

When Private Goes Public: Legal Protection for Women Who Breastfeed in Public and at Work

Danielle M. Shelton*

I was shocked and appalled to read that it is not only permissible for women to breastfeed in public in the State of New York, but now also punishable as a crime for anyone interfering in this act.

. . .

Breasts in public view, thong bathing suits with buttocks in full view; what's next, unisex washrooms? Or will it be OK to pull off the shoulder of a major highway and urinate in public view too? To me, this is just another sad example of the declining decency and public morality in America.¹

The promotion of family values and infant health demand putting an end to the vicious cycle of embarrassment and ignorance that constricts women and men alike in the subject of breast feeding and represents hostility to mothers and babies in our culture based on archaic and outdated moral taboos. Any genuine promotion of family values should encourage public acceptance of this most basic act of nurture between mother and baby, and no mother should be made to feel incriminated or socially ostracized for breast feeding her baby.²

Unfortunately for many breastfeeding women, the first opinion expressed above is all too common and the latter all too rare. Breastfeeding is perceived by many as dirty, sexual, embarrassing, and generally something that should be kept behind closed doors. It is something about which women should be cautious and

* Law Clerk to the Honorable Ed Carnes, Eleventh Circuit Court of Appeals. B.A., Augustana College, *summa cum laude*; J.D., Harvard University, *magna cum laude*. I began this article as a course paper for Professor Martha Field's Reproductive Rights Seminar. My sincere thanks to the seminar participants and other friends and family members too numerous to mention specifically.

1. Robert F. Holas, *Declining Decency*, CHL. TRIB., May 29, 1994, at C2 (letter to the editor).

2. N.Y. CIV. RIGHTS LAW § 79-e (Consol. 1994) (Legislative Findings). The New York legislature went on to find that "the breast feeding of a baby is an important and basic act of nature which must be encouraged in the interests of maternal and child health and family values." *Id.*

ashamed. But such has not always been the case, and it need not continue.

When talking with my great-grandmother, she seemed surprised that breastfeeding is controversial at all, let alone an issue with legal implications. She recalled the days of her childhood when women would unbutton their blouses and breastfeed their babies during church. No one thought much about it. Breastfeeding was like burping a baby—just something a person did, whether in public or private. My great-grandmother is not alone in her surprise that breastfeeding raises legal issues. Upon learning that I was writing this article, a fellow lawyer gave me a puzzled look and then asked, quite sincerely, what breastfeeding has to do with the law.

While many people may be unaware of the legal issues surrounding breastfeeding, most breastfeeding women are not. At the recent United Nations Conference on Women, delegates from around the world said that "restrictive work arrangements, social stigma and false information are denying [women] a choice in how to feed their babies."³ Breastfeeding women wonder whether they will be harassed, evicted, or even arrested for feeding their babies in public. Moreover, employed breastfeeding women worry about whether and how they can breastfeed or breastpump⁴ at work. Although the legal issues facing breastfeeding women are not altogether new, they are increasingly important as more women attempt to breastfeed in public and at work.⁵ Statistics compiled by the United States Bureau of Labor statistics show that over 50% of mothers with children under the age of three are working outside the home.⁶ Among mothers who work full-time, more than half begin breastfeeding their newborns in the hospital, yet only 12.5% are still nursing five to six months later compared to 22.7% of non-working mothers.⁷ When breastfeeding women leave their homes and attempt to integrate breastfeeding into their public and professional lives, they face barriers to breastfeeding that require legal protection.

3. Marcus Eliason, *Rain Muddies Women's Gathering*, MONTGOMERY ADVERTISER, Sept. 2, 1995, at 11A.

4. "Breastpumping" is the term used to describe the manual or mechanical expression of milk from a woman's breast into a container. The milk usually is stored and later fed to the baby from a bottle.

5. Telephone Interview with Mary Lofton, La Leche League International (Mar. 15, 1994).

6. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 241 (1989).

7. Pamela Mendels, *Lunch Time for Breast-Fed Babies*, NEWSDAY, June 5, 1994 at A74 (citing statistics reported by Ross Laboratories).

This article examines the discrimination against breastfeeding in public and at work and discusses actual and potential legislative and judicial responses. This article urges that citizens, legislatures, and courts gain greater awareness of the barriers that breastfeeding women face and work to eliminate these barriers. Part I discusses the various types of discrimination against breastfeeding that women regularly encounter in public and at work. Part II discusses recent state laws addressing public breastfeeding and other potential sources for relief under state law. Part III discusses federal support for the right to breastfeed, including the Fourteenth Amendment, and Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act (PDA). Finally, the article concludes that the lack of clear protection for the right to breastfeed under both state and federal law leaves many women vulnerable to continued harassment and discrimination. Until a clear and feasible policy protecting breastfeeding and breastpumping is established, many women may be forced to choose unnecessarily between their jobs, their public lives, and the well-being of their children.

I. Discrimination Against Breastfeeding

Discrimination against breastfeeding is a reality that shapes the daily lives of many women and requires them to make difficult choices about their own well-being as well as that of their children. It seems no breastfeeding woman is immune from potential attacks by employers, police officers, quasi-public property owners, other citizens, and security guards. As plentiful as the incidents of discrimination are the reasons behind the hostility to breastfeeding. Indeed, part of the difficulty in addressing this problem is simply determining its source.

A. Discrimination Illustrated

Examples of discrimination against breastfeeding women abound. In Florida, a security guard instructed a woman to leave a shopping mall because she breastfed her infant in the food court.⁸ Similarly, the manager informed a diner at the upscale Beverly Rodeo Hotel that she could not nurse her son in the dining area.⁹ An-

8. Barri Bronston, *The Feeding Frenzy: Nursing Mothers Struggle to Feed Their Babies in Public, Despite Frequent Disapproval*, NEW ORLEANS TIMES-PICAYUNE, June 27, 1994, at D1.

9. Christine A. Littleton, *Restructuring Sexual Equality*, 75 CAL. L. REV. 1279, 1310 (1987) (discussing *Kaufman v. Beverly Rodeo Hotel*, No. C494133 (Cal. Super. Ct. Santa Monica, filed Apr. 12, 1984)). Littleton imagines a dialogue between the woman and the manager in which the woman asks for "equality" and the manager

other woman was "banished from" a public swimming pool because she refused to stay in the locker room while breastfeeding.¹⁰

Discrimination against breastfeeding or breastpumping in the workplace takes a similar form.¹¹ An attorney with a mid-sized Manhattan law firm, who pumped breastmilk for her infant several times a day in her office, was called into a senior partner's office and told to wean her child. He said at her billing rate the breastmilk cost about \$10 an ounce and the law firm could not afford it.¹² In the public sector, a United States postal employee was prohibited from pumping breastmilk during her breaks in the first aid room. She was told that it was not the policy of the post office "to allow federal facilities to be used for draining breast milk."¹³

Such instances of discrimination against breastfeeding have far-reaching and socially detrimental effects. Working women who might otherwise choose to breastfeed their children may choose not to do so, fearing intolerance or simply embarrassment.¹⁴ Some wo-

replies, "Yes, let's have equality. We don't allow men to bare their breasts in the dining room, so we can't let you do it either." The dialogue continues, with each exchange revealing a new, yet equally frustrating, rationalization for the manager's sex discrimination.

10. Elizabeth N. Baldwin & Kenneth A. Friedman, *Breastfeeding Legislation in the United States*, NEW BEGINNINGS, Nov.-Dec. 1994, at 164. In fact, the city went on to enact an ordinance forbidding breastfeeding at the pool. *Id.*

11. Although this article focuses on discrimination against breastfeeding and theories of legal protection, it is worth noting that some employers have developed "infant nursing areas" in their workplaces. The areas allow breastfeeding mothers to breastpump or nurse their babies during breaks. The list of employers who have developed nursing areas includes AT&T, Texas Instruments, New York Life Insurance Company, and Goldman Sachs & Company. See Pamela Mendels, *Making Moms Feel At Home: Employers Find Breast-feeding Rooms Are Good Business*, DALLAS MORNING NEWS, June 24, 1994, at 1C.

12. Kathleen Sylvester, *How Firms Cope With Motherhood: Examining the Options*, NAT'L L.J., Nov. 7, 1983, at 1, 28. One suspects that the attorney, not the firm, was paying the price of breastpumping through longer work hours.

13. Judy Mann, *Nursing Mother's Story Has Yet Another Chapter*, WASH. POST, July 9, 1980, at C1. Fortunately, the woman's neighbor knew someone at the postal service and discovered that no such policy existed. *Id.* The woman then was allowed to use the first aid station. A media relations officer for the postal service explained, "It was a problem about understanding this was not going to go on forever, that it was something that would be a convenience for a certain amount of time." *Id.*

14. There are numerous reports of difficulty and embarrassment surrounding attempts to find a place to breastpump at work. See, e.g., Mendels, *supra* note 7 (reporting that a legal secretary considered weaning her son because "continued nursing meant embarrassing visits to the ladies room." Her new employer provided a special nursing area at work, however, allowing her to continue breastfeeding.); Shelley D. Coolidge, *Sanuita Program Promotes Breast-Feeding by Mothers*, CHRISTIAN SCI. MONITOR, Mar. 1, 1994, at 9 ("Many women stop breast-feeding after they return to work . . . Others continue, but never inform their supervisors for fear of being reprimanded or fired."); Patrice Wendling, *Nursing Mothers Go Corporate*, CAPITAL TIMES, Sept. 7, 1995, at 3F ("I began to think about the newsroom's own women's restroom, located within earshot of the generally all-male city desk and

men may feel pressured to leave their jobs in order to raise their children in the manner they desire. Similarly, many children may be denied the benefits of breastmilk.¹⁵ Further, many valuable female employees will struggle unnecessarily in attempting to breastfeed or breastpump in a hostile workplace.

One need only look to Norway, where women are allowed two hours daily to breastfeed at work, to observe the positive impact that employer cooperation has on breastfeeding rates. Ninety-nine percent of mothers are still breastfeeding after six weeks, in contrast to only forty percent in England and twelve percent in Northern Ireland, where no such policies are in place.¹⁶ Despite widespread agreement among medical professionals that breastfeeding, when possible, is the best form of nutrition for infants, the rate of breastfeeding in this country is low. Only fifty-five percent of new mothers nationwide ever try breastfeeding. Only twenty percent breastfeed for six months.¹⁷ Undoubtedly the failure to support and accommodate this vital process in public and the workplace contributes to the problem.

B. Sources of Intolerance

The reasons for discrimination against breastfeeding are quite varied. One argument against breastfeeding at work, and particularly in public, is that breasts and breastfeeding are inherently sexual. As one breastfeeding advocate noted, "Our society is far more at home with the idea of sexy breasts than functional ones."¹⁸

Similar to the criticism that public breastfeeding is "sexual" is the complaint that breastfeeding is "embarrassing, unnecessary,

without a stitch of privacy or even a bench to sit on. And how those mustard yellow walls and stark bathroom stalls looked less than inviting on my first day back to work as a breast-feeding mom/reporter.").

15. See *infra* notes 29-36 and accompanying text (discussing the health benefits of breastfeeding to both mother and child).

16. Judy Jones, *Formula To Take Babies Off Breast*, OBSERVER (London), Apr. 9, 1995, at 9; Dinah Hall, *The Campaign for Real Milk*, INDEPENDENT (London), May 15, 1994, at 60.

17. Ross Laboratories, *Ross Mothers Survey: Breast-Feeding Rates Increase for Fourth Consecutive Year* (June 1995) (unpublished press release, on file with the Law and Inequality Journal).

18. Reena N. Glazer, *Women's Body Image and the Law*, 43 DUKE L.J. 113, 138 n.151 (1993) (quoting trial transcript from a case involving women who publicly exposed their breasts in secluded area of park in protest of state law which criminalizes women, but not men, exposing their chests in public). The letter to the editor excerpted at the beginning of this article exemplifies this notion—the writer cited public breastfeeding as "another sad example of the declining decency and public morality in America." Holas, *supra* note 1, at C2.

disgusting, a form of exhibitionism or attention-seeking."¹⁹ An attorney with whom I worked seemed embarrassed to learn I had been pumping breastmilk when he tried to walk into my locked office. Red-faced, he told me he was sorry and that we should forget *it* ever happened.

A significant amount of hostility toward public breastfeeding stems from the belief that breastfeeding is trivial and mundane. Rather than viewing breastfeeding as a symbol of our country's moral downfall, some think it is simply unimportant and not worthy of legal protection. Unfortunately, many of those with the ability to shape policies and influence change—employers, judges, security guards, restaurant owners, and voters—hold this view. For example, one law review author described as "frivolous" a woman's lawsuit against a city that had prevented her from breastfeeding by a public wading pool.²⁰ The author compared the lawsuit to one in which a man sued the devil for causing his downfall and to another in which a prisoner sued a sheriff for letting him escape.²¹ Similarly, a federal district judge dismissed as "frivolous" a public teacher's claim regarding the right to breastfeed over her lunch hour and awarded the other side attorneys' fees.²² In another situation, a newspaper editorial criticized the state legislature for considering a pro-breastfeeding statute and suggested moving on to more "pressing topics."²³

Breastfeeding is not trivial. It involves an intricate process of supply and demand which necessitates breastfeeding or pumping at regular intervals. Breastmilk is produced and maintained by the baby's nursing, which sends a signal to the mother's brain to increase the milk supply.²⁴ Not surprisingly, the physical ties of breastfeeding also cultivate strong psychological bonds between mother and child.²⁵ In addition, breastmilk is widely recognized as

19. Peter Pallot, *Breastfeeding Women Are Told To Leave*, DAILY TELEGRAPH (London), Nov. 6, 1993, at 6.

20. Anne Proffitt Dupre, Note, *Yost v. Torok and Abusive Litigation: A New Tort To Solve an Old Problem*, 21 GA. L. REV. 429, 430-31 n.7 (1986).

21. *Id.*

22. *Dike v. School Bd.*, 650 F.2d 783, 783 (5th Cir. 1981). The case was reversed and remanded on appeal. See *infra* Part III.A.

23. *Breast-Feeding Mothers: Don't Complicate Matters*, VIRGINIAN-PILOT, Feb. 13, 1994, at C4.

24. DIANE MASON & DIANE INGERSOLL, *BREASTFEEDING AND THE WORKING MOTHER* 25 (1986).

25. Some pro-breastfeeding advocates take on an almost religious zealotry. One pro-breastfeeding group member said that she thinks everyone should breastfeed if they physically can and another woman said that when she sees a woman bottle feeding her baby she thinks she and that woman "don't have as much in common." 20/20: *The Pressure to Breastfeed* (ABC television broadcast, Mar. 20, 1995).

the ideal food for infants.²⁶ It provides complete nutrition until the baby is six months old, helps the infant's health by reducing the chances of contracting ear and respiratory infections, and reduces the child's allergic tendencies.²⁷ Studies also show that breastfeeding may reduce a mother's chances of developing breast cancer and help her return to her pre-pregnancy shape.²⁸

In fact, the benefits of breastfeeding for both mother and child have prompted various government agencies to sponsor programs encouraging new mothers to breastfeed.²⁹ For example, the Breastfeeding Promotion Consortium, formed by the United States Department of Agriculture (the USDA) and the American Academy of Pediatrics, meets twice yearly to discuss methods of promoting breastfeeding.³⁰ In 1989, a federal act allotted \$8 million to state Supplemental Food Programs for Women, Infants, and Children (commonly referred to as WIC programs) to spend on the promotion of breastfeeding.³¹ The USDA, which administers WIC, stated that its promotion of breastfeeding is not simply to save money otherwise spent on infant formula; rather, the USDA believes breastfeeding provides significant health benefits to infants.³²

The health benefits of breastfeeding are also widely recognized in other countries, where various pro-breastfeeding measures have been taken. In the past year, both Britain and China have issued regulations severely limiting advertising by infant formula companies.³³ The countries hope that absent such advertising new mothers will look to the breast before the bottle. In Canada, the government is promoting breastfeeding through a \$450,000 national advertising campaign.³⁴ The campaign's main television advertisement shows a woman breastfeeding her baby at a mall

26. Nancy B. Brent et al., *Breast-feeding In a Low-Income Population: Program to Increase Incidence and Duration*, 149 ARCHIVES PEDIATRICS & ADOLESCENT MED., 798, 798 (1995); Mark Momjian, *Winning the Weaning War: Breastfeeding as a Factor In Child Custody Litigation*, 8 AM. J. FAM. L. 135, 135 (1994).

27. Terry Gilbert, *The Case for Breastfeeding: Proponent Says Women Denied Empowerment*, CALGARY HERALD, Nov. 29, 1991, at D6.

28. P.A. Newcomb, *Lactation and a Reduced Risk of Premenopausal Breast Cancer*, 330 N. ENG. J. MED. 81 (1994).

29. See, e.g., Testimony of William Ludwig, Administrator, Department of Agriculture, before Senate Appropriations Committee, FDCH Congressional Testimony, May 10, 1995; FLA. STAT. ANN. § 383.011 (West 1993).

30. Virginia Bearder, *WIC: America's Best Kept Secret*, SPECIAL DELIVERY, Dec. 22, 1994, at 4.

31. *Id.* (referring to the Child Nutrition and WIC Reauthorization Act).

32. *Id.*

33. Hall, *supra* note 16, at 60; *China Bans Ads for Infant Formula*, PHOENIX GAZETTE, July 4, 1995, at A10.

34. Laurie Monsebraaten, *Ads To Promote Breast-Feeding*, TORONTO STAR, Sept. 10, 1994, at D8.

and asks, "What's wrong with this picture?" The text replies, "Nothing."³⁵ According to a Canadian government spokesperson, the health benefits of increased breastfeeding will greatly outweigh the campaign costs.³⁶

Besides the criticisms of breastfeeding as both sexual and trivial—a peculiar combination—both breastfeeding and babies are viewed as unprofessional. Babies simply do not fit the professional image. As such, the workplace is neither inclined nor equipped to meet the needs of breastfeeding and breastpumping employees. Thus, an employer may be hostile to the breastfeeding employee's need for more flexible and frequent breaks as well as a private area to nurse or pump breastmilk.³⁷

II. State Legislative Protection for Breastfeeding

Fortunately, growing public awareness of discrimination against breastfeeding has resulted in more options for women seeking relief in state courts. A few states have enacted statutes that explicitly address and protect breastfeeding. Although most states have not yet taken this step, prevalent state anti-discrimination laws provide another potential source of legal protection for breastfeeding women.

A. *Express Statutory Protection for Breastfeeding*

A few states, most notably Florida, North Carolina, Virginia and New York, have recently enacted laws which either affirmatively protect a woman's right to breastfeed, or decriminalize breastfeeding.³⁸ Several other state legislatures have considered such laws, including Arizona,³⁹ California,⁴⁰ Illinois,⁴¹ New Jersey⁴² and Ohio.⁴³ Pro-breastfeeding laws take three basic forms. Such statutes may: (1) specifically exempt breastfeeding from public nudity and other criminal statutes; (2) provide mothers

35. *Id.*

36. *Id.*

37. See, e.g., Judy Mann, *Nursing Mother's Story Has Yet Another Chapter*, WASH. POST, July 9, 1980, at C1.

38. FLA. STAT. ANN. §§ 800.02-.04 (West 1992); N.Y. CIV. RIGHTS LAW § 79-e (Consol. 1994); N.Y. PENAL LAW § 245.01 (Consol. 1994); N.C. GEN. STAT., § 14-190.9 (1994); VA. CODE ANN. § 18.2-387 (Michie 1995).

39. S. 1510, 41st Leg., 2d Reg. Sess. (Ariz. 1994) (introduced Feb. 8, 1994).

40. Assembly 157, Reg. Sess. (Cal. 1995) (introduced Jan. 18, 1995).

41. S. 190, 89th Gen. Assembly, Reg. Sess., 1995 Ill. Laws 59.

42. Assembly 2009, 206th Leg., 1st Reg. Sess. (N.J. 1994) (introduced Mar. 29, 1993).

43. S. 342, 120th Gen. Assembly, Reg. Sess. (Ohio 1993) (introduced Aug. 4, 1994).

with the right to breastfeed wherever mothers and babies are otherwise authorized to be; or (3) protect the right to breastfeed through civil rights remedies.

Almost as important as which of these legislative approaches a state chooses to take, however, is the choice of language and terms employed in the statute itself. Some statutes refer to the breastfeeding of "infants" or "babies" rather than "children," a distinction that may be critical. Elizabeth Baldwin, legal director of the La Leche League,⁴⁴ noted that the choice to use the word "babies" in the Florida statute was a conscious one. When she asked the then-bill's sponsor what his response to inquiries about nursing *children* would be, he simply stated that children are not "covered."⁴⁵ The statute, however, does not define the term "babies," thus it is unclear at what age a baby becomes a child.⁴⁶

Another distinction among the statutes is the use of the word "mother" rather than "women." It is not difficult to imagine scenarios, such as the use of a wet nurse, in which the term "mother" might be underinclusive and restrict a statute's scope. Interestingly, none of the statutes limit their scope to "discreet" or "non-flamboyant" breastfeeding. For example, the North Carolina statute says that a woman may breastfeed "irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breast feeding."⁴⁷

The statute enacted in Virginia is an example of the first approach—it makes breastfeeding noncriminal. It amends the state's criminal indecent exposure law to specifically exempt breastfeeding.⁴⁸ The amendment states that "[n]o person shall be deemed to be in violation of this section for breastfeeding a child in any public place."⁴⁹ Some of the amendment's detractors argued that the

44. The La Leche League is an international non-profit advocacy group which offers information, education and support to mothers who want to breastfeed their babies. MASON & INGERSOLL, *supra* note 24, at 28.

45. Telephone Interview with Elizabeth Baldwin, La Leche League International (Mar. 15, 1994). See also La Leche League International, Breastfeeding Rights Packet (1986) (discussing American culture's negativism toward breastfeeding beyond age one) (on file with the *Law and Inequality Journal*).

46. Specifically, the Florida statute, which exempts breastfeeding from misdemeanor prosecution as conduct constituting an "unnatural or lascivious act" states simply that "a mother's breast feeding of her *baby* does not under any circumstances violate this section." FLA. STAT. § 800.02 (1994) (emphasis added).

47. N.C. GEN. STAT. § 14-190.9 (1994). Even so, the manner in which a woman breastfeeds seems relevant at some level. It certainly affects whether people even notice her breastfeeding.

48. VA. CODE ANN. § 18.2-387 (Michie 1994). See also 1994 MICH. PUB. ACTS 313-14 (specifically excluding breastfeeding from the definition of "public nudity" for purposes of city and village charters, respectively).

49. *Id.*

amendment was unnecessary. First, they argued that breastfeeding was not "an obscene display or exposure," and thus would not fall under the statute.⁵⁰ Second, even if breastfeeding technically would fall within the scope of the indecent exposure statute, the statute's application to the typical breastfeeding woman probably would be struck down as unconstitutional.⁵¹ Although both of these arguments may have merit, the amendment still serves the important purpose of changing public perception and making breastfeeding women feel more secure.

The Florida statute, enacted in February of 1993, was the first state law providing protection for public breastfeeding. It is an example of both the first and second types of statutes outlined above—it affirmatively protects a mother's right to breastfeed and also makes breastfeeding noncriminal. The bill was introduced by a Republican legislator who had read about the harassment of a breastfeeding mother by a mall security guard. A self-described "traditionalist" on family values, the representative described public breastfeeding as "a family values issue if there ever was one."⁵² The new law states that "[a] mother may breastfeed her baby in any location, public or private, where the mother is otherwise authorized to be, irrespective of whether the nipple of the mother's breast is covered during or incidental to the breast feeding."⁵³ The bill also amended the state's indecent exposure, lewd and lascivious behavior and obscenity statutes to exempt breastfeeding mothers.⁵⁴

Similar to the Florida laws, North Carolina's pro-breastfeeding statute gives women the right to breastfeed and decriminalizes breastfeeding.⁵⁵ Both the Florida and North Carolina statutes offer potentially broad protection to breastfeeding mothers. Not only does a woman have the right to breastfeed her baby in public, she can do so *wherever* she and her baby are otherwise authorized to be. For example, the North Carolina statute provides that "a woman may breast feed in any public or private location where she is otherwise authorized to be, irrespective of whether the nipple of the

50. *But see* Pallot, *supra* note 19, at 6 (discussing how some women find breastfeeding "embarrassing, unnecessary," or "disgusting").

51. Constitutional protection of the right to breastfeed was announced in *Dike v. School Board*, 650 F.2d 783 (5th Cir. 1981). The *Dike* case, discussed in detail in Part III.A, may prevent the application of indecent exposure laws to breastfeeding women.

52. Larry Rohter, *Florida Approves Measure on Right to Breast-Feed in Public*, N.Y. TIMES, Mar. 4, 1993, at A18.

53. FLA. STAT. § 383.015(1) (1994) (originally introduced as H. B. 231 (Fla. 1993), amending FLA. STAT. §§ 383.015, 800.02, 800.03, 800.04, 847.001).

54. *See* FLA. STAT. §§ 800.02-.04, 847.001 (1994).

55. N.C. GEN. STAT. § 14-190.9b (1994).

mother's breast is uncovered . . ."⁵⁶ Thus, a woman presumably can breastfeed in a variety of quasi-public places, such as restaurants, food courts, and even museums. The Florida and North Carolina statutes, however, probably would not protect the woman who wishes to breastfeed or breastpump at work. First, the statutes are silent about work and breastpumping. Second, and more importantly, babies generally are not allowed to be at work with their mothers.

The statute enacted in New York is an example of the third approach mentioned above.⁵⁷ As an addition to the state's civil rights law, it protects a woman's right to breastfeed wherever she and her baby are otherwise authorized to be. Most importantly, it provides a remedy. The remedy can be enforced through the Attorney General, the Division of Human Rights, or a private civil suit.⁵⁸ The availability of a remedy is important in deterring much of the informal harassment surrounding breastfeeding. Under the New York law, the breastfeeding woman who is asked to leave a restaurant can say more than just, "I have a right to breastfeed here, you know." Indeed she can threaten or even bring suit. In contrast, the Florida and North Carolina statutes offer breastfeeding women no legal recourse against those who discriminate against them, despite the fact that breastfeeding is "protected."

As with the other statutes, however, the New York statute probably does not apply to breastfeeding or pumping at a private workplace. The legislative history of the act suggests that the legislature was primarily concerned about breastfeeding in public or quasi-public (e.g., malls) places.⁵⁹ In order for the law to apply to private employers, a clear legislative intent would have to be found. Even so, the New York law may have some significance for public employees, in spirit if not in actual application. The preamble to the law states the legislature's clear intent to encourage breastfeeding and prevent interference with it. It "declares that the breast feeding of a baby is an important and basic act of nature which must be encouraged in the interests of maternal and child health

56. *Id.*

57. N.Y. CIV. RIGHTS LAW § 79-e (Consol. 1994). The law states, "Notwithstanding any other provision of law, a mother may breast feed her baby in any location, public or private, where the mother is authorized to be, irrespective of whether or not the nipple of the mother's breast is covered during or incidental to the breastfeeding." *Id.*

58. See *Open Breast-Feeding Becomes Legal Right*, N.Y. TIMES, May 19, 1994, at B4, and Correction of May 23, 1994, at A2 (stating that the law gives women the right to file civil suits or to ask the Attorney General or the Division of Human Rights to bring suit on her behalf).

59. See N.Y. CIV. RIGHTS LAW § 79-e (Consol. 1994) (Legislative Findings).

and family values.”⁶⁰ Thus, a breastfeeding public employee arguing for a right to breastfeed at work could point to this strong statement of intent by the legislature.

B. State Antidiscrimination Laws

Although most states have not yet enacted legislation which affirmatively protects breastfeeding, women in these states are not without recourse under state law. Widely promulgated antidiscrimination statutes provide a basis for asserting a violation of a woman's civil rights stemming from discrimination against breastfeeding. The case of *Eaton v. Iowa City*⁶¹ illustrates both the possibilities and pitfalls inherent in state antidiscrimination laws.

Linda Eaton's fight to breastfeed her son received widespread attention. Eaton was a firefighter with the Iowa City Fire Department—an obviously male-dominated workplace. She requested permission to bring her son into the station twice a day so that she could breastfeed him in the women's locker room during her free time. The city denied her request, citing an unwritten fire department policy banning regularly scheduled family visits.⁶² Even so, Eaton breastfed her baby at the station. When she was again suspended for violating fire department policy Eaton filed a civil rights suit against the city and obtained a temporary restraining order which allowed her to breastfeed until her suit was decided.⁶³

Eaton's civil rights suit claimed that the City's actions violated her civil right to privacy, as protected under a state statute. Like Dike, Eaton relied on *Griswold v. Connecticut*⁶⁴ and *Prince v. Massachusetts*,⁶⁵ which established a constitutional right to marital privacy and a right to guide and direct one's children, respectively. The Iowa Civil Rights Commission unanimously ruled that the City discriminated against Eaton and awarded her compensatory payment, back pay and attorneys' fees. The Commission rejected the City's argument that the City should not have “to make whatever accommodations an employee would feel necessary” for breastfeeding.”⁶⁶ The Commission also found the City's claim of “business necessity” to be without merit. For example, although the City

60. S. 39999-A, Reg. Sess. (N.Y. 1994).

61. Equity No. 44570 (Iowa Dist. Ct., Johnson County, dismissed Oct. 3, 1980).

62. MASON & INGERSOLL, *supra* note 24, at 180-81. Apparently, the station had an unwritten rule forbidding “visitors on the premises during a firefighter's duty shift.” *Id.*

63. *Id.* at 181.

64. 381 U.S. 479 (1965).

65. 321 U.S. 158 (1944).

66. Jamie Gold, *Against Motherhood?*, WASH. POST, Aug. 8, 1979, at E2.

claimed Eaton would be unable to respond to fires quickly enough, the first time the alarm rang while she was breastfeeding her son, Eaton was the second one on the truck.⁶⁷ The combination of the injunction, the time it took the Commission to hear her claim, and the Commission's favorable ruling allowed Eaton to breastfeed her son at the firehouse until he was seven months old.

Eaton's strategy, however, was not without costs. Although the state Civil Rights Commission was sympathetic to her claims, her co-workers and the city were not. After the breastfeeding litigation ended, Eaton brought suit against the City alleging sexual harassment and discrimination. In retaliation for her breastfeeding suit, she claimed someone cut off the middle fingers of her protective gloves, poured salt into her orange juice, and blackened out her picture.⁶⁸ Due to the continued harassment and the city's refusal to take action,⁶⁹ Eaton resigned from the fire department. Years later, when Eaton's harassment suit was finally decided, the jury found against Eaton, concluding that the pranks had been mere "firehouse horseplay."⁷⁰

III. Federal Theories for a Right to Breastfeed

Clearly, state laws alone do not adequately protect breastfeeding women. As the several instances described in Parts I and II exemplify, breastfeeding women face various forms of discrimination, particularly in the workplace. Potential criminal prosecution for breastfeeding is merely one of the many hurdles that breastfeeding women face. In order to truly establish and guarantee a woman's right to breastfeed in public and elsewhere, legal theories supporting such a right must be developed and asserted by and for women who have suffered this form of harassment and discrimination. Theories based upon the Fourteenth Amendment and Title VII, as amended by the Pregnancy Discrimination Act, are discussed below.

67. Joseph McLellan, *The High Cost of Lunch at the Firehouse: Linda Eaton's Fight to Nurse on the Job*, WASH. POST, May 18, 1979, at C1.

68. MASON & INGERSOLL, *supra* note 24, at 182.

69. *Id.*

70. See *Firefighter's Bias Suit in Iowa Goes to a Jury*, N.Y. TIMES, Feb. 2, 1984, at D22; *Chief Denies Iowa Firemen Were Sexist*, N.Y. TIMES, Jan. 25, 1984, at C8. See also *Ex-Firefighter Loses Her Bias Suit in Iowa*, N.Y. TIMES, Feb. 3, 1984, at A8.

A. *Dike v. School Board: The Fourteenth Amendment*

The Due Process Clause⁷¹ provides the strongest argument for a right to breastfeed. In the most significant breastfeeding rights case thus far, *Dike v. School Board*,⁷² the Fifth Circuit held that a public school teacher had a constitutionally protected interest in breastfeeding her child, finding that a woman's right to breastfeed stems from the Ninth and Fourteenth Amendments.⁷³

In this case, school teacher Janice Dike nursed her baby during her lunch break for three months before she was told to stop. At that time, the principal and the school board told her that a school policy prohibited teachers from bringing their children to work. Dike stopped nursing her baby temporarily but had to start again because the baby developed an allergy to formula and refused the bottle, even if it contained expressed breastmilk. Because the Board still refused to let her breastfeed, Dike was compelled to take an unpaid leave of absence.⁷⁴

Dike brought suit against the board, alleging interference with her fundamental right to nurture her child through breastfeeding. She argued that the right to breastfeed is entitled to constitutional protection as part of a larger right to parent. Thus, she relied on cases such as *Wisconsin v. Yoder*,⁷⁵ *Prince v. Massachusetts*,⁷⁶ and *Pierce v. Society of Sisters*⁷⁷ which held that parents have a fundamental right to direct the upbringing of their children.

71. U.S. CONST. amend. XIV, § 1. However, the Equal Protection Clause may provide alternative support for a right to breastfeed. Feminist theorists have made similar proposals in contexts such as pregnancy. See, e.g., Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (arguing that biological difference should be the focal point of equal protection analysis in gender cases). Although courts have not interpreted the clause to protect public breastfeeding, the theory may be tenable. Breastfeeding, like pregnancy, imposes special burdens on women. Only women can breastfeed. Thus, policies which prohibit or otherwise infringe upon breastfeeding exclusively disadvantage women. It seems obvious that discrimination against breastfeeding is discrimination against women. But see *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that a public health insurance scheme that excluded pregnancy benefits did not impermissibly discriminate on the basis of sex); see also *supra* notes 112 and 113 and accompanying text (discussing *Geduldig*).

72. 650 F.2d 783 (5th Cir. 1981).

73. The court noted, however, that a mother's interest in breastfeeding her child must be weighed against the interests of the school. *Id.* at 785.

74. MASON & INGERSOLL, *supra* note 24, at 177.

75. 406 U.S. 205 (1972) (holding that a state law requiring school attendance until age 16 violated both the First and Fourteenth Amendment rights of Amish parents who urged that school conflicted with their ability to raise their children according to their values).

76. 321 U.S. 158, *reh'g denied*, 321 U.S. 804 (1944). In *Prince*, the Court recognized that the primary care of children resides with their parents or guardians, but that parental rights may be subject to limitations by the state. *Id.* at 166.

Dike also cited such cases as *Griswold v. Connecticut*⁷⁸ and *Roe v. Wade*,⁷⁹ which held that a fundamental right to privacy applied to both contraception and abortion, respectively. In sum, Dike argued that breastfeeding fell within the penumbra of constitutional rights,⁸⁰ which cannot be interfered with absent a compelling state interest.

The district court dismissed Dike's complaint as "frivolous" and awarded attorneys' fees to the school board.⁸¹ On appeal, the Fifth Circuit Court of Appeals reversed and remanded deeming breastfeeding "the most elemental form of parental care."⁸² Citing *Griswold*, the court compared breastfeeding to marriage, calling both "intimate to the degree of being sacred."⁸³ The court also relied on the cases mentioned above involving the constitutional right to guide one's children. Interestingly, the court also cited cases which fell under the rubric of equal protection, such as *Zablocki v. Redhail*⁸⁴ and *Skinner v. Oklahoma*.⁸⁵ Emphasizing that breastfeeding is an issue of choice, the court recognized that a "parent may choose to believe that breastfeeding will enhance the child's psychological as well as physical health."⁸⁶

But the fact that the court found breastfeeding to be a protected liberty interest was, as the court said, only the beginning of the constitutional inquiry.⁸⁷ The board's "no teachers' children at school" policy would be permissible if it "furthered sufficiently important state interests and was closely tailored to effectuate only those interests."⁸⁸ It is unclear, however, how "important" the state's interest must be. The court gave examples of the school board's possible interests, such as "avoiding disruption of the edu-

77. 268 U.S. 510 (1925) (striking down state statute requiring public school attendance as an interference with parental rights in directing their children's upbringing).

78. 381 U.S. 479 (1965).

79. 410 U.S. 113 (1973).

80. See, e.g., *Griswold*, 381 U.S. at 485 (1965) (holding that a married couple's access to contraception is constitutionally protected by the penumbra of the "specific guarantees of the Bill of Rights").

81. *Dike*, 650 F.2d at 784.

82. *Id.* at 787.

83. *Id.* (citing *Griswold*, 381 U.S. at 486).

84. 434 U.S. 374 (1978) (requiring strict scrutiny analysis of state law that prevented persons violating child support orders from remarrying).

85. 316 U.S. 535 (1942) (finding statute that required sterilization of habitual criminals but exempted certain crimes to be a violation of the Equal Protection Clause).

86. *Dike*, 650 F.2d at 787 (emphasis added).

87. *Id.*

88. *Id.*

cational process, ensuring that teachers perform their duties without distraction, and avoiding potential liability for accidents."⁸⁹

On remand, the district court ruled in favor of the school board, holding that the board had a compelling interest in restricting teachers' children from school property that could only be achieved through a "no teachers' children at school" policy. The court discussed the board's need for teachers' loyalty and undivided attention as well as legitimate liability concerns. It is difficult to believe that the board's interests are truly "compelling" or the least restrictive alternative. Rather, it seems the circuit court's ambiguous language combined with the district court's view of breastfeeding as trivial⁹⁰ led to more of a "balancing test" than a "strict scrutiny" analysis. That is, the district court weighed the interests of the school district versus those of *Dike*, giving no more weight to the latter.

Before the case could be appealed, the parties settled out of court.⁹¹ *Dike* received back pay and was reinstated. Perhaps the board's settlement proposal indicated its uncertainty that the district court's holding would be upheld on appeal. The unfavorable holding of the district court combined with subsequent settlement, however, leave many questions unanswered. Certainly *Dike* is an important precedent for women in the public⁹² and employment contexts. Beyond that, the scope of the right to breastfeed, when applied to individual cases, is somewhat uncertain. Although several cases have discussed *Dike*, none have significantly clarified the scope of a woman's right to breastfeed.⁹³ A court easily could manipulate the concept of a "compelling" state interest to justify certain restrictions on the manner in which a woman breastfeeds. For example, a state might argue that it has a compelling interest in protecting people's sensibilities against a woman who breastfeeds in a flamboyant and exposing manner.

Because *Dike* leaves many questions unanswered, a woman arguing for a due process right to breastfeed should not rely on it

89. *Id.*

90. The same district court judge heard the case originally and on remand.

91. MASON & INGERSOLL, *supra* note 24, at 179.

92. In the public context, for example, the existence of a fundamental right to breastfeed suggests that the application of an indecent exposure law to a breastfeeding mother would be unconstitutional.

93. See *Barrash v. Bowen*, 846 F.2d 927 (4th Cir. 1988) (holding that public employee's constitutional right to breastfeed does not entitle employee to six months of maternity leave); *Southerland v. Thigpen*, 784 F.2d 713 (5th Cir. 1986) (holding that incarcerated mother had no fundamental interest in breastfeeding which would override the state's competing interests); *Berrios-Berrios v. Thornburg*, 716 F. Supp. 987 (E.D. Ky. 1989) (holding that inmate had fundamental right to breastfeed her baby during regular visits but no right to express and store breastmilk).

alone. Rather, she should emphasize the fundamental rights language of *Dike*, using both the parental prerogative and individual privacy rationales.⁹⁴ She should also point out the high threshold that a state faces in justifying an intrusion on a fundamental right. Specifically, a state must demonstrate a compelling, not simply substantial, state interest as well as show that no less restrictive alternative exists.⁹⁵ Cases such as *Griswold v. Connecticut*,⁹⁶ *Roe v. Wade*,⁹⁷ and *Zablocki v. Redhail*⁹⁸ are helpful here.⁹⁹ In addition, a woman should discuss in detail exactly why breastfeeding is important. A woman should express the sincerity of her belief that breastfeeding is best for her child. She should emphasize that, to her, breastfeeding is an integral part of parenting. Indeed, she should point out that studies show that breastfeeding is beneficial for a child.¹⁰⁰ She must overcome the view that breastfeeding is trivial and persuade the court that breastfeeding is an important and personal childrearing decision.

Due process protection for breastfeeding, though, has several inherent limitations. First, the Due Process Clause only protects individual liberties from *state* interference.¹⁰¹ Private employers and owners of private property, or even quasi-public property, are not affected. Thus, the woman who is prevented from breastfeeding or breastpumping in a nongovernment workplace must find legal protection elsewhere.¹⁰²

Second, due process protection is merely protection from *state interference*. Under this rationale, the state may not unduly interfere with a woman's right to breastfeed, but it is not required to *accommodate* breastfeeding. In the context of birth control and abortion rights, this distinction surfaces with respect to public funding.¹⁰³ That is, Congress may refuse to fund abortion even though the right to seek abortion exists. In the breastfeeding context, the "no interference versus accommodation" debate plays out

94. *Dike*, 650 F.2d at 787.

95. *See id.* (explaining test for justifying impinging on a fundamental right).

96. 381 U.S. 479 (1965).

97. 410 U.S. 113 (1973).

98. 434 U.S. 374 (1978).

99. *See supra* text accompanying notes 75-85 (discussing relevance of cases).

100. Actually, a woman should not have to show that breastfeeding is better for a child, only that it is not harmful. Even so, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), suggests that the court's view of the "wholesomeness" of the parent's wishes goes a long way.

101. *See, e.g., The Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Civil Rights Act cannot constitutionally be imposed on individual actions).

102. Indeed, as discussed earlier, it is unlikely that any state laws would protect a breastfeeding mother's interests vis-a-vis her private employer. *See supra* part II.A.

103. *See Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

in the workplace. A public employer probably does not have to offer a breastfeeding woman extended leave, flexible breaks or a place to pump breastmilk.¹⁰⁴ For example, in rejecting a working woman's claim of a right to breastfeed, the court in *Barrash v. Bowen* stated: "She may have a constitutional right to nurse her baby for six months . . . but the plaintiff here asserts no right to be let alone while she cares for her baby in the manner she thinks best. Her claim is one of entitlement . . ." ¹⁰⁵ Other courts, also, might distinguish the right to breastfeed from accommodation of breastfeeding, especially in a situation requiring significant accommodation.

B. Title VII and the Pregnancy Discrimination Act

Title VII¹⁰⁶ offers some protection for women from sex discrimination.¹⁰⁷ Generally speaking, it extends equal protection analysis to the employment context and provides a remedy to employees harmed by illegal discrimination. Title VII forbids employment discrimination on the basis of race, color, religion, sex, or national origin, by employers of fifteen or more employees, including state and local governments, educational institutions and, most importantly, private employers.¹⁰⁸ Notably, Title VII was amended in 1978 to include employment protection for pregnancy and pregnancy-related conditions; this amendment is commonly referred to as the Pregnancy Discrimination Act (PDA).¹⁰⁹

Typically, Title VII lawsuits are brought by plaintiffs under the disparate treatment or disparate impact theories. Under both theories, the plaintiff must show that an unfair hiring or employment practice exists. These theories are problematic in the context of breastfeeding because breastfeeding women often seek additional

104. Notably, a public employer may have to "accommodate" breastfeeding women to the same extent that it accommodates other similarly-situated persons. See *supra* part II.

105. 846 F.2d at 932 (holding that even if employee has right to breastfeed, such right does not entitle her to discretionary leave in order to enable her to breastfeed).

106. 42 U.S.C. § 2000e (1994).

107. The Act provides that:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2003-2(a) (1994).

108. 42 U.S.C. § 2000e (b) (1994).

109. 42 U.S.C. § 2000e (k) (1994).

accommodation, not a level playing field with other non-breastfeeding workers,¹¹⁰ and many employers do not have general practices in place that breastfeeding women could claim should be extended to them. Examples of such practices that might be discriminatory are family visiting policies that exclude infants, or leave policies for family emergencies but not for more routine matters like breastfeeding. Thus, neither the disparate treatment nor the disparate impact theory is a cure-all for employed breastfeeding women. However, both theories offer potential relief for women who can point to specific discriminatory hiring or employment practices.

Breastfeeding women who make claims under Title VII will most likely do so under the Pregnancy Discrimination Act. Congress passed the Act in response to two Supreme Court decisions which held that discrimination on the basis of pregnancy did not constitute sex discrimination.¹¹¹ In the first of these cases, *Geduldig v. Aiello*,¹¹² the Supreme Court held that a state law, which excluded from disability benefits a temporary disability arising from a normal pregnancy, did not violate the Equal Protection Clause.¹¹³ The next similar case to reach the Court was *General Electric Co. v. Gilbert*.¹¹⁴ In this case, the Court held that an employer's disability plan that covered all disabilities except those associated with or arising out of pregnancy was not in violation of Title VII.¹¹⁵ A year after *Gilbert*, in *Nashville Gas Co. v. Satty*,¹¹⁶ the Court considered an employer's policy of requiring that pregnant women take a leave of absence during pregnancy without disa-

110. In some cases, breastfeeding mothers might seek a level playing field with non-breastfeeding workers.

111. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

112. 417 U.S. 484 (1974).

113. To reach this conclusion, the Court compared women on the aggregate to men on the aggregate, and said that there was no evidence that the plan "worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program." 417 U.S. at 496. The Court stated, "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at 496-97.

114. 429 U.S. 125 (1976).

115. In *Gilbert*, the Supreme Court made the same aggregate comparison of women to men as it had in *Geduldig*, and reached the same result. The Court stated:

As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all-inclusive.

429 U.S. at 138-39.

116. 434 U.S. 136 (1977).

bility benefits, and which stripped them of their seniority upon their return to work. The court held the absence of disability benefits to be in conformity with Title VII, but found that stripping returning women of their seniority violated Title VII.¹¹⁷

Despite the fact that the Court had moved slightly closer to finding that at least some forms of pregnancy discrimination constituted sex discrimination in *Satty*, Congress acted to make this connection by passing the Pregnancy Discrimination Act. The Act provides:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in . . . this title shall be interpreted to permit otherwise.¹¹⁸

Because of the passage of the PDA, employers may no longer maintain policies that negatively impact pregnant women relative to other employees, unless the employer can establish a defense of business necessity or show that the policy was part of a bona fide occupational qualification (BFOQ).

The PDA establishes that pregnancy discrimination constitutes sex discrimination; thus, the inquiry for breastfeeding plaintiffs is whether breastfeeding, as a natural extension of pregnancy, is protected as either a "related medical condition," or because the breastfeeding woman is "affected by pregnancy." No case has directly determined whether the PDA protects breastfeeding. However, the closest case on point suggests that it might not. In *Board of School Directors v. Rossetti*,¹¹⁹ the Pennsylvania Supreme Court rejected a public teacher's claim that the school board's refusal to grant her a discretionary extended leave to breastfeed her baby constituted sex discrimination. The state civil rights law¹²⁰ under which the claim was heard essentially mimicked the PDA. The

117. *Id.* at 139-42. The Court stated:

We held in *Gilbert* that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other "because of their differing roles in 'the scheme of human existence,'" . . . But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their significant role.

Id. at 142 (citations omitted).

118. 42 U.S.C. § 2000e (k) (1994).

119. 411 A.2d 486 (Pa. 1979).

120. 42 PA. CONS. STAT. ANN. § 955(a) (Supp. 1995). The Act has been interpreted as proscribing pregnancy-based discrimination as sex discrimination.

court held that breastfeeding is not protected as a condition of pregnancy. The court stated that the female teacher who wanted leave to breastfeed was treated the same as male teachers who requested leave to stay home with an infant. The court saw equality in the fact that teachers of both sexes were given discretionary leave. Notably, *Rossetti's* holding is not binding with regard to a federal court's interpretation of the PDA and it is possible other courts will not follow it.¹²¹

One could argue that, contrary to the court's holding in *Rossetti*, discrimination against breastfeeding is sex discrimination. As the lower court in *Rossetti* pointed out, "leave for breastfeeding purposes under the circumstances of this case is merely a logical and natural extension of [the] concept" that pregnancy discrimination is sex discrimination.¹²² In the strict physical sense, it is unclear how pregnancy and breastfeeding are different. Both are quasi-voluntary conditions.¹²³ Both are exclusively linked to women's bodies. Like pregnancy, breastfeeding is exclusively women's burden and benefit. In fact, distinguishing discrimination against breastfeeding from that against pregnancy may be splitting hairs—for many women breastfeeding is a natural extension of pregnancy.

If the PDA applies to breastfeeding as a "related medical condition," the implications are broad. A breastfeeding employee who demonstrates that her employer discriminated against breastfeeding would be entitled to relief under the PDA. In particular, a breastfeeding or breastpumping woman could bring suit under either a disparate treatment¹²⁴ or disparate impact theory.¹²⁵

Without exploring in detail the elements of disparate treatment and disparate impact claims, it is useful to describe some situations in which breastfeeding women might make these claims. Breastfeeding plaintiffs could make a claim of systemic disparate treatment by pointing to the existence of an announced, formal pol-

121. An unpublished decision of the Sixth Circuit Court of Appeals, on a claim similar to *Rosetti's*, was rejected on similar grounds. *Wallace v. Pyro Mining Co.*, 951 F.2d 351 (6th Cir. 1991).

122. *Board of Sch. Directors v. Rossetti*, 387 A.2d 957, 960 (Pa. Commw. Ct. 1978).

123. I say "quasi-voluntary" because pregnancy arguably is not a "choice" for the woman who becomes pregnant involuntarily (i.e., is raped) and is unable to obtain or chooses not to have an abortion. Similarly, breastfeeding may not be a "choice" for the woman who, after becoming pregnant involuntarily, feels obligated to breastfeed her baby.

124. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

125. *See, e.g., Nashville Gas Co. v. Satty*, 434 U.S. 136, 141-43 (1977) (discussing disparate impact analysis in pregnancy discrimination case); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that Title VII prohibits neutral employment practices which have a discriminatory impact, absent a showing of business necessity).

icy of discrimination. Thus, a breastfeeding employee would have to show that her employer treated breastfeeding or breastpumping employees differently than similarly situated employees. A breastfeeding employee might challenge an employer policy which disallows breastfeeding or breastpumping at work but allows practices with a similar impact on the employee's work relationship. For example, a breastfeeding woman might challenge an employer policy that allows a company lounge to be used for diabetic employees who require insulin injections and rest, but does not allow the lounge to be used for breastfeeding and breastpumping employees. Similarly, a breastfeeding employee might challenge an employer policy which only allowed leave for medical and disability purposes. Such practices probably would constitute sex discrimination under Title VII unless the employer could offer an adequate defense.¹²⁶

A second Title VII theory, disparate impact, applies to employment practices that "are fair in form, but discriminatory in operation."¹²⁷ Thus, unlike disparate treatment analysis, in which the employee must show intentional discrimination, disparate impact analysis requires only a showing of discriminatory impact.¹²⁸ Even so, a disparate impact argument imposes a high burden of proof on the plaintiff and is difficult to satisfy. First, a plaintiff employee must show a statistically significant impact on female employees as a result of an employer practice.¹²⁹ For example, a breastfeeding employee may argue that an employer's refusal to allow half-hour breaks for any purpose has a disparate impact on women: women as a group, because of some women's need to breastfeed and breastpump, are disadvantaged by such a policy. Second, the employer must defend the employment practice by showing a business necessity for it. Because "business necessity" is a somewhat broad defense,¹³⁰ in many situations employers could argue effectively that accommodating breastfeeding employees is too costly or disruptive. Thus, a disparate impact case would probably be difficult to win.

A pro-pregnancy Supreme Court case offers a glimmer of hope for breastfeeding mothers. In *California Federal Savings & Loan Ass'n v. Guerra*,¹³¹ the Court considered whether a California stat-

126. An employer defense of "business necessity" would most likely be successful in a situation where the woman wants to breastfeed her baby at work, rather than breastpump. Under such circumstances, the employer could argue that the breastfeeding disrupts the workplace.

127. *Griggs*, 401 U.S. at 431.

128. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

129. See EEOC Guidelines, 29 C.F.R. § 1607.4D (1995).

130. See, e.g., *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

131. 479 U.S. 272 (1987).

ute that required certain employers to provide female employees an unpaid pregnancy disability leave of up to four months was preempted by Title VII and the PDA. The Court held that the federal statute did not preempt the state law, because the Court found "that Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.'"¹³² Thus, added benefits provided to pregnant women that were not provided to non-pregnant persons were held consistent with the PDA. If this case were extended to breastfeeding, and an employer provided breastfeeding women with certain benefits (like additional break time, or extended leave), such a benefit would not be found to violate Title VII.

Thus, Title VII could provide a legal basis for breastfeeding plaintiffs to challenge discriminatory hiring or employment practices. The PDA would offer protection to breastfeeding women if the link between pregnancy and breastfeeding—both conditions unique to women—were made. No court has yet made this connection, and the paucity of decisions in this area makes it difficult to predict whether such claims would be successful. Yet because breastfeeding is a condition unique to women, use of Title VII is problematic because the statute requires comparison of similarly-situated groups. With regard to both pregnancy and breastfeeding, such comparisons are difficult, if not impossible, to make. Nonetheless, if breastfeeding were accorded the same status as pregnancy under Title VII, this employment statute could be a useful tool for some breastfeeding women.

Conclusion

Discrimination against breastfeeding in public and at work is widespread. It acts as a barrier to women who would otherwise choose to breastfeed at work but are effectively prevented from doing so. Given that breastfeeding is widely acknowledged as beneficial for both babies and their mothers, it is disturbing that the facilitation of this important process meets so much misunderstanding and resistance. Although some states have taken steps by enacting laws which affirmatively protect breastfeeding, or at least exempt it from criminal prosecution, more complete protection is needed. Most current state laws are limited in their reach and fail to provide legal remedies. Thus, other sources of legal protection for breastfeeding must be considered.

132. 479 U.S. at 285 (quoting *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

While several theories under federal and constitutional law are generally promising, women working in the private sector, as well as women who breastfeed in quasi-public places such as restaurants, remain the least protected. The uncertain scope of a federally recognized right to breastfeed and the current approach that requires only that the government not interfere with a woman's right to breastfeed leave women vulnerable. Without better accommodation of breastfeeding and breastpumping in the workplace, the abstract right to breastfeed is of little value. Thus, future legislative action should require "reasonable accommodation" of breastfeeding and provide for civil penalties for interference with a woman who is lawfully breastfeeding. Until the legislatures and courts send clear messages about the right to breastfeed and what it entails, women will be discouraged from breastfeeding in public and at work. As a result, both women and their children will suffer.