Title: **Gender-Based Discrimination in the Workplace: Why Courts Tell Employers that Breastfeeding Discrimination is Legal**

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Abstract:

In March 2010 the Patient Protection and Affordable Care Act and Reconciliation Act of 2010 were signed into law. These Acts include a provision governing "reasonable break time for nursing mothers" for those categories of employers and employees covered under the Fair Labor Standards Act. However, neither these Acts, nor the Pregnancy Discrimination Act, nor Title VII, nor the Americans with Disabilities Act ensure that women are protected from discrimination resulting from her choice to lactate in the workplace.

The American Academy of Pediatrics recommends that a child be breastfed exclusively until they are six months old. However, for children born in 2008, while 74.6 percent began to breastfeed, only 44.3 percent were breastfed at six-months-old. Children born into lower income families have much lower rates of breastfeeding and a study of Maryland WIC participants found that one of the most frequent reasons these women report ceasing breastfeeding is "having to return to work."While the Patient Protection and Affordable Care Act and Reconciliation Act of 2010 does require that employees covered under the Fair Labor Standards Act be granted "reasonable break time" to lactate at work, the Acts do not apply to jobs held by some of the lowest paid working mothers in the United States.

Accordingly, this paper reviews agency decisions, state and local court decisions, and federal United States court decisions in which the plaintiff(s) filed claims alleging that they had been discriminated against for requesting to or attempting to lactate at work. These claims include, but are not limited to, those in which: (1) the employer failed to accommodate a woman who requested to lactate at work; and / or (2) the woman suffered an adverse employment action based upon her decision to lactate at work.

The paper analyzes language contained within the decisions, both the courts' holdings and dicta, for patterns regarding both how the court has treated and may treat claims of discrimination made under the following laws: the Pregnancy Discrimination Act; Title VII; the Americans with Disabilities Act; and the Patient Protection and Affordable Care Act and Reconciliation Act of 2010. Analysis indicates that the courts will be unsympathetic to claims made under any or all of these laws. Courts have indicated that:

- A mother's choice to breastfeed her child would not be considered a medical condition related to childbirth or pregnancy under the Pregnancy Discrimination Act;
- When a woman is denied the right to breastfeed, there is no viable claim for either sex or sex-plus discrimination, analyzed under the Title VII framework; and
- Claims made under the Americans with Disabilities Act would not be successful because lactation is not considered a disability.

Finally, this paper will discuss the need for new legislation to provide further protection for women who choose to lactate in the workplace.

I. Introduction

The American Academy of Pediatrics recommends that a child be breastfeed exclusively until they are six.-months-old and for that child to continue to receive breast milk until age one.[1] Breastfeeding is encouraged by physicians, the Centers for Disease Control and Prevention ("CDC") and the government because it provides substantial health benefits to both the child and the mother.[2] Children who receive breast milk are, at the same time, receiving important antibodies that help to protect them from bacteria and viruses.[3] These children tend to "have fewer ear infections, respiratory infections, urinary tract infections, and have diarrhea less often."[4] Accordingly, children who are breastfeed exclusively "tend to need fewer health care visits, prescriptions and hospitalizations resulting in a lower total medical care cost compared to never-breastfed infants."[5] For the mother, breastfeeding reduces the risk of suffering from pre-menopausal breast cancer and osteoporosis, as well as the ability to return to her pre-pregnancy weight sooner.[6]

Despite this encouragement, according to the CDC, for children born in 2008, while 74.6 percent began to breastfeed, only 44.3 percent were breastfed at six-months-old and 23.8 percent at one-year-old.[7] The CDC has continued to find that there are disparities in breastfeeding rates based on a family's socioeconomic status with children born into lower income families having

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[1] Gartner LM, Morton J, Lawrence RA, et al. Breastfeeding and the use of human milk. PEDIATRICS 115, 496-506 (2005).
[2] National Conference of State Legislatures, Breastfeeding Laws (March 2010) http://www.ncsl.org/IssuesResearch/Health/BreastfeedingLaws/tabid/14389/Default.aspx#Res.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Centers for Disease Control and Prevention. Breastfeeding Report Card 2011, United States: Outcome Indicators. Centers for Disease Control and Prevention. Accessed on 11 April 2013 at http://www.cdc.gov/breastfeeding/data/reportcard/outcome2011.htm.

lower rates of breastfeeding.[8] Additionally, non-Hispanic black women are much less likely to breastfeed than non-Hispanic whites.[9] It hypothesizes that this difference is due to a number of factors, one of which being that non-Hispanic black women return to work sooner than their white counterparts and there is insufficient support for breastfeeding in these workplaces.[10] A study of Maryland WIC participants found that one of the most frequent reasons these women report ceasing breastfeeding is "having to return to work."[11]

Fifty-six percent of women who have children under the age of three work outside the home, per the United States Department of Labor.[12] As of August 2009, the date the CDC released its 2009 Report Card on Breastfeeding, fifteen states required employers to provide space and time for mothers wishing to lactate.[13] While in those states women who choose to lactate may be able to require that a company comply with the procedural guarantees of these statutes, this does not ensure that they are protected from discrimination that may result from their choice to lactate in the workplace. As Dr. Lillian Beard, Associate Clinical Professor of Pediatrics at the George Washington University School of Medicine and Health Sciences and Assistant Professor at Howard University College of Medicine, observed, "[t]he biggest barrier

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[8] *Id.*

[9] Racial and Ethnic Differences in Breastfeeding Initiation and Duration, by State --- National Immunization Survey, United States, 2004—2008, 59 MORBIDITY AND MORALITY WEEKLY REPORT 11, 327 (March 26, 2010), accessed http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5911a2.htm.

[10] *Id.* (*citing* Ludington-Hoe S, McDonald PE, Satyshur R. Breastfeeding in African-American women. 13 J NAT'L BLACK NURSES ASSOC., 56 (2002)).

[11] Hurley, K.M., Black, M.M., Papas, M.A., & Quigg, A.M. Variation in breastfeeding behaviours, perceptions, and experiences by race/ethnicity among a low-income statewide sample of Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) participants in the United States. *Maternal & Child Nutrition*, 2008; 4(2): 95-105.

[12] Jake A. Marcus, Pumping 9 to 5, MOTHERING 48 (May/June 2008).

[13] Centers for Disease Control and Prevention, Division of Nutrition, Physical Activity, and Obesity, Breastfeeding Report Card – United States, 2009 (Aug. 2009) http://www.cdc.gov/breastfeeding/pdf/2009BreastfeedingReportCard.pdf (the following states require at least that employers provide time and space for lactation: Arkansas, California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Maine, Minnesota, Montana, New Mexico, New York, Oregon, Tennessee, and Vermont).

to mothers continuing to breastfeed seems to be the fact that more mothers are in the workplace."[14]

Accordingly, this paper reviews agency decisions, state and local court decisions, and federal United States court decisions in which the plaintiff(s) filed claims alleging that they had been discriminated against for requesting to or attempting to lactate at work. These claims include, but are not limited to, those in which: (1) the employer failed to accommodate a woman who requested to lactate at work; and / or (2) the woman suffered an adverse employment action based upon her decision to lactate at work. The paper analyzes language contained within the decisions, both the courts' holdings and dicta, for patterns regarding both how the court has treated and may treat claims of discrimination made under the following laws: the Pregnancy Discrimination Act; Title VII; the Americans with Disabilities Act; and the Patient Protection and Affordable Care Act and Reconciliation Act of 2010 ("Affordable Care Act"). Finally, this paper will discuss the need for new legislation to provide further protection for women who choose to lactate in the workplace.

II. Common Situations in Which Breastfeeding Discrimination Occurs

There are three common situations in which a woman can be discriminated against based upon her decision to lactate at work: (1) the employer can fail to hire her; (2) the employer can fail to accommodate her request to lactate at work; or (3) the employer can engage in an adverse employment action against her based upon her decision to lactate. Since an employer must know of a potential employee's desire to lactate at work before she is hired, the first scenario is less likely to occur unless a woman discloses this during the selection process. The later two scenarios represent active and passive approaches to breastfeeding discrimination. In the second,

[14] Joseph Brownstein, Study: Not Breastfeeding Costs U.S. Billions Each Year, ABC News Website (April 5, 2010) http://abcnews.go.com/Health/breastfeeding-failure-costs-us-billion-year/story?id=10272015.

the employer simply refuses to accommodate a request to lactate, without any further adverse action to the woman. The third scenario presents a situation in which the employer actively takes an adverse employment action against the woman based on her decision to lactate. Adverse employment action includes, but is not limited to, termination, demotion, non-selection, denial of training, denial of promotion, and oral and writing warnings or discipline. Note however, that even if the employer accommodates a request to lactate, this does not mean that it is not also possible that they will take an adverse employment action against that woman based on her decision to do so.

If a woman is discriminated against because of her decision to breastfeed or lactate at work, she has few real options available. She may continue to lactate at work, but, given the current protections in the law, she does so at her own peril. Depending on the severity of the adverse employment action taken against her, she may discontinue to both lactate in the workplace or request an accommodation to do so, but then she is being forced to give up her right to do so based on improper pressure from her employer. She must either choose between supporting her family through the income she earns while working, or providing her chosen method of care to her child. While breastfeeding advocacy groups such as La Leche League International encourage taking a stand and asserting your right to breastfeed when challenged or discriminated against, this is not an option for many women.[15] Many women cannot afford to risk loosing their job and, as a result, are forced to give up lactating at work or breastfeeding entirely.

[15] Melissa R. Vance, Breastfeeding Legislation in the United States: A General Overview and Implications for Helping Mothers. 41 LEAVEN 3, 51 (June-July 2005).

III. The Court's Response to Claims of Breastfeeding Discrimination

A woman who has experienced breastfeeding discrimination in the workplace has four possible claims. She can allege she has been discriminated against under: (1) the Pregnancy Discrimination Act; (2) Title VII, alleging a sex or sex-plus claim; (3) the Americans With Disabilities Act; (4) the Affordable Care Act; or (5) some combination thereof. As will be discussed in turn, the courts have examined claims of breastfeeding discrimination under each and have repeatedly ruled against mothers (See Table 1).

Table 1. Federal Cases Examining Breastfeeding Discrimination

	Federal Laws Addressed			
Case Name	***Pregnancy Discrimination Act***	***Title VII - sex & sex plus claims***	***Americans With Disabilities Act***	***Patient Protection and Affordable Care Act***
Barrash v. Bowen	No viable claim			
Bond v. Sterling, Inc.			No viable claim (using ADA analysis to interpret NY law)	
Derungs v. Wal-Mart Stores, Inc.		No viable claim (using Title VII analysis to interpret Ohio law)		
EEOC v. Houston Funding II, Ltd.	***Viable claim***	***Viable claim***		
Fejes v. Gilipin Ventures	No viable claim			
Jacobson v. Regent Assisted Living	No viable claim	No viable claim		
Martinez v. NBC and MSNBC		No viable claim	No viable claim	
McNill v. NY City Dept. of Correction	No viable claim			
Miller v. Roche Surety and Casualty Co., Inc.				Partially viable claim
Salz v. Casey's Marketing Co.				Partially viable claim
Wallace v. Pyro Mining Co.	No viable claim	No viable claim		

i. Pregnancy Discrimination Act

As an amendment to Title VII, the Pregnancy Discrimination Act of 1978 ("PDA") "prohibit[s] sex discrimination on the basis of pregnancy."[16] Specifically it provides that a woman may not be discriminated against "because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes."[17] In "cases involving discretionary leaves of absence for breast-feeding purposes, courts have uniformly held that rules relating to regulation of breast-feeding do not violate the PDA or Title VII."[18]

In a Fourth Circuit case, *Barrash v. Bowen*, the plaintiff claimed that she experienced actionable discrimination under the PDA when she was denied additional maternity leave so that she could continue to breastfeed her child.[19] While this paper is addressing only the need to lactate in the workplace, the analysis is the same. The Fourth Circuit dismissed her claim by simply stating that "[u]nder the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), pregnancy and related conditions must be treated as illnesses only when incapacitating."[20] Since there is little argument that lactating is an incapacitating condition, the PDA provides no protection against breastfeeding discrimination.

Overall, the PDA's protections have been defined very narrowly. Even conditions that are directly related to pregnancy are not protected; for example, "infertility is outside of the PDA's protection because it is not pregnancy, childbirth, or a related medical condition . . . ."[21] A "claim of discrimination based on her status as a new parent is not cognizable under the PDA"

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[16] Pub. L. 95-555, S. 995 (1978); 42 U.S.C. § 2000e(k).
[17] *Id.*
[18] *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 439 (6th Cir. 2004).
[19] 846 F.2d 927 (4th Cir. 1988).
[20] *Id.* at 931.
[21] *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674, 679-80 (8th Cir. 1996).

because this status is based on her social role, rather than a medical condition.[22] Finding that "an individual's choice to care for a child is not a "medical condition" related to childbirth or pregnancy. Rather, it is a social role chosen by all new parents who make the decision to raise a child."[23] Further, the decision to breastfeed, even if medically necessary for the health of the child, undergoes the same analysis and a mother's choice to breastfeed her child is not considered a medical condition related to childbirth or pregnancy under the meaning of the PDA.[24]

While there has been little protection recognized under the PDA to date, in a case yet to be decided on the merits, the Fifth Circuit Court of Appeals in *Equal Employment Opportunity Commission v. Houston Funding II, Ltd*. held "that lactation is a related medical condition of pregnancy for purposes of the PDA." Noting that, "[t]he PDA does not define the statutory term "medical condition"" and, in the Court's interpretation, lactation falls within a reasonable definition of "pregnancy, childbirth, or related medical conditions" which are protected by the Act.[25] This is significant because the Court has declared that a claim of breastfeeding discrimination could be a viable claim under the PDA, contrary to what earlier cases and other circuits have held.

In examining the terms of the PDA, the circuits are split as to whether lactation in the workplace is protected. Absent a Supreme Court decision, protection from discrimination now depends on which circuit a mother resides in. Accordingly, plaintiffs not residing in the Fifth Circuit must look to other laws for protection from discrimination.

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[22] *Piantanida v. Wyman Center, Inc.*, 116 F.3d 340, 342 (8th Cir. 1997).
[23] *Id.* at 342. *See also Jacobson v. Regent Assisted Living, Inc.*, 1999 WL 373790 (D.Or. Apr 09, 1999) (NO. CV-98-564-ST).
[24] *Fejes v. Gilipin Ventures*, 960 F.Supp. 1487 (D. Colorado 1997); *Wallace v. Pyro Mining Co.*, 951 F.2d 351 (6th Cir. 1991).
[25] *Equal Employment Opportunity Commission v. Houston Funding II, Ltd.*, --- F.3d ----, 3 (5th Cir. 2013).

ii. Title VII – sex and sex-plus claims

Title VII of the Civil Rights Act of 1964 ("Title VII") provides in relevant part that

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . . [26]

A sex-plus claim under Title VII adds an element to the above analysis:

> "sex-plus" discrimination ... exists when a person is subjected to disparate treatment based not only on her sex, but on her sex considered in conjunction with a second characteristic.... [27]

While the PDA is an amended portion of Title VII, the following section will address claims analyzed under the traditional Title VII analysis for sex and sex-plus discrimination. Most claims analyzed under the Pregnancy Discrimination Act contain at least an understandable reference to other Title VII protections. As a result, courts often analyze these claims in an overlapping application of cases.

In a seminal case simply addressing sex discrimination, the Sixth Circuit in *Derungs v. Wal-Mart Stores, Inc.*, stated that "no judicial body thus far has been willing to take the expansive interpretive leap to include rules concerning breast-feeding within the scope of sex discrimination."[28] While this is a public accommodation case and does not directly address employment discrimination, the holding is still significant. Since the court analyzed the issues

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[26] 42 U.S.C. § 2000e-2.
[27] *Derungs v. Wal-Mart Stores, Inc.*, 141 F.Supp.2d 884, 890 (*quoting Martinez*, 49 F.Supp.2d at 309).
[28] *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 439 (6th Cir. 2004).

within the Title VII context, it demonstrates the court's attitude towards whether breastfeeding discrimination claims would be successful sex or sex-plus claims under Title VII.

In *Derungs*, the plaintiffs each attempted to breastfeed their child in a public area within various Wal-Mart Stores in Ohio.[29] Each was approached by Wal-Mart staff would told them that they were not allowed to breastfeed their child in the store and that they would have to resume in the restroom or leave the store.[30] Plaintiff's sued under Ohio's Public Accommodation statute that prohibits sex discrimination.[31]

The lower court examined their claims under the Title VII framework and stated that

> Title VII forbids gender discrimination in employment, but gender discrimination by definition consists of favoring men while disadvantaging women or vice versa. The drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other, while in given cases perhaps deplorable, is not the sort of behavior covered by Title VII.[32]

Even under a sex-plus analysis, this court found that

> ... [I]n a "sex-plus" or "gender-plus" case, the protected class need not include all women [but] the plaintiff must still prove that the subclass of women was unfavorably treated as compared to the corresponding subclass of men. Absent such a subclass, a plaintiff cannot establish sex discrimination.[33]

This court found and the Sixth Circuit affirmed that these plaintiffs did not have a viable claim for either sex or sex-plus discrimination when analyzed under the Title VII framework.[34]

In *Martinez v. N.B.C., Inc.*, the plaintiff alleged that she was a victim of sex-plus discrimination on the basis of her decision to lactate at work.[35] The Court in this case held that she did not have a viable claim, because "[t]o allow a claim based on sex-plus discrimination

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[29] *Id.* at 430.
[30] *Id.*
[31] *Id.* at 431.
[32] *Derungs v. Wal-Mart Stores, Inc.*, 141 F.Supp.2d 884, 890 (*quoting Martinez*, 49 F.Supp.2d at 309).
[33] *Derungs*, 374 F.3d at 432 (*citing Derungs v. Wal-Mart Stores, Inc.*, 141 F.Supp.2d at 890-91(*citations omitted; emphasis in original*)).
[34] *Derungs*, 374 F.3d at 439.
[35] *Martinez v. N.B.C., Inc.*, 49 F.Supp.2d 305 (S.D.N.Y. 1999).

here would elevate breast milk pumping—alone—to a protected status. But if breast pumping is to be afforded protected status, it is Congress alone that may do so."[36]

The Court in *Equal Employment Opportunity Commission v. Houston Funding II, Ltd.* also held that the plaintiff in that case did state a viable claim of sex discrimination by showing that her employer fired her "because she was lactating and wanted to express milk at work."[37] The court remanded the decision to a lower court for findings of fact, so the outcome of this particular case has not been decided. However, the case is significant in that it is the first federal court decision to recognize a claim of breastfeeding discrimination could be viable under either the PDA or Title VII.

While recent claims rely primarily on the Pregnancy Discrimination Act, rather than straight Title VII analysis, often neither is successful. It is because of this that plaintiffs have been adding claims under the Americans With Disabilities Act in an attempt to reach a successful cause of action.

iii. Americans With Disabilities Act

The Americans With Disabilities Act ("ADA") provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[38] Many have argued, under the previous version of the ADA,[39] that discrimination based upon a woman's decision to

[36] *Martinez v. N.B.C., Inc.*, 49 F.Supp.2d 305, 311 (S.D.N.Y. 1999).
[37] --- F.3d ----, 4 (5th Cir. 2013).
[38] 42 U.S.C. § 12112(a) (2009).
[39] "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual . . . ." 42 U.S.C. § 12112(a) (1991).

lactate in the workplace should be protected and accommodated under this Act.[40] However, these attempts to gain protection under the ADA have been unsuccessful.[41]

Pointedly, in looking to the ADA's definition of disability to interpret a related state statute, the court in *Bond v. Sterling* stated that "[i]t is simply preposterous to contend a woman's body is functioning abnormally because she is lactating."[42] Even "pregnancy-related complications usually will not qualify a woman for ADA protection," it is only those conditions that present physiological impairments, such as premature labor, that would be upheld under the ADA.[43] Further, this court stated that "to the extent [a] plaintiff argues her child must be breast-feed [sic] as a matter of medical necessity, any disability would be that of her child alone."[44]

Following *Bond*, the court in *Martinez v. N.B.C., Inc.*, dismissed that plaintiff's ADA claim that lactation is a disability.[45] It reasoned that

> is not to say that a statute requiring employers to afford reasonable accommodation to women engaged in breast feeding or breast pumping would be undesirable. As noted, however, that determination is not for the Court, the only task of which is to determine whether the ADA so provides. It does not.[46]

The general condition of lactation is not a disability within the meaning of the ADA and women who elect to lactate at work will receive no protections or have any right to an accommodation under the ADA.

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[40] *Martinez v. N.B.C., Inc.*, 49 F.Supp.2d 305, 308 (S.D.N.Y. 1999); *Bond v. Sterling*, 997 F.Supp. 306, 311 (N.D.N.Y. 1998).

[41] *Martinez*, 49 F.Supp.2d at 308 ("Every court to consider the question to date has ruled that "pregnancy related medical conditions do not, absent unusual conditions, constitute a [disability] under the ADA.") (*citations omitted*)).

[42] *Bond*, 997 F.Supp. at 311.

[43] *Id.* at 310 (*quoting Lacoparra v. Pergament Home Centers, Inc.*, 982 F.Supp. 213, 228 (S.D.N.Y. 1997) (*citing Hernandez v. City of Hartford*, 959 F.Supp. 125, 130 (D.Conn. 1997))).

[44] *Bond*, 997 F.Supp. at 311. *See also McNill v. New York City Dep't of Correction*, 950 F.Supp. 564 (S.D.N.Y.1996) (holding the mother is not protected from breastfeeding discrimination under the Pregnancy Discrimination Act, even in the case of a medical necessity, because child is disabled and the mother is not).

[45] 49 F.Supp.2d at 309.

[46] *Id.*

Accordingly, lactation, even when it is vital to the child's health, would never receive protection or accommodation under the ADA. To qualify for employment protection to care for a child that demanded breast-milk, if her employer was unwilling to accommodate her need to express milk at work, the woman would have to apply for the Family Medical Leave Act. The Family Medical Leave Act ("FMLA"), or comparable state statutes, are not a reasonable alternative. An individual and their employer must both meet the statutory requirements to be covered by FMLA and the leave is caped at 12 weeks per year. In many cases, if a woman had just returned from maternity leave, she has just exhausted her 12 weeks of eligible FMLA time and would have no time remaining even if she were able to have breastfeeding qualified under the Act.

iv. Patient Protection and Affordable Care Act

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act and on March 30, 2010, he signed the Reconciliation Act of 2010.[47] Section 4207 of these Acts provides a provision governing "reasonable break time for nursing mothers."[48] This provision amends the Fair Labor Standards Act of 1938 ("FLSA")[49] to include the following new language

> (r)(1) An employer shall provide –
> (A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and
> (B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.
>
> (2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

[47] Pub. L. 111-148, 11-152 (2010).
[48] *Id.* at § 4207.
[49] 29 U.S.C. § 207.

> (3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.
>
> (4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.[50]

While this change represents a wonderful step forward in the protections available to women who elect to lactate at work, it is not without limitations. If an employer has less than 50 employees and it can demonstrate that compliance with this law would impose an undue hardship, it need not comply. These new provisions only apply to FLSA-covered employees. FLSA exempts certain classes of workers from its protections: namely the following groups are not protected by FLSA and would not receive any benefit from this new provision:

1. Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and employees in certain computer-related occupations (as defined in Department of Labor regulations);
2. Employees of certain seasonal amusement or recreational establishments, employees of certain small newspapers, seamen employed on foreign vessels, employees engaged in fishing operations, and employees engaged in newspaper delivery;
3. Farmworkers employed by anyone who used no more than 500 "man-days" of farm labor in any calendar quarter of the preceding calendar year;
4. Casual babysitters and persons employed as companions to the elderly or infirm.[51]

The exemptions mean a substantial number of vulnerable workers have no federal right to lactate at work without enduring discrimination. Additionally, the new provision does not provide for remedies if a covered woman's right to lactate at work under FLSA is violated.[52]

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[50] Pub. L. 111-148, 11-152 § 4207; 29 U.S.C. § 207.
[51] United States Dept. of Labor, Wage and Hour Div., Handy Reference Guide to the Fair Labor Standards Act, Wage and Hour Division Website (July 2007) http://www.dol.gov/whd/regs/compliance/hrg.htm#8.
[52] *Salz v. Casey's Marketing Co.*, No. 11-cv-3055 (N.D. Iowa, July 19, 2012).

In a 2012 case from the Northern District of Iowa, the court held that while the Affordable Care Act does include a provision governing "reasonable break time for nursing mothers," the Act does not provide an independent action cause of action for mothers who are discriminated against for lactating at work.[53] Instead, mothers who are discriminated against must file a claim with the Department of Labor ("DOL") and then the DOL may choose to pursue the claim by either requesting compliance from the employer or seeking injunctive relief to prevent the employer from discriminating against the mother further. However, while the Affordable Care Act does not provide for an independent cause of action, the court held that § 215(a)(3) provides a separate cause of action and includes separate remedies if the employer "discharge[s] or in any other manner discriminate[s] against" the mother because she "has filed any complaint … under or related to" the FLSA.[54]

To provide adequate protection from breastfeeding discrimination, legislation needs to be enacted that both covers a larger proportion of working mothers and provides for meaningful remedies. Accordingly, since the current laws in place do not provide adequate protection and accommodation, new federal legislation must be enacted.

IV. Comparing Cases in Ohio and California: How the State Impacts Whether a Woman is Protected from Breastfeeding Discrimination

States are free to enact legislation that offers greater protection from discrimination than do existing federal laws. However, a federal law protecting women from breastfeeding discrimination is vital to uniformly protect the rights of women in the workplace. As of August 2009, only fifteen states required employers to provide space and time for mothers wishing to

[53] *Id*.
[54] *Id*.; 29 U.S.C. § 215. *See also Miller v. Roche Surety and Casualty Co., Inc.*, No. 12-10259 (11th Cir. 2012).

lactate.[55] While this is positive, these statutes do not ensure that they are protected from discrimination that may result from their choice to lactate in the workplace. As the cases below illustrate, a woman's protections under the law vary widely depending on which state they live and work in.[56]

a. No Protecting from Breastfeeding Discrimination in Ohio

In *Allen v. Totes / Isotoner, Corporation*, the Ohio Supreme Court in a per curiam option affirmed the lower court's grant of summary judgment to the employer, Totes / Isotoner (hereafter "Totes").[57] In doing so the Court substantially eroded the statutory protections granted to lactating women in Ohio.

When Allen was hired by Totes, she was still breastfeeding her five-month-old son. During the times when she could not feed him directly she used a breast pump. It took her approximately fifteen minutes to complete the whole process of pumping and preparing to pump. During her orientation with Totes Allen was informed that she would receive two ten-minute breaks and one half-hour lunch break at pre-set times. Immediately thereafter, Allen talked to a Totes representative and let her know that she was lactating and requested a place to pump. The representative replied to the request later and told Allen that she could pump in the women's restroom during her break. When Allen requested that a chair be provided, this request was denied. Allen let the representative know that she would try to wait until her scheduled lunch

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[55] Centers for Disease Control and Prevention, Division of Nutrition, Physical Activity, and Obesity, Breastfeeding Report Card – United States, 2009 (Aug. 2009) http://www.cdc.gov/breastfeeding/pdf/2009BreastfeedingReportCard.pdf (the following states require at least that employers provide time and space for lactation: Arkansas, California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Maine, Minnesota, Montana, New Mexico, New York, Oregon, Tennessee, and Vermont).

[56] *Allen v. Totes / Isotoner Corp.*, 915 N.E.2d 622, 624 (Ohio 2009) (holding there is no protection against breastfeeding discrimination under Ohio law); *Dept. of Fair Employment and Housing v. Acosta Tacos*, Case No. E-200708 T-0097-00se C 08-09-017 09-03-P (Fair Employment and Housing Commission of Cal. June 19, 2009) accessed at http://www.fehc.ca.gov/act/pdf/Chavez_09-03-P.pdf (holding there is protection against breastfeeding discrimination under California law); *Currier v. National Board of Medical Examiners*, 965 N.E.2d 829 (Mass. 2012) (holding protections under Massachusetts law apply to lactating mothers).

[57] 915 N.E.2d 622, 624 (Ohio 2009).

break to pump, but that she was unsure if she could do so. The second week, Allen decided that she could no longer wait to pump and began to take an additional break to do so, without first discussing it with anyone at Totes. Allen was soon discovered by her supervisor and then Allen requested that her need to pump be accommodated by extending her break time. Totes considered Allen's request and made the decision to instead terminate her for taking unauthorized breaks.[58]

After she was terminated, Allen filed a suit against Isotoner for wrongful termination under the Ohio Fair Employment Practices Act, as it was amended by the Pregnancy Discrimination Act.[59] The lower court found, and the Ohio Supreme Court held that "(1) Totes did not discriminate against Plaintiff on the basis of her pregnancy; (2) Plaintiff cannot identify a clear public policy that was violated by her discharge; and (3) Plaintiff is not disabled and therefore was not entitled to Reasonable Accommodation."[60]

Ohio's Pregnancy Discrimination Act provides that discrimination "'because of sex' and 'on the basis of sex' include ... because of or on the basis of pregnancy, any illness arising out of and occurring during the course of pregnancy, childbirth, or related medical conditions."[61] Allen argued that she was discriminated against based on the fact that she was experiencing the physical condition of lactating, a condition, she argues, is related to pregnancy.[62] The lower court disagreed, and the Supreme Court affirmed, stating that

> Allen gave birth over five months prior to her termination from Totes. Pregnant woman who give birth and chose not to breastfeed or pump their breasts do not continue to lactate for five months. Thus, Allen's condition of lactating was not a

[58] *Allen v. Totes / Isotoner Corp*., 2007 WL 5843192 (Court of Common Pleas of Ohio July 31, 2007).
[59] *Id.* at 623 (*citing* Ohio Rev. Code Chapter 4112; 138 Ohio Laws, Part I, 1430, 1431-32).
[60] *Allen v. Totes / Isotoner Corp*., 2007 WL 5843192 (Court of Common Pleas of Ohio July 31, 2007).
[61] *Allen v. Totes / Isotoner Corp*., 2007 WL 5843192 (Court of Common Pleas of Ohio July 31, 2007) (*citing* Ohio Rev. Code Chapter 4112).
[62] *Id.*

> condition relating to pregnancy but rather a condition relating to breastfeeding. Breastfeeding discrimination does not constitute gender discrimination.[63]

Based upon this finding, the court summarily dismissed Plaintiff's claims based on both sex discrimination and public policy.[64] With respect to Allen's final claim that lactation constitutes a disability and therefore requires accommodation, the Court followed other jurisdictions' treatment of breastfeeding discrimination under ADA and held that post-partum lactation is not a disability under the ADA.[65]

Allen did not act perfectly. Certainly her actions would have been more defensible if she had first requested an accommodated break schedule when she first discovered that it would not work to wait until her lunch break to pump. However, unless the company would have taken a dramatically different approach with their request than it did responding to her request for a chair, it likely would have made little difference. Though Ohio has laws in place that prevent discrimination based on pregnancy and sex discrimination, they do nothing to protect lactating women from discrimination after their child is born. Since there are no federal laws that provide a remedy, these women are left unprotected and are forced to choose between their job and caring for their child as they see fit.

b. California's Decision to Uphold a Claim of Breastfeeding Discrimination

In *Department of Fair Employment and Housing v. Acosta Tacos* the Fair Employment and Housing Commission of the State of California held in a precedential decision that "breastfeeding is an activity intrinsic to the female sex. Accordingly, termination in violation of complainant's right to return from work from pregnancy disability leave because she was still

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[63] *Id.* (*citing Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 439 (6th Cir. 2004)).
[64] *Id.*
[65] *Id*. (*citing Martinez v. N.B.C., Inc.*, 49 F.Supp.2d 305, 308 (S.D.N.Y. 1999); *Bond v. Sterling*, 997 F.Supp. 306, 311 (N.D.N.Y. 1998)).

breastfeeding was discrimination on the basis of sex . . . ."[66] In doing so, it found that Acosta Tacos discriminated against Marina Chavez, the complainant, based on her decision to continue to breastfeed after returning from maternity leave.[67]

Prior to being terminated, Chavez worked the swing shift, 5:00 PM till midnight or 2:00 AM, at Acosta Tacos as a cashier.[68] After returning from an unpaid one-month-long maternity leave to care for her premature child, Chavez resumed work at Acosta Tacos.[69] During Chavez's lunch break, she had the baby's father meet her at work and she would breastfeed their newborn in their car.[70] She then returned to work the remainder of her shift.[71] The following day, her second day back at work, her manager told her that he did not want her working there and when she asked him why, he said that he was "the owner and [he] could do as [he] pleased because [he] was the one who gave orders."[72] He explained that he found out that she had breastfeed her newborn baby on her lunch break the previous night, that she could not breastfeed on her breaks, and that she could not return to work until she was done lactating.[73] Chavez objected and said that she could not wait to return to work until she stopped breastfeeding and her manager responded by firing her.[74]

The Administrative Law Judge found that the Department of Fair Employment and Housing "established both direct and circumstantial evidence to support its allegation that Chavez's breastfeeding was a causal factor in Acosta Taco's decision to terminate Chavez's

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[66] *Dept. of Fair Employment and Housing v. Acosta Tacos*, Case No. E-200708 T-0097-00se C 08-09-017 09-03-P (Fair Employment and Housing Commission of Cal. June 19, 2009) accessed at http://www.fehc.ca.gov/act/pdf/Chavez_09-03-P.pdf.
[67] *Id.*
[68] *Id.* at 3 (Proposed Decision).
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 4.
[73] *Id.*
[74] *Id.*

employment."[75] Accordingly, she found that Acosta Tacos "discriminated against Chavez based on her sex in violation of the [Fair Employment and Housing] Act" and Chavez is entitled to be compensated for any loss or injury that resulted.[76] Back pay of $21,645, plus ten percent interest, together with compensatory damages for emotional distress of $20,000 were awarded to Chavez.[77] Additionally, Acosta Tacos received a $5,000 administrative fine, was ordered to develop and implement a written policy prohibiting sex and pregnancy discrimination, post said policy, and train its employees on the policy, and was required to post specific notices provided.[78]

This case represents a landmark not only for the rights of working lactating women in California, but across the United States. Until *Acosta Tacos*, there had never before been a case that even minimally upheld a woman's right to be free from breastfeeding discrimination in the workplace. This case addresses laws specific to California, but it paves the way for courts to adopt the same reasoning in a case of first impression under some other state-specific statute.

V. Proposed Breastfeeding Discrimination Act

The current legal remedies have proven to be insufficient protections to women and deterrents to employers to discriminating against women who choose to lactate at work. While the Patient Protection and Affordable Care Act could provide a minor reduction in discrimination resulting from breastfeeding, a wholly separate act should be passed to provide both an appropriate level of protections and baseline accommodations.

[75] *Id.* at 8.
[76] *Id.* at 12.
[77] *Id.* at 15.
[78] *Id.* at 15-16.

One of the primary limitations of the Pregnancy Discrimination Act is that, even if it were found to cover breastfeeding, it does not require an employer to accommodate.[79] The new healthcare bill does include provisions that will mandate employer compliance with respect to some workers, but provides little if any remedies for a violation of this mandate. Accordingly, federal legislation, similar to the model legislation contained in Table 2, should be adopted in order to provide needed protection and rights to accommodation for women who choose to lactate in the workplace.

New legislation should require an employer allow and employees to have the option of using paid break time or provide reasonable unpaid break time to express milk. Specifically, it should require that an employer allow the individual to use paid break time or meal time to do so. For the average 8-hour-per-day worker, this equates to between 50 minutes (two 10-minute breaks and a half hour lunch) and 1 hour (two 15-minute breaks and a half hour lunch) of already allotted break time that may be used. If the individual elects not to use the existing break time, the employer must allow them to make up their time at the beginning or end of their regularly scheduled shift. The employer must work with the employee to develop a reasonably consistent schedule that is workable for both parties.

Additionally, the employer should be required to make reasonable efforts to provide a room or other location, in close proximity to the work area, where an employee can express milk in private. At a minimum, this room or location shall include an electrical outlet and a locked door, or an ability to control who enters the space. This requirement does not mean that use of the room belongs exclusively to that individual. Rather, the room must be available for her use for this specific purpose and, at the times that she is pumping, it must be free from intrusion. It is reasonable for the employer to work with the employee(s) to set up a schedule to ensure that

[79] Pub. L. 95-555, S. 995 (1978).

Table 2. Model Breastfeeding Discrimination Act

(a) Employer Responsibilities

An employer shall provide reasonable unpaid break time or permit an employee to use paid break time or meal time each day to allow an employee to express breast milk for a nursing child.

1) Time to express breast milk shall be provided at least every 3 hours for 20 minutes at a time on a reasonably consistent schedule.
2) The employer shall allow the employee to make-up the time spent expressing breast milk at the beginning or end of the employee's scheduled shift.
3) The employer shall make reasonable efforts to provide a room or other location, in close proximity to the work area, where an employee can express milk in private. At a minimum, this room or location shall include an electrical outlet and a locked door, or an ability to control who enters the space.
4) The employer shall make reasonable efforts to provide access to refrigeration and allow the employee to store her expressed milk therein.

(b) Employer Practices

It shall be an unlawful practice for an employer --

1) to fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to their choice to express breast milk in the work place; or
2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect her status as an employee, because of that individual's choice to express breast milk in the work place.

(c) Employment Agency Practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of that individual's choice to express breast milk in the work place, or to classify or refer for employment any individual on the basis of that individual's choice to express breast milk in the work place.

(d) Labor Organization

It shall be an unlawful employment practice for a labor organization --

1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual with respect to their choice to express breast milk in the work place;
2) to limit, segregate, or classify its membership or applicants for membership in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant or employment, because of that individual's choice to express breast milk in the work place; or
3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(e) Training Programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of that individual's choice to express breast milk in the work place.

****This proposed text is modeled after the New York Labor Law and Title VII.*

the woman has both adequate time to pump and the room may be used for other purposes. The act should also require access to refrigeration, though it is not necessary that it be located in the private space designated for pumping in order to comply.

Proposed legislation, like the model breastfeeding discrimination act included in Table 2, would protect women from discrimination based on their decision to breastfeed and provides specific protections against a failure to hire, failure to accommodate, or termination. While this is not the primary purpose, legislation like this would also provide protection to women who are discriminated against based on their decision not to breastfeed.

Any proposed legislation will no doubt be subjected to criticism from both breastfeeding advocates and employer groups. Employer groups will protest the introduction of additional legislation that limits the way that they conduct business and contract with employees. While employers may worry that these changes will impose a substantial cost on the company, studies show that lactation programs actually save employers money due to increased productivity and decreased absenteeism.[80]

Breastfeeding advocates may protest that legislation like the model breastfeeding discrimination act does not go far enough. Specifically, the model act does not require that the employer provide additional paid break time for women to lactate at work. Aside from being unpalatable to most employers, this presents an opportunity for abuse on both the part of the employer and the employee. In order to maximize the privacy granted to women, they must be accountable for the time they spend expressing milk and there should not be a monetary incentive for the employer to rush the process.

Additionally, the model act does not allow enough time for an employee to have the right to leave the workplace during every break in order to nurse their child. This may be practical if

[80] Jake A. Marcus, Pumping 9 to 5, MOTHERING 48 (May/June 2008) (*citations omitted*).

the employer has an onsite daycare facility or if there is a nearby facility, but the act provides no specific protections to allow for this. Similarly, the model act does not provide for the right to bring your child into the workplace for the purpose of nursing them. Instead, an employer and employee should be encouraged to come to a mutually beneficial agreement about any nursing arrangement.

VI. Paper limitations

There are numerous situations in which a woman may be discriminated against on the basis of her decision to lactate. This paper does not presume to address each of these unique scenarios. Rather, this paper will address the current protections that exist to protect individuals from discrimination based their decision to lactate in the workplace and the need for additional legislation to adequately protect this right. Specifically, this paper does not address public indecency laws, laws allowing women to breastfeed in public, or a right to breastfeed on private property, such as a restaurant. The scope of this paper is limited to a woman's right to lactate in the workplace. Additionally, this paper is limited to a discussion of federal laws protecting discrimination. While individual states may enact laws that offer greater protection against discrimination, these laws are not common in the area of breastfeeding discrimination and are outside the scope of this paper.

VII. Conclusion

The courts have plainly stated the breastfeeding discrimination is not protected under the current federal laws. New legislation targeting breastfeeding discrimination would provide much needed protection and rights to accommodation for fifty-six percent of women who have children under the age of three who work outside the home.[81] It would greatly help to increase

[81] Jake A. Marcus, Pumping 9 to 5, MOTHERING 48 (May/June 2008).

the number of children that receive breast milk and the length of time that their mothers are able to provide breast milk after returning to work.

According to the Society for Human Resource Management's ("SHRM") 2007 survey, only 26 percent of employers in the United States have "lactation program / designated area" for employees to pump.[82] The survey found that of large employers, those with 500 or more employees, 42 percent reported having such a program; while only nine percent of employers with less than 100 employees had a program.[83] In an effort to explain the discrepancy, advocates hypothesize that "[e]mployers, particularly smaller ones, may worry that providing lactation-support benefits may be too expensive. However, [they point out that the] studies of existing workplace programs show that such programs actually save employers money in decreased absenteeism and increased productivity..."[84] Additionally, they recommend that any "financial costs may also be outweighed by public-relations benefits, particularly in states that have legal definitions of mother-friendly and/or family-friendly for which the employer might apply and receive free publicity."[85]

It is not only breastfeeding advocates that support increased lactation in the workplace.[86] A healthcare policy group comprised of large employers, the National Business Group on Health, endorsed breastfeeding as "offer[ing] important economic benefits to families, employers, and society at large."[87] It further stated that "[c]hildren who are not breastfeed contribute to huge additional health-care expenditures for the employers of their parents. Their

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[82] Society for Human Resource Management, 2007 Benefits: A Survey Report, Table A-1 (Alexandria, VA: 2007): 8.
[83] *Id.*
[84] Jake A. Marcus, Pumping 9 to 5, MOTHERING 48 (May/June 2008) (*citations omitted*).
[85] *Id.* (*citations omitted*).
[86] *Id.* (*citing* K. P. Campbell and S. Chattopadhyay, "Breastfeeding Evidence-Statement: Counseling," in: K. P. Campbell, S. Chattopadhyay et al., eds., A Purchaser's Guide to Clinical Preventive Services: Moving Science into Coverage (Washington, DC: National Business Group on Health, 2006): 24; www.businessgrouphealth.org/benefitstopics/topics/purchasers/condition_specific/overviewpregnancychapter.pdf).
[87] *Id.*

parents are also responsible for significant productivity losses in the workplace associated with absenteeism and presenteeism."[88] Studies support these assertions and found that mothers who used formula instead of breastfeeding their child experienced absenteeism rates more than twice as high as their breastfeeding counterparts.[89]

One company has actually calculated their cost savings associated with lactation programs and found that each participant in their breastfeeding program represented a savings of almost $116,000, coupled with the costs of $2,100 it incurred for each pregnant employee that elected not to participate.[90] However, despite the demonstrated cost savings and positive publicity associated with employer support of lactation in the workplace, discrimination remains. To truly combat this problem, it is not enough to positively encourage employers to act non-discriminately. Instead, new federal legislation must be enacted to ensure that women who choose to lactate at work are not discriminated against for their decision to do so.

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[88] *Id.* (citing Rowena Bonoan, MPH, "Breastfeeding Support at the Workplace: Best Practices to Promote Health and Productivity," Washington Business Group on Health 2 (March 2000): 34 www.businessgrouphealth.org/pdfs/wbgh_breastfeeding_brief.pdf.

[89] Cynthia Reeves Tuttle and Wendy I. Slavit, Establishing the Business Case for Breastfeeding, 4 BREASTFEEDING MEDICINE 1 (2009) (*citing* R. Cohen, M.B. Mrtek, and R.G. Mrtek, Comparison of maternal absenteeism and infant illness rates among breastfeeding and formula-feeding women in two corporations. AM. J. HEALTH PROMOTION 10, 148-53 (1995)).

[90] *Id.* (discussing Mutual of Omaha's breastfeeding program).