

Pumping at Work: Protection from Lactation Discrimination in the Workplace

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I. INTRODUCTION

LaNisa Allen is a new mother, and, like any mom, she wants the best for her son.¹ Following doctors' recommendations, LaNisa decides to breastfeed her son in order to provide him with the best nourishment possible.² In order to help support her new family, LaNisa secures a position through a temporary service at the Totes factory as a general laborer repackaging leather gloves and earning \$8.75 per hour.³ LaNisa hopes to continue breastfeeding when starting work and plans to use a breast pump at work to maintain her milk supply.⁴ She must pump for approximately fifteen minutes every three to four hours to prevent her breasts from becoming engorged and leaking and her milk supply drying up.⁵

Prior to beginning work, LaNisa informs her employer that she is still breastfeeding her infant son and requests break time and a location to express her milk.⁶ Her work schedule is 6:00 a.m. until 2:30 p.m. with two unpaid, ten-minute breaks at 8:00 a.m. and 1:00 p.m. and a half-hour, unpaid lunch break at 11:00 a.m.⁷ Totes responds that LaNisa may only use her breast pump during her lunch break at 11:00 a.m., five hours into her shift, and that she will have to pump in the ladies' restroom.⁸ When LaNisa requests at least a chair to sit on while she expresses her milk, her employer denies her request.⁹ LaNisa responds that she does not know whether she can wait until

¹ These facts are a variation on the facts in *Allen v. Totes/Isotoner Corp.*, No. CV06-03-0917, 2007 WL 5843192 (Ohio Com. Pl. July 31, 2007), *aff'd*, Butler App. No. CA2007-08-196 (Ohio Ct. App. Apr. 7, 2008), *aff'd per curiam*, 915 N.E.2d 622 (Ohio 2009).

² For a discussion of the health and nutritional benefits of breastmilk for infants, see discussion *infra* Part II.A.

³ Merit Brief of Appellant LaNisa Allen, *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622 (Ohio 2009) (No. 08-0845), 2008 WL 5042218 at *2-3 [hereinafter Brief of Appellant].

⁴ *Id.* at *3.

⁵ *Allen*, 2007 WL 5843192.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

11:00 a.m., but at her employer's refusal to consider a different schedule, LaNisa says that she will try.¹⁰

For a week, LaNisa feeds her son before she leaves for work, but by 11:00 a.m., over five hours since last expressing her milk, LaNisa's breasts are engorged and leaking and she is in terrible pain.¹¹ LaNisa begins going to the restroom around 10:00 a.m. to express her milk, which she does every day for two weeks without incident.¹² All employees are permitted to take unscheduled restroom breaks as needed throughout the day to attend to bodily functions.¹³ One day, LaNisa's supervisor sees her in the restroom pumping outside of her lunch break.¹⁴ Her supervisor reports the discovery and LaNisa's need for an extended break to the manager, who decides to terminate LaNisa for taking an unauthorized break¹⁵—a break that was necessary only because LaNisa was lactating and her employer refused to give her a reasonable break time to express her milk.

LaNisa Allen's unfortunate story is true. When she sued her employer for wrongful termination alleging pregnancy discrimination, the Supreme Court of Ohio ultimately held that she was terminated for taking an unauthorized break, in violation of her employer's policy, and that her employer's reason was not a mere pretext for pregnancy discrimination.¹⁶ Thus, the Court refused to consider whether workplace lactation is within the scope of Ohio's pregnancy discrimination laws.¹⁷ The case garnered national attention, and may have galvanized timely lobbying efforts, just as Congress was considering the Health Care Reform Bill.¹⁸

Until the enactment of the Patient Protection and Affordable Care Act (commonly known as Health Care Reform) in March of 2010,¹⁹ employers did not have to accommodate the milk expression needs of breastfeeding and lactating employees under then-existing federal law and the laws of most

¹⁰ *Id.*

¹¹ Brief of Appellant, *supra* note 3, at *4.

¹² *Id.* at *5.

¹³ *Id.* at *4.

¹⁴ *Allen*, 2007 WL 5843192.

¹⁵ *Id.*

¹⁶ *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622, 624 (Ohio 2009) (per curiam).

¹⁷ *Id.*

¹⁸ See Senator Jeff Merkley, *Why We Must Stand Up for the Right to Breastfeed*, MOMSRISING.ORG (Sept. 9, 2009), <http://www.momsrising.org/blog/why-we-must-stand-up-for-the-right-to-breastfeed/> ("This ruling by the Ohio Supreme Court reaffirms why it's important that Congress include [the amendment to provide new mothers with flexible break times and privacy to pump breast milk] in the health reform legislation.").

¹⁹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4207, 124 Stat. 119 (2010).

states.²⁰ If employees attempted to attend to these needs at work, they could be fired for it, as LaNisa was.²¹ Under federal law as it was interpreted prior to March 2010, the actions of LaNisa's employer were perfectly legal.²² And many states, including Ohio, have no laws explicitly protecting milk expression in the workplace.²³

Women who breastfeed and work after having a child face a difficult choice of whether to start and continue breastfeeding. This decision requires that a woman continue to express her milk approximately every three hours to maintain her milk supply, prevent leakage, and avoid pain, as well as potential medical complications.²⁴ The availability of breast pumps allows women to financially provide for their families while continuing to provide their babies' nutrition.²⁵ But until the enactment of Health Care Reform, an employer could refuse to allow a woman to pump at work or fire her for doing so, effectively removing any real "choice" she had.²⁶ Health Care Reform now requires that employers provide nursing mothers reasonable break time as needed by the employee in order to express milk at work for her nursing child.²⁷ This is a significant step toward promoting breastfeeding

²⁰ See, e.g., *Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999); see also Thomas H. Barnard & Adrienne L. Rapp, *The Impact of the Pregnancy Discrimination Act on the Workplace—From a Legal and Social Perspective*, 36 U. MEM. L. REV. 93, 122–23 (2005) ("Not the PDA's prohibition against pregnancy-related discrimination, Title VII's prohibition against gender discrimination, the Americans with Disabilities Act . . . , nor the FMLA provide women any rights regarding [breastfeeding and the need to pump breast milk during the workday]."); *infra* Parts III & IV.

²¹ See *infra* Part IV.

²² See *infra* Part IV.

²³ See *infra* Part III.

²⁴ GALE PRYOR & KATHLEEN HUGGINS, *NURSING MOTHER, WORKING MOTHER* 127 (2007) (recommending that mothers pump for fifteen to thirty minutes at least every three hours). In addition to drying up of the milk supply and discomfort, a woman may experience plugged ducts and breast infections if unable to breastfeed or otherwise express milk for an extended period of time. LA LECHE LEAGUE INT'L, *THE WOMANLY ART OF BREASTFEEDING* 151 (7th ed. 2004).

²⁵ See Colette Bouchez, *Breast Pumps: The Working Mom's Friend*, WEBMD (July 29, 2008), <http://www.webmd.com/parenting/baby/breastfeeding-9/breast-pump?page=2> ("Among today's working moms, breast pumps allow many women to give their baby the benefits of mother's milk even when they can't be together all the time. Breast pumps are devices designed to help you package Mother Nature by expressing your milk, then storing it in the refrigerator to use for bottle feedings later.")

²⁶ See Elissa Aaronson Goodman, Note, *Breastfeeding or Bust: The Need for Legislation to Protect a Mother's Right to Express Breast Milk at Work*, 10 CARDOZO WOMEN'S L.J. 146, 150 (2003) ("Women, especially those who work, may face an illusory choice in determining how to feed their newborns, with breastfeeding often seeming like an impractical option.")

²⁷ 29 U.S.C.A. § 207 (West 2010).

and making it possible for mothers to continue breastfeeding after returning to work. This national requirement for accommodation is particularly important, given the variation in state laws in this area.²⁸

Despite this great stride, however, working mothers are still vulnerable under the law. While employers have a duty of accommodation, any provision prohibiting employment discrimination against women exercising their rights under this law is startlingly absent from the law. Without an explicit statement that discrimination on the basis of lactation is prohibited, nursing mothers who still face adverse employment actions because of their status as lactating women must look to other laws for recourse. The Pregnancy Discrimination Act (PDA),²⁹ which amended Title VII of the Civil Rights Act of 1964,³⁰ prohibits discrimination on the basis of “pregnancy, childbirth, or related medical conditions,”³¹ and may still provide the protection working mothers need, despite prior unfavorable decisions by the federal courts in this area.³²

Thus far federal courts have failed to interpret Title VII and the PDA as offering any protection to breastfeeding and lactating mothers in the workplace.³³ Congress has failed to correct the interpretations of the lower courts either by amending the PDA to clarify its intent regarding breastfeeding and lactation or including a non-discrimination provision in the new Reasonable Break Time for Nursing Mothers law.³⁴ While there is clear protection from discrimination under some state laws, this protection is dramatically inconsistent from state to state.³⁵ Further national protection is necessary for this critical nationwide issue.³⁶

²⁸ See *infra* Part III.

²⁹ 42 U.S.C. § 2000e(k) (2006) (amending Title VII’s prohibition on sex discrimination in employment to include “pregnancy, childbirth, or related medical conditions”).

³⁰ 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination in employment on the basis of sex).

³¹ 42 U.S.C. § 2000e(k).

³² See *infra* Part V.

³³ See *infra* Part IV. While other legal provisions such as the Family and Medical Leave Act of 1993, the Americans with Disabilities Act of 1990, and the constitutional right to privacy have been used, also largely unsuccessfully, to advance women’s rights in this area, this Note focuses on Title VII and the PDA as the statutes having the most obvious connection to breastfeeding discrimination and, therefore, the areas of existing law most likely to succeed in protecting breastfeeding women in the workplace. See *infra* note 117 and accompanying text.

³⁴ See *infra* Part III.

³⁵ See *infra* Part III.

³⁶ Promotion of breastfeeding is on the national health agenda, with the Centers for Disease Control and Prevention setting objectives for rates of breastfeeding to be

Congress has already spoken in the PDA, and the PDA should be interpreted to protect lactation. A concurring opinion in the Supreme Court of Ohio in LaNisa Allen's case suggests another possible approach for Title VII-PDA arguments in federal courts.³⁷ Successful Title VII cases are needed not only to protect lactating women in the workplace, but also to prompt a split among the circuits. Potentially, divergent cases can propel the issue to the Supreme Court. If the Court adheres to the line of reasoning articulated in this Note, it would make clear that lactation is protected under the PDA. If the Court were instead to follow the reasoning used by most lower courts to date, then perhaps Congress would recognize its oversight and respond with an appropriate amendment to either the PDA or the Nursing Mothers law to prohibit discrimination.

This Note seeks to describe the current state of the law related to breastfeeding and lactation discrimination and to present a new approach to litigating a lactation discrimination claim. Part II of this Note discusses the many benefits to breastfeeding not only for infants and mothers but also for employers and society.³⁸ Part II also describes the current rates of breastfeeding in the U.S. as well as employment barriers to breastfeeding for working mothers.³⁹ Part III examines the new federal law for nursing mothers while highlighting the need for further protection from discrimination for nursing moms in the workplace.⁴⁰ Part IV chronicles the development of pregnancy discrimination under Title VII of the Civil Rights Act of 1964 and examines the subsequent treatment of breastfeeding litigation by federal courts.⁴¹ Finally, Part V assesses the adequacy of current legislative protection and proposes a new approach to PDA litigation based upon drawing a distinction between lactation and breastfeeding in order to persuade courts that the physiological process of lactation, unlike the social act of breastfeeding, is within the ambit of the PDA.⁴²

achieved in the U.S. under its *Healthy People 2010* initiative. See Department of Health and Human Services, Centers for Disease Control and Prevention, *Breastfeeding Report Card—United States, 2009* [hereinafter *Breastfeeding Report Card*], available at <http://www.cdc.gov/breastfeeding/pdf/2009BreastfeedingReportCard.pdf>.

³⁷ See *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622 (Ohio 2009) (per curiam) (O'Connor, J., concurring).

³⁸ See *infra* Part II.A.

³⁹ See *infra* Part II.B.

⁴⁰ See *infra* Part III.

⁴¹ See *infra* Part IV.

⁴² See *infra* Part V.

II. BENEFITS AND CHALLENGES OF BREASTFEEDING

An examination of the benefits of breastfeeding, the current rate of breastfeeding in the U.S., and workplace barriers to improving that rate are preliminary to understanding why breastfeeding should be promoted and protected by the law. This section essentially provides an introduction to the status of breastfeeding in the U.S., beginning with an overview of the many benefits of breastfeeding.⁴³ These benefits are then juxtaposed to the current rates of breastfeeding in the U.S.⁴⁴ Although many social and cultural barriers to improving the breastfeeding rate exist, the section concludes by considering, in particular, workplace barriers to breastfeeding.⁴⁵ This discussion sets the stage for why further change in the law is needed.

A. *Benefits of Breastfeeding*

Breastfeeding is highly beneficial to children, mothers, families, and society.⁴⁶ These benefits are manifold, affecting health, nutrition, immunology, growth and physical development, psychology, society, the economy, and the environment.⁴⁷

Health benefits from breastfeeding accrue to both infants and mothers.⁴⁸ The American Academy of Pediatrics (AAP) endorses breastfeeding as the optimal and “uniquely superior” form of nutrition for infants.⁴⁹ AAP recommends breastfeeding exclusively for the first six months of infancy, with continuation of breastfeeding through at least the first year of the child’s life.⁵⁰ Breastfed babies have decreased incidence and severity of infectious

⁴³ See *infra* Part II.A.

⁴⁴ See *infra* Part II.B.

⁴⁵ See *infra* Part II.B.

⁴⁶ American Academy of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496, 496 (2005).

⁴⁷ *Id.*

⁴⁸ *Id.* at 496–97.

⁴⁹ *Id.* One of breastfeeding’s strongest champions is renowned pediatrician, Dr. William Sears. See WILLIAM SEARS & MARTHA SEARS, THE FAMILY NUTRITION BOOK 232 (1999) (“Human milk truly is the gold standard when it comes to infant nutrition.”); ASKDR.SEARS.COM, <http://www.askdrsears.com/default.asp> (last visited Mar. 12, 2010). But see Hanna Rosin, *The Case Against Breast-Feeding*, THE ATLANTIC, April 2009, available at <http://www.theatlantic.com/magazine/archive/2009/04/the-case-against-breast-feeding/7311/> (arguing that the health claims about the benefits of breastmilk have been grossly overstated, based upon review of medical literature and physician interviews).

⁵⁰ American Academy of Pediatrics, *supra* note 46, at 499. This recommendation is shared by the American College of Obstetricians and Gynecologists, American Academy

diseases, including bacterial meningitis, diarrhea, respiratory tract infection, and urinary tract infection.⁵¹ Sudden infant death syndrome⁵² in the first year of life and post-neonatal infant mortality⁵³ have also been found to occur at reduced rates among breastfed infants.⁵⁴ Older children and adults who were breastfed also face less risk of developing type 1 and type 2 diabetes, lymphoma, leukemia, Hodgkin disease, obesity, high cholesterol, and asthma.⁵⁵ Breastfeeding may also have neurodevelopment benefits, with studies showing slightly enhanced performance on tests of cognitive development by children who were breastfed.⁵⁶ Mothers who breastfeed also experience positive health benefits, such as decreased post-partum bleeding, decreased risk of breast and ovarian cancer, as well as a possible decreased risk of postmenopausal osteoporosis and hip fractures.⁵⁷ Breastfeeding also helps women return to their pre-pregnancy weight.⁵⁸

Benefits of breastfeeding are not limited to mothers and their children, but also extend to employers and the larger society. Mothers who choose to breastfeed, when this choice is available, save costs to employers and the U.S. health care system, as well as benefit the environment.⁵⁹ Because of the

of Family Physicians, Academy of Breastfeeding Medicine, World Health Organization, United Nations Children's Fund, and many other health organizations. *Id.* at 498.

⁵¹ *Id.* at 496. Other infectious diseases with reduced incidence and severity in breastfed infants include bacteremia, necrotizing enterocolitis, otitis media, and late-onset sepsis in preterm infants. *Id.*

⁵² "Sudden infant death syndrome (SIDS) is the sudden death of an infant under age 1 that cannot be explained after a thorough investigation has been conducted, including a complete autopsy, an examination of the death scene, and a review of the clinical history." *Definitions*, NATIONAL SUDDEN AND UNEXPECTED INFANT/CHILD DEATH & PREGNANCY LOSS RESOURCE CENTER, <http://www.sidscenter.org/definitions.html#5a> (last visited Mar. 12, 2010).

⁵³ Post-neonatal infant mortality is the rate of death between the ages of twenty-eight days to under one year. *Id.*

⁵⁴ American Academy of Pediatrics, *supra* note 46, at 496. The AAP reports that post-neonatal infant mortality rates in the United States are reduced by 21% in breastfed infants. *Id.* (citing Aimin Chen & Walter J. Rogan, *Breastfeeding and the Risk of Postneonatal Death in the United States*, 113 PEDIATRICS e435, e437 (2004), available at <http://pediatrics.org/cgi/content/full/113/5/e435>). The Chen and Rogan study, however, acknowledges that the effects of breast milk and breastfeeding cannot be separated completely from other characteristics of the mother and child. Chen & Rogan, *supra*, at e438. But, assuming causality, breastfeeding could potentially save or delay approximately 720 infant deaths in the U.S. each year. *Id.* at e438-39.

⁵⁵ American Academy of Pediatrics, *supra* note 46, at 496-97.

⁵⁶ *Id.* at 497.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

reduced incidence of short- and long-term health problems in breastfed babies and their mothers, by supporting and accommodating the needs of breastfeeding employees, employers can reduce health care costs, lost productivity, and absenteeism.⁶⁰ Mothers of formula-fed infants require one-day absences to care for sick children more than twice as often as mothers of breastfed infants.⁶¹ Economically, reduced illness resulting from breastfeeding could decrease annual health care costs in the U.S. by \$3.6 billion.⁶² Breastfeeding also benefits the environment by reducing waste due to formula packaging and energy requirements for production and transportation of products required for formula feeding.⁶³ Society and employers benefit when mothers choose to breastfeed.

B. Breastfeeding Rates and Workplace Barriers to Breastfeeding

Despite the tremendous benefits to breastfeeding, the rate of breastfeeding in the U.S. trails behind national goals. The U.S. Department of Health and Human Services' *Healthy People 2010* initiative states the Nation's health promotion and disease prevention agenda.⁶⁴ Because of the many benefits derived from breastfeeding, *Healthy People 2010* contains specific objectives for rates of breastfeeding in the year following birth: 75% in the early post-partum period, 50% at six months, and 25% at one year.⁶⁵ Of U.S. children born in 2006, 73.9% were breastfed at some point in the early post-partum period, with the percentage of children breastfeeding at six months dropping to 43.4% and 22.7% at twelve months.⁶⁶ At three months of age, 33.1% of infants were breastfeeding exclusively, with that number dropping to 13.6% at six months.⁶⁷ Current breastfeeding rates are falling short of the *Healthy People 2010* goals.

Breastfeeding goals have not been achieved, in part, because of substantial obstacles to women choosing to breastfeed their children. The AAP reports that maternal employment is among the obstacles to initiation and continuation of breastfeeding, particularly in the absence of workplace

⁶⁰ *Id.*; National Business Group on Health, Center for Prevention and Health Services, *Investing in Workplace Breastfeeding Programs and Policies*, 1.2.

⁶¹ National Business Group on Health, *supra* note 60, at 1.2.

⁶² American Academy of Pediatrics, *supra* note 46, at 497.

⁶³ *Id.*

⁶⁴ *About Healthy People 2010*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/nchs/healthy_people/hp2010.htm (last updated Oct. 14, 2009).

⁶⁵ *Breastfeeding Report Card*, *supra* note 36.

⁶⁶ *Id.*

⁶⁷ *Id.*

facilities and support for breastfeeding.⁶⁸ Studies have shown that a woman's career plans are the most significant factor in determining the duration of breastfeeding and whether she breastfeeds at all.⁶⁹ Of employed women with children under the age of one year, only 25% breastfed for at least a month while working.⁷⁰ A major challenge for working women who breastfeed is that they cannot go an entire work day without expressing milk and need time throughout the day to do so.⁷¹ Many employers have been unwilling to provide women with the time and facilities to pump at work.⁷² In some cases, employers have simply fired employees who attempt to breastfeed or express milk in the workplace.⁷³ Even with the new law mandating accommodation, hostility toward the women who exercise their rights under the law will undoubtedly still remain in some workplaces.

The workplace barriers facing working mothers are demonstrated, in part, by the increase in pregnancy discrimination⁷⁴ charges filed with the Equal Employment Opportunity Commission (EEOC). Indeed, pregnancy discrimination, which includes pregnancy, childbirth, and related medical conditions,⁷⁵ is one of the fastest-growing categories of employment discrimination charges filed with the EEOC.⁷⁶ It surpasses the percentage

⁶⁸ American Academy of Pediatrics, *supra* note 46, at 498. Other barriers include insufficient prenatal education about breastfeeding, disruptive hospital policies and practices, inappropriate interruption of breastfeeding, early hospital discharge, lack of timely routine follow-up care and post-partum home health visits, lack of family and broad societal support, media portrayal of bottle feeding as normative, commercial promotion of infant formula, misinformation, and lack of guidance and encouragement from health care professionals. *Id.*

⁶⁹ National Business Group on Health, *supra* note 60, at 1.3.

⁷⁰ *Id.* at 1.1.

⁷¹ PRYOR & HUGGINS, *supra* note 24, at 127.

⁷² See Henry Wyatt Christup, *Litigating a Breastfeeding and Employment Case in the New Millennium*, 12 YALE J.L. & FEMINISM 263, 267 (2000).

⁷³ See New Mothers' Breastfeeding Promotion Act of 1998, H.R. 3531, 105th Cong. § 2(19) (1998) ("Many employers deny women the opportunity to breastfeed or express milk. Some women have been discharged for requesting to breastfeed or express milk during lunch and other regular breaks. Some women have been harassed or discriminated against.").

⁷⁴ The EEOC defines pregnancy discrimination as "treating a woman (an applicant or employee) unfavorably because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth." *Pregnancy Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/types/pregnancy.cfm> (last visited Jan. 11, 2010).

⁷⁵ 42 U.S.C. § 2000e(k) (2006).

⁷⁶ Jennifer Yue, *The Flood of Pregnancy Discrimination Cases: Balancing the Interests of Pregnant Women and Their Employers*, 96 KY. L.J. 487, 487 (2008).

increases in both sexual harassment and sex discrimination claims.⁷⁷ Over the last ten years, charges of pregnancy discrimination filed with the EEOC and fair employment practices agencies (FEPAs) have increased over 48% from 4,160 in fiscal year 2000 to 6,196 in fiscal year 2009.⁷⁸ The rise in pregnancy discrimination charges reflects the resistance of employers to the needs of a female workforce.

Children, women, employers, and society all benefit when a woman chooses to breastfeed her child.⁷⁹ However, women attempting to continue breastfeeding after returning to work face severe obstacles in the workplace, despite these benefits. Thus, many women are discouraged from breastfeeding while working. A recent Act of Congress, however, recognized these many benefits and has removed one barrier to women choosing to breastfeed by imposing a duty on employers to accommodate the milk expression needs of breastfeeding employees.⁸⁰

III. CONGRESSIONAL POLICY: MANDATORY ACCOMMODATION

Enacted in March of 2010, the Patient Protection and Affordable Care Act (Health Care Reform) contained an amendment that now requires employers to provide reasonable break time for nursing mothers.⁸¹ The legislation passed after a similar bill lay dormant in committee for twelve years.⁸² Prior to enactment of the law, the only protection for nursing employees was that provided by twenty-four states, the District of Columbia, and Puerto Rico, which all had some form of workplace breastfeeding law on the books.⁸³ This Section first discusses the earlier failed attempts to get

⁷⁷ *Id.*

⁷⁸ *Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1997–FY 2009*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm> (last visited Jan. 11, 2010). Settling pregnancy discrimination claims has cost employers over \$143 million in direct monetary benefits to pregnancy discrimination complainants, not including damages obtained through litigation. *Id.* This figure also does not include the legal costs associated with responding to EEOC charges and litigating disputes that cannot be resolved before suit is brought. *Id.*

⁷⁹ For a cost-benefit analysis of providing breast-pumping breaks during the workday, see Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER SOC. POL'Y & L. 471, 500–02 (2001).

⁸⁰ See *infra* Part III.

⁸¹ 29 U.S.C.A. § 207 (West 2010).

⁸² See Acts cited *infra* note 84.

⁸³ *Breastfeeding Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=14389> (last updated Mar. 2010) [hereinafter *Breastfeeding Laws*].

breastfeeding legislation through Congress, then describes the current state of the law with the passage of Health Care Reform, and concludes with a discussion of a critical difference in the proposed and enacted laws: protection from discrimination on the basis of lactation.

A. Early Attempts at Protection for Nursing Mothers: Breastfeeding Promotion Act

The Breastfeeding Promotion Act has been reintroduced in each subsequent session of Congress since the 105th (1997–1998),⁸⁴ without ever getting out of committee. Most recently introduced into both the House and Senate on June 11, 2009, the Breastfeeding Promotion Act⁸⁵ had two major goals: first, to require employers to accommodate the needs of working mothers to express milk in the workplace,⁸⁶ and second, to prohibit discrimination on the basis of breastfeeding and expressing milk in the workplace.⁸⁷

In order to require accommodation by the employer, the Act sought to amend the Fair Labor Standards Act. The following language was proposed:

An employer shall provide 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. The employer shall make reasonable efforts to provide 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. An employer shall not be required to compensate an employee for any work time spent for such purpose.⁸⁸

⁸⁴ See Breastfeeding Promotion Act of 2007, H.R. 2236, 110th Cong. (2007); Pregnancy Discrimination Act Amendments of 2005, H.R. 2122, 109th Cong. (2005); Breastfeeding Promotion Act, H.R. 2790, 108th Cong. (2003); Pregnancy Discrimination Act Amendments of 2003, S. 418, 108th Cong. (2003); Breastfeeding Promotion Act, H.R. 285, 107th Cong. (2001); Pregnancy Discrimination Act Amendments of 2001, S. 256, 107th Cong. (2001); Pregnancy Discrimination Act Amendments of 2000, H.R. 3861, 106th Cong. (2000); Pregnancy Discrimination Act Amendments of 2000, S. 3023, 106th Cong. (2000); Pregnancy Discrimination Act Amendments of 1999, H.R. 1478, 106th Cong. (1999); New Mothers' Breastfeeding Promotion Act of 1998, H.R. 3531, 105th Cong. (1998).

⁸⁵ S. 1244, 111th Cong. (2009); H.R. 2819, 111th Cong. (2009).

⁸⁶ S. 1244 § 501(a); H.R. 2819 § 501(a).

⁸⁷ S. 1244 § 101(b)(2); H.R. 2819 § 101(b)(2).

⁸⁸ S. 1244 § 501(a); *see also* H.R. 2819 § 501(a).

Additionally, the Act provided up to a \$10,000 tax credit for employer expenses for providing a location on the business premises where employed mothers may breastfeed or express milk for their children.⁸⁹

In order to prohibit discrimination, the Act proposed to amend the Pregnancy Discrimination Act “to clarify that breastfeeding and expressing breast milk in the workplace are protected conduct under the . . . [PDA].”⁹⁰ The Act would have achieved this clarification by adding lactation to the list of prohibited bases of discrimination in the PDA to read, “pregnancy, childbirth (*including lactation*), or related medical conditions.”⁹¹ With its coverage of mandatory accommodations, non-discrimination, and employer incentives, the Act was much more comprehensive than the law that recently passed.

B. Health Care Reform: Reasonable Break Time for Nursing Mothers

While the stand-alone Breastfeeding Promotion Act has languished in committee for over a decade, the nursing mothers amendment slipped into the massive 2,074-page Health Care Reform Bill relatively unnoticed.⁹² Introduced by Senator Jeff Merkley (D-Ore.),⁹³ the amendment provides mandatory accommodation for nursing mothers. It does so by amending the Fair Labor Standards Act of 1938 (FLSA) and requires the following: that (1) employers provide a “reasonable break time” for an employee to express breast milk at work; (2) such break time is provided each time the employee “has need to express the milk”; (3) break time is provided for up to one year after the birth of the child; and (4) the employer provide a private place, other than a restroom, where the employee may express milk.⁹⁴ These requirements are nearly identical to those proposed by the stalled Breastfeeding Promotion Act.⁹⁵ The Department of Labor (DOL),

⁸⁹ S. 1244 § 45R(b); H.R. 2819 § 45R(b).

⁹⁰ S. 1244 § 101(b)(2); H.R. 2819 § 101(b)(2).

⁹¹ S. 1244 § 102(1) (emphasis added); H.R. 2819 § 102(1) (emphasis added). The PDA stated that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same,” 42 U.S.C. § 2000e(k) (2006), while both the House and Senate bills proposed amending the language “by inserting ‘(including lactation)’ after ‘childbirth,’” S. 1244 § 102(1); H.R. 2819 § 102(1).

⁹² See Mary Agnes Carey, Phil Galewitz, & Laurie McGinley, *7 Items You Didn't Know Were in the Senate Bill*, MSNBC.COM, Nov. 30, 2009, http://www.msnbc.msn.com/id/34209992/ns/health-health_care/ (describing the nursing mothers amendment as being in the “congressional tradition” of “adding pet interests that otherwise might not pass to a big bill that at least will be put up for a vote”).

⁹³ Senator Merkley also introduced the Breastfeeding Promotion Act into the Senate.

⁹⁴ 29 U.S.C.A. § 207 (West 2010).

⁹⁵ Compare 29 U.S.C.A. § 207, with S. 1244 § 501(a); H.R. 2819 § 501(a).

responsible for administering the law, has provided some additional guidance.⁹⁶ According to the DOL's fact sheet, the frequency and duration of breaks will vary as needed by the nursing mother.⁹⁷

There are, however, some limitations on the application of these requirements. First, as an amendment to Section 7 of the FLSA, the provision only applies to those employees who are not exempt from the FLSA's overtime pay requirements—generally hourly, not salary, employees.⁹⁸ Second, employers with fewer than fifty employees are exempt from the requirements if the requirements would impose an undue hardship on the employer in the form of “significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.”⁹⁹ Third, the employer is not required to compensate the employee for any work time spent expressing milk.¹⁰⁰

However, the law does not preempt state laws that provide greater protection than the new federal law.¹⁰¹ There are some state variations on the reasonable-break-time requirement that serve to strengthen protection to breastfeeding employees. A few states specify that the time must be provided “in order to maintain milk supply and *comfort*.”¹⁰² Not only does such language recognize the physiological need to express milk, but also the woman's comfort level. Some states are also more specific regarding the frequency and duration of a “reasonable” break.¹⁰³ For example, Oregon

⁹⁶ See *Fact Sheet #73: Break Time for Nursing Mothers Under the FLSA*, U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, July 2010, <http://www.dol.gov/whd/regs/compliance/whdfs73.pdf> [hereinafter *Fact Sheet #73*].

⁹⁷ *Id.*

⁹⁸ 29 U.S.C.A. § 207; see also *Fact Sheet #73*, *supra* note 96.

⁹⁹ 29 U.S.C.A. § 207(r)(1)(3).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² 2009 Ark. Acts, Act 621, H.B. 1552 (2009) (emphasis added); D.C. CODE § 2-1402.82(d)(1) (2007) (requiring that employers provide reasonable daily unpaid break periods “as required by the employee . . . to maintain milk supply and comfort”).

¹⁰³ See OR. REV. STAT. § 653.077(1)(c) (2007); P.R. LAWS ANN. tit. 29, § 478a (2009) (requiring most private employers to provide an hour during the workday to breastfeed or express milk, which may be divided into two thirty-minute sessions or three twenty-minute sessions, but allowing small business to provide only a half-hour of break time for expressing milk during each work day); P.R. LAWS ANN. tit. 3, § 1466(5)(a) (2009) (requiring public employers to provide, as a “fringe benefit,” a half-hour of paid break time, which may be distributed into two fifteen-minute sessions within the full-time work day for breastfeeding or the expression of milk). Although a proposed version of New York's law specified a minimum amount of time that would be considered reasonable—one hour of unpaid break time within each eight-hour work period for the first twelve months of the child's life—the version that ultimately passed used the vague “reasonable time” language. See S. 45, 222d Leg., 1st Sess. (N.Y. 1999).

requires thirty-minute breaks to express milk in the middle of each four-hour work period or other reasonable rest periods as agreed to by the employer and employee.¹⁰⁴ As long as this is not less often than the mother needs, as the federal law requires,¹⁰⁵ then this provision could provide nursing employees with more frequent breaks. In addition to requiring a private location, a few states also require an employer to provide cold storage for expressed milk.¹⁰⁶ Some states also provide a maximum duration for accommodation longer than the one-year federal requirement.¹⁰⁷ The new law is a significant improvement for working mothers,¹⁰⁸ and state laws that provide even more protection will continue to benefit women in those states.

C. The Missing Element: A Non-Discrimination Provision

While the accommodation requirements of the proposed Breastfeeding Promotion Act and the enacted Health Care Reform are identical, the latter is missing an important element that was present in the former: a prohibition on discrimination on the basis of lactation.¹⁰⁹ This is important for several reasons. First, some employers may seek to avoid the requirements of the law by refusing to hire employees who are more likely to demand accommodation. Second, even if employers provide the required

¹⁰⁴ OR. REV. STAT. § 653.077(1)(c) (2007).

¹⁰⁵ 29 U.S.C.A. § 207 (requiring reasonable break time “each time such employee has need to express the milk”).

¹⁰⁶ See, e.g., IND. CODE §§ 5-10-6-2(b), 22-2-14(2)(b) (2010) (requiring public employers to provide cold storage for expressed milk and private employers to provide cold storage or allow the employee to provide her own cold storage space for keeping expressed milk).

¹⁰⁷ See COLO. REV. STAT. § 8-13.5-104(1) (2008) (requiring reasonable break time to express milk for up to two years after the child’s birth); ME. REV. STAT. ANN. tit. 26, § 604 (2009) (up to three years following the child’s birth); P.R. LAWS ANN. tit. 29, § 478b (2009), P.R. LAWS ANN. tit. 3, § 1466(5)(b) (2009) (for one year after the employee’s return to her position, not just after the birth of the child); VT. STAT. ANN. tit. 21, § 305(a)(1) (2008) (up to three years after the child’s birth).

¹⁰⁸ Indeed, many commentators have advocated for passage of national legislation as the solution. See Christrup, *supra* note 79, at 494 (“The best option for maintaining workplace equality and encouraging breastfeeding is the requirement that employers accommodate breast-pumping.”); Goodman, *supra* note 26, at 146 (“[A] federal statute protecting [expressing breast milk at work] would offer the best solution.”); Lisa Hansen, Note, *A Comprehensive Framework for Accommodating Nursing Mothers in the Workplace*, 59 RUTGERS L. REV. 885, 905–08 (2007) (“[E]nacting a national law means a woman’s right to breastfeed or express breast milk in the workplace will no longer be tied to her state of residence.”); Alison Reuter, Comment, *Subtle But Pervasive: Discrimination Against Mothers and Pregnant Women in the Workplace*, 33 FORDHAM URB. L.J. 1369, 1418–20 (2006) (proposing a “Parental Discrimination Act”).

¹⁰⁹ See *supra* Part III.B.

accommodations, employees exercising their rights under the law may face adverse employment actions in other aspects of their jobs, such as restricted opportunities for promotion, less flexible scheduling, or lower wage increases. Third, many working mothers are not covered by the new law. Because it applies only to those employees not exempt from overtime, salaried employees have no protection under this law. Finally, if an employer does not provide the required accommodation, it is unclear how the law will be enforced. A prohibition on discrimination on the basis of lactation would provide a cause of action for employees seeking recourse for an employer's failure to comply with the law or for those employees who are not within the law's coverage. With no explicit non-discrimination provision included in the enacted law, the lactating employee must look to either state law or other federal laws under which such discrimination may be covered.

D. Inconsistent Protection Against Discrimination: State Legislation

Prior to the enactment of Health Care Reform, state legislatures have been the most responsive to the need to protect lactating and breastfeeding women from employment discrimination. Treatment among the states, however, has not been uniform, with wide variation in the levels of protection afforded.¹¹⁰ While twenty-four states, the District of Columbia, and Puerto Rico have laws regarding breastfeeding or the expression of milk in the workplace,¹¹¹ only seven states have laws explicitly prohibiting discrimination against breastfeeding or lactating women.¹¹²

The reach of these provisions vary. Some states have a simple prohibition on discrimination against mothers who express milk in the

¹¹⁰ Compare, e.g., 26 ME REV. STAT. ANN. tit. 26 § 604 (2009) (prohibiting discrimination on the basis of expressing milk in the workplace and requiring employers to provide reasonable daily unpaid breaks to express milk for up to three years following the birth of a child, in a sanitary, private, and secure location other than a restroom stall), with H.J. RES. 1, 57th Leg., 2003 Gen. Sess. (Wyo. 2003) (“encourag[ing] breastfeeding and commend[ing] employers . . . who make accommodations for breastfeeding mothers whenever feasible”). More than half the states, twenty-six, do not have any workplace breastfeeding laws.

¹¹¹ *Breastfeeding Laws*, *supra* note 83. Sixteen states (Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Maine, Minnesota, Mississippi, Montana, New Mexico, New York, Oregon, Tennessee, and Vermont), the District of Columbia, and Puerto Rico required accommodation on the part of employers prior to the enactment of the federal law. *Id.* Georgia, North Dakota, Oklahoma, Rhode Island, Texas, Virginia, Washington, and Wyoming recommended or encouraged accommodation. *See id.*

¹¹² Those states are Colorado, Connecticut, Hawaii, Maine, Montana, New York, and the District of Columbia. *Id.*

workplace.¹¹³ Others prohibit “adverse employment action” against an employee exercising her rights to express milk in the workplace.¹¹⁴ Even more extensive provisions prohibit “refus[al] to hire or employ or to bar or discharge from employment, or withhold pay, demote, or penalize” an employee who expresses milk in the workplace.¹¹⁵ The District of Columbia took a different approach than many states by amending the Human Rights Act of 1977 definition of discrimination on the basis of sex to include breastfeeding.¹¹⁶

Even with accommodation now required by federal law, recourse for the employer’s failure to comply or adverse action against employees exercising these rights may still be limited without some measure prohibiting discrimination. If an employee’s ability to enforce her rights is limited to what is provided by state laws, only seven states have made clear that she is protected. Again, this national issue requires a national solution and arguments under existing federal law are necessary unless Congress makes clear that discrimination on the basis of lactation is prohibited.

IV. PREGNANCY DISCRIMINATION AND BREASTFEEDING UNDER TITLE VII

Currently, Title VII of the Civil Rights Act of 1964 and its amendment, the Pregnancy Discrimination Act of 1978 (PDA), do not appear to protect women faced with adverse employment actions because of a need to express breast milk at work.¹¹⁷ This section examines the history and development of

¹¹³ COLO. REV. STAT. § 8-13.5-104(1) (2008); ME. REV. STAT. ANN. tit. 26, § 604 (2009) (employer “may not discriminate in any way against an employee who chooses to express breast milk in the workplace”); N.Y. LAB. LAW § 206-c (2007) (employer may not discriminate “in any way” against an employee who expresses breast milk in the workplace).

¹¹⁴ CONN. GEN. STAT. § 31-40w(c) (2009) (“An employer shall not discriminate against, discipline or take any adverse employment action against any employee because such employee has elected to exercise her rights [to express milk in the workplace].”).

¹¹⁵ HAW. REV. STAT. § 378-2(7) (1999) (amending the civil rights laws to make it an unlawful employment practice “[f]or any employer or labor organization to refuse to hire or employ or to bar or discharge from employment, or withhold pay, demote, or penalize a lactating employee because an employee breastfeeds or expresses milk at the workplace”); *see also* MONT. CODE ANN. § 39-2-215(2) (2010) (prohibiting public employers from refusing to hire or employ, bar, or discharge any employee who expresses milk in the workplace and from “discriminat[ing] against an employee who expresses milk in the workplace in compensation or in terms, conditions, or privileges of employment unless based upon a bona fide occupational qualification”).

¹¹⁶ D.C. CODE § 2-1401.05(a) (2007).

¹¹⁷ This Note focuses on the history and future of Title VII and the PDA as the most likely statutes under which discrimination claims by working mothers may meet with

Title VII and the PDA, as well as the subsequent interpretation of the PDA by federal courts. An understanding of the early pregnancy discrimination cases and failed attempts to bring breastfeeding discrimination under the coverage of the same cause of action is necessary for determining how more successful actions may be brought in the future.

A. The Basic Framework: Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 provides: “It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”¹¹⁸ Title VII discrimination cases can generally be brought as either a disparate impact or disparate treatment claim.¹¹⁹ A disparate impact claim alleges that the effects of a facially neutral policy fall more harshly on a protected class.¹²⁰ For a disparate treatment claim, the approach used more commonly by breastfeeding and lactating workers, the plaintiff must show that an employer treated her less favorably because of her sex, including pregnancy, childbirth,

some success. Unsuccessful attempts have been made to protect breastfeeding as a constitutional privacy right. *See* *Dike v. Sch. Bd.*, 650 F.2d 783, 787 (5th Cir. 1981); *Christup, supra* note 72, at 272 (“[T]he constitutional protection afforded by *Dike* has yet to successfully protect a single breastfeeding worker and the doctrine appears to be shrinking, not growing.”). Claims under the Family and Medical Leave Act of 1993 and the Americans with Disabilities Act of 1990 have also been unanimously rejected. *See* *Christup, supra* note 72, at 269 (“[T]he FMLA is inapplicable to most women in the workforce and still forces those women who are covered to choose between breastfeeding and work.”); *Jendi B. Reiter, Accommodating Pregnancy and Breastfeeding in the Workplace: Beyond the Civil Rights Paradigm*, 9 *Tx. J. WOMEN & L.* 1, 5–6 (1999) (“Courts have repeatedly held that a normal, healthy pregnancy is not an ADA-qualifying disability. The need to breastfeed appears even harder to fit within the statutory language.”).

¹¹⁸ 42 U.S.C. § 2000e-2(a)(1) (2006).

¹¹⁹ *See generally* LEX K. LARSON, *LARSON ON EMPLOYMENT DISCRIMINATION* (2009) (discussing disparate treatment theory in Part IV and disparate impact theory in Part V); *Abigail Levin, Cause of Action Under Title VII of Civil Rights Act of 1964*, 42 *U.S.C.A. §§ 2000e et seq., for Sex Discrimination Based on Pregnancy, Childbirth, or Related Medical Condition*, in 40 *CAUSES OF ACTION* 2d 645 (2009).

¹²⁰ *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.”). While there are potential arguments to be made for protection under a disparate impact analysis, this Note primarily focuses on disparate treatment, the method of analysis used by most courts to date. This Note seeks to demonstrate the flawed reasoning of prior disparate treatment cases while suggesting a more appropriate analysis. *See infra* Part V.

or related medical condition.¹²¹ The courts have generally refused to recognize either claim by breastfeeding workers, holding that they are not a protected class under Title VII or the PDA, and often citing the Supreme Court's pre-PDA analysis of Title VII in *General Electric Co. v. Gilbert*.¹²²

1. *The Supreme Court's Interpretation of Title VII Sex Discrimination and Pregnancy: General Electric Co. v. Gilbert*

While it seems logical that discrimination on the basis of pregnancy would be discrimination "because of sex," the Supreme Court did not so find.¹²³ In *General Electric Co. v. Gilbert*, the Supreme Court held that pregnancy discrimination was not discrimination because of sex, substantially limiting the reach of sex discrimination actions under Title VII.¹²⁴ This decision reversed the Fourth Circuit,¹²⁵ which had upheld the

¹²¹ Levin, *supra* note 119, at 682–85.

¹²² See *infra* Part IV.B.

¹²³ The district court in *Gilbert*, which was ultimately reversed by the Supreme Court, found it "self evident" that discrimination on the basis of pregnancy, which affects only women and not men, is discrimination on the basis of sex. *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 381 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976).

¹²⁴ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145–46 (1976). The stage was set for the *Gilbert* reasoning in *Geduldig v. Aiello*, 417 U.S. 484 (1974). In *Geduldig*, the Court rejected a challenge to California's disability insurance program, which provided benefits to employees experiencing temporary disabilities not covered by worker's compensation, but excluded from coverage compensation for any work loss due to normal pregnancy. *Geduldig*, 417 U.S. at 494. Reversing the decision of the three-judge district court below, the Court reasoned that the exclusion of a disability unique to women does not "amount[] to invidious discrimination under the Equal Protection Clause" because the program "does not discriminate with respect to the persons or groups which are eligible for disability insurance protection." *Id.* While *Geduldig* was brought under the equal protection clause, the Court's reasoning was applied to the Title VII challenge of a similar disability plan in *Gilbert*:

Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

Gilbert, 429 U.S. at 134–35 (quoting *Geduldig*, at 496–97 n.20).

¹²⁵ *Gilbert v. Gen. Elec. Co.*, 519 F.2d 661, 667 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976) ("[Defendant's] denial of pregnancy-related disability from the application of its employee disability benefit program . . . falls clearly within the prohibitions of Title VII and *Aiello* confers no immunity for such denial.").

district court decision¹²⁶ that an employer's disability plan that denied benefits for disabilities arising from pregnancy violated Title VII's provision prohibiting discrimination on the basis of sex.¹²⁷ The *Gilbert* Court reasoned that women, though they alone can get pregnant, were not discriminated against because "[t]he program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."¹²⁸ Thus, because some women are not part of the disfavored group, the program cannot be discrimination on the basis of sex: "There is no risk from which men are protected and women are not."¹²⁹ The Court acknowledged that there could be discrimination on the basis of sex, "should it be shown 'that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other,'"¹³⁰ but the Court found no such indication in the case.¹³¹

Gilbert generated two dissenting opinions: one by Justice Brennan, in which Justice Marshall joined,¹³² and one by Justice Stevens.¹³³ Justice Brennan sharply pointed out the Court's fallacy:

Indeed, the shallowness of the Court's "underinclusive" analysis is transparent. Had General Electric assembled a catalogue of all ailments that befall humanity, and then systematically proceeded to exclude from coverage every disability that is female-specific or predominantly afflicts women, the Court could still reason as here that the plan operates equally: Women, like men, would be entitled to draw disability payments for their circumcisions and prostatectomies, and neither sex could claim payment for pregnancies, breast cancer, and the other excluded female-dominated disabilities. Along similar lines, any disability that occurs disproportionately in a particular group—sickle-cell anemia, for example—could be freely excluded from the plan without troubling the Court's analytical approach.¹³⁴

Justice Stevens simplified the analysis by observing that a policy that places "pregnancy in a class by itself . . . discriminates on account of sex; for it is

¹²⁶ *Gilbert*, 375 F. Supp. at 386, *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976).

¹²⁷ *Gilbert*, 429 U.S. at 128.

¹²⁸ *Id.* at 135 (quoting *Geduldig*, 417 U.S. at 496–97 n.20).

¹²⁹ *Id.* (quoting *Geduldig*, 417 U.S. at 496–97).

¹³⁰ *Id.* (quoting *Geduldig*, 417 U.S. at 496–97 n.20).

¹³¹ *Id.* at 140.

¹³² *Id.* at 146 (Brennan, J., dissenting).

¹³³ *Gilbert*, 429 U.S. at 160 (Stevens, J., dissenting).

¹³⁴ *Id.* at 152 n.5 (Brennan, J., dissenting).

the capacity to become pregnant which primarily differentiates the female from the male.”¹³⁵ Justice Stevens rejected the majority’s definition of the two groups as pregnant women and nonpregnant persons, arguing that the appropriate “classification is between persons who face a risk of pregnancy and those who do not.”¹³⁶

Thus, the strained analysis of the majority in *Gilbert* began a line of reasoning still invoked by courts today in cases in which discrimination is based on a factor disproportionately affecting some women and not men, such as lactation and breastfeeding.¹³⁷ As the dissents pointed out, the majority thwarted Congress’s intent in enacting Title VII.¹³⁸ Congress swiftly responded following the decision to correct the Court’s interpretation of Title VII, clarifying congressional intent.

2. Congress’s Response to *Gilbert*’s Majority: *The Pregnancy Discrimination Act*

Congress responded to the *Gilbert* holding by enacting the PDA,¹³⁹ which effectively overruled the decision. Enacted in 1978, just two years after *Gilbert* was decided, the PDA amended Title VII’s definition of sex discrimination to include pregnancy discrimination:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, 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, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work¹⁴⁰

The express purpose of the PDA was to “change the definition of sex discrimination in title VII to reflect the ‘commonsense’ view and to insure that working women are protected against *all* forms of employment

¹³⁵ *Id.* at 161–62 (Stevens, J., dissenting) (footnote omitted).

¹³⁶ *Id.* at 161–62 n.5 (Stevens, J., dissenting).

¹³⁷ See Diana Kasdan, Note, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. REV. 309, 324–27 (2001) (“The appellate court rationales for rejecting breastfeeding-based claims thus have been carried across several jurisdictions and have established a prevailing approach to this question of law, with logic reminiscent of *Gilbert*.”).

¹³⁸ *Gilbert*, 429 U.S. at 146–62.

¹³⁹ *Gilbert* was decided on December 7, 1976. The PDA was introduced in the Senate four months later on March 15, 1977. S. REP. NO. 95-331, at 3 (1977).

¹⁴⁰ 42 U.S.C. § 2000e(k) (2006).

discrimination based on sex.”¹⁴¹ Both the House and Senate Reports rejected the majority opinion in *Gilbert*¹⁴² and endorsed the dissents’ expressions of the “principle and meaning” of Title VII.¹⁴³ In a floor debate, Representative Ronald Sarasin, a House bill manager, stated that the PDA gives a woman “the right . . . to be financially and legally protected before, during, and *after* her pregnancy.”¹⁴⁴ The House Report also discussed the potential breadth of the Act: “In using the broad phrase ‘women affected by pregnancy, childbirth and related medical conditions,’ the bill makes clear that its protection extends to the *whole range of matters concerning the childbearing process*.”¹⁴⁵ Thus, in enacting the PDA, Congress not only brought pregnancy and related conditions into the express terms of Title VII, but also clarified its intent that Title VII should be broadly construed to protect working women from all forms of sex-based discrimination.

Subsequent to the enactment of the PDA, the Supreme Court concluded that “[w]hen Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the *holding* and the *reasoning* of the Court in the *Gilbert* decision.”¹⁴⁶ Despite this clear rejection of *Gilbert* by Congress and acknowledgement by the Supreme Court, lower courts have continued to apply *Gilbert* reasoning to cases that courts find to be outside of “pregnancy, childbirth, or related medical conditions.”¹⁴⁷ It is at the hand of this reasoning that most of the breastfeeding/lactation discrimination cases brought in federal courts have met their fate, despite the clear purpose of the PDA to extend broad Title VII protection to women.¹⁴⁸ Most federal courts that have heard the issue have refused to find that breastfeeding, lactation, and the need to express breast milk at work are protected by Title VII.¹⁴⁹ An examination of the major cases in this area is necessary to understand the state of the law today and what counsel can learn from this body of law to

¹⁴¹ S. REP. NO. 95-331, at 3 (emphasis added).

¹⁴² The Senate Report classified *Gilbert* as “threaten[ing] to undermine the central purpose of the sex discrimination prohibitions of title VII.” S. REP. NO. 95-331, at 3.

¹⁴³ S. REP. NO. 95-331, at 2–3; H.R. REP. NO. 95-948, at 2 (1978) (“[T]he dissenting Justices correctly interpreted the Act.”).

¹⁴⁴ 124 CONG. REC. 38,574 (1978), *reprinted in* COMM. ON LABOR AND HUMAN RESOURCES, LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978: PUBLIC LAW 95-555, at 208 (1979) (emphasis added).

¹⁴⁵ H.R. REP. NO. 95-948, at 5 (emphasis added).

¹⁴⁶ *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) (emphasis added).

¹⁴⁷ *See infra* Part IV.B.

¹⁴⁸ *See, e.g.,* *Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d 305, 308, 309 (S.D.N.Y. 1999).

¹⁴⁹ *See* cases discussed *infra* Part IV.B.

help women who experience employment discrimination because of their need to express milk in the workplace.

B. Title VII and PDA Breastfeeding Discrimination Litigation in the Lower Federal Courts

This section discusses the major breastfeeding cases in federal courts since enactment of the PDA. The progression of cases illustrates how the reasoning of a few early cases arising out of one factual circumstance, women seeking extended leave to breastfeed, has been repeatedly applied in all cases bearing any relation to breastfeeding—including the “pumping” cases in which women were not permitted to attend to the bodily function of lactation at work.

Early breastfeeding cases brought under the PDA factually dealt with women attempting to extend their maternity leaves so that they could continue breastfeeding.¹⁵⁰ The first such case, *Barrash v. Bowen*, decided in the Fourth Circuit, was brought by a female government employee whose request for six months maternity leave to breastfeed her infant was denied by her employer.¹⁵¹ Her continued requests for leave were based upon a claim of illness in order to fit within her employer’s policy for granting leave.¹⁵² The court determined that under the PDA “pregnancy and related conditions must be treated as illnesses only when incapacitating.”¹⁵³ Because the woman was not incapacitated, she was not entitled to additional leave.¹⁵⁴ The appellate court also observed that while maternity leave of six months or more granted to women decreased over a three-year period and six-month leaves granted to men increased, “[o]ne can draw no valid comparison between people, male and female, suffering extended incapacity from illness or injury and young mothers wishing to nurse little babies.”¹⁵⁵ The court went on to state the following:

Any limitation upon the liberality with which leave without pay had been granted in earlier years would have an adverse impact upon young mothers wishing to nurse their babies for six months, but that is not the kind

¹⁵⁰ See, e.g., *Wallace v. Pyro Mining Co.*, No. 90-6259, 1991 WL 270823, at *1 (6th Cir. Dec. 19, 1991); *Barrash v. Bowen*, 846 F.2d 927, 928 (4th Cir. 1988).

¹⁵¹ *Barrash*, 846 F.2d at 928.

¹⁵² *Id.* at 928–29.

¹⁵³ *Id.* at 931.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 931–32.

of disparate impact that would invalidate the rule, for it shows no less favorable treatment of women than of men.¹⁵⁶

Even when breastfeeding is not a choice by the mother, but instead is the only way that the child will accept nourishment, the plaintiff's claim has been rejected out of failure to show medical necessity.¹⁵⁷ In *Wallace v. Pyro Mining*, the only other breastfeeding employment discrimination case heard by a circuit court to date, the plaintiff requested six weeks extended maternity leave because her baby would only breastfeed.¹⁵⁸ Her employer refused to extend her leave and fired her when she refused to return to work when required.¹⁵⁹ Wallace sued, alleging violation of the PDA.¹⁶⁰ The Sixth Circuit rejected her PDA claim, stating that it did not need to determine if the PDA applied because Wallace "failed to produce evidence supporting her contention that breastfeeding her child was a medical necessity."¹⁶¹ The appellate court further concluded that she failed to show that her employer "treated women less favorably than men . . . with respect to requests for leaves of absence."¹⁶²

Even when a plaintiff has been able to show the medical necessity of breastfeeding for the child, courts have found the child's necessity insufficient under the PDA.¹⁶³ In *McNill v. New York City Department of Correction*, the plaintiff alleged a violation of the PDA because she lost certain discretionary benefits as a result of absences due to the need to breastfeed her child, who could not bottle feed because of a cleft palate.¹⁶⁴ The court defined the issue as whether breastfeeding is "related to 'pregnancy, childbirth or [a] related medical condition' within the meaning of the PDA."¹⁶⁵ The court focused on the "related medical condition" of the child, the cleft palate, and determined that a medical condition of the child falls outside the PDA.¹⁶⁶ The court read Congress's intent regarding "related medical conditions" as "limited to incapacitating conditions for which medical care or treatment is usual and normal. Neither breast-feeding and

¹⁵⁶ *Id.* at 932.

¹⁵⁷ See *Wallace v. Pyro Mining Co.*, No. 90-6259, 1991 WL 270823, at *1-2 (6th Cir. Dec. 19, 1991).

¹⁵⁸ *Id.* at *1.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *McNill v. N.Y. City Dep't of Corr.*, 950 F. Supp. 564, 570 (S.D.N.Y. 1996).

¹⁶⁴ *Id.* at 566-67.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 569-70.

weaning, nor difficulties arising therefrom, constitute such conditions.”¹⁶⁷ Finally, the court concluded that “[t]he PDA only provides protection based on the condition of the mother—not the condition of the child” and that the plaintiff whose child requires breastfeeding is, therefore, not a member of a protected class.¹⁶⁸

Litigants seeking modified schedules, not extension of full maternity leave, have also had their claims rejected.¹⁶⁹ In *Fejes v. Gilpin Ventures*, the request of the employee-mother was not as burdensome to the employer as those requesting extended leave, but was rejected nonetheless.¹⁷⁰ The plaintiff, a blackjack dealer in a casino, claimed she was refused a part-time schedule to breastfeed her child and was subsequently fired.¹⁷¹ The court rejected her Title VII claim, holding that breastfeeding and other post-pregnancy childrearing concerns are not “medical conditions related to pregnancy or childbirth” within the scope of the PDA.¹⁷² Viewing breastfeeding as only a matter of childcare, the court concluded that “[n]othing in the PDA, or Title VII itself, obliges an employer to accommodate the child-care concerns of breast-feeding workers.”¹⁷³

In the most recent cases, employees’ requests to attend to their bodies’ lactation by expressing breast milk at work have also been rejected by courts as not protected by the PDA.¹⁷⁴ In *Jacobson v. Regent Assisted Living*, the plaintiff brought a disparate treatment claim based upon, among other things, her employer’s refusal to allow her to express her breast milk.¹⁷⁵ On one occasion, Jacobson’s employer insisted that she go over work with him, despite her stating that she needed to get home to feed her son.¹⁷⁶ She was then humiliated when her breasts became overly full and began to leak.¹⁷⁷ On a second occasion, her employer insisted she attend a meeting with him in

¹⁶⁷ *Id.* at 571.

¹⁶⁸ *Id.*

¹⁶⁹ See, e.g., *Jacobson v. Regent Assisted Living, Inc.*, No. CV-98-564-ST, 1999 WL 373790, at *11 (D. Or. Apr. 9, 1999) (“Title VII and the PDA do not cover breast feeding or childrearing concerns because they are not ‘medical conditions related to pregnancy, childbirth or related medical conditions.’”); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1492 (D. Colo. 1997) (“[B]reast-feeding and child rearing concerns after pregnancy are not medical conditions related to pregnancy or childbirth within the meaning of the PDA.”).

¹⁷⁰ *Fejes*, 960 F. Supp. at 1491–94.

¹⁷¹ *Id.* at 1490–91.

¹⁷² *Id.* at 1492.

¹⁷³ *Id.*

¹⁷⁴ See, e.g., *Jacobson*, 1999 WL 373790, at *11.

¹⁷⁵ *Id.* at *7.

¹⁷⁶ *Id.* at *4.

¹⁷⁷ *Id.*

another city.¹⁷⁸ She told him that she could not be away from home very long because she was nursing and that she would need time to both pump her breast milk and eat in order to keep up her nourishment.¹⁷⁹ Her employer gave her no breaks during the trip and “she was forced to sit on the plane drenched in breast milk,” which caused her both humiliation and pain from the fullness of her breasts.¹⁸⁰

Despite this treatment, the court did not consider how lactation and the need to express breast milk were different from the facts of previous cases in which plaintiffs sought extended leave to breastfeed. Citing *Fejes* and *Wallace*, the court dismissed the claim without consideration, stating the following:

[T]o the extent that Jacobson bases her discrimination claim on her assertion that [her employer] would not allow her to pump her breast milk, she fails to state a claim. Title VII and the PDA do not cover breast feeding or childrearing concerns because they are not “medical conditions related to pregnancy, childbirth or related medical conditions.”¹⁸¹

In evaluating whether her employer’s excuse for terminating her was pretextual, the court stated that, rather than proving pretext, her employer’s refusal to allow her to pump her breast milk “proves only that [her employer] treated a breast feeding woman the same as a man.”¹⁸²

Similarly, in *Martinez v. N.B.C. Inc.*, the plaintiff’s claim was that her employer insufficiently accommodated her need to pump her breast milk at work.¹⁸³ Invoking the reasoning of *Gilbert*, the court concluded that she failed to state a claim under Title VII because “[t]he drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other . . . is not the sort of behavior covered by Title VII.”¹⁸⁴ The court further rejected her claim of sex-plus discrimination,¹⁸⁵ made on the basis of sex plus the need to express milk, because there was no corresponding subclass of men who could also be characterized by the need to express

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Jacobson*, 1999 WL 373790, at *4.

¹⁸¹ *Id.* at *11.

¹⁸² *Id.* at *15.

¹⁸³ *Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d 305, 308 (S.D.N.Y. 1999).

¹⁸⁴ *Id.* at 309.

¹⁸⁵ Sex-plus discrimination occurs when a person is subject to disparate treatment based on sex in conjunction with a second characteristic. See Marjorie A. Shields, Annotation, *Validity, Construction, and Application of Governmental or Private Regulation of Breast-Feeding*, 5 A.L.R. 6th 485, 491 (2005) (discussing federal courts’ treatment of breastfeeding under a sex-plus theory of discrimination).

milk.¹⁸⁶ The court determined that “[t]o allow a claim based on sex-plus discrimination here would elevate breast milk pumping—alone—to a protected status.”¹⁸⁷ The decision refused to acknowledge that discrimination based on a factor disproportionately affecting women—lactation, like pregnancy—is discrimination on the basis of sex.

This review of the breastfeeding discrimination claims brought in federal court under Title VII and the PDA may be discouraging, as those claims have been largely unsuccessful. This is due, in part, to the scant number of cases,¹⁸⁸ and the fact that only two circuits have heard breastfeeding discrimination cases.¹⁸⁹ Moreover, only a limited number of legal theories have been presented to courts, and others remain to be tried.¹⁹⁰

V. A NEW APPROACH TO BREASTFEEDING AND LACTATION IN EMPLOYMENT DISCRIMINATION CASES

While the new law for nursing mothers requires *accommodation* for expressing milk, the level of protection for a lactating and breastfeeding worker against *discrimination* largely depends upon the state in which the employee resides. The federal courts have failed to interpret Title VII and the PDA as offering any protection to breastfeeding and lactating mothers in the workplace at a national level.¹⁹¹ Similarly, Congress has failed to correct the interpretations of the lower courts by either amending the PDA to clarify its intent regarding breastfeeding and lactation or by including a non-

¹⁸⁶ *Martinez*, 49 F. Supp. 2d at 310.

¹⁸⁷ *Id.* at 311.

¹⁸⁸ *Wallace v. Pyro Mining Co.*, 951 F.2d 351 (6th Cir. 1991) (unpublished table decision); *Barrash v. Bowen*, 846 F.2d 927 (4th Cir. 1988); *Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d 305 (S.D.N.Y. 1999); *Jacobson v. Regent Assisted Living, Inc.*, No. CV-98-564-ST, 1999 WL 373790 (D. Or. Apr. 9, 1999); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487 (D. Colo. 1997); *McNill v. N.Y. City Dep’t of Corr.*, 950 F. Supp. 564 (S.D.N.Y. 1996).

¹⁸⁹ *Wallace*, 951 F.2d 351 (6th Cir. 1991) (unpublished table decision); *Barrash*, 846 F.2d 927 (4th Cir. 1988).

¹⁹⁰ See *Christup*, *supra* note 72, at 285 (arguing that “the strongest argument available to a breastfeeding plaintiff under Title VII is one that is styled as a traditional sex discrimination disparate treatment claim, but which relies on the PDA and *Newport News* to explain why breastfeeding discrimination is sex discrimination”); *Kasdan*, *supra* note 137, at 312 (arguing that breastfeeding discrimination is within the scope of the PDA, based upon statutory language, legislative intent, and Supreme Court interpretation of the PDA); see also *infra* Part V. While courts and commentators have focused largely on disparate treatment analysis, claims brought under a disparate impact theory may also be successful.

¹⁹¹ See *supra* Part IV.

discrimination provision in Health Care Reform.¹⁹² While some states have made progress passing laws prohibiting lactation discrimination,¹⁹³ state protection is dramatically inconsistent.¹⁹⁴ State protection from lactation discrimination is simply inadequate—a national solution is required for this critical, nationwide issue.¹⁹⁵

Congress has already spoken in the PDA to nationally protect pregnancy, childbirth, and related medical conditions.¹⁹⁶ There are essentially two options to achieve a national solution making clear that lactation is covered by the PDA: either a decision from the Supreme Court or an act of Congress explicitly prohibiting discrimination on the basis of lactation, which could be achieved by amending the PDA, as was proposed by the Breastfeeding Promotion Act. Successful Title VII-PDA cases in the lower courts may help to achieve either of these outcomes. Potentially, divergent cases among the circuits may propel the issue to the Supreme Court, which has not yet heard a lactation discrimination case. When such a case is heard, either outcome may ultimately benefit working mothers. If the Court adheres to the line of reasoning articulated in this Note, it would make clear that lactation is protected from discrimination under the PDA. Alternatively, if the Court follows the *Gilbert*-like reasoning used by most lower courts to date, then perhaps Congress will take the next step to protecting nursing women in the workplace by explicitly prohibiting lactation-based discrimination. To achieve the objective of getting a case to the Supreme Court, a legal theory to overcome the decisions discussed in Part IV is needed.¹⁹⁷

¹⁹² See *supra* Part III.

¹⁹³ Indeed, many commentators have advocated that state action is the appropriate solution to protecting nursing mothers in the workplace. See, e.g., Reiter, *supra* note 117, at 22 (“State governments, with their broad power to legislate for the general welfare, may be more suited for this task than the constitutionally limited federal government . . .”).

¹⁹⁴ See *supra* Part III.D.

¹⁹⁵ See *supra* Part II. Promotion of breastfeeding is on the national health care agenda. See *Breastfeeding Report Card*, *supra* note 36. However, *Healthy People 2010* objectives are unlikely to be achieved without a national solution that fully addresses the needs of breastfeeding mothers in the workplace as career plans are the most significant factor in determining a woman’s choices regarding breastfeeding. See National Business Group on Health, *supra* note 60, at 1.3.

¹⁹⁶ See 42 U.S.C. § 2000e(k) (2006).

¹⁹⁷ The theory that follows is based upon a disparate treatment analysis. However, it should be noted that disparate impact is also fertile ground for further research of potential legal theories for lactation discrimination claims. Even if a court determines that lactation discrimination is not protected as sex or pregnancy discrimination, if an employers’ actions regarding workplace lactation disproportionately affect women, then litigants could still argue a disparate impact sex discrimination claim.

A concurring opinion in a recent Ohio Supreme Court case provides some new reasoning for legal arguments in this area.¹⁹⁸ By focusing on the physiological process of lactation, rather than the act of breastfeeding, the opinion comes to the conclusion that the Ohio PDA, which contains nearly identical language to the federal PDA, protects women from discrimination based on lactation.¹⁹⁹ This approach should be advanced by litigants and followed by courts because it corresponds with the realities of the biological nexus between pregnancy and lactation and is consistent with the language and legislative history of the PDA.

A. A View from the Supreme Court of Ohio: Allen v. Totes/Isotoner Corp.

In August of 2009, the Supreme Court of Ohio issued its decision in *Allen v. Totes/Isotoner Corp.*, a case brought under Ohio's equivalent of the PDA.²⁰⁰ Ohio's statute contains nearly identical language to Title VII:

[T]he terms "because of sex" and "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions. Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work²⁰¹

Allen, whose story is discussed in this Note's introduction,²⁰² was terminated for "taking an unauthorized, additional break" when she left her work station

¹⁹⁸ *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622 (Ohio 2009) (O'Connor, J., concurring).

¹⁹⁹ *Id.* at 630.

²⁰⁰ *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622 (Ohio 2009) (per curiam).

²⁰¹ OHIO REV. CODE § 4112.01(B) (2007). The only difference between this language and the language of the federal PDA is the addition of "any illness arising out of and occurring during the course of a pregnancy" to the list of prohibited bases for discrimination in the Ohio Revised Code. Compare OHIO REV. CODE § 4112.01(B), with 42 U.S.C. § 2000e(k). This difference is not significant for purposes of this discussion because it was not the relevant language in the case. The language discussed in the case, "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes," is common to both the Ohio Revised Code and the federal PDA. See 42 U.S.C. § 2000e(k); OHIO REV. CODE § 4112.01(B).

²⁰² See *supra* Part I.

to express her milk.²⁰³ Every employee was permitted unscheduled restroom breaks as needed between scheduled breaks.²⁰⁴

In a *per curiam* opinion, the majority avoided the issue. The case presented an opportunity for the Ohio Supreme Court to clarify for working mothers in Ohio whether they are protected under Ohio law from discrimination on the basis of lactation.²⁰⁵ The court, however, avoided the issue by deciding that Allen was fired, not because of lactation or breastfeeding, but because she violated her employer's rules by taking an additional, unauthorized break.²⁰⁶

Not all justices agreed with the reasoning of the decision. Justice O'Connor concurred only in the judgment, writing separately.²⁰⁷ Unlike the *per curiam* opinion, Justice O'Connor's opinion addressed the issue of whether the Ohio law prohibits an employer from discriminating against a female employee because of or on the basis of lactation.²⁰⁸ In a departure from the reasoning of the federal courts regarding the similar language of Title VII, Justice O'Connor concluded that "given the physiological aspects of lactation, . . . lactation also has a clear, undeniable nexus with pregnancy and with childbirth. Therefore, it necessarily follows that lactation is 'because of or on the basis of pregnancy' and that women who are lactating are women 'affected by pregnancy [or] childbirth.'"²⁰⁹ Justice O'Connor explicitly refused to apply the rationale of *Gilbert*, on the basis of the Ohio legislature's "clear and unambiguous" rejection of the *Gilbert* reasoning in

²⁰³ *Allen v. Totes/Isotoner Corp.*, No. CV06-03-0917, 2007 WL 5843192 (Ohio Com. Pl. July 31, 2007), *aff'd*, Butler App. No. CA2007-08-196 (Ohio Ct. App. Apr. 7, 2008), *aff'd per curiam*, 915 N.E.2d 622 (Ohio 2009).

²⁰⁴ *Allen v. Totes/Isotoner Corp.*, Butler App. No. CA2007-08-196 (Ohio Ct. App. Apr. 7, 2008), *aff'd per curiam*, 915 N.E.2d 622 (Ohio 2009).

²⁰⁵ *Allen*, 915 N.E.2d at 623 ("Allen's . . . appeal . . . sought review of the issue whether Ohio law prohibits an employer from discriminating against a female employee because of or on the basis of lactation."). Ohio is currently one of the twenty-six states without any law regarding lactation in the workplace.

²⁰⁶ *Id.* at 624 ("[T]he evidence in the record demonstrates that Allen took unauthorized breaks from her workstation, and Isotoner discharged her for doing so. . . . Consequently, this court does not reach the issue whether alleged discrimination due to lactation is included within the scope of Ohio's employment-discrimination statute . . .").

²⁰⁷ *Id.* at 625 (O'Connor, J., concurring in judgment). Chief Justice Moyer joined her opinion. *Id.* (Moyer, C.J., concurring in judgment).

²⁰⁸ *Id.* (O'Connor, J., concurring in judgment) ("I write separately to set forth why I would hold that lactation falls within the scope of [the Ohio statute] and that the statute prohibits employment discrimination against lactating women.").

²⁰⁹ *Id.* at 630 (quoting *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402 (N.D. Ill. 1994)).

adopting the PDA following Congress's lead.²¹⁰ Unlike the federal courts, Justice O'Connor analyzed the physiological process of lactation to determine that a lactating woman is "affected by pregnancy [or] childbirth," and is, therefore, within the protection of the PDA.²¹¹ Justice O'Connor, nonetheless, concluded that Allen failed to develop a record from which a jury could find in her favor, agreeing with the majority that Allen was terminated simply for taking an unauthorized break.²¹²

Justice Pfeifer dissented, agreeing with Justice O'Connor that lactation discrimination is covered under Ohio's PDA.²¹³ Unlike Justice O'Connor, Justice Pfeifer raised the question of why Allen's trips to the restroom to attend to a bodily function were treated differently than restroom trips of other employees outside scheduled breaks.²¹⁴ He disagreed with the majority that Allen's firing for what her employer claimed were unscheduled, unauthorized breaks adequately disposed of the case.²¹⁵ The separate views in *Allen v. Totes/Isotoner Corp.* give employee litigants new reasoning supporting their position that may find some success in the circuits that have not yet heard the issue.

B. Distinguishing Lactation from Breastfeeding

Justice O'Connor's analysis²¹⁶ rests on an essential premise that federal courts have overlooked: breastfeeding and lactation, quite simply, are not the same thing. The term lactation describes "the formation and secretion of milk by the mammary glands"²¹⁷—that is, the process of milk production in the

²¹⁰ *Id.* at 628–29. Interestingly, Justice O'Connor cited almost exclusively to federal cases in her analysis, but did not mention any of the federal breastfeeding discrimination cases cited in Part IV. One can only surmise that because she rejected the application of the *Gilbert* reasoning to a lactation case, she did not find them persuasive in their reasoning.

²¹¹ *Allen*, 915 N.E.2d at 630 (O'Connor, J., concurring in judgment).

²¹² *Id.* at 625.

²¹³ *Id.* at 633 (Pfeifer, J., dissenting).

²¹⁴ *Id.* Justice O'Connor dismissed the argument in a sentence: "Allen was not forbidden to take similar breaks, nor has she presented any evidence that any other employee routinely used the bathroom for 15-minute breaks on a scheduled basis each day." *Id.* at 631 (O'Connor, J., concurring in judgment).

²¹⁵ *Id.* at 633 (Pfeifer, J., dissenting).

²¹⁶ Justice O'Connor's analysis was also endorsed by Chief Justice Moyer. *Id.* at 625 (Moyer, C.J., concurring in judgment). And Justice Pfeifer agreed with Justice O'Connor's conclusion that lactation discrimination is unlawful in Ohio. *See id.* at 633 (Pfeifer, J., dissenting).

²¹⁷ *Allen*, 915 N.E.2d at 630 (O'Connor, J., concurring in judgment) (citing 1 RUSS, FREEMAN, & MCQUADE, ATTORNEYS MEDICAL ADVISOR § 4:5 (2008)).

body.²¹⁸ Lactation is stimulated by the rise and fall of various hormones during and immediately following pregnancy.²¹⁹ Breastfeeding, however, is the act of feeding a baby from the mother's breast.²²⁰ It is a method of delivering nourishment to a child, a care-giving choice made by the child's mother. This fundamental distinction is critical for a finding that lactating women are "affected by pregnancy, childbirth, or related medical conditions" and, therefore, "shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."²²¹ The body's physiological response to pregnancy and childbirth is lactation; thus, a lactating woman is "affected by pregnancy [and] childbirth."²²²

Opponents may argue, like the lower courts found in *Allen*,²²³ that continued lactation is a condition that arises out of the choice to breastfeed, rather than pregnancy. This argument is based upon the fact that while pregnancy initially stimulates lactation, the process continues because of the act of breastfeeding, which may be regarded as a childcare choice rather than a condition related to pregnancy.²²⁴ While lactation certainly is related to breastfeeding, as Justice O'Connor conceded,²²⁵ such an argument does not change its relation to pregnancy and, therefore, its protection under the PDA. It does not matter that lactation, while a condition related to pregnancy, is one also related to the care-giving choice to breastfeed. Indeed, pregnancy itself is often the result of a conscious choice, and yet, such a choice has no bearing on protection of pregnancy under the law.²²⁶ Lactation is the natural result of pregnancy or childbirth. Thus, a lactating woman is typically one

²¹⁸ STEDMAN'S MEDICAL DICTIONARY 958 (27th ed. 2000).

²¹⁹ See Anna Edgar, *Anatomy of a Working Breast*, 22 NEW BEGINNINGS 44, 47 (2005).

²²⁰ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 153 (11th ed. 2004). In support of this argument that courts should distinguish between lactation and breastfeeding in their pregnancy discrimination analysis, it is worth noting that the term "breastfeed" was not located in any of the medical dictionaries consulted for this Note.

²²¹ 42 U.S.C. § 2000e(k) (2006).

²²² *Id.*

²²³ *Allen*, 2007 WL 5843192 ("Allen's condition of lactating was not a condition relating to pregnancy but rather a condition relating to breastfeeding.").

²²⁴ This reasoning is a remaining product of *Gilbert*. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976) (stating that pregnancy need not be covered under a disability program because it is "often a voluntarily undertaken and desired condition," rather than a disease).

²²⁵ *Allen*, 915 N.E.2d at 630 (O'Connor, J., concurring in judgment).

²²⁶ See Kasdan, *supra* note 137, at 340 ("Simply put, the element of choice, or a resulting benefit to the child, are not sound foundations for stripping breastfeeding of protection under Title VII.")

who is “affected by pregnancy [or] childbirth,”²²⁷ and is, therefore, protected from discrimination on that basis.

When one focuses on lactation—the body’s physiological response to pregnancy—as the direct result of pregnancy, rather than what has been seen as a parental choice on how best to nourish a baby, the earlier breastfeeding cases in which women sought extended leave to breastfeed become readily distinguishable from the modern “pumping” cases. This legal reasoning can be applied both by women seeking to express milk at work as a function of lactation, in the case of those employees not covered under the new law, or those who are covered by the new law seeking redress from discrimination on the basis of lactation and their choice to exercise their rights.²²⁸ Because lactation is the body’s natural physical response to pregnancy, unlike the parental choice to breastfeed, lactation is more clearly related to pregnancy.

C. This Approach Is Consistent with Both the Language and Legislative History of the PDA

The statutory language of the PDA is broad²²⁹ and was intended to be so construed.²³⁰ The PDA prohibits discrimination “on the basis of pregnancy, childbirth, or related medical conditions.”²³¹ This list was not, however, intended to be exhaustive as the preceding language, “are not limited to,” indicates.²³² Lactation falls within the coverage of the PDA as an impermissible sex-based distinction for the same reasons that pregnancy and childbirth are covered. It is similar to pregnancy and childbirth as a physical distinction between men and women related to pregnancy, and, as such, would be included under the broad language of the statute.

Lactation may also be read as a “medical condition” related to pregnancy or childbirth, within the language of the PDA. The federal courts that have heard breastfeeding and lactation discrimination cases have narrowly read the language “on the basis of [pregnancy- or childbirth-]related medical conditions”²³³ when concluding that lactation discrimination is not covered by the PDA.²³⁴ Those courts refused to acknowledge that breastfeeding was a

²²⁷ 42 U.S.C. § 2000e(k).

²²⁸ The lactation-breastfeeding distinction also avoids the cultural bias expressed in the language of some courts: that Title VII does not protect “young mothers wishing to nurse little babies.” *Barrash v. Bowen*, 846 F.2d 927, 932 (4th Cir. 1988).

²²⁹ 42 U.S.C. § 2000e(k).

²³⁰ S. REP. NO. 95-331, at 3 (1977).

²³¹ 42 U.S.C. § 2000e(k).

²³² *Id.*

²³³ *Id.*

²³⁴ *See* cases cited *supra* note 188.

medical condition related to pregnancy because it was not sufficiently “incapacitating” or requiring “medical care or treatment.”²³⁵ Lactation, however, can be quite disabling when a woman is unable to relieve the buildup of milk in the breasts, causing breast and back pain, plugged ducts, and breast infection.²³⁶ Additionally, the language of a remedial statute such as the PDA should be broadly construed. Determining that only incapacitating conditions are medical conditions within the meaning of the PDA ignores this rule of statutory interpretation. Diabetes is undoubtedly a medical condition, but may not always be incapacitating and may not require medical treatment if properly managed with diet and exercise. Similarly, lactation is not always, but can be, incapacitating or require medical attention, particularly when infrequent expression of milk leads to medical complications.²³⁷ Thus, when the “related medical condition” is read broadly, as it should be, lactation is properly considered a medical condition related to pregnancy and childbirth.

As described in the previous section and by Justice O’Connor in *Allen*, discrimination on the basis of lactation is properly regarded as discrimination directly on the basis of pregnancy and childbirth.²³⁸ Justice O’Connor concluded that discrimination on the basis of lactation was on the basis of pregnancy, as the two are inextricably linked.²³⁹ She also cited the next clause in the statute that “women *affected by* pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work,”²⁴⁰ concluding that lactating women are “affected by pregnancy [or] childbirth.”²⁴¹ Unlike the act of breastfeeding, the physiological process of lactation fits easily into any of these approaches to statutory interpretation.

These readings of the statutory language are also supported by the legislative intent stated in both the House and Senate reports.²⁴² The Senate Report declared that the PDA was to “change the definition of sex discrimination in Title VII to reflect the ‘commonsense’ view and to insure

²³⁵ See, e.g., *McNill v. N.Y. City Dep’t of Corr.*, 950 F. Supp. 564, 571 (S.D.N.Y. 1996).

²³⁶ LA LECHE LEAGUE INT’L, *supra* note 24, at 151.

²³⁷ *Id.*

²³⁸ *Allen*, 915 N.E.2d at 630 (O’Connor, J., concurring in judgment).

²³⁹ *Id.*

²⁴⁰ 42 U.S.C. § 2000e(k) (2006) (emphasis added).

²⁴¹ *Allen*, 915 N.E.2d at 630 (O’Connor, J., concurring in judgment).

²⁴² For a more detailed treatment of the PDA legislative history as applied to breastfeeding, see Kasdan, *supra* note 137, at 333–38. The analysis of legislative history is equally, if not more so, applicable to lactation as to breastfeeding.

that working women are protected against *all* forms of employment discrimination based on sex.”²⁴³ Lactation as an effect of pregnancy or childbirth comports with “commonsense” understandings of lactation as part of pregnancy and childbirth.²⁴⁴ The House articulation of the intended reach of the PDA is similarly broad, stating that the statutory language “makes clear that its protection extends to the whole range of matters concerning the childbearing process.”²⁴⁵ Lactation, which is prompted by hormonal changes caused by pregnancy and childbirth,²⁴⁶ is undeniably a “matter[] concerning the childbearing process.”²⁴⁷

As courts have interpreted the PDA narrowly, they have excluded breastfeeding, seen by courts as a childcare choice, from the PDA’s coverage. By focusing on lactation—the body’s natural, physical response to pregnancy—rather than breastfeeding—a caregiving choice by a mother—courts should conclude that lactation is within the PDA. Unlike breastfeeding, lactation is the inevitable result of pregnancy and childbirth and cannot be properly separated. This reading of the PDA reflects the biology of lactation, pregnancy, and childbirth and is consistent with the expansive language and clear legislative history of the PDA.

VI. CONCLUSION

Women are prominent contributors in the workplace and to the national economy. Because of their childbearing and child-nourishing ability, mothers are in a unique position when it comes to caring for infant children when returning to the workforce. Congress has taken the first step in mandating employer accommodation of nursing mothers. Without protection from discrimination on the basis of lactation, however, nursing mothers in the workplace are not fully protected. A focus on lactation, rather than breastfeeding, and a plain language argument of the PDA are still necessary to ensure that lactating women who choose to exercise their rights under Health Care Reform to express milk in the workplace are protected from discrimination on that basis. In the absence of clear anti-discrimination

²⁴³ S. REP. NO. 95-331, at 3 (1977) (emphasis added).

²⁴⁴ An ABA Journal blog reported that the decision “ignite[ed] controversy over the Internet” as the dismissal, which did not reach the issue, was “nonetheless being seen as a blow to working moms.” Martha Neil, *Mom Loses Case Over Unauthorized 10 a.m. Breast-Pumping Bathroom Break*, ABA JOURNAL LABOR & EMPLOYMENT BLOG (Aug. 31, 2009, 5:42 PM), http://www.abajournal.com/news/article/mom_loses_case_over_unauthorized_10_a.m._breast-pumping_bathroom_break/.

²⁴⁵ H.R. REP. NO. 95-948, at 5 (1978).

²⁴⁶ See Edgar, *supra* note 219, at 47.

²⁴⁷ H.R. REP. NO. 95-948, at 5.

protection by Congress and inconsistent treatment in the states, working mothers will continue to face discrimination and must rely on the existing statutory framework. The analysis offered by this Note is one approach that may bring about successful claims for working mothers who make the difficult choice and personal sacrifice to provide the best nutrition for their children while returning to the workforce.