



Labor and Employment Corner

by Kristin A. Zech

Federal Protections for Breastfeeding Mothers in the Workplace

Following maternity leave, a woman returning to the

workplace must find a balance between the needs of her family and the requirements of her job. Many working mothers of infants and toddlers face the additional challenge of continuing breastfeeding in their workplace environment. Although the American Academy of Pediatrics recommends exclusive breastfeeding until a child is 6 months of age and continued breastfeeding until 1 year, this is a challenge for women who are often medically released to work six weeks postpartum.¹ Further, the Family and Medical Leave Act (FMLA) only provides for 12 weeks of unpaid leave for the birth of a child. Women who work for employers not subject to FMLA have no federally guaranteed maternity leave.² While historically federal law has afforded little protection for breastfeeding mothers in the workplace, the 2010 Patient Protection and Affordable Care Act (PPACA) includes a number of provisions designed to facilitate breastfeeding, such as required break times for working mothers to express breast milk through the child's first year of life. Although the PPACA advances breastfeeding as a policy matter, many working mothers do not fall within its provisions, current enforcement mechanisms do not address violations in a timely manner, and private causes of action for lactating women under federal law are severely limited.³

Human milk production works on a supply-and-demand basis: the more a baby feeds, the more milk a woman produces.⁴ As such, when a breastfeeding woman is separated from her child during the workday, she must express milk about as often as her child would feed to maintain her supply.⁵ For younger babies, this requires expression every two to three hours; once a baby begins eating solid foods, the number of sessions may decrease.⁶ Failure to timely express milk can result in a decrease in supply, discomfort for the mother, and potential infection.⁷

Prior to the enactment of the PPACA, federal courts largely rejected any legal protections for lactating women under Title VII of the Civil Rights Act of 1964, including as amended by the Pregnancy Discrimination Act (PDA), and the Americans with Disabilities Act (ADA). In *Martinez v. NBC, Inc. and MSNBC, Inc.*, the U.S. District Court for the Southern District of New York considered and rejected on summary judgment the claims of Alicia Martinez,

an MSNBC producer who resigned 10 months after returning from maternity leave. After her resignation, Martinez filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that, "MSNBC had 'failed to provide [her] with a safe, secure, sanitary and private area to pump breast milk' and that her complaint to human resources was followed by a course of retaliatory conduct including verbal harassment, schedule changes, and the demotion to associate producer."⁸ She included claims for, *inter alia*, ADA discrimination and retaliation, and disparate treatment discrimination and retaliation under Title VII.⁹ Embracing the explanation of a sister court that "it is simply preposterous to contend a woman's body is functioning abnormally because she is lactating," the court dismissed all ADA claims.¹⁰ The court also rejected Martinez's sex-plus discrimination claim under Title VII, concluding that "men are physiologically incapable of pumping breast milk, so plaintiff cannot show that she was treated less favorably than similarly situated men" and that breast milk pumping did not place her in a protected class.¹¹ Finally, it dismissed her Title VII retaliation claim, finding that breast milk pumping "is not an employment practice covered by Title VII."¹²

Claims brought specifically under the PDA met a similar fate.¹³ As the U.S. District Court for the Southern District of Texas noted, "Lactation is not pregnancy, childbirth, or a related medical condition. [Plaintiff] gave birth on December 11, 200[8]. After that day, she was no longer pregnant and her pregnancy-related conditions ended," concluding, "Firing someone because of lactation or breast-pumping is not sex discrimination."¹⁴

The courts rejected PDA claims even where a woman demonstrated that breastfeeding was medically necessary for her infant. In *Wallace v. Pyro Mining Company*, Martha Wallace sought a six-week extension of maternity leave, after her six-week-old infant refused to take a bottle. When her employer refused the request, Wallace did not return to work and was discharged. Considering the PDA, the U.S. District Court for the Western District of Kentucky stated, "[W]hile it may be that breast-feeding and weaning are natural concomitants of pregnancy and childbirth, they are not 'medical conditions' related thereto" and concluded that "Nothing in the

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Pregnancy Discrimination Act, or Title VII, obliges employers to accommodate the child-care concerns of breast-feeding female workers by providing additional breast-feeding leave not available to male workers.¹⁵ Similarly, in *McNeill v. New York City Department of Correction, et al.*, the U.S. District Court for the Southern District of New York concluded that a condition of the child (in this case, a cleft palate and lip that necessitated breastfeeding) was not within the PDA: “Conditions related to pregnancy or childbirth would directly involve the condition of the mother. ... The fact that children are born without cleft palates and lips demonstrates that whatever biological mechanism is the cause of this unfortunate condition, it is *not* the condition of being pregnant.”¹⁶

There is some indication, however, that courts may be ready to reconsider the applicability of extant federal employment laws to lactation. In *Equal Employment Opportunity Commission v. Houston Funding, II, Ltd., et al.*, the EEOC brought suit on behalf of Donnicia Venters, whose employment was terminated following her maternity leave. Throughout her leave, Venters kept in regular contact with her employer. At one point, she informed her supervisor that she was breastfeeding and asked to use a breast pump at work. When the supervisor presented this request to a partner at the company, the partner “responded with a strong ‘NO. Maybe she needs to stay home longer.”¹⁷ When Venters was released to return to work, she again asked for a room to pump milk and was immediately informed that her position had been filled; her termination letter noted that she was discharged for job abandonment.¹⁸ Reversing the district court decision and remanding the case for trial, the U.S. Court of Appeals for the Fifth Circuit concluded that, “lactation is a related medical condition of pregnancy for purposes of the PDA. Lactation is the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth.”¹⁹ Notably, the court commented that “the issue here is not whether Venters was entitled to special accommodations—at the time, she was not entitled to special accommodations under Title VII—but, rather, whether Houston Funding took an adverse employment action against her, namely, discharging her, because she was lactating and expressing milk.”²⁰

While *Houston Funding* may represent a shift in the recognized scope of Title VII and the PDA, it currently stands in contrast to cases concluding that federal employment laws afford little—if any—protection to breastfeeding mothers in the workplace.

On March 23, 2010, President Barack Obama signed the PPACA which, *inter alia*, amended Section 7 of the Fair Labor Standards Act (FLSA) to mandate break time for lactating mothers. Under the PPACA, employers are required to 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.”²¹ Employers must also 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.”²² While the space does not have to be specifically dedicated to a nursing mother’s use, it must be available when needed.²³ Women need not be compensated during breaks to express breast milk, except that a lactating woman using a regularly



compensated break for this purpose must be compensated in the same way other employees are compensated for such break time.²⁴ If the break time is uncompensated, the mother must be relieved of all duties during the break, or else it may be deemed compensable.²⁵ The federal statute does not pre-empt any more favorable provisions under state law.²⁶

However, the PPACA’s break time provision is limited in its applicability. The act amended Section 7 of the FLSA, which pertains to, *inter alia*, maximum hours in a given workweek and overtime compensation. The break time provision only protects women who are not exempt from this section’s requirements. Accordingly, nursing mothers classified as exempt are not entitled to break time or space to express breast milk. This leaves a significant portion of working women unprotected under the federal law. Further, employers with fewer than 50 employees are exempt if compliance would impose an undue hardship.²⁷

While the PPACA is a positive step toward supporting breastfeeding mothers in the workplace, remedies for any violation are severely limited rendering its protections illusory. In *Salz v. Casey’s Marketing Company*, Stephani Salz sued her former employer alleging a direct violation of the PPACA’s requirement for a secure, private place to express breast milk. Although the employer designated the convenience store’s office as an appropriate place, Salz discovered an operating video camera in the office. Salz alleged that the employer refused to disable the camera, instead suggesting that she put a plastic bag over it. Uncomfortable with this situation, Salz was inhibited in her ability to express milk, resulting in a noticeable decline in her supply. Thereafter, Salz was reprimanded for alleged performance issues, and she ultimately resigned.

In dismissing Salz’s PPACA claim, the U.S. District Court for the Northern District of Iowa explained that, “[s]ince Section 207(r)(2) provides that employers are not required to compensate employees for time spent express milking, and Section 216(b) [the enforcement provision for Section 7 of the FLSA] provides that enforcement of Section 207 is limited to unpaid wages, there does not appear to be a manner of enforcing the express breast milk provisions.”²⁸ Rather, Salz’s sole remedy was to file a claim with the Department of Labor, which could then seek injunctive relief in federal court.²⁹

Notably, the *Salz* court did recognize the viability of an FLSA retaliation claim: “Though Section 216(b) clearly limits a plaintiff claiming a direct violation of Section 207(r) to unpaid wages, Section

215(a)(3) provides for a separate cause of action with separate remedies should an employer 'discharge or in any other manner discriminate against' the employee 'because such employee has filed any complaint ... under or related to' the [FLSA], including the express breast feeding provision. In other words, once an employer discriminates or discharges an employee in relation to an employee's complaint about the employer's express breast feeding policy, they have violated not only Section 207(r) but also Section 215(a)(3).³⁰

The U.S. District Court for the District of Colorado similarly addressed the recovery option in *Falk v. City of Glendale*. The court theorized that lactation-related claims could be viable under Title VII and the PDA. Katie Falk, a 911 dispatcher, was not afforded a private space and was unable to take necessary breaks to express milk, resulting in soiled clothing and three breast infections. Despite multiple complaints to her supervisors of these difficulties, Falk allegedly received no accommodations or other relief. Although dismissing the case on its particular facts, the *Falk* court posited that, "A plaintiff could potentially succeed on a [Title VII] claim if she alleged and was able to prove that lactation was a medical condition related to pregnancy, and that this condition, and not a desire to breastfeed, was the reason for the discriminatory action(s) that she suffered."³¹ Further, "[i]f lactation is a natural consequence of pregnancy, then expressing milk is equivalent to any other involuntary bodily function. Therefore, if other coworkers were allowed to take breaks to use the restroom while lactating mothers were banned from pumping, discrimination might exist."³²

While *Falk* and *Salz* provide a road map for potential future claims based upon a failure to accommodate a woman's need to express milk, significant questions remain regarding damages that may be available for violations. In the case of retaliation, damages may be quantified based on the employee's lost wages or benefits. However, where an employer refuses to permit adequate breaks or provide an appropriate space, the employee arguably suffers no lost wages. Further, there is no provision for compensation for any loss of milk supply or impact on the child, to the extent such damages could even be quantified.

Additionally, there does not appear to be any mechanism to timely address violations of the break time provision aside from a complaint to the Department of Labor. In the absence of any direct cause of action, it is unlikely a woman could independently obtain injunctive relief to immediately alleviate an employer's interference with her need to express milk.

On Aug. 1, 2011, Rep. Carolyn B. Maloney (D-N.Y.) and Sen. Jeff Merkley (D-Ore.) introduced the Breastfeeding Promotion Act of 2011 (H.R. 2758; S. 1463).³³ This legislation would have amended Title VII to include breastfeeding and expression of milk as protected conduct under the PDA and expanded the break time provision under the FLSA to include women classified as "exempt."³⁴ The bill never made it out of committee.

While significant strides have been made in the past decade to support the needs of breastfeeding women in the workplace, few legal protections currently exist under federal law. Claims under the ADA, Title VII, and the PDA have largely failed based on the courts' findings that lactation is not a covered activity or condition. Although the PPACA guarantees break time and an appropriate space for breastfeeding mothers to express milk, these provisions are not available to all women. Further, a woman's options for redress under federal law may be limited to (1) a retaliation claim under the FLSA in which

wages are likely not recoverable or (2) a complaint to the Department of Labor, which may seek injunctive relief.

Given the gaps in legal protection, employers remain the key to supporting breastfeeding mothers in the workplace. It is imperative to educate employers on the benefits and mechanics of breastfeeding and provide them with the information and tools necessary to develop policies that facilitate breastfeeding.³⁵ By working together, employer and employee can foster an environment where a breastfeeding mother can balance her career and her family. ☉

Endnotes

¹American Academy of Pediatrics, *Breastfeeding and the Use of Human Milk*, 129 PEDIATRICS, 1 (March 1, 2012) available at pediatrics.aappublications.org/content/129/3/e827.short.

²29 U.S.C. § 2612; 29 U.S.C. § 2611.

³Although numerous states afford protection to lactating women under state provisions, this article focuses solely on federal law.

⁴*The Business Case for Breastfeeding: Steps for Creating a Breastfeeding Friendly Worksite, Easy Steps to Supporting Breastfeeding Employees*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTH RESOURCES AND SERVICES ADMINISTRATION 6.

⁵*Id.*

⁶*Id.*

⁷*Id.*

⁸*Martinez v. NBC, Inc., et al.*, 49 F.Supp.2d 305, 308 (S.D.N.Y. 1999).

⁹*Id.*

¹⁰*Id. at 309.*

¹¹*Id. at 310.*

¹²*Id. at 311.* See also, *Derungs, et al. v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 439 (6th Cir. 2004) (noting, in discussing Title VII cases within the context of the Ohio provision prohibiting discrimination in places of public accommodation, "none of the district or appellate courts found that breast-feeding fell within the scope of gender discrimination because of the absence of a comparable class. ... It is clear from the foregoing, that no judicial body thus far has been willing to take the expansive interpretive leap to include rules concerning breast-feeding within the scope of sex discrimination."); but see, *Page v. Tr. of the Univ. of Pennsylvania, et al.*, 222 Fed. Appx. 144, 145 (3d Cir. 2007) ("The University concedes that Page is a member of a protected class. Therefore, we will assume, without holding, that a complaint based on the need to express breast milk is cognizable under Title VII.").

¹³But see, *Fortier v. U.S. Steel Group*, 2002 U.S. Dist. LEXIS 11788 (W.D.Pa. June 4, 2002) (finding that the plaintiff stated claim for pregnancy discrimination and/or sexual harassment where she announced her intention to breastfeed to employer during pregnancy).

¹⁴*Equal Employment Opportunity Comm'n v. Houston Funding II, Ltd., et al.*, 2012 U.S. Dist. LEXIS 13644 at *3-4 (S.D.Tex. Feb. 2, 2012), *rev'd* 2013 U.S. App. LEXIS 10933 (5th Cir. May 30, 2013). See also, *Jacobson v. Regent Assisted Living, Inc.*, 1999 U.S. Dist. LEXIS 7680 at *30 (D.Ore. April 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.'").

¹⁵*Wallace v. Pyro Mining Co.*, 789 F.Supp. 867, 869-70 (W.D.Ky. 1990), *aff'd* 1991 U.S. App. LEXIS 30157 (6th Cir. Dec. 19, 1991).

¹⁶*McNeill v. New York City Dept. of Corr., et al.*, 950 F.Supp. 564, 569-70 (S.D.N.Y. 1996). See also, *Fejes v. Gilpin Ventures, Inc.*, 960 F.Supp. 1487, 1492 (D.Colo. April 25, 1997) (“I conclude that the PDA only provides protection based on the condition of the mother—not the condition of the child. Also, I conclude that breastfeeding and child rearing concerns after pregnancy are not medical conditions related to pregnancy or childbirth within the meaning of the PDA.”).

¹⁷*Equal Employment Opportunity Comm’n v. Houston Funding II, Ltd., et al.*, 2013 U.S.App. LEXIS 10933 at *3 (5th Cir. May 30, 2013), *rev’g* 2012 U.S.Dist. LEXIS 13644 (S.D.Tex. Feb. 2, 2012).

¹⁸*Id.*

¹⁹*Id.* at *7.

²⁰*Id.* at *13-14 n. 6.

²¹29 U.S.C. § 207(r)(1)(A).

²²29 U.S.C. § 207(r)(1)(B).

²³*Fact Sheet #73: Break Time for Nursing Mothers under the FLSA*, U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION (December 2010).

²⁴*Id.*

²⁵*Id.*

²⁶29 U.S.C. § 207(r)(4). Many states have adopted more favorable provisions for nursing mothers, including the application of such provisions to both exempt and non-exempt employees. See, e.g., 21 V.S.A. § 305 (Vermont) (requiring employer to provide employee with reasonable break time to express milk for three years after the child’s birth); 26 M.R.S. § 604 (Maine) (requiring employer to provide adequate break time to express milk for three

years following childbirth); C.R.S. 8-13.5-104 (Colorado) (requiring employer to provide reasonable break time to express milk for up to two years after birth); H.R.S. § 378-2 (Hawaii) (making it a discriminatory practice to, *inter alia*, refuse to hire, discharge, or penalize lactating employee who breastfeeds or expresses milk at the workplace). For further information on protections afforded under state laws, see National Conference of State Legislatures, *Breastfeeding Laws*, available at www.ncsl.org/issues-research/health/breastfeeding-state-laws.aspx.

²⁷29 U.S.C. § 207(r)(3).

²⁸*Salz v. Casey’s Mktg. Co.*, 2012 U.S.Dist. LEXIS 100399, *7 (N.D. Iowa July 19, 2012).

²⁹*Id.*

³⁰*Id.* at 9-10 (internal citations omitted). See also, *Falk v. City of Glendale*, 2012 U.S.Dist. LEXIS 87278, n. 8, 11 (D.Colo. June 25, 2012) (intimating that an FLSA retaliation claim could lie to redress a violation of the break time provisions).

³¹*Falk*, 2012 U.S.Dist. LEXIS 87278, n. 7. This comment is consistent with the Fifth Circuit’s finding in *Equal Employment Opportunity Comm’n v. Houston Funding II, Ltd., et al.*, *supra*.

³²*Id.* at 14.

³³Breastfeeding Promotion Act of 2011, H.R. 2758, S. 1463, 112th Cong. (2011).

³⁴*Id.*

³⁵See *The Business Case for Breastfeeding: Steps for Creating a Breastfeeding Friendly Worksites, Easy Steps to Supporting Breastfeeding Employees*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTH RESOURCES AND SERVICES ADMINISTRATION.

SIDEBAR continued from page 6

¹⁰See Priya Mehra, Jai S. Pathak, *Directors and Shareholders of Indian Companies Are Permitted to Attend Board Meetings and Shareholder Meetings via Video Conference* MARTINDALE.COM (June 8, 2011) www.martindale.com/corporate-law/article_Gibson-Dunn-Crutcher-LLP_1293978.htm.

¹¹See TRAC Immigration, *Immigration Court Backlog Tool* (June 2013) trac.syr.edu/phptools/immigration/court_backlog/.

¹²See U.S. News and World Reports, *Which Law School Graduates Have the Most Debt?* (2013) grad-schools.usnews.rankings-andreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings.

¹³See American Bar Association Section of Legal Education and Admission to the Bar, *Law School Tuition 1985–2012* www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_tuition.authcheckdam.pdf (last visited Aug. 4, 2013).

¹⁴See *2011–2012 SALT Salary Survey*, SALT EQUALIZER, May

2012 available at www.saltlaw.org/userfiles/SALT%20salary%20survey%202012.pdf.

¹⁵See India Report.

¹⁶See *Ten for 2012: Top Ten Trends for Legal Outsourcing in 2012 2* (Fronterion LLC) available at fronterion.com/wp-content/uploads/2011/12/Fronterion-Ten-For-2012-Top-Ten-Trends-for-Legal-Outsourcing-in-2012.pdf.

¹⁷See Francesco Guerrero, *Welch Condemns Share Price Focus*, FINANCIAL TIMES, March 12, 2009, available at www.ft.com/intl/cms/s/0/294ff1f2-0f27-11de-ba10-0000779fd2ac.html#axzz1eiLpL2PZ.

¹⁸See Sasha Boursand, Amar Gupta, *Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance 3* (on file with Pace University) available at www.pace.edu/seidenberg/sites/pace.edu.seidenberg/files/media/files/ssrn/AG%20Reviewed%20Version3.pdf.

¹⁹BLUE OYSTER CULT, (DON’T FEAR) THE REAPER. (Columbia, 1976).

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