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From Nipples to Powder

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FROM NIPPLES TO POWDER

Marian Kousaie*

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1. Credit for the title of this Comment is given to Hollie McNish, a UK spoken word poet who brilliantly, eloquently, and in a politely forceful manner asked the question that many new mothers likely ask themselves at one time or another: Why, in a world where breasts are commonly out just for show and touted in advertisements and television programs, must I hide away to breastfeed my child? Why should I be embarrassed? Hollie’s poem is entitled Embarrassed and can be viewed at https://www.youtube.com/watch?v=KiS8q_fifa0&spfreload=10.

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I. INTRODUCTION

In the United States, breastfeeding may not always be at the
forefront of our minds, but the discussion certainly is not pushed under a
rug either. Every day women become new mothers and are quickly
confronted with one of their first motherly decisions: how to feed their
new baby. The choice between breastfeeding and bottle-feeding can be a
difficult one, complete with personal, social, and legal concerns. New
mothers may have physical difficulties with breastfeeding and may fear
that their babies will not get enough to eat if they are breastfed. Some
may fear embarrassment or harassment if they need to breastfeed while
in public. Still others may worry about whether they can continue to
breastfeed when returning to work and whether they will be given
accommodations and adequate time to express breast milk while on the
job. While the choice to breastfeed is personal and private, the
conversation about breastfeeding, its benefits, barriers, and legal
protections, is not personal and private. Rather, the public, through many
outlets, carries it on.

The conversation begins mildly and unobtrusively with policy
statements,2 reports,3 statistics,4 and report cards5 by governmental

2. In 2012, the American Academy of Pediatrics (AAP) published a policy statement
discussing breastfeeding as a public health issue. See AAP, Policy Statement: Breastfeeding and the
Use of Human Milk, 129 PEDIATRICS e827, e827-e841 (2012),
http://pediatrics.aappublications.org/content/129/3/e827.full.pdf+html [hereinafter AAP, Policy
Statement] for the statement, which outlines the advances of scientific knowledge regarding
breastfeeding, current breastfeeding statistics and trends, the health benefits of breastfeeding for
both baby and mother, the economic benefits nationally and individually from breastfeeding, and
agencies and private entities. In 2011, for example, the U.S. Department of Health and Human Services issued *The Surgeon General’s Call to Action to Support Breastfeeding*. The written foreword of the *Call to Action* states that the purpose of the initiative is to “set forth the important roles and responsibilities of clinicians, employers, communities, researchers, and government leaders and to urge us all to take on a commitment to enable mothers to meet their personal goals for breastfeeding.” While the policy statements, reports, and statistics presented by organizations and governmental entities are thorough, beneficial, and accessible, the question remains: Is the information effectively disseminated to the public in order to educate new mothers and their families about the benefits and barriers to breastfeeding?

3. In 2005, the Natural Resources Defense Council (NRDC) involved itself in the breastfeeding discussion with its *Healthy Milk, Healthy Baby: Chemical Pollution and Mother’s Milk* initiative. *Healthy Milk, Healthy Baby: Chemical Pollution and Mother’s Milk*, NRDC.ORG, http://www.nrdc.org/breastmilk/default.asp (last revised Mar. 25, 2005). The NRDC provides an explanation of the initiative to reduce the amount of pollutants in breast milk, and further includes information outlining the benefits of breastfeeding, including information with respect to the health benefits to a breastfed child in the first years of life as well as later in life, the health benefits to the breastfeeding mother, the breastfeeding rates of the United States as compared to other industrialized countries, the social and economic benefits of breastfeeding, and the problems with infant formula. Id.

4. The Centers for Disease Control and Prevention (CDC) collect breastfeeding data and statistics through the following: the U.S. National Immunization Survey – National and State Breastfeeding Rates, which asks breastfeeding questions in order to assess the breastfeeding practices of the United States population; the Infant Feeding Practices Study II and Its Year Six Follow-Up, which was conducted from 2005 to 2007, initially focused on infant feeding practices and behaviors through the first year of life, and later conducted a follow-up with the mothers and children who participated after six years in order to “characterize the health, development, and dietary patterns of the children”; the Maternity Care Practices Survey, which monitors “maternity care practices associated with successful breastfeeding promotion and support”; and the HealthStyles Survey, which collects “health-related opinions of men and women aged 18 years and above.” *Breastfeeding: Data and Statistics*, CDC.GOV, http://www.cdc.gov/breastfeeding/data/index.htm (last updated June 17, 2015).


7. *Call to Action*, supra note 6, at v.
As the breastfeeding conversation became widely introduced to the public in the form of advertisements, magazine articles, and websites, the court of public opinion quickly began to issue opinions on both sides of the debate. Around 2003, the U.S. Department of Health and Human Services initiated an “attention-grabbing advertising campaign” in an attempt to increase the nation’s low breastfeeding rate and to “convince mothers that their babies faced real health risks if they did not breast-feed.” The infant formula industry, however, strongly disagreed with the blunt content of the advertisements and lobbied for advertisements with milder images, arguing that the original advertisements would scare mothers into breastfeeding. The formula industry’s lobbying did not stop the informational advertisements from running, but it did help modify the content of the advertisements that eventually ran. If a powerful industry can lobby, and succeed, against sharing blunt, truthful information to the public about the risks associated with not breastfeeding children, it likely does not come as a shock that, as a nation, breastfeeding is thinly protected, frequently discussed in a negative light, and remains a sensitive topic.

Even without powerful industry players modifying the messages the public receives through advertisements, breastfeeding remains a delicate and controversial subject at the state and national level. On a more local level and smaller scale, in 2010, the Ohio Department of Health launched a statewide campaign to increase breastfeeding rates in Ohio. At the time of the campaign, Ohio had some of the lowest breastfeeding rates in the country, with only half of the babies in the state having ever been breastfed and only three states having fewer babies breastfed at

8. See infra notes 11-19, 28-29 and accompanying text.
9. See infra notes 20-23 and accompanying text.
10. See infra notes 24-27 and accompanying text.
12. Id.
13. Id. The advertisements that actually ran had “images of dandelions and cherry-topped ice cream scoops, to dramatize how breast-feeding could help avert respiratory problems and obesity.” Id.
The Ohio breastfeeding campaign, Help Me Grow, aimed to “increase awareness of the importance of breastfeeding and ultimately boost breastfeeding rates in the Buckeye state.” As part of the campaign, billboards were put up across Ohio with a picture of one of two babies and the slogan “Breast Milk Satisfies.” The advertisements elicited public outcry because the baby in one of the pictures had breast milk dripping from his mouth onto his chin. The controversy centered on the fact that “people find breast milk coming out of a baby’s mouth unappealing,” and given the staggeringly low breastfeeding rates in Ohio, the reaction was likely not a surprise.

In 2012, Time Magazine had the nation buzzing about breastfeeding and attachment parenting when the magazine cover posed the question “Are You Mom Enough?” The magazine’s cover also showed a picture of a mother breastfeeding her three-year-old son, who was standing on a chair to reach his mother’s breast. While the story was about attachment parenting in general, the controversy centered on the graphic nature of the cover photo and the belief by many that the child in the picture was too old for breastfeeding. Parenting expert Joani Geltman commented that “[p]eople have an issue with nursing in public anyway, even with an infant.”

Controversy notwithstanding, there is a wealth of information about breastfeeding on websites dedicated to advocating breastfeeding, providing support and encouragement to breastfeeding mothers, and educating new mothers on the benefits and challenges to breastfeeding. For example, La Leche League International is an international organization created by seven women with the mission to help “mothers worldwide to breastfeed through mother-to-mother support,

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15. Id. The three states with lower breastfeeding rates than Ohio were Kentucky, Louisiana, and Mississippi. Id.
16. Id.
17. Id.
18. Id.
21. Id.
23. Id. (internal quotation marks omitted).
encouragement, information, and education, and to promote a better understanding of breastfeeding as an important element in the healthy development of baby and mother.” Additionally, Womenshealth.gov, run by the Office on Women’s Health of the U.S. Department of Health and Human Services, provides information to new mothers regarding the importance of breastfeeding, the challenges to breastfeeding, and how to incorporate breastfeeding into everyday life after having a child. The website also provides important information on support for nursing mothers in the workplace including industry solutions for breastfeeding mothers, information for nursing mothers who work, an overview of the laws protecting nursing mothers, and information on breastfeeding policies in the workplace. Additionally, the United States Breastfeeding Committee provides a directory with contact information for the breastfeeding coalition for each state, territory, and various tribes.

With all of the available and easily accessible information about the benefits of breastfeeding, why does breastfeeding remain taboo and poorly protected by state legislatures and the courts of law? As an indication of how little we, as a nation, have evolved in our acceptance and support of breastfeeding, in 2014, two students at the University of North Texas launched “When Nurture Calls,” an advertising campaign advocating for the “right of mothers to nurse their children in public areas.” The advertisements depict women breastfeeding in bathroom stalls and contain a caption at the bottom that reads: “Would you eat here? By law, breastfeeding mothers are not protected from harassment and refusal of service in public, often forcing them to feed in secluded spaces such as public bathrooms . . . because a baby should never be nurtured where nature calls.” Although this Comment does not directly address the issue of breastfeeding in public, the sentiment of these

29. Id.
Advertisements can directly translate to the issue of new mothers returning to work who wish to continue to breastfeed their children. When working mothers make this choice, they must lactate and express breast milk at work and should not have to do so in a bathroom stall.

Throughout this Comment, both breastfeeding and lactation are addressed. There is a distinction between the two. Lactation is “the formation and secretion of milk by the mammary glands.” More succinctly, lactation is the bodily process of producing milk. Breastfeeding, on the other hand, is the actual physical act of feeding a child from the mother’s breast. Lactation and breastfeeding can also be distinguished because breastfeeding is a mother’s choice to provide nourishment to her child through breast milk while lactation is a “physiological response to pregnancy and childbirth.”

Given this distinction between lactation and breastfeeding, when this Comment uses the term breastfeeding it is in reference to the physical act of feeding an infant from a mother’s breast. When this Comment uses the term lactation it is in reference to the physical and hormonal response of milk production by the body in response to pregnancy or childbirth. Additionally, when the expression of breast milk is discussed, this includes pumping breast milk, or other means to expel breast milk from the body, but not the physical act of breastfeeding a child.

This Comment asserts that lactation and the expression of breast milk at work should have greater legal protections in order to further the benefits that breastfeeding provides to mother, baby, and society. Further, in order to fully protect mothers and infants, protection against discrimination for lactation and the expression of breast milk in the workplace as well as requirements for accommodations for lactating mothers is required. Circuit courts should, thus, follow the lead of EEOC v. Houston Funding II, Ltd., a 2013 decision in the United States Court of Appeals for the Fifth Circuit, and declare that lactation is a condition related to pregnancy and that it is protected by the Pregnancy Discrimination Act. Additionally, Congress should fill the gaps that remain in the Patient Protection and Affordable Care Act and require accommodations for all lactating mothers who wish to express breast milk.

31. Id. at 1312-13.
32. Id. at 1313.
33. Id. Since lactation is an involuntary result of pregnancy or childbirth, it is more easily protected from discrimination than breastfeeding. Id.
This Comment provides a general timeline of breastfeeding and lactation protection in the judicial system. It focuses on the *Houston Funding II* decision, its importance, and the possible legal effects that it will have, with a specific focus on discrimination in the workplace and the future protection of lactating women in the workforce. As a summary of important background information, Part II.A discusses the proven health benefits of breastfeeding, Part II.B outlines national breastfeeding statistics, and Part II.C enumerates the barriers to breastfeeding. Part III outlines the different legal theories that breastfeeding and lactation discrimination have been argued under in the United States courts. This discussion includes Part III.A, the potential constitutional protections for breastfeeding and lactation in the workplace; Part III.B, the arguments for protecting breastfeeding and lactation in the workplace under the Americans with Disabilities Act (ADA); Part III.C, the arguments for protecting breastfeeding and lactation in the workplace under the Family and Medical Leave Act (FMLA); and Part III.D, protecting breastfeeding and lactation in the workplace under state laws. Parts IV.A and IV.B introduce Title VII and the Pregnancy Discrimination Act (PDA) while Part IV.C discusses early breastfeeding and lactation cases that were argued under these laws and the issue of protecting lactation and expressing breast milk at work. Part IV.D analyzes the *Houston Funding II* case and subsequent cases to demonstrate that a legal shift may be occurring where lactation and the expression of breast milk are accorded protection from discrimination at work under Title VII and the PDA. Finally, Part V summarizes the Patient Protection and Affordable Care Act (PPACA) provisions that also provide greater protection to lactating mothers expressing breast milk in the workplace.

II. BACKGROUND

This section outlines the health benefits of breastfeeding in Part II.A and the current national breastfeeding statistics in Part II.B in order to better understand the importance of protecting lactation and the expression of breast milk through laws and judicial decisions and how our current system is falling short. This section also discusses the current barriers to breastfeeding in the United States in Part II.C in order to ensure that the rules that are implemented break down those barriers.

A. Proven Health Benefits of Breastfeeding

While it is each mother’s choice whether to breastfeed her child,
and breastfeeding comes with its own set of challenges, research shows that breastfeeding positively impacts the physical health of both infant and mother and additionally provides psychosocial, economic, and environmental benefits.\textsuperscript{34} The U.S. Department of Health and Human Service’s \textit{Call to Action to Support Breastfeeding} states, “The health effects of breastfeeding are well recognized and apply to mothers and children . . . .”\textsuperscript{35} Breastfed babies are less likely to contract “common childhood infections” such as diarrhea and ear infections,\textsuperscript{36} or rarer, more serious infections and diseases such as severe lower respiratory infections, leukemia, type 2 diabetes, asthma, eczema, childhood obesity, and sudden infant death syndrome.\textsuperscript{37} Breastfeeding mothers, moreover, have a lower risk of contracting breast and ovarian cancer than those women who have never breastfed.\textsuperscript{38} They also have a decreased occurrence of postpartum depression.\textsuperscript{39}

Breastfeeding can provide psychosocial benefits as well. Breastfeeding creates bonding and closeness between mother and child.\textsuperscript{40} Studies have even shown that breastfeeding reduces the rate of abuse or neglect perpetrated by mothers.\textsuperscript{41}

The economic benefits of breastfeeding are realized by both the family of the breastfed child and by the general population of the United States. The \textit{Call to Action} cited a study conducted in 1999, which estimated that families who breastfeed could save more than $1200-$1500 in formula expenses alone in the first year of the breastfed child’s life.\textsuperscript{42} A more recent study found that the United States could save $13

\begin{thebibliography}{99}
\bibitem{35} \textit{Call to Action}, supra note 6, at 1.
\bibitem{36} \textit{Id.} The \textit{Call to Action} states: “The risk of acute ear infection . . . is 100 percent higher among exclusively formula-fed infants than in those who are exclusively breastfed during the first six months.” \textit{Id.} The percentages of increased health risks for formula fed children for a variety of health issues are summarized in Table 1, Excess Health Risks Associated with Not Breastfeeding, of the \textit{Call to Action}. \textit{Id.} at 2.
\bibitem{37} \textit{Id.} at 1-2. The AAP reports the same findings in a manner geared towards a medically sophisticated audience. AAP, \textit{Policy Statement}, supra note 2, at e828-31.
\bibitem{38} \textit{Call to Action}, supra note 6, at 1.
\bibitem{39} AAP, \textit{Policy Statement}, supra note 2, at e831.
\bibitem{40} \textit{Call to Action}, supra note 6, at 1.
\bibitem{41} AAP, \textit{Policy Statement}, supra note 2, at e831.
\bibitem{42} \textit{Call to Action}, supra note 6, at 3 (citing T.M. Ball & A.L. Wright, \textit{Health Care Costs of Formula-Feeding in the First Year of Life}, 103 \textit{Pediatrics} 870 (1999),
billion annually in healthcare costs if 90 percent of mothers followed recommended guidelines and breastfed exclusively for six months. The study went further and determined that if the ideal 90 percent rate is not achieved, even if 80 percent of families followed breastfeeding guidelines, $10.5 billion in healthcare costs could still be saved.

Finally, there are global, environmental benefits to breastfeeding. Because “human milk is a natural, renewable food” that acts as a complete source of nutrition for babies, it requires no packaging or transportation costs and reduces the carbon footprint “by saving precious global resources and energy.” Infant formula, on the other hand, requires fuel for transportation, energy to produce, and packaging that likely ends up in landfills.

In order to realize the above enumerated benefits of breastfeeding, the American Academy of Pediatrics (AAP) recommends exclusive breastfeeding for the first six months of a child’s life followed by continued breastfeeding for a year or longer as other foods are introduced to the child. There are many other prominent organizations in addition to the AAP that also recommend breastfeeding for at least the first year of a child’s life due to the variety of benefits breastfeeding provides. These organizations include the American Academy of Family Physicians, American College of Obstetricians and Gynecologists, American College of Nurse-Midwives, American Dietetic Association, and the American Public Health Association. As the Natural Resources Defense Council (NRDC) succinctly states: “Breast milk is a unique nutritional source that cannot adequately be replaced by any other food, including infant formula... [and while] [i]nfant formulas are able to mimic a few of the nutritional components of breast milk, . . . formula cannot hope to duplicate the vast and constantly changing array of essential nutrients in human milk.”

http://pediatrics.aappublications.org/content/103/Supplement_1/870.full.pdf+html

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43. Id. at 3 (citing M. Bartick & A. Reinhold, The Burden of Suboptimal Breastfeeding in the United States: A Pediatric Cost Analysis, 125 PEDIATRICS e1048 (2010)). The AAP cited the same study and additionally mentioned that the healthcare savings did not include savings from “a reduction in parental absenteeism from work or adult deaths from diseases acquired in childhood . . .”, indicating that the savings could be even greater. AAP, Policy Statement, supra note 2, at e832.

44. Call to Action, supra note 6, at 3 (citing M. Bartick & A. Reinhold, The Burden of Suboptimal Breastfeeding in the United States: A Pediatric Cost Analysis, 125 PEDIATRICS e1048 (2010)).

45. Id. at 4.

46. Id.

47. AAP, Policy Statement, supra note 2, at e827.

48. Call to Action, supra note 6, at 4.

49. Healthy Milk, Healthy Baby: Chemical Pollution and Mother’s Milk, NRDC.ORG,
B. National Breastfeeding Statistics

While the benefits of breastfeeding are important to enumerate in order to understand why breastfeeding should be protected, the current breastfeeding statistics in the United States and our national breastfeeding goals also inform the national breastfeeding debate in order to compare what we are currently accomplishing to what we wish to achieve. The Centers for Disease Control and Prevention (CDC) provide a yearly report card that outlines national and state-by-state information and statistics regarding breastfeeding practices. The Office of Disease Prevention and Health Promotion, through the Healthy People initiative, provides the health objectives and benchmarks for the United States.

According to the CDC’s 2014 Breastfeeding Report Card, 79.2 percent of children in the United States have ever been breastfed, with only 18.8 percent of children being exclusively breastfed at six months of age. The targets of Healthy People 2020 are to increase the percentage of infants who have ever been breastfed to 81.9 percent and to increase the percentage of infants being exclusively breastfed at six months of age to 25.5 percent. Although breastfeeding rates in the U.S. have not met the Healthy People 2020 objectives yet, the CDC acknowledged in the 2014 Breastfeeding Report Card that breastfeeding rates in the United States continue to rise. The CDC attributed the continued increase of breastfeeding rates to certain community breastfeeding support indicators such as the increase of professional lactation support to new mothers, the steady percentage of live births at baby-friendly facilities, and the decreased percentage of breastfed

http://www.nrdc.org/breastmilk/benefits.asp (last revised Mar. 25, 2005). The American Dietetic Association stated: “Human milk is uniquely tailored to meet the nutrition needs of human infants. It has the appropriate balance of nutrients provided in easily digestible and bioavailable forms.” Call to Action, supra note 6, at 4. Furthermore, the AAP stated: “Human milk is species-specific, and all substitute feeding preparations differ markedly from it, making human milk uniquely superior for infant feeding. Exclusive breastfeeding is the reference or normative model against which all alternative feeding methods must be measured with regard to growth, health, development, and all other short- and long-term outcomes.” Id. at 5.

50. See Breastfeeding Report Cards, supra note 5.
51. Office of Disease Prevention and Health Promotion, About Healthy People, HEALTHYPEOPLE.GOV, https://www.healthypeople.gov/2020/About-Healthy-People (last revised Jun. 25, 2015). Each decade there is a new Healthy People agenda to improve the health of the United States. Id. The current program is Healthy People 2020. Id.
53. Id. at 6.
54. Id. at 2.
infants receiving formula before two days of age.\textsuperscript{55} The CDC specifically discussed the following factors as playing a major role in whether a new mother will choose to breastfeed: support of a mother’s breastfeeding efforts provided by the child’s birth facility; mother-to-
mother support, especially from La Leche League Leaders, who are volunteer mothers who provide support to other pregnant and breastfeeding mothers; professional support from health professionals including International Board Certified Lactation Consultants and Certified Lactation Counselors; and support in childcare settings.\textsuperscript{56} Importantly, the CDC also recognizes that one of the Healthy People 2020 objectives is an increase in the proportion of employers who have “worksite lactation support programs.”\textsuperscript{57}

Additionally, to better understand the breastfeeding rates in the United States and how to improve them, the Call to Action broke down breastfeeding rates among children born in 2007 by different sociodemographic factors using the CDC’s annual National Immunization Survey (NIS), which includes questions relating to breastfeeding practices.\textsuperscript{58} According to the summary, 75 percent of children born in 2007 in the United States were ever breastfed.\textsuperscript{59} The summary separated the results by ethnicity\textsuperscript{60} and found that Asian or Pacific Islander mothers breastfed their children at the highest rates overall, with 83 percent of children born to this ethnicity of mothers having ever been breastfed and 32 percent of children born to this ethnicity of mothers still being breastfed at twelve months of age.\textsuperscript{61} Non-
Hispanic White mothers breastfed their children at rates close to the national average with 76.2 percent of children born to this ethnicity of mothers having ever been breastfed and 23.3 percent of children born to

\textsuperscript{55} Id. at 5 (comparing with CDC, Breastfeeding Report Card: United States 2013, at 5 (2013), http://www.cdc.gov/breastfeeding/pdf/2013breastfeedingreportcard.pdf). In the 2014 Breastfeeding Report Card, the CDC specifically pointed out that the increase in professional lactation support, Certified Lactation Counselors (CLCs), and International Board Certified Lactation Consultants (IBCLCs) per 1,000 live births, were instrumental in the increase of breastfeeding rates in the United States. Id. at 2.

\textsuperscript{56} Id. at 6-7.


\textsuperscript{58} Call to Action, supra note 6, at 6-9.

\textsuperscript{59} Id. at 8.

\textsuperscript{60} The ethnicities reported were: American Indian or Alaska Native, Asian or Pacific Islander, Hispanic or Latino, Non-Hispanic Black or African American, and Non-Hispanic White. Id.

\textsuperscript{61} Id.
this ethnicity of mothers still being breastfed at twelve months of age. The ethnicity with the lowest breastfeeding rates was Non-Hispanic Black or African American mothers with only 58 percent of children born to this ethnicity of mothers having ever been breastfed and only 12.5 percent of children born to this ethnicity of mothers still being breastfed at twelve months of age. The Call to Action did not state why the breastfeeding rates were so much lower in the African American population, but it hypothesized that employment may play a role, given that African American women tend to return to work sooner than their Caucasian counterparts and are more likely to work in environments that do not support breastfeeding. The Call to Action pointed out that the early discontinuation of breastfeeding is linked to the mother’s return to work. However, a new mother may be able to continue breastfeeding if she returns to a supportive work environment.

C. Barriers to Breastfeeding in the United States

Notwithstanding the data regarding the variety of benefits from breastfeeding and the support available to many mothers who wish to breastfeed, there are still many barriers to breastfeeding in the United States. The Call to Action enumerates some of the barriers to breastfeeding, which can include: (1) a lack of knowledge regarding the specific benefits of breastfeeding and the risks associated with not breastfeeding; (2) the fact that bottle-feeding is viewed as the social norm for feeding babies; (3) poor familial and social support; (4) embarrassment about breastfeeding because, even though a 2001 national public opinion survey found that 43 percent of adults in the United States believe that women should have the right to breastfeed in public, many mothers who have breastfed in public have been asked to stop breastfeeding or to leave the public area; and (5) lactation issues such as insufficient milk supply, nipple soreness, general pain, or a failure of the infant to latch.

One of the most significant barriers to breastfeeding is the mother’s return to work. According to the Call to Action, returning to work is a significant barrier to breastfeeding for many women because often there

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62. Id.
63. Call to Action, supra note 6, at 8.
64. Id.
65. Id.
66. Id.
67. Id. at 10-13.
68. Call to Action, supra note 6, at 14.
is a lack of location and privacy for breastfeeding or expressing breast milk in the workplace, there is often no place to store the expressed breast milk at the workplace, many women have inflexible work hours or limited maternity leave, and many women fear job insecurity.69 A survey conducted by the Society for Human Resource Management in 2009 indicated that only 25 percent of companies had lactation programs or made accommodations for lactating mothers.70 Additionally, even if a company has a lactation program, many mothers experience “pressure from coworkers or supervisors to not take breaks to express breast milk, and existing breaks often do not allow sufficient time for expression.”71 Furthermore, oftentimes women must resort to using a bathroom stall to breastfeed or express breast milk when the employer does not provide a private, sanitary location for these purposes.72

Although women often face opposition to expressing breast milk at work, the American Academy of Pediatrics (AAP) stated in its 2012 policy statement that providing a breastfeeding friendly worksite results in many benefits to employers “including a reduction in company health care costs, lower employee absenteeism, reduction in employee turnover, and increased employee morale and productivity.”73 The AAP also emphasized that for every one dollar a company spends on a worksite lactation support program, which could include things like a private pump site, refrigerated storage for expressed milk, a hand-washing facility, and adequate break time for breastfeeding mothers, the return on investment is two to three dollars.74

III. LEGAL ARGUMENTS FOR SUPPORTING LACTATION IN THE WORKPLACE

Women who wish to breastfeed their newborns as well as continue careers are often faced with a difficult choice between the two. In order to adequately protect new mothers who wish to lactate and express breast milk in the workplace, both protection against discrimination and legally required accommodations are needed. The protection of

69. Id.
71. Id. at 14.
72. Id.
73. AAP, Policy Statement, supra note 2, at e836.
74. Id.
breastfeeding and lactation in the workplace has been argued under many theories and laws. This section discusses the breadth and limits of protecting lactation and expressing breast milk in the workplace under the Right to Privacy under the United States Constitution in Part III.A, the Americans with Disabilities Act (ADA) in Part III.B, the Family and Medical Leave Act (FMLA) in Part III.C, and multiple state laws in Part III.D. This section will demonstrate that, despite a few narrow exceptions, these arguments have historically failed to protect breastfeeding, lactation, and the expression of breast milk in the workplace.

A. Constitutional Protections for Lactation and Expressing Breast Milk in the Workplace

The constitutional argument for lactation in the workplace is rooted in the right to privacy: a fundamental personal liberty, which is “an established part of our constitutional jurisprudence.”

The right to privacy protects personal, individual liberties including the rights of marriage, procreation, contraception, abortion, and family relationships. The Constitution protects freedom of personal choice in the areas of marriage and family life, including parents’ interests in “nurturing and rearing their children,” from undue state interference.


76. See generally Loving v. Va., 388 U.S. 1 (1967) (holding that the freedom to marry is a basic civil right that cannot be restricted by racial discrimination); Zablocki v. Redhail, 434 U.S. 374 (1978) (maintaining that the personal decision to marry is constitutionally protected by the right of privacy).

77. See generally Skinner v. State of Okla., 316 U.S. 535 (1942) (concluding that the right to procreate is a basic civil right).

78. See generally Griswold v. Conn., 381 U.S. 479 (1965) (affirming that the right to marry is a fundamental right and additionally, a married couple has the fundamental right to use contraceptives); Eisenstadt v. Baird, 406 U.S. 438 (1972) (finding that the right of privacy also protects individuals and their rights to use contraceptives; the decision to bear a child should be free from government intrusion).

79. See generally Roe v. Wade, 410 U.S. 113 (1973) (declaring that the right of privacy includes a woman’s choice to terminate a pregnancy).

80. See generally Moore v. City of East Cleveland, 431 U.S. 494 (1977) (explaining that the right of privacy includes choosing family living arrangements).

81. Dike v. Sch. Bd., 650 F.2d 783, 785-86 (5th Cir. 1981). The court referred to the holdings of numerous United States Supreme Court cases to articulate this constitutional protection, including: Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925) (holding that a statute requiring children to attend public schools was unconstitutional as it interfered with parental rights to raise and educate their children) and Meyer v. Neb., 262 U.S. 390 (1923) (holding that a statute forbidding schools to
In its 1981 decision in *Dike v. School Board*, the United States Court of Appeals for the Fifth Circuit addressed the constitutional right to privacy with respect to family life, as it relates to lactation and breastfeeding in the workplace. In *Dike*, the Fifth Circuit concluded that the Constitution protects a woman’s decision to breastfeed her child from undue state interference.

Janice Dike was a teacher at an elementary school. After giving birth, Dike returned to work but wished to continue breastfeeding her child. She found a way to do so without interrupting her work responsibilities or disrupting the education of any of her students. During Dike’s lunch period, in which she had no work duties, her husband or her child’s babysitter would bring her child to the school and Dike would breastfeed the baby in the privacy of a locked room. After three months without issue, the school’s principal required Dike to stop breastfeeding her child at school by “citing a school board directive prohibiting teachers from bringing their children to work with them for any reason.” Dike was also prohibited from leaving work to feed her child on her lunch break, and after her baby developed an allergic reaction to formula, Dike was forced to take an unpaid leave of absence for the remainder of the school term. Dike sued the school board and alleged that it had “unduly interfered with a constitutionally protected right to nurture her child by breastfeeding.”

The Fifth Circuit held that Dike’s wish to breastfeed her child was entitled to constitutional protection against state infringement in some circumstances. In so holding, the court stated:

> Breastfeeding is the most elemental form of parental care. It is a communion between mother and child that, like marriage, is intimate to the degree of being sacred. Nourishment is necessary to maintain the child’s life, and the parent may choose to believe that breastfeeding will enhance the child’s psychological as well as physical health. In light of the spectrum of interests that the Supreme Court has held spe-

82. *Dike*, 650 F.2d at 784.
83. *Id.* at 787.
84. *Id.* at 784.
85. *Id.*
86. *Id.* at 784-85.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
cially protected we conclude that the Constitution protects from excessive state interference a woman’s decision respecting breastfeeding her child.92

The court went further in its analysis, however, and stated that not all restrictions of protected liberties are prohibited by the Constitution.93 Instead, state employers who interfere with breastfeeding must establish the following in order to demonstrate that the workplace restrictions on breastfeeding are not in violation of the Constitution: (1) the interference “further[s] sufficiently important state interests,” and (2) the interference is “closely tailored to effectuate only those interests.”94 This test follows Supreme Court precedent, which established that a compelling state interest could be dominant to an individual right.95

While the analysis in Dike appears promising, there are some limitations. First, the test utilized by the Fifth Circuit seems to give deference to the state since the state actors imposing the interference with breastfeeding need only defend the actions by demonstrating that it furthers state interests.96 More importantly, the primary roadblock to the application of this case law to breastfeeding in the workplace is that it does not apply to private individuals, but only to state actors.97 This means that only state employees are protected, and those women who work for private individuals and companies cannot benefit.98


93. Id. The Fifth Circuit ultimately remanded the case to the district court and clearly stated that its holding and remand “does not mean that the school board’s restrictions on the exercise of this liberty in the employment context are necessarily constitutionally invalid.” Id.

94. Id. Upon remand, the district court found that “avoiding disruption of the educational process” was a sufficient state interest and prohibiting teachers from bringing their children to work was sufficiently tailored to affect the state interest. Shana M. Christrup, Breastfeeding in the American Workplace, 9 AM. U. J. GENDER SOC. POL’Y & L. 471, 492 (2001) (citing Dumeriss Cruver-Smith, Note, Protecting Public Breast-Feeding in Theory But Not in Practice, 19 WOMEN’S RTS. L. REP. 167, 174 (1998)).

95. See, e.g., Roe v. Wade, 410 U.S. 113, 155 (1973) (stating that if there is a compelling state interest and a narrowly drawn regulation expressing only those compelling state interests, a fundamental liberty may be regulated); Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (explaining that a statutory classification that significantly interferes with fundamental rights can be upheld when it is supported by compelling state interests and when it is narrowly tailored to affect only those compelling state interests).

96. Christrup, supra note 94, at 492.

97. Id. at 493.

98. Id.
B. Arguments to Protect Lactation and Expressing Breast Milk at Work Under the Americans with Disabilities Act

A handful of cases have asserted that lactation and the expression of breast milk should be protected in the workplace under the Americans with Disabilities Act. These cases, however, have largely failed because courts do not recognize pregnancy and related medical conditions as disabilities.

The main purpose of the Americans with Disabilities Act (ADA) of 1990 is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” Protection under the ADA, of course, depends on whether a person has a disability. The ADA defines a disability as “a physical or mental impairment that substantially limits one or more major life activities . . . ,” having “a record of such an impairment,” or “being regarded as having such an impairment.” With respect to employment, the ADA states that “the term discriminate against a qualified individual on the basis of disability includes not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless . . . the accommodation would impose an undue hardship on the operation of the business . . . .”

Courts, however, do not recognize pregnancy as a disability. Pregnancy, instead, has been considered a healthy state so employers are not required to make reasonable accommodations to women who are pregnant even if a pregnant woman faces substantial physical limitations or disability during her pregnancy.

This viewpoint that pregnancy is not a disability has also been employed in cases addressing lactation and breastfeeding in the workplace. In one case, Bond v. Sterling, the plaintiff alleged disability discrimination under the New York Human Rights Law (HRL), rather than under the ADA. Courts have generally agreed that pregnancy-related impairments are not disabilities.

105. Id. Some courts have “included pregnancy-related impairments under the protections of the ADA when the pregnancy creates unusual or atypical limitations or impairments.” Id. (citing Gabriel v. City of Chicago, 9 F. Supp. 2d 974, 980 (N.D. Ill. 1998); Jessie v. Carter Health Care Ctr., Inc. 926 F. Supp. 613, 616 (E.D. Ky. 1996); Villarreal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D. Tex. 1995)).
than the ADA. Bond claimed that her need to breastfeed her child was a disability and, therefore, her dismissal from work was unlawful. The court in Bond looked to cases that addressed breastfeeding as a disability under the ADA for guidance, even though the court acknowledged that the HRL requirements to determine whether a party is disabled were stricter than the ADA’s requirements. The HRL required “prevention” of a “normal bodily function” while the ADA only required the “substantial limitation” of a “major life activity.” Regardless of this difference, the Bond court found that “status as a breast-feeding mother does not constitute a ‘disability’ within the meaning of the HRL.” The Bond court also relied upon previous cases tried under the ADA that found that ADA protection does not usually extend to pregnancy-related complications, unless physiological impairments such as premature labor, nausea, or back pain are present. The court went further and stated that the “physiological aspect of the impairment implies ‘an abnormal functioning of the body or a tissue or organ’” and therefore, “[i]t is simply preposterous to contend a woman’s body is functioning abnormally because she is lactating.”

In breastfeeding cases brought under the ADA, the claims tend to center around the “reasonable accommodations” requirement. For example, in Martinez v. NBC Inc., Martinez claimed that her employer did not adequately accommodate her under the ADA when she desired to pump breast milk at work. The court stated that “[e]very court to consider the question” of whether pumping breast milk at work is protected by the ADA “has ruled that ‘pregnancy and related medical conditions do not, absent unusual conditions, constitute a [disability] under the ADA.'” The court, therefore, dismissed Martinez’s claims.

107. Id.
108. Id. at 310.
110. Id. at 311.
113. Id. at 311 (citing Hernandez v. City of Hartford, 959 F. Supp. 125, 130 (D. Conn. 1997)).
114. Id.
115. Martinez, 49 F. Supp. 2d 305, 306 (S.D.N.Y. 1999). This case also contained a claim under Title VII of the Civil Rights Act of 1964. Id.
116. Id. at 308 (quoting Lacoparra v. Pergament Home Ctrs., Inc., 982 F. Supp. 213, 228 (S.D.N.Y. 1997)).
under the ADA.\textsuperscript{117} However, in dicta, the court did state that its dismissal of Martinez’s claim under the ADA was “not to say that a statute requiring employers to afford reasonable accommodation to women engaged in breast feeding or breast pumping would be undesirable.”\textsuperscript{118}

Arguing for protection of breastfeeding under the ADA has not proven fruitful up to this point, and according to some, this is for the best. The main arguments against protecting breastfeeding in the workplace under the ADA are that “equating breastfeeding to a disability runs counter to policies within public health that emphasize the naturalness of breastfeeding and its superiority to infant formula”; the reasonable accommodation standard under the ADA does not provide a standard that all breastfeeding women can rely on because it must be analyzed case by case; and finally, equating lactation with a disability could expand the definition of disability to include normal body processes, which, in turn, could unduly burden businesses with the task of accommodating many issues, causing everyone to suffer.\textsuperscript{119}

In 2008, Congress passed the ADA Amendments Act (ADAAA), which provides that “pregnancy-related impairments may be defined as disabilities.”\textsuperscript{120} The Equal Employment Opportunity Commission (EEOC) has interpreted this modification to mean that employees temporarily disabled by pregnancy must be treated like other temporarily disabled employees.\textsuperscript{121} According to the EEOC, if a non-pregnant employee is temporarily disabled and is provided with accommodations, such as light duty, unpaid leave, or temporary reassignment, these same accommodations must be provided to an employee who is temporarily disabled due to pregnancy.\textsuperscript{122} These modifications could provide pregnant women more protection at work, both while pregnant and after pregnancy while lactating and expressing breast milk. However, the protections may not be broad enough. It is still unclear whether these modifications protect women who are experiencing a “normal pregnancy,” and to this point, “The potential protection for pregnant employees in the Amended Americans with Disabilities Act has not yet

\begin{footnotes}
\footnote{117. Id. at 309.}
\footnote{118. Id.}
\footnote{119. Christrup, supra note 94, at 487-88.}
\footnote{120. Matambanadzo, supra note 104, at 159 (explaining that the amendments to the ADA were “designed to expand the definition of disability and ensure that the Act protects more individuals”).}
\footnote{121. Id.}
\footnote{122. Id. at 159-160.}
\end{footnotes}
C. Protections for Breastfeeding Under the Family and Medical Leave Act

The purpose of the Family and Medical Leave Act (FMLA) is to help new parents and families adjust and provide care when a child is born or adopted, when a family member requires care due to a serious health issue, or when the person taking leave herself has a serious health issue that renders her unable to perform her job duties. The FMLA provides up to twelve weeks leave for both men and women as long as the person requesting leave has been working with the employer he or she is requesting leave from for at least one year and for at least 1,250 hours in that one year. The FMLA provides an option for new mothers who wish to remain home and continue to breastfeed newborns. However, there are limitations to the FMLA, and many women are not eligible for FMLA protections.

It appears that the FMLA is a viable option for a woman if she wishes to breastfeed and is unable or unwilling to do so while at work. The benefits under the FMLA for breastfeeding are both for the new mother and for her employer. For example, one benefit is that the new mother is able to stay home for 12 weeks in order to breastfeed her child and adjust to her new role as a mother. An additional benefit is that a new father can also stay home. Not only does this maintain equality between the two sexes, but it also can provide the new mother with

123. Id. at 160.
126. 29 U.S.C.A. § 2611(2)(A) (Westlaw through P.L. 114-49). Under the statute an employer is defined as “any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees . . . .” 29 U.S.C. § 2611(4)(A)(i) (Westlaw through P.L. 114-49). Additionally, an employee is not eligible for FMLA leave if he or she works at a site with less than 50 employees and the total number of employees within 75 miles of the site is less than 50 employees. 29 U.S.C. § 2611(2)(B)(ii) (Westlaw through P.L. 114-49).
128. But see Matambanadzo, supra note 104, at 148-49 (pointing out that many women workers do not qualify for FMLA maternity leave because of the large percentage of employers that are not covered by FMLA, the small number of job sites that qualify for FMLA, and the low percentage of workers eligible for FMLA leave).
129. But see id. at 148 (arguing that although the FMLA gives some women “access to unpaid leave after giving birth,” it is not enough time for the new mother and baby, and this inadequacy is caused by the FMLA’s balance of employee and employer interests).
130. Christrup, supra note 94, at 489.
131. Id.
132. Id.
the support and encouragement that she needs to continue breastfeeding. The benefit for employers is that they need not make accommodations for the new mother to breastfeed at work.\textsuperscript{133}

However, there are limitations and issues associated with the FMLA as applied to breastfeeding. One of the biggest issues is the fact that the leave is unpaid and many dual income families cannot afford to have one parent take unpaid leave in order to care for the new baby.\textsuperscript{134} For single parent families without adequate savings, an extended period of unpaid leave may not even be an option.\textsuperscript{135} Additionally, the restriction that the employee must have worked 1,250 hours in the previous year before obtaining leave excludes many women, especially those who work part time.\textsuperscript{136} Finally, the twelve weeks provided for the in FMLA may not be enough time for breastfeeding and could cause problems for the continuation of breastfeeding,\textsuperscript{137} especially considering the recommendations that new mothers feed their infants exclusively with breast milk for the first six months of the child’s life.\textsuperscript{138} Thus, while the FMLA does provide benefits and is an option for new mothers who wish to remain home to breastfeed, there are associated difficulties and drawbacks.\textsuperscript{139}

\textbf{D. Breastfeeding Protections Under State Laws}

Some states have opted to provide more extensive and specific regulations than federal laws and regulations with respect to breastfeeding in order better serve and protect women. According to the National Conference of State Legislatures (NCSL), forty-nine states, the District of Columbia, and the Virgin Islands have laws that allow women to breastfeed in any public or private location.\textsuperscript{140} Additionally, twenty-
nine states, the District of Columbia, and the Virgin Islands exempt breastfeeding from public indecency laws. 141 However, only twenty-seven states, the District of Columbia, and Puerto Rico have laws related to breastfeeding in the workplace. 142 Finally, only five states and Puerto Rico have “implemented or encouraged the development of a breastfeeding awareness education campaign.” 143

While the Constitution of the United States, the ADA, the FMLA, and various state laws all provide different levels of protection for lactating and breastfeeding mothers in the workplace, each type of protection has limitations. To this point, the only argument for protecting lactation and the expression of breast milk in the workplace that has prevailed is under the theory of gender discrimination under Title VII, which contains the Pregnancy Discrimination Act (PDA). This is why protection for mothers who wish to express breast milk at work under Title VII and the PDA is so important. The gaps in the federal law must be filled in order for every woman across the United States to have the right to lactate and pump breast milk at work without encountering discrimination.
IV. THE IMPACT OF TITLE VII AND THE PREGNANCY DISCRIMINATION ACT ON PROTECTING LACTATION IN THE WORKPLACE

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace on the basis of race, color, religion, sex, or national origin.\textsuperscript{144} Focusing on gender discrimination, the statute specifically states: “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 compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”\textsuperscript{145} Until recently, courts often held that lactating or breastfeeding employees were not a protected class under Title VII and therefore, gender discrimination claims regarding lactation in the workplace were often unsuccessful.\textsuperscript{146} In reaching this conclusion, most courts followed the reasoning in \textit{General Electric Co. v. Gilbert}, a Supreme Court case decided before the enactment of the PDA.\textsuperscript{147} Congress enacted the PDA in response to the Supreme Court’s decision in \textit{Gilbert},\textsuperscript{148} and recent court decisions analyzing the PDA have provided some protection for lactation and expressing breast milk in the workplace.\textsuperscript{149}

A. The Supreme Court Weighs In and Construes Title VII Not to Protect Pregnancy-Related Discrimination

The issue of whether pregnancy discrimination is considered gender discrimination that is protected by Title VII appeared before the Supreme Court in 1976 in \textit{General Electric Co. v. Gilbert}.\textsuperscript{150} The case involved an employer’s disability plan, which provided benefits to all employees.\textsuperscript{151} However, disabilities arising from pregnancy were excluded from the disability plan.\textsuperscript{152} The plaintiffs, on behalf of a class of female employees, alleged that the disability plan, in denying benefits for disabilities arising from pregnancy, violated Title VII and constituted

\textsuperscript{146} \textit{See infra} notes 173-204 and accompanying text.
\textsuperscript{148} \textit{See infra}, note 166.
\textsuperscript{149} \textit{See infra}, notes 205-237 and accompanying text.
\textsuperscript{150} \textit{Gilbert}, 429 U.S. at 125-26.
\textsuperscript{151} \textit{Id.} at 127.
\textsuperscript{152} \textit{Id.}
discrimination based upon sex.\textsuperscript{153}

The Supreme Court ultimately held that Title VII did not protect pregnancy-related discrimination because it was not gender discrimination.\textsuperscript{154} The Court explained that although women alone can become pregnant, they were not discriminated against in the disability plan because the plan divided potential disability recipients into two different groups—pregnant women, a group that was exclusively female, and nonpregnant persons, a group that included members of both genders.\textsuperscript{155} Since some women were part of the nonpregnant persons group, because they were not pregnant, there was no discrimination based upon sex because there was no risk that men were protected where women were not.\textsuperscript{156} The Court additionally pointed out that pregnancy was different from the other diseases covered by the disability plan because pregnancy is not really a disease, but rather is a desired condition that is entered into voluntarily.\textsuperscript{157} Therefore, the Court concluded that the disability plan was no more than an insurance package that covered some risks while excluding others, which did not result in gender discrimination just because the disability plan was not all inclusive.\textsuperscript{158}

The majority opinion invited two dissenting opinions—one from Justice Brennan, in which Justice Marshall joined,\textsuperscript{159} and one from

\begin{itemize}
\item \textsuperscript{153} Id. at 127-28. The United States District Court for the Eastern District of Virginia had concluded that the “exclusion of such pregnancy-related disability benefits from General Electric’s employee disability plan violated Title VII.” Id. at 128 (citing Gilbert v. Gen. Elec. Co., 375 F. Supp. 367, 385-386 (E.D. Va. 1974)). The United States Court of Appeals for the Fourth Circuit affirmed the conclusions of the Eastern District of Virginia. Id. (citing Gilbert v. Gen. Elec. Co., 519 F. 2d 661 (4th Cir. 1975)).
\item \textsuperscript{154} Id. at 145-46. Prior to this case, the Court decided Geduldig v. Aiello. Id. at 132 (mentioning Geduldig v. Aiello, 417 U.S. 484 (1974)). In Geduldig, the Court rejected a similar claim to that in Gilbert where the plaintiffs claimed that a disability program that excluded coverage for pregnancy disabilities violated the Equal Protection Clause of the Fourteenth Amendment and constituted sex discrimination. Id. In Gilbert, the Court noted that the decision in Geduldig, since it dealt with a similar disability plan, was relevant to the Gilbert case and the determination of whether the exclusion of pregnancy-related disabilities was discrimination on the basis of sex, even though Geduldig was decided under the Equal Protection Clause of the Fourteenth Amendment and Gilbert was asserted under Title VII. Id. at 132-34.
\item \textsuperscript{155} Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976) (citing Geduldig v. Aiello, 417 U.S. 484, 496-97, n.20 (1974)). The Court went further and stated that “Geduldig is precisely [on] point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is [not a gender-based discrimination at all].” Id. at 136.
\item \textsuperscript{156} Id. at 135 (citing Geduldig v. Aiello, 417 U.S. 484, 496-497 (1974)).
\item \textsuperscript{157} Id. at 136.
\item \textsuperscript{158} Id. at 138-39.
\item \textsuperscript{159} Id. at 146 (Brennan, J., Marshall, J., dissenting).
\end{itemize}
Justice Stevens.  

Justice Brennan, in his dissenting opinion, stated that the “Court’s assumption that General Electric engaged in a gender-neutral risk-assignment process is purely fanciful” and, further, the “interpretation that the exclusion of pregnancy from a disability insurance plan is incompatible with the overall objectives of Title VII has been unjustly rejected.”  

Justice Brennan pointed out that pregnancy was the only sex-specific disability that was excluded from the disability plan—prostatectomies, vasectomies, and circumcisions, all conditions specific to the reproductive system of men, were covered by the disability plan. He argued that the flaw in the Court’s reasoning was that even if the defendant had catalogued every possible human ailment and then excluded only those that are female-specific, the Court would have still reasoned that the plan operated equally because both women and men could claim disability for every other ailment, including those that primarily affect men, and neither women nor men could claim disability for those excluded female ailments.

Justice Stevens, in his dissent, stated that by definition, a rule which places “pregnancy in a class by itself . . . discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male.” Justice Stevens also rejected the majority’s division of the potential recipients of the disability plan into the groups of “pregnant women and nonpregnant persons” by stating that the classification of future risk is between those who “face the risk of pregnancy and those who do not.”

B. Congress Enacts the Pregnancy Discrimination Act in Response to the Supreme Court Decision in Gilbert

In response to the decision from the Supreme Court in General Electric Co. v. Gilbert, Congress, in 1978, passed the Pregnancy Discrimination Act (PDA). The PDA reads:

161. Id. at 148 (Brennan, J., Marshall, J., dissenting).
162. Id. at 152 (Brennan, J., Marshall, J., dissenting).
163. Id. at 152 n.5 (Brennan, J., Marshall, J., dissenting).
164. Id. at 161-62 (Stevens, J., dissenting).
166. See Orozco, supra note 30, at 1301. The note points out that Gen. Elec. Co. v. Gilbert was decided in December 1976 and only four months later, in March 1977, the PDA was introduced to the Senate. Id. at 1301 n.139 (citing S. REP. NO. 95-331, at 3 (1977)).
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 . . . 168

Both the House and Senate Reports accompanying the PDA rejected the majority opinion in Gilbert. 169 The Senate Report explained, “The express purpose of the PDA was to change the definition of sex discrimination in [T]itle VII to reflect the commonsense view and to insure that working women are protected against all forms of employment discrimination based on sex.” 170 Even the Supreme Court acknowledged 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.” 171 The intent of Congress in passing the PDA was to bring “pregnancy and related conditions into the express terms of Title VII” and additionally to clarify that Congress wished Title VII to be “broadly construed to protect working women from all forms of sex-based discrimination.” 172

C. Early Court Interpretations After Enactment of the Pregnancy Discrimination Act Were Not Protective

Originally, most breastfeeding cases brought under the PDA centered on women seeking to extend maternity leave in order to breastfeed their infants, 173 accommodations due to pregnancy, 174 or in

170. Id. at 1301 (citing S. REP. NO. 95-331, at 3) (internal quotation marks omitted).
172. Orozco, supra note 30, at 1302.
173. See generally Barrash v. Bowen, 846 F.2d 927 (4th Cir. 1988) (explaining that denying requests for extended maternity leave in order to breastfeed a newborn is not gender discrimination under Title VII because “pregnancy and related conditions must be treated as illnesses only when incapacitating” and there is no valid comparison between incapacitated workers and “young mothers wishing to nurse little babies”); Wallace v. Pyro Mining Co., No. 90-6259, 1991 U.S. Dist. LEXIS 30157 (6th Cir. Dec. 19, 1991) (holding that the PDA is not applicable in cases where the mother requests additional maternity leave and fails to prove that breastfeeding her infant is a medical necessity).
174. See generally Urbano v. Cont’l Airlines, 138 F.3d 204 (5th Cir. 1998) (concluding that special treatment is not required under the PDA for pregnancy).
On July 1, 2014, the United States Supreme Court granted writ of certiorari for Young v. UPS, No. 12-1226, 2014 U.S. LEXIS 4683 (U.S. July 1, 2014). The case presents a question involving whether accommodations should be provided to pregnant women at work; specifically, the question presented is “[w]hether, and in what circumstances, an employer that provides work
order to lactate and pump breast milk at work.\textsuperscript{175} In these earlier cases, despite the enactment of the PDA and Congress’s clear intent to extend Title VII protection broadly, most courts declined to provide protection to women against discrimination on the basis of pregnancy or related conditions such as lactation or breastfeeding.

Early cases brought under the PDA to protect lactating or breastfeeding analyzed whether the PDA provided protection for women who wished to extend their maternity leave in order to breastfeed their infants. One of the first cases was \textit{Barrash v. Bowen}, a case decided in the United States Court of Appeals for the Fourth Circuit.\textsuperscript{176} In \textit{Barrash}, the court denied a female employee’s requests for six months of maternity leave in order to breastfeed her newborn.\textsuperscript{177} Despite continued requests for extended maternity leave and submissions from physicians indicating that Barrash was ill and could not return to work, Barrash was terminated from her position.\textsuperscript{178} In applying the PDA, the court stated, “[P]regnancy and related conditions must be treated as illnesses only when incapacitating.”\textsuperscript{179} In so determining that there was no gender discrimination under the PDA, the court acknowledged that over a three-year period, the number of women who received six-month long maternity leaves decreased while the number of men receiving six-month leaves increased.\textsuperscript{180} The court stated that this did not amount to accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are ‘similar in their ability or inability to work.’”

American Bar Association, \textit{Preview of United States Supreme Court Cases}, AMERICANBAR.ORG, http://www.americanbar.org/publications/preview_home/12-1226.html (last visited Mar. 4, 2015). Because this case does not address protecting women from discrimination for lactating in the workplace, nor does it address accommodations requested for lactating in the workplace, the case is not discussed in this Comment. Arguments were heard in the United States Supreme Court on December 3, 2014, and at the time this Comment was written a decision was forthcoming. \textit{Supreme Court of the United States; October Term 2014, For the Session Beginning December 1, 2014} (2014), available at http://www.supremecourt.gov/oral_arguments/argument_calendars.aspx.

\textsuperscript{175} See generally Puente v. Ridge, 324 F. App’x. 423 (5th Cir. 2009) (finding that the PDA does not require employers to provide preferential treatment to breastfeeding mothers and, therefore, denying a breastfeeding mother additional breaks is not gender discrimination); Martinez v. NBC Inc., 49 F. Supp. 2d 305 (S.D.N.Y. 1999) (concluding that denying an employee’s request for accommodations to breastfeed is not gender discrimination when the breastfeeding employee cannot prove that she was treated any differently than similarly situated men); Vachon v. R.M. Davis, Inc., No. 03-234-P-H, 2004 U.S. Dist. LEXIS 6339 (D. Me. Apr. 13, 2004); Falk v. City of Glendale, No. 12-cv-00925-JLK, 2012 U.S. Dist. LEXIS 87278 (D. Colo. June 25, 2012) (hypothesizing that discrimination against breastfeeding mothers may exist, but holding that breastfeeding mothers are not a protected class under Title VII).

\textsuperscript{176} \textit{Barrash}, 846 F.2d 927, 927 (4th Cir. 1988).

\textsuperscript{177} \textit{Id.} at 928.

\textsuperscript{178} \textit{Id.} at 928-29.

\textsuperscript{179} \textit{Id.} at 931.

\textsuperscript{180} \textit{Id.}
gender discrimination because the men who received the six-month leaves were incapacitated while the women who did not receive the six-month maternity leaves were not incapacitated.  

A second case that dealt with a new mother requesting extended maternity leave to breastfeed her child was *Wallace v. Pyro Mining Co.* The plaintiff, Wallace, requested an additional six weeks leave in order to breastfeed her newborn because her baby refused bottles and would only breastfeed. Her request was denied, and when she did not return to work out of fear for her baby’s health, she was terminated from her position. Wallace filed suit and alleged a violation under the PDA. The court rejected Wallace’s PDA claim, stating that it did not need to decide whether the PDA applied in this case because Wallace failed to “produce evidence supporting her contention that breastfeeding her child was a medical necessity.”

Additionally, courts have declined to extend PDA protection to mothers requesting accommodations at work in order to pump breast milk. For example, in *Puente v. Ridge*, Puente claimed that because she used some of her break time during her shift to pump breast milk, she lost the ordinary breaks that other similarly situated employees received. The court determined that since Puente had not proven that she received less than the status quo, and had actually asked for a benefit different than what other employees received, PDA protection did not apply because “the PDA does not impose an affirmative obligation on employers to grant preferential treatment . . . .” Similarly, in *Martinez v. NBC Inc.*, Martinez claimed that her employer did not sufficiently

183. Id. at *2.
184. Id.
185. Id.
186. Id. at *3. The district court in Wallace stated that it saw “no significant difference between the situation in Gilbert” and this case, observing “Pyro’s decision does not deny anyone personal leave on the basis of sex—it merely removes one situation, breast-feeding, from those for which personal leave will be granted. While breast-feeding, like pregnancy, is a uniquely female attribute, excluding breast-feeding from those circumstances for which Pyro will grant personal leave is not impermissible gender-based discrimination, under the principles set forth in Gilbert.” Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990).
187. Puente, 324 F. App’x. at 423, 424 (5th Cir. 2009). The defendant stated that the case was actually about the Puente’s request for additional breaks rather than her loss of ordinary breaks given to other similarly situated employees. Id.
188. Id. at 428 (quoting Urbano v. Cont’il. Airlines, 138 F.3d 204, 207 (5th Cir. 1998)) (internal quotation marks omitted). See infra note 216 and accompanying text for a further discussion of this case.
accommodate her wish to pump breast milk at work. The court concluded that Martinez’s claim failed because there was no allegation that Martinez was treated any differently than similarly situated men and that if pumping breast milk at work is to be protected, Congress should make that determination.

In *Falk v. City of Glendale*, Falk requested space and break time in order to pump breast milk when she returned from her maternity leave, but she was unable to take the breaks that she needed in order to pump breast milk, and no accommodations were provided to her. The court stated that “[t]he language of the PDA focuses solely on the conditions experienced by the mother,” however, “Title VII does not extend to breast-feeding as a child care concern.” The court stated that even though lactation is not per se excluded from protection under Title VII as amended by the PDA, Falk’s claim under Title VII was not a claim for relief as a member of a protected class simply because Falk wished to continue to breastfeed her child. The court did outline a possible situation where lactation could be protected under Title VII, albeit narrowly, by posturing that “[i]f lactation is a natural consequence of pregnancy, then expressing milk is equivalent to any other involuntary bodily function . . . [and] if other coworkers were allowed to take breaks to use the restroom while lactating mothers were banned from pumping, discrimination might exist.”

Even in cases where neither extended maternity leave nor accommodations were requested, courts have declined to extend Title VII protection under the PDA to lactating mothers. In *McNill v. New*
York City Department of Correction, McNill alleged that her employer violated the PDA when certain benefits were withdrawn due to her absences from work. She stated that her absences from work were because her son was born with a cleft palate and required breastfeeding prior to a corrective surgery and for several weeks afterwards. The court focused on the child’s cleft palate and concluded that it was outside the scope of the PDA and was not a “condition related to pregnancy or childbirth” because such conditions only involve conditions of the mother. The court concluded that only conditions of the mother are protected by the PDA, not conditions of the child, and therefore mothers whose children require breastfeeding are not members of a protected class.

In Fejes v. Gilpin Ventures, Fejes, a blackjack dealer at a casino, alleged that her employer discriminated against her when it refused to move her to a part-time position so that she could establish an appropriate breastfeeding schedule with her newborn and subsequently terminated her employment. The court held that Fejes’s claim was not viable because child rearing concerns after pregnancy, including breastfeeding, are not actual medical conditions related to childbirth or pregnancy, therefore, neither the PDA nor Title VII requires an employer to accommodate a breastfeeding employee’s child care concerns.

Finally, in Jacobson v. Regent Assisted Living, an employee’s request to attend to her body’s lactation was twice denied by her employer and she experienced pain and humiliation when she began leaking breast milk. Jacobson was subsequently fired and filed suit against her former employer alleging sex discrimination under Title VII. The court concluded that neither Title VII nor the PDA protects breastfeeding and childrearing concerns since they are not medical conditions that are related to pregnancy or childbirth.

Despite the enactment of the PDA and Congress’s clear intent to

196. Id. at 566-67.
197. Id. at 569-70.
198. Id. at 571.
200. Id. at 1491-92.
202. Id. at *14.
203. Id. at *1.
extend Title VII protection broadly, most courts have declined to protect women against discrimination on the basis of pregnancy or related conditions such as lactation or breastfeeding regardless of whether the breastfeeding mother requested additional maternity leave or accommodations for pregnancy or breastfeeding and lactation after pregnancy.

D. Houston Funding II and the Future of the PDA

As articulated above, cases argued under the United States Constitution, ADA, FMLA, and PDA have either failed to protect women from gender discrimination due to lactation in the workplace or are limited in their protection of lactating women in the workplace. But, in 2013, in EEOC v. Houston Funding II, the protection for women lactating and expressing breast milk at work was expanded. The remainder of this section will analyze the Houston Funding II case. Part IV.D.1 discusses whether the holding of Houston Funding II indicates that Title VII and the PDA do protect women against sexual discrimination for lactating or expressing breast milk in the workplace. Part IV.D.2 discusses whether other courts have followed the Houston Funding II conclusion that lactation is a pregnancy related condition under Title VII as amended by the PDA. Part IV.D.2 also acknowledges the gaps that remain in protecting women who are lactating and expressing breast milk in the workplace after the Houston Funding II decision.

1. The Fifth Circuit Protects Lactation in the Workplace Under the Pregnancy Discrimination Act

In stark contrast to many decisions in district courts, federal circuit courts, and other decisions in its own circuit, the United States Court of Appeals for the Fifth Circuit held in May 2013, that “discharging a female employee because she is lactating or expressing breast milk constitutes sex discrimination in violation of Title VII.” Furthermore, the court provided a new and persuasive interpretation to the question of whether lactation is a “related medical condition of pregnancy for purposes of the PDA” by holding that it is so covered by the PDA.

In EEOC v. Houston Funding II, the Equal Employment

205. See supra notes 173-204 and accompany text.
206. EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 426 (5th Cir. 2013).
207. Id. at 428.
Opportunity Commission (EEOC) sued Houston Funding II, Ltd. on behalf of Donnicia Venters, claiming that Venters was unlawfully discharged because she wished to express breast milk at work.208 The Fifth Circuit first addressed the issue of whether Houston Funding’s discharge of Venters violated Title VII generally.209 The court followed precedent previously set by the Fifth Circuit in Harper v. Thiokol Chemical Corp.210 In Harper, the Fifth Circuit held that Thiokol violated Title VII, as amended by the PDA, when it required women who had been on maternity leave to have “sustained a normal menstrual cycle” before returning to work.211 The court explained that this policy “clearly deprives female employees of employment opportunities and imposes on them a burden which male employees need not suffer.”212 The Fifth Circuit determined that when Venters was discharged from Houston Funding because she was lactating, this created an “adverse employment action . . . [that] . . . clearly impose[d] upon women a burden that male employees need not—indeed, could not—suffer.”213

Additionally, the court specifically held that “lactation is a related medical condition of pregnancy for the purposes of the PDA.”214 The court interpreted the PDA statute to include lactation under the plain meaning of the statutory term “medical condition” since the statute did not explicitly define the term.215 Furthermore, the court used previous Fifth Circuit precedent to reach this finding.216 Utilizing the reasoning in

208.  Id. at 426. The circuit court explained that “[t]he district court granted summary judgment in favor of Houston Funding, finding that, as a matter of law, discharging a female employee because she is lactating or expressing milk does not constitute sex discrimination.” Id. The court further explained that the district court granted the motion for summary judgment because it determined that “lactation is not a related medical condition of pregnancy” and therefore, “firing someone because of lactation or breast-pumping is not sex discrimination.” Id. at 427 (internal quotation marks omitted).

209.  Id. at 427-28.

210.  Id. at 427 (citing Harper v. Thiokol Chemical Corp., 619 F.2d 489 (5th Cir. 1980)).

211.  EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 427 (5th Cir. 2013) (quoting Harper v. Thiokol Chemical Corp., 619 F.2d 489, 491-492 (5th Cir. 1980)) (internal quotation marks omitted).

212.  Id. (quoting Harper v. Thiokol Chemical Corp., 619 F.2d 489, 491-92 (5th Cir. 1980)) (internal quotation marks omitted).

213.  Id. at 428 (following the precedent set by the Fifth Circuit in Harper v. Thiokol Chemical Corp. that when employment discrimination occurs and imposes a burden upon female employees that male employees “need not” suffer, especially in the case of pregnancy related issues, Title VII is violated and a cognizable sex discrimination claim is present as under the PDA).

214.  Id. (explaining that “[l]actation is the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth”).

215.  Id. (using medical dictionaries to determine that the term “medical condition” is defined broadly and, therefore, can include lactation).

216.  EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 429 (5th Cir. 2013). The court used its
the Harper decision that “[m]enstruation is a normal aspect of female physiology, which is interrupted during pregnancy, but resumes shortly after the pregnancy concludes,” the court succinctly concluded that “[s]imilarly, lactation is a normal aspect of female physiology that is initiated by pregnancy and concludes sometime thereafter.”

Although this holding from the court is important for the furtherance of protecting lactating at work, the court made an important statement distinguishing protecting against discrimination based upon lactation and deciding whether lactating mothers are entitled to special accommodations in order to pump breast milk at work. The court distinguished cases that involve “claims that the employer did not appropriately accommodate the female employee who wanted to use a breast pump at work” from cases, like Houston Funding II, where a female employee experiences an adverse employment action due to pregnancy related conditions.

Judge Jones, in her concurring opinion, decision in Harper v. Thiokol Chemical Corp., stating that “although this Court in Harper did not explicitly find menstruation was a related medical condition of pregnancy under the PDA” its holding that the maternity leave policy violated Title VII “at least implicitly [held] that menstruation was ‘pregnancy, childbirth, or [a] related medical condition.’” Id. (emphasis added). Also, the court discussed Puente v. Ridge, an unpublished case from the Fifth Circuit. Id. at 429 n.5. In Puente, the court again did not explicitly decide the issue of “whether lactation and the expressing of breast milk were covered under Title VII,” but the court again implied that they are. Id. (citing Puente v. Ridge, 324 F. App’x 423, 428 (5th Cir. 2009)) (emphasis added). The reason that the court in Puente did not have to specifically decide the issue of whether lactation is considered a medical condition under the PDA is because the plaintiff “failed to allege facts that, if true, would entitle her to relief.” Id. The Fifth Circuit explained that this is an implicit indication that Title VII protects lactation as a medical condition because if the court believed that lactation was not protected, it “could have simply said that employment decisions entailing a woman’s lactation or expressing of breast milk do not violate Title VII, rather than focusing on the plaintiff’s failure to properly articulate her claim.” Id. (emphasis added).

217. Id. at 429. The court postured that “[i]f an employer commits unlawful sex-based discrimination by instituting a policy revolving around a woman’s post-pregnancy menstrual cycle, as in Harper, it is difficult to see how an employer who makes an employment decision based upon whether a woman is lactating can avoid such unlawful sex discrimination.” Id.

218. Id. at 429 n.6 (stating that “[t]he issue here is not whether Venters was entitled to special accommodations . . . but, rather, whether Houston Funding took an adverse employment action against her, namely discharging her, because she was lactating and expressing breast milk.”).

219. Id. The court distinguishes cases such as: Martinez v. NBC Inc., 49 F. Supp. 2d 305, 308-10 (S.D.N.Y. 1999) (approaching the issue of whether “pregnancy and related medical conditions” are disabilities under the ADA and concluding that an employer does not need to accommodate an employee’s “desire to use a breast pump in the workplace”); Urbano v. Cont’l. Airlines, Inc., 138 F.3d 204, 207 (5th Cir. 1998) (determining that special treatment for employees based upon pregnancy is not required by the PDA); Falk v. City of Glendale, No. 12-cv-00925-JKL, 2012 U.S. Dist. LEXIS 87278, at *4 (D. Colo. June 25, 2012) (holding that employers are not required to provide accommodations to employees under the PDA); Vachon v. R.M. Davis, Inc., No. 03-234-P-H, 2004 U.S. Dist. LEXIS 6339, at *10 (D. Me. Apr. 13, 2004) (determining that a plaintiff who asserts that her employer did not provide adequate accommodations for breastfeeding at work does
succinctly stated the court’s determination that “the PDA does not mandate special accommodations to women because of pregnancy or related conditions” and explained that “if Venters intended to request special facilities or down time during work to pump or ‘express’ breast milk, she would not have a claim under Title VII or the PDA.”

2. The Lower Courts Follow _Houston Funding II_—Are Appellate Courts Close Behind?

Although cases decided after the _Houston Funding II_ decision still involve issues such as accommodations for lactating women in the workplace, district courts acknowledge the extension of PDA protection that the _Houston Funding II_ decision provides for women who wish to lactate and pump breast milk at work.

In _Martin v. Canon Bus. Solutions, Inc._, the United States District Court for the District of Colorado had the opportunity to analyze a pregnancy and gender discrimination case after the decision in _Houston Funding II_. In _Martin_, the plaintiff, a sales representative, alleged that her employer discriminated against her in violation of Title VII and the PDA when it did not provide accommodations for her to breastfeed, and further, by removing her commission-based clients and denying her bonus to her. The important statement that the court made was that the defendant relied upon other District of Colorado decisions, which were not binding upon the court, and so the court instead applied the _Houston Funding II_ reasoning from the Fifth Circuit. The court ultimately concluded that because lactation is a direct result of pregnancy, the need for accommodations to express breast milk at work readily fits into the definition of “pregnancy, childbirth, or related medical conditions” as provided in the PDA. This case is pivotal in the further analysis of

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220. Id. at 430 (Jones, J., concurring). Judge Jones goes further to ponder that “if providing a plaintiff with special accommodations to pump breast milk at work were required, one wonders whether a plaintiff could be denied bringing her baby to the office to breastfeed during the workday.” Id. at 430-31.


222. Id. at *21.

223. Id. at *22 n.4.

224. Id. (quoting EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 430 (5th Cir. 2013)).
Title VII as amended by the PDA because the court explicitly adopted the approach provided by the Fifth Circuit in Houston Funding II that lactation is protected under the PDA as a medical condition related to pregnancy.

More recently, in Wilson v. Ontario County Sheriff’s Department, a corrections officer requested break time to pump breast milk following her pregnancy.225 The court stated that the PDA does not require employers to extend any benefits to pregnant women that they do not already provide to other disabled individuals, nor does it require an employer to provide alternative employment to an employee who is unable to perform duties due to pregnancy.226 Additionally, the court determined that the plaintiff did not have a right, constitutional or under the PDA, to additional compensated breaks to pump milk.227 The court clearly drew the line between an employee requesting accommodations to express milk and alleging discrimination relating to lactation breaks.228 The court stated that the plaintiff would have a claim if an employer had told her that she could not use her regular breaks to pump milk, or if he had denied her any other employment benefit based upon her status as a lactating mother.229

In yet another case, the plaintiff alleged that she was harassed for taking lactation breaks and was eventually terminated.230 The court in EEOC v. Vamco Sheet Metals, Inc. determined, based upon the difference between discrimination under Title VII and the requests to accommodate, that the plaintiff may be able to state a claim under Title VII for discriminatory treatment.231 The court, quoting Houston Funding II, stated, “[W]here a plaintiff’s claim focuses on adverse employment actions or conditions relating to her lactation breaks, as opposed to an alleged failure to accommodate a disability, an employer may be liable under Title VII.”232

Finally, in Lara-Woodcock v. United Air Lines Inc., the court cited Houston Funding II, stating that discrimination against a woman who is

226. Id. at *36.
227. Id. at *37.
228. Id. at *36-37.
229. Id.
231. Id. at *13-14.
232. Id. at *15.
breastfeeding may be actionable as sex discrimination. In this case, the court did not decide whether and to what extent the plaintiff’s employer was required to accommodate her because her employer actually did accommodate her—the plaintiff’s decision not to return to work was unilateral and because her absence from work was not authorized, she was rightly terminated. The court cited Dormeyer v. Comerica Bank, stating that the PDA “does not protect a pregnant employee from being discharged after her absence from work even if her absence is due to pregnancy or complications of pregnancy, unless the absences of non-pregnancy employees are overlooked.” Furthermore, the court cited Troupe v. May Dept. Stores, stating that the PDA “requires the employer to ignore an employee’s pregnancy, but . . . not her absence from work, unless the employer overlooks the comparable absences or nonpregnant employees.” Although the court did not decide the case based upon gender discrimination under Title VII for lactating mothers at work, the court did imply that had the facts of the case been different, there was a potential gender discrimination claim present.

V. THE PATIENT PROTECTION AND AFFORDABLE CARE ACT APPROACHES THE ACCOMMODATIONS ISSUE

While the Houston Funding II decision seemed to pave the way for more courts to determine that lactation and the expression of breast milk is a protected medical condition under the PDA, it also left a gap to fill—namely, when are employers required to provide accommodations to employees in order to pump breast milk at work? The Patient Protection and Affordable Care Act (PPACA) provides a starting point to fill this gap. There are, of course, still some limitations that Congress should address in order to fully protect women who wish to express breast milk in the workplace.

Congress passed the PPACA in 2010. Section 4207 of the PPACA contains a provision that amends the Fair Labor Standards Act (FLSA) and provides protections for some women to lactate and express

234. Id. at 1045.
235. Id. (quoting Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 583 (7th Cir. 2000)) (internal quotation marks omitted).
236. Id. (quoting Troupe v. May Dept. Stores Co., 20 F.3d 734, 738 (7th Cir. 1994)) (internal quotation marks omitted).
237. Id. at 1046.
milk at work. Congress, through this section, protects non-exempt workingwomen who wish to express milk at work for children under the age of one. While this is a step in the right direction, this creates protections only for a small group of people, i.e., lactating, low-income mothers, rather than establishing antidiscrimination and accommodation standards for all employees with caregiving or other personal needs.

In December 2010, the Department of Labor (DOL) provided a summary of public comments regarding the PPACA and the recent amendment to the FLSA. Under the FLSA, employers are required to “provide reasonable break time and place for nursing mothers to express breast milk for one year after their child’s birth.” More specifically, the PPACA amended the FLSA to require employers to provide a “reasonable break time for an employee to express breast milk” with the additional caveat that the “employer shall not be required to compensate an employee receiving reasonable break time.” Furthermore, the employer must provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public” for working women to express breast milk in.

With respect to the reasonable break time, employers are asked to consider the “frequency and number of breaks a nursing mother might need and the length of time she will need to express breast milk.” The DOL points out that this determination is dependent upon many factors related to the child, including: the age of the baby; the number of feedings in the baby’s normal schedule; and whether the baby is eating solid food. Additionally, the DOL recognizes that a mother continues to produce milk constantly, and if a mother is not able to directly nurse her child, her milk supply may drop, which, in turn, may affect her ability to continue to nurse her child. In accordance with all of these considerations, the DOL proposed that nursing mothers typically need

240. Id. at 330.
241. Id.
243. Id. at 80074.
244. Id.
245. Id.
246. Id. at 80075.
248. Id.
two to three breaks per eight-hour shift. With respect to the length of
time needed to express milk, this also varies, although typically pumping
takes between 15 and 20 minutes.

The DOL next addressed the space, other than a bathroom, that
employers are required to provide to breastfeeding mothers. The DOL
states that its initial interpretation for this requirement is that it “requires
employers where practicable to make a room (either private or with
partitions for use by multiple nursing employees) available for use by
employees taking breaks to express breast milk. However, the DOL
does state that the employer is not obligated to maintain a “permanent,
dedicated space for nursing mothers” so “A space temporarily created or
converted into a space for expressing milk or made available when
needed by a nursing mother is sufficient provided that the space is
shielded from view, and free from intrusion from coworkers and the
public.”

Although this provision in the PPACA provides more protection for
women who wish to express breast milk at work, there are some
limitations. The break time and space accommodations are required for
employers with more than fifty employees, but employers with fewer
than fifty employees do not have to provide accommodations or break
time as long as they can demonstrate undue hardship. Also, there are
eligibility limitations based upon class and type of breastfeeding. With
respect to class, eligibility is limited to non-exempt employees—those
employees who are not exempt from the FLSA’s overtime protections
based upon salary, position, or other factors. Usually, non-exempt
workers are hourly employees under a certain weekly income. This
means that almost 12 million otherwise eligible salaried women do not
qualify for protection under the PPACA’s breastfeeding accommodations provisions. Finally, the PPACA only protects

249. Id.
250. Id.
251. Id. at 80075-76.
252. Department of Labor, Reasonable Break Time for Nursing Mothers, 75 F.R. 80075-76
(Dec. 21, 2010).
253. Karin & Runge, supra note 239, at 347. The PPACA uses a “hybrid model” combining
the approaches of other federal employment and discrimination laws such as Title VII, the ADA,
and the FMLA. Id. at 350. The PPACA is applicable to all employers no matter how many
employees work at a particular site, however, the undue hardship defense is only available to
employers with fewer than fifty employees. Id. at 350-51.
254. Id. at 348.
255. Id.
256. Id. at 348-49.
257. Id. at 349.
employees wishing to *express* breast milk at work.\textsuperscript{258} Strictly speaking, this means that the PPACA only protects women who are expressing breast milk at work for later use; it does not protect women who wish to bring their infant into work to have her breastfeed by direct attachment to her mother.\textsuperscript{259}

While this revision to the FLSA in the PPACA is a step in the right direction to further protect women who wish to express breast milk at work, there are still many women who are not protected. The gap remains between protecting women who wish to lactate and express breast milk at work through required accommodations and the current status of the law.

**VI. CONCLUSION**

Mothers breastfeeding their infants provide a multitude of benefits for baby, mother, and society. When employed mothers must return to the workforce, sometimes a choice must be made between continuing to breastfeed and returning to work. This is why lactation and the expression of breast milk at work should have legal protections—in order to continue to provide the breastfeeding benefits to mom, baby, and society. Although protection for breastfeeding has its limitations under the United States Constitution, the Americans with Disabilities Act, the Family Medical Leave Act, and state laws, as a nation we are slowly moving in the right direction. In order to fully protect mothers and their infants, there must be both protections against discrimination related to lactation and the expression of breast milk in the workplace as well as requirements for accommodations for lactating mothers. When these two protections properly overlap, women can feel comfortable, protected, and ready to return to work knowing that their children will still get the benefits of breastfeeding.

The decision in *Houston Funding II* provided persuasive legal authority for additional circuit courts, as well as district courts, to declare that lactation is a condition related to pregnancy and should be protected against sexual discrimination in the workplace. These decisions to protect against discrimination, along with the accommodation provisions in the PPACA, provide a good foundation for growth. However, a gap still remains. There are still circuits where lactation is not considered a condition related to pregnancy, and there are employees who are exempt from the PPACA accommodations. This is

\textsuperscript{258} Karin & Runge, *supra* note 239 at 350.

\textsuperscript{259} *Id.*
where growth needs to occur—to fill in the gaps that remain and provide protection for every woman who wishes to pump breast milk at work in order to provide her child, herself, and our society with the wide array of benefits that breastfeeding provides.