluding night school. . .” The Idaho Supreme Court held that this provision impermissibly discriminates between those unemployed persons who attend night school and those who attend school during the day and that the state could not constitutionally deny unemployment benefits to an otherwise eligible person such as respondent whose attendance at daytime classes would not interfere with employment in her usual occupation and did not affect her availability for fulltime work. The United States Supreme Court reversed the decision of the Idaho court. *Id*.

The Supreme Court noted that it has consistently deferred to legislative determinations concerning the desirability of statutory classifications affecting the regulation of economic activity and the distribution of economic benefits. “If the classification has some ‘reasonable basis,’ it does not offend the Constitution simply because the classification ‘is not made with mathematical nicety or because in practice it results in some inequality.” *Idaho Dept. of Employment*. 434 U.S. 105, ___, 54 L.Ed.2d 327, 327, 98 S.Ct. 327, ___, quoting, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 55 L.Ed. 369, 31 S.Ct. 337 (1911). The court noted that it was rational for the Idaho Legislature to conclude that daytime employment is far more plentiful than nighttime work and, consequently, that attending school during daytime hours imposes a greater restriction upon obtaining full-time employment than does attending school at night. In a world of limited resources, a State may legitimately extend unemployment benefits only to those who are willing to maximize their employment potential by not restricting their availability during the day by attending school. *Id*.

In *Richard S. Schweiker v. George Hogan*, 457 U.S. 569 (1982), petitioner challenged Medicaid eligibility rules. In upholding the validity of the legislation the court stated:
A belief that an Act of Congress may be inequitable or unwise is of course an insufficient basis on which to conclude that

it is unconstitutional. Moreover, the validity of a broad legislative classification is not properly judged by focusing solely on the portion of the disfavored class that is affected most harshly by its terms. *Califano v. Jobst*. 434 U.S. 47, 54 L.Ed.2d 228, 98 S.Ct. 95.
The injury that they regard as inconsistent with constitutional principles of equal treatment could be avoided by denying them *all* Medicaid benefits, thus placing them in a worse position financially than they are in now. No interest in "equality" could be furthered by such a result. If a State may deny all benefits to the medically needy--while providing benefits to the categorically needy and rendering some persons who are on public assistance better off than others who are not--a State surely may narrow the gap between the two classes by providing partial benefits to the medically needy, even though certain members of that class may remain in a position less fortunate than those on public assistance.

Schweiker. 457 U.S. at 589.

In *Otis R. Bowen v. Buenta M. Owens*, et al., 476 U.S. 340 (1986), the petitioner challenged a difference in social security benefits. Certain provisions of the Social Security Act in effect between 1979 and 1983 authorized payment of survivor's benefits from a wage earner's account to a widowed spouse who remarried after age 60, but not to a similarly situated divorced widowed spouse. The question was whether those provisions violated the equal protection component of the Due Process Clause of the Fifth Amendment.

The Court noted that Congress faces an unusually difficult task in providing for the distribution of benefits under the Act. The court noted that the program is massive and requires Congress to make many distinctions among classes of beneficiaries while making allocations from a finite fund. In that context, the court's review is deferential. *Bowen*, 476 U.S. at 345. "Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confined to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Mathews v. De Castro*, 429 U.S. 181, 185 (1976), quoting *Helvering v. Davis*, 301 U.S. 619, 640, 81 L.Ed. 1307, 57 S.Ct. 904 (1937).

In *Jefferson v. Hackney*, 406 U.S. 535 (1972) the court stated:
"Applying the traditional standard of review under [the Equal Protection Clause], we cannot say that Texas' decision to provide somewhat lower welfare benefits for {Aid to Families with Dependent Children] recipients is invidious or irrational. Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able to the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments are of course possible, it is not irrational for the State to believe that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them. Whether or not one agrees with this state determination, there is nothing in the Constitution that forbids it."

In *United States Railroad Retirement Board v. Gerhard H. Fritz*, 449 U.S. 166, reh. den. (US) 67 L.Ed.2d 385, 101 S.Ct. 1421 (1980), petitioner 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 this reasons in fact underlay the legislative decision," *Flemming v. Nestor*, 363 U.S., 15 612, 4 L.Ed.2d. 1435, 80 S.Ct. 1367, 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, 48 L.Ed.2d. 478, 96 S.Ct. 1883 (1976), and the fact the line might have been drawn differently at some points 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 this case.

C. THE UNIVERSITY CAN PLAUSIBLY BELIEVE THAT ADOPTIVE PARENTS HAVE A STRONGER EQUITABLE CLAIM THAN BIOLOGICAL PARENTS ON SCARE UNIVERSITY RESOURCES.

The University has provided this Court the expert opinions of an attorney with many years' experience advising adoptive parents and running an adoption agency, an economist with expertise in the area of employment benefits, and the testimony of various University officials with first-hand knowledge of the history and economics of benefits at the University.

These legislative facts indicate that the out-of-pocket cost of adopting a child is ordinarily far greater than the out-of-pocket costs giving birth to a child, that the time needed away from work to arrange for adoption is both substantially greater and less predictable than the time away from work needed for the birth of a child, and that a working biological mother at the University and elsewhere will ordinarily have six weeks of sick leave associated with the medical disability that permits, as an indirect benefit, the biological mother to bond with the child.

The University also recognizes that retention of employees is good business and that its benefits package is important not only to recruitment but to retention. Viewed in its entirety, the University's benefits package is substantially more generous than the average employer's. It is also good business to listen to the needs and wants of employees when structuring a benefits package and the University has consistently followed that practice. The adoptive leave benefit first appeared in a collective bargaining proposal from AFSCME. As is its practice, and after consultation with their constituent group leaders, the University soon extended that benefit to its faculty and professional and scientific employees. This has occurred despite the fact that the number of biological parents employed at the University is far greater than the number of adoptive parents, indicating that our employees recognize the considerably greater need of their adoptive parent colleagues.

It is also significant that the next change in the use of sick leave proposed to the relevant University committee was that adoptive leave be increased from five days to ten days. When that proposal was being considered by the University's Faculty and Staff Councils, the question was raised as to whether there should be some benefit for biological fathers. However, in the end it was decided that at a time when the University was striving to cut costs in many sectors to deal with Financial reality, expanding either benefit was not the best use of increasingly scare resources. (App. p. 3; Aff. D. True).

Employee benefits are a very substantial portion of the University budget and additions to those benefits must always be considered in light of scarce resources. Over the last few years, of course, the resources available from the State of Iowa for the University's base budget have been slashed by $75 million. Under present conditions, any additional benefit would likely need to be financed by reduction of one or more existing benefits. (App. p. 2; Aff. D. True).

As previously noted, the EEOC Guidance on Parental Leave recognizes that adoptive parents have a greater equitable claim than biological parents to parental leave based simply on the standard provision of maternity leave as a medical disability. But the financial advantages of biological parents are really considerably greater than that if one takes into account that biological parents have the benefit of health insurance to cover the birth of a baby. Adoptive parents have no equivalent benefit to cover the acquisition costs of adopting a child - costs which on average are far higher than the cost of a normal birth. (App. p. 48; Interrogatory Response Barnes).

In addition, it should be recognized that biological parents, particularly a biological father, can make use of both unpaid

FMLA leave and vacation benefits. Because of the greater predictability of a biological birth, a biological father could also set aside five days of vacation for spending time with a newly arrived child. In Mr. Johnson's case, for example, he would have acquired 18 days of additional vacation over the nine months' gestation period. It can scarcely be considered a major hardship to allocate 5 vacation days to parenting. Adoptions can take considerably longer than nine months and the timing and extent of leave needed for adoption is considerably less predictable. (App. p. 16; Interrogatory Response Barnes).

Finally, the University would certainly never disparage the right of biological parents to choose to begin or expand their family. Nor would it deny that some in Iowa believe that the state's birthrate is too low. It also cannot be disputed that there are many millions of children throughout this country and the world who are under fed, under clothed, under educated and under loved. Those employees who choose to assist in meeting those needs have a strong moral claim to University support.

To summarize, the University is not saying that biological children would not benefit from more time with their working parents nor that compensated parental leave would not at least marginally increase the time that biological parents would spend with their children. It does contend that the existing benefit package provides great support for biological parents, much greater support in total than it provides for adoptive parents. And, it does contend that there is a very strong reason to believe our adoptive parents have a stronger equitable claim to be five days of paid parental leave currently provided them than do our biological parents,

CONCLUSION

For the reasons set forth above, the Defendants request the Court to enter summary judgment against Plaintiff and all causes of action and dismiss the instant matter. The University of Iowa requests to be heard in oral argument on this matter.

Original filed.

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David A. JOHNSON, on his own behalf and on behalf of all others similarly situated, Plaintiff, 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.
2004 WL 5830547 (S.D.Iowa) (Trial Motion, Memorandum and Affidavit)

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