IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

DAVID A. JOHNSON, on his own behalf and on behalf of all others similarly situated, Plaintiff, vs. UNIVERSITY OF IOWA, STATE BOARD OF REGENTS, DAVID J. SKORTON, M.D., in his official capacity, DOUGLAS K.TRUE, in his official capacity, and SUSAN C. BUCKLEY, in her official capacity, Defendants.	)	CIVIL NO. 3-03-CV-10062 ORDER

THE COURT HAS BEFORE IT plaintiff's motion for class certification, filed June 16, 2003. Defendants resisted the motion on October 20, 2003 and plaintiffs filed a reply memorandum on October 24, 2003. The matter is fully submitted.

I. BACKGROUND

The relevant facts were set forth in this Court's September 26, 2003 Order denying defendants' motion to dismiss or stay, and will be repeated only as pertinent to the present motion. Briefly, named plaintiff David Johnson argues that the University of Iowa's ("the University") Parental Leave policy discriminates against biological fathers, by denying them the opportunity to use up to forty hours of accrued sick leave to care for their newborns, when such an opportunity is expressly granted to newly *adoptive* parents of either gender. Accordingly, plaintiff now seeks to certify the following class: "all

persons who have been, who are, or who may in the future become biological fathers and who have been, who are, or who may in the future become subject to, as employees of the University of Iowa, the institution's Parental Leave Policy pursuant to Operations Manual Section 22.8."

II. APPLICABLE LAW AND DISCUSSION

A. Law Governing Class Certification

Rule 23(a) of the Federal Rules of Civil Procedure states as follows:

> **(a) Prerequisites to a Class Action**. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). The burden is on the plaintiff to satisfy each prerequisite of Rule 23(a). *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). Assuming all of the requirements of Rule 23(a) are met, plaintiffs seeking to proceed on behalf of a class must also satisfy one or more of the conditions set forth under Rule 23(b). FED. R. CIV. P. 23(b); *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (citing Rule 23(b)). In the present case, plaintiffs seek to certify the Class under either Rule 23(b)(2) or (b)(3).[1]

[1] To meet the conditions of Rule 23(b)(2), plaintiff must show "the party opposing the class has acted or refused to act on grounds generally applicable to the class . . . ." Rule 23(b)(3) requires a finding that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

In evaluating a motion to certify a class this Court must accept as true all of the allegations set forth in the Complaint. *See, e.g., Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 661 n. 15 (2d Cir. 1978); *Thompson v. American Tobacco Co., Inc.*, 189 F.R.D. 544, 549 (D. Minn. 1999). "Although the strength of a plaintiff's claim should not affect the certification decision, a district court 'certainly may look past the pleadings to determine whether the requirements of Rule 23 have been met.'" *Thompson*, 189 F.R.D. at 549 (quoting *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996)).

In their October 20, 2003 resistance, defendants urge the Court to delay its ruling on class certification pursuant to Federal Rule of Civil Procedure 23(c)(1) until a substantive motion to dismiss or for summary judgment.[2] The Court notes, however, that no dispositive motion currently is pending, leaving the Court and plaintiff to speculate as to the substance of such a motion, let alone whether the motion would be successful. The Court therefore declines to grant defendants' request.

B. Requirements of Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires that the "class be so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). Several factors are relevant in analyzing "numerosity," such as the number of persons in the proposed class, the type of action at issue, the monetary value of the

[2] Federal Rule of Civil Procedure 23(c)(1) provides:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

individual claims and the inconvenience of trying each case individually. *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559 (8th Cir. 1982).

The Eighth Circuit has not established any "rigid rules regarding the necessary size of classes." *Emanuel v. Marsh*, 828 F.2d 438, 444 (8th Cir. 1987), *rev'd on other grounds*, 487 U.S. 1229 (1988). Other courts, however, have found a class of at least forty members to presumptively satisfy the numerosity requirement. *See, e.g., Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Ansari v. New York Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y. 1998); *Davis v. Northside Realty Associates, Inc.*, 95 F.R.D. 39, 43 (N.D. Ga. 1982).

In the present case, plaintiff has produced data collected by University personnel that estimates there are more than 200 *current* fathers who meet the class definition. *See* Exh. A to Plaintiff's Reply Brief (internal University memorandum indicating the number of "fathers who enrolled their child within one year of life on health insurance benefits" exceeded 200). This number is more than sufficient to justify class certification. *See Paxton*, 688 F.2d at 560-61 (court found 75 black employees out of 418 employee promotions satisfied numerosity test).[3] There undoubtedly are many more men who may become biological fathers in the future who also would meet the definition. In addition, although not argued by plaintiff, there may be men who currently are biological fathers, but are not represented in defendant's initial estimate based on the fact they and/or their children are not covered by the health insurance plan offered by the University.

Because not all of these individuals presently are known to defendants, coupled with the fact

[3] Because defendants have control of the necessary data, the Court is unpersuaded by defendants' bare assertion that the class size is not too large to render joinder impracticable.

plaintiff seeks broad-based injunctive relief, the Court finds the numerosity requirement is satisfied. *See, e.g., Paxton,* 688 F.2d at 561 (certifying class of 75 individuals because joinder would be impractical and because none individually could obtain the broad declaratory and injunctive relief sought).

2. Commonality

To establish "commonality," it is not necessary to demonstrate *every* question of law or fact is common to each member of the class. *Paxton*, 688 F.2d at 561. Rather, the issues linking the class members must be "substantially related" to resolution of the case. *Id.*

The common "link" binding potential class members in this case is the fact the University allegedly has applied its Parental Leave Policy uniformly to deny the benefit at issue to its male employees who are biological parents. *See* Amended Complaint at ¶¶ 23-25 (alleging that University administrators confirmed benefits administrator's interpretation of Parental Leave Policy as denying biological fathers the ability to use sick leave to care for a new child). The fact slight factual variations may exist, such as whether a class member currently has children, will not defeat commonality. *Paxton*, 688 F.2d at 561 (finding commonality existed despite fact allegedly discriminatory practices affected class members in different ways).

3. Typicality

To satisfy the requirement of typicality, the proponent of certification must show that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3). In general, typicality is established if the claims of all members arise from a single event or share the same legal theory. *Paxton*, 688 F.2d at 561-62. If the legal theories of the

representative plaintiffs are the same or similar to those of the class, however, slight differences in fact will not defeat certification. *See De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983); *see also Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996).

In the present case, the claims of Mr. Johnson and all proposed class members share the same constitutional and statutory theories. The fact discrepancies may exist in the amount of damages available, if any, does not prevent a finding that the typicality requirement has been met.

4. Adequacy of Representation

"The focus of Rule 23(a)(4) is whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Paxton*, 688 F.2d at 562-63.

The common interest shared by Mr. Johnson and his putative class members is the desire to end the discrimination to which biological fathers employed by the University allegedly have been subjected as a result of defendants' maintenance and/or interpretation of the Parental Leave Policy. As to the second requirement, the Court is confident plaintiff's counsel is both willing and able to vigorously represent the interests of all potential class members.

Adequacy of representation is established.

C. Rule 23(b)

Assuming a plaintiff is able to met all of the prerequisites set forth in Rule 23(a), he or she must also satisfy one or more of the conditions set forth under Rule 23(b). FED. R. CIV. P. 23(b); *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (citing Rule 23(b)). In the present case, plaintiff contends certification is appropriate under either Rule 23(b)(2) or (b)(3).

Certification may be established under Rule 23(b)(2) "if the prerequisites of subdivision (a) are satisfied, and in addition . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ." FED. R. CIV. P. 23(b)(2).

In the present case, the Court finds that defendants' actions in drafting, implementing and applying the challenged Parental Leave Policy constitute actions generally applicable to the class. Furthermore, contrary to defendant's argument, although plaintiff seeks monetary damages as well as injunctive relief, the amended complaint makes clear that injunctive relief predominates. Because the Court finds the requirements of Rule 23(b)(2) are satisfied, it need not address whether certification also is appropriate under Rule 23(b)(3).

IV. CONCLUSION

For the reasons outlined above, IT IS ORDERED that this case is certified as a class action under Federal Rule of Civil Procedure 23(b)(2). The class consists of the following: "all persons who have been, who are, or who may in the future become biological fathers and who have been, who are, or who may in the future become subject to, as employees of the University of Iowa, the institution's Parental Leave Policy pursuant to Operations Manual Section 22.8."

Within sixty (60) days from the date of this Order, the parties are directed to submit a proposed plan for notification of the pendency of the action to potential class members. The plan may be combined with the proposed Scheduling Order pursuant to Rule 16 of the Federal Rules of Civil Procedure. The Clerk of Court is directed to extend the Rule 16 dismissal deadline accordingly.

IT IS ORDERED.

Dated this 19th day of November, 2003.

RONALD E. LONGSTAFF, Chief Judge
United States District Court