University of Tennessee, Knoxville
Trace: Tennessee Research and Creative Exchange

College of Law Faculty Scholarship | Law

September 2011

Breastfeeding in the Workplace: Accommodating Women and Benefiting Employers

Melissa Martin
mmarti31@utk.edu

Follow this and additional works at: http://trace.tennessee.edu/utk_lawpubl

Part of the Law Commons

Recommended Citation
Martin, Melissa, "Breastfeeding in the Workplace: Accommodating Women and Benefiting Employers" (2011). *College of Law Faculty Scholarship.*
http://trace.tennessee.edu/utk_lawpubl/50

This is brought to you for free and open access by the Law at Trace: Tennessee Research and Creative Exchange. It has been accepted for inclusion in College of Law Faculty Scholarship by an authorized administrator of Trace: Tennessee Research and Creative Exchange. For more information, please contact trace@utk.edu.

Breastfeeding in the Workplace: Accommodating Women and Benefiting Employers

Melissa Martin

This article argues that accommodating women by facilitating breastfeeding in the workplace also benefits employers. It states that current legislation designed to protect women's employment rights simply does not cover breastfeeding. It argues for a law protecting women's right to breastfeed at work because it benefits the women, their children, and ultimately the employers.

In American culture, many people consider the sight of a woman's breast offensive or even obscene. This attitude toward female nudity may explain why society often forces breastfeeding mothers to nurse in such ill-suited locations as public restrooms. While the public claims to see great value in breastfeeding, there are very few de facto accommodations made for it. A woman is hard-pressed to find somewhere other than a restroom to breastfeed in most malls or grocery stores, for example. There are also very few de jure accommodations. Lack of accommodation is especially true for working women. Currently, there are no federal laws explicitly protecting working women who breastfeed their infants. Very few states have such legislation. Because of the myriad of benefits of breastfeeding, legislators need to enact specific federal laws that ensure women's abilities to express breast milk at work. They should be certain that these laws do not have a disparate impact on women in low-paying occupations.

This paper will discuss the problem of working women who want to breastfeed. It will outline of the benefits of breastfeeding. Then, it will discuss the current state and federal laws indirectly addressing this issue. There will be a summary of the cases that have attempted to apply current laws to women who want legal protection for breastfeeding at work. It will also discuss successful companies who have reaped the benefits of giving protections to breastfeeding employees. Then, I will analyze why the current statutes do not provide adequate protection. I will argue that more expansive legislation is necessary and will analyze this proposition under various feminist theories. I will describe proposed legislation and will outline that legislation's protections for low-

income employees who potentially could be adversely affected by it. Lastly, I will address the potential backlash and negative impact of this legislation.

I. Benefits of Breastfeeding to Mothers, Infants, Employers, and Society

Breastfeeding benefits mothers, infants, employers, and society in general. Mothers benefit greatly from breastfeeding. It helps a mother lose her pregnancy weight and helps her uterus contract to its normal size.[1] Nursing is also a contraceptive that may prevent pregnancy during lactation.[2] Breastfeeding will also save time and money.[3] The mother often bonds with her baby during breastfeeding,[4] and it has been linked to women having fewer urinary tract infections, having a lower risk of osteoporosis and hip fractures, and having a lower risk of breast, ovarian, or cervical cancers.[5]

In addition to mothers, breastfeeding also benefits infants. They benefit primarily from the nutritional value of breast milk.[6] Breast milk contains the best combination of nutrients for brain development, growth, and digestion.[7] Breastfed babies also have fewer illnesses because they receive their mothers' antibodies through breast milk.[8] Breastfeeding also lowers an infant's risk of Sudden Infant Death Syndrome, intestinal disorders, juvenile diabetes, allergies, and pediatric cancers.[9] Studies show that breastfed babies have fewer learning and behavior problems than formula-fed infants.[10] Breastfeeding eliminates the risk that an infant's formula will be contaminated or will

---

[1] Rebecca D. Williams, *Breast-Feeding Best Bet For Babies*, FDA CONSUMER MAGAZINE, Oct. 1995 Issue, *available at* http://www.fda.gov/fdac/features/895_brstfeed.html.
[2] *Id*.
[3] *Id*.
[4] Interview with Wayne Z. Henderson, M.D., Physician, University of Tennessee Medical Center, in Knoxville, Tenn. (Apr. 5, 2006).
[5] NAOMI BAUMSLAG & DIA L. MICHELS, MILK, MONEY, AND MADNESS: THE CULTURE AND POLITICS OF BREASTFEEDING xxviii (Bergin & Garvey 1995).
[6] Williams, *supra* note 1.
[7] *Id*.
[8] *Id*.
[9] Kim Diana Connolly, *The Ecology of Breastfeeding*, 13 SOUTHEASTERN ENVTL. L.J. 157, 158 (2005).
[10] BAUMSLAG & MICHELS, *supra* note 5, at xxviii.

contain potentially hazardous substances.[11] Breastfeeding also provides the baby with human contact that helps the baby bond with his/her mother.[12]

Working women breastfeeding also benefits employers. A 1995 study compared absenteeism rates between mothers who breastfed and mothers who fed their infants formula.[13] That study showed "that women who breast-feed their babies are less likely to be absent from work because of baby-related illnesses and less likely to have long absences when they do miss work."[14] Accommodating female employees who choose to breastfeed may also encourage more women to continue working after having children, which will reduce recruiting and turnover costs.[15] Breastfeeding also reduces healthcare costs, so it may lower the cost of some companies' benefits packages.[16] Common sense says that providing more benefits to employees makes them happier and increases their loyalty to their employer. Lastly, breastfeeding even benefits the environment,[17] so because corporate America is often blamed for environmental deterioration, supporting environmentally-friendly breastfeeding may even be a good public relations move. Because of the cost benefits to both mothers and employers, promoting breastfeeding seems wise even from a Law & Economics standpoint.[18]

II. Doctrine

---

[11] *Id*. The Food & Drug Administration issued twenty-two formula recalls between 1983 and 1994, and over half of these recalls involved circumstances that could have resulted in serious health problems for the infants. *Id*.

[12] Williams, *supra* note 1.

[13] Rona Cohen et al., *Comparison of Maternal Absenteeism and Infant Illness Rates Among Breast-feeding and Formula-feeding Women in Two Corporations*, 10 AM. J. HEALTH PROMOTION 148 (1995).

[14] *Id*. at 153. The study examined mothers at two corporations, a utilities company and an aeronautics corporation, with on-site breastfeeding programs. *Id*. at 149.

[15] Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U.J. GENDER SOC. POL'Y & L. 471, 478 (2001).

[16] *Id*.

[17] Connolly, *supra* note 9, at 157.

[18] Law and Economics is "[a] discipline advocating the economic analysis of the law, whereby legal rules are subjected to a cost-benefit analysis to determine whether a change from one legal rule to another will increase or decrease allocative efficiency and social wealth." BLACK'S LAW DICTIONARY (8th ed. 2004).

A. Statutes Unsuccessfully Used to Protect Working, Breastfeeding Mothers

1. Inadequate Federal Legislation

In America, no federal legislation directly protects working women who want to breastfeed.[19] Instead, litigants have unsuccessfully used four other laws to try to get breastfeeding accommodations at work.[20] The four laws that they have tried to adapt for this purpose are the Pregnancy Discrimination Act,[21] Title VII,[22] the Americans with Disabilities Act,[23] and the Family Medical Leave Act.[24]

i. Title VII and the Pregnancy Discrimination Act

Title VII prevents employers from discriminating on the basis of sex.[25] The Pregnancy Discrimination Act ("PDA") amended Title VII.[26] The PDA prohibits discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."[27] Because it amended Title VII's definition section, such discrimination falls under the definition of discrimination "because of sex" or "on the basis of sex."[28]

---

[19] Shana M. Christrup, *supra* note 15, at 483. While legislation does not deal with working women who want to breastfeed, there is a law that allows women to breastfeed on federal property that women and children are legally permitted to be on. Right to Breastfeed Act, Pub. L. No. 106-58 §647, 113 Stat. 430, 478 (1999).

[20] *Id*. A 1981 case seemed to provide some hope for a constitutional right to breastfeed at work. In that case, the plaintiff took an unpaid leave of absence from her job as a teacher because she had to breastfeed her infant son who was allergic to formula. Her employer had refused to allow her to breastfeed on campus even when her doing so did not interfere at all with her job duties. Relying on several Supreme Court decisions dealing with privacy, the circuit court ruled that "her interest in nurturing her child by breastfeeding is entitled in some circumstances to constitutional protection against state infringement." However, this case has been subsequently overruled. Nevertheless, there may be an opportunity for such reasoning to be employed by courts in the future. Dike v. Sch. Bd. of Orange County, 650 F.2d 783, 785 (5th Cir. July 17, 1981).

[21] 42 U.S.C.A. § 2000e (1994).

[22] 42 U.S.C.A. §§2000e-2000e-17 (1998).

[23] 42 U.S.C.A. §§12101-12213 (1990).

[24] 29 U.S.C.A. §2601-2654 (1994).

[25] 42 U.S.C.A. § 2000e-2(a) (1994).

[26] Shana M. Christrup, *supra* note 15, at 483.

[27] 42 U.S.C.A. §2000(e)(k)(1994).

[28] *Id*.

Courts have not interpreted Title VII or the PDA to protect women who want to breastfeed at work.[29] The Sixth Circuit refused to find a Title VII violation when an employer fired a woman who would not return to work because she needed to breastfeed her infant who refused bottles.[30] That circuit focused on Wallace's failure to prove that breastfeeding her child was a medical necessity and also that she was disparately impacted by the defendant's granting of leaves of absence.[31] That court affirmed the district court's order which stated that "[n]either Title VII, nor the Pregnancy Discrimination Act intended to make it illegal for an employer to deny personal leave to a female worker who requests it to accommodate child-care concerns [such as breastfeeding]."[32] Because of an earlier decision by the Supreme Court, the court refused to find impermissible gender discrimination even though the plaintiff's circumstances were uniquely female.[33] Additionally, the court looked at the legislative history of the PDA to conclude that the PDA was not intended to cover breastfeeding, which the court found sufficiently unrelated to pregnancy and "related medical conditions."[34] While the Family Medical Leave Act of 1993 would likely have covered this plaintiff for twelve weeks if it had been passed, this decision still stands for the proposition that Title VII and the PDA do not ordinarily cover absences for breastfeeding.

For similar reasons, a Colorado district court has also held that breastfeeding is not under the scope of the PDA.[35] In that case, a woman was fired for not returning to

---

[29] Shana M. Christrup, *supra* note 15, at 484.
[30] Wallace v. Pyro Mining Co., No. 90-6259, 1991 U.S. App. LEXIS 30157, at *3 (6th Cir. Dec. 19, 1991).
[31] *Id.* at *3-4.
[32] Wallace v. Pyro Mining Co., 789 F. Supp. 867, 870 (W.D. Ky. Aug. 27, 1990).
[33] *Id.* at 869.
[34] *Id.*
[35] Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1491 (D. Colo. Apr. 25, 1997).

work as a blackjack dealer.[36] She claimed that her company fired her in violation of the PDA.[37] She could not return to work "because she had been unable to establish an appropriate breast-feeding schedule."[38] However, the district court did not find her claim actionable because it also held that the PDA's language and legislative history indicate that it was not intended to cover post-pregnancy, child-rearing situations such as breastfeeding.[39] The facts necessitating this litigation occured after the passage of the Family Medical Leave Act, and the plaintiff did take advantage of the leave that Act permitted; however, Gilpin Ventures fired her for not returning to work after her twelve weeks of leave had already expired.[40]

In *Barrash v. Bowen*, a mother was fired from the Social Security Administration for failing to return to work five and a half months after the birth of her child.[41] She had requested six months of discretionary leave so that she would be able to breastfeed her infant.[42] The court held that to qualify as an illness under the PDA a condition must be "incapacitating," which would not include breastfeeding.[43] The court reasoned that if the PDA was intended to cover circumstances as ordinary as breastfeeding that it would have explicitly said so.[44] The court also reasoned that the plaintiff's request for leave to breastfeed did not provide a basis for a Title VII disparate impact claim because the Social Security Administration's policy manual provided that any granting of unpaid

---

[36] *Id*. at 1490.
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id.* at 1490.
[41] 846 F.2d 927, 928 (4th Cir. Mar. 24, 1988).
[42] *Id*.
[43] *Id*. at 931.
[44] *Id.*

leave was discretionary.[45] Given the courts' negative treatment of breastfeeding claims brought under the PDA and Title VII, it is unlikely that a breastfeeding litigant will find protection under these statutes as they exist currently.

ii. Americans with Disabilities Act

While the Americans with Disabilities Act of 1990 ("ADA") makes it illegal for employers to discriminate against current or potential employees on the basis of their disability,[46] courts have not applied this statute to protect breastfeeding mothers. To qualify as a disability under this statute, an individual must have a "physical or mental impairment that substantially limits one or more of the major life activities of the individual; a record of such impairment; or be[ ] regarded as having such an impairment."[47] The ADA requires employers to make "reasonable accommodations" for such disabilities unless doing so "would impose an undue hardship on the operation of the business of such covered entity."[48] Like Title VII and the PDA, employees have also attempted to use ADA to protect their perceived right to breastfeed at work.[49]

In a 1998 wrongful termination case, a federal district court concluded that "pregnancy-related complications usually will not qualify a woman for ADA protection."[50] After being fired for not returning to work six months after her child's birth, the woman tried to assert wrongful termination claims under Title VII, the PDA, the Family Medical Leave Act, the Employee Retirement Income Security Act, and the

---

[45] *Id*.
[46] 42 U.S.C.A. §§12101-12213 (1990).
[47] 42 U.S.C.A. §12102(2) (1990).
[48] 42 U.S.C.A. §12112(b)(5)(A) (1990).
[49] *See, e.g.,* Bond v. Sterling, Inc., 997 F. Supp. 306 (N.D.N.Y. Mar. 11, 1998); Lacoparra v. Pergament Health Ctrs., Inc., 982 F. Supp. 213, 228 (S.D.N.Y. Oct. 10, 1997).
[50] Lacoparra v. Pergament Health Ctrs., Inc., 982 F. Supp. 213, 228 (S.D.N.Y. Oct. 10, 1997).

ADA.[51] The court dismissed the plaintiff's claim in its entirety, stating that she was not entitled to relief under any of the statutes that she attempted to employ.[52]

In *Bond v. Sterling, Inc.*, the employer fired the plaintiff for refusing to attend an out-of-town seminar because she could not bring her six week old infant whom she was breastfeeding.[53] She alleged that her employer's firing violated the ADA because her status as a breastfeeding mother was a disability.[54] In response to her allegation, the court stated that "common sense suggests no 'impairment' associated with the status of being a breast-feeding mother."[55] Because breastfeeding is a natural occurrence following pregnancy, courts have not protected it under the ADA.

iii. Family Medical Leave Act

The Family Medical Leave Act ("FMLA") has helped some working mothers breastfeed, but its changes are not nearly enough to remedy the problem. The FMLA provides unpaid leave for men and women after the birth or adoption of a child, after the placement of a foster child, when the employee himself/herself has a serious health condition that renders him/her unable to do his/her job, or when the employee cannot work because his/her spouse, child, or parent has a serious health condition.[56] The employee may take up to twelve weeks of unpaid leave any time in the twelve month period following the qualifying event.[57]

Despite its helpful changes, the FMLA's limitations prevent it from providing the necessary protection to *all* breastfeeding mothers. The FMLA only applies to employees

---

[51] *Id.* at 216-17.
[52] *Id.* at 231.
[53] 997 F. Supp. 306, 308 (N.D.N.Y. Mar. 11, 1998).
[54] *Id.* at 309.
[55] *Id.* at 310.
[56] 29 U.S.C.A. §2612(a)(1)(A)-(D) (1994).
[57] *Id.* at §2612(a)(1).

who have worked a minimum number of hours for the employer[58] and to employers who meet minimum size requirements.[59] Women, who meet the hour requirement and whose employers meet the size requirement, have used the FMLA to stay home for up to twelve weeks to breastfeed their children. However, the FMLA only provides unpaid leave, so the Act necessarily has a disparate impact on low-income people who are unable to afford to take unpaid leave. Additionally, while most doctors recommend breastfeeding for more than six months, the FMLA only provides twelve weeks of leave and does not provide any mechanisms to assist parents in transitioning back to work. The leave is not flexible, must be taken all at one time, and is not conducive to extended breastfeeding.

2. Inadequate State Legislation

While some states have passed legislation to promote breastfeeding, overall, the states' efforts are not nearly comprehensive enough. A significant portion of this legislation is not related to working women specifically, but there are some states that have passed laws specifically addressing the issue of working women wanting to breastfeed.[60] Tennessee's legislation is an example of the more accommodating type of legislation covering this issue.[61] Tennessee's law is mandatory in nature and applies to all employers in the state.[62] It requires employers to "provide reasonable unpaid break time each day" to mothers who need to breastfeed or pump breast milk.[63] This requirement does not have to be met, however, if providing the break time "would unduly

---

[58] *Id*. at §2611(2)(A)(ii).
[59] *Id*. at §2611(2).
[60] *See, e.g.,* CAL. LAB. CODE § 1031 (West 2003); GA. CODE ANN. § 34-1-6 (West 2005); TENN. CODE ANN. § 50-1-305 (West 2005).
[61] TENN. CODE ANN. § 50-1-305.
[62] *Id*. The legislation is mandatory in that the employer "shall" meet all of the requirements of the act. *Id*. The legislation's application to all employers makes it more comprehensive than most federal legislation, which only applies to employers meeting statutory requirements.
[63] *Id*. at § 50-1-305(a).

disrupt the operations of the employer."[64] Additionally, it also requires the employer to "make reasonable efforts" to provide a convenient place, besides a toilet stall, for employees to pump breast milk or breastfeed.[65] By providing break time and a private location pump breast milk, this statute is more accommodating than most.

California's statute on this issue is very similar to Tennessee's approach.[66] California's statute is also mandatory in nature.[67] It also requires break time, which may be unpaid if it does not run concurrently with the rest time required under the wage order of the Industrial Welfare Commission.[68] Like Tennessee, employers are not required to provide this break time if doing so "would seriously disrupt the operations of the employer."[69] California's statute also requires employers to "make reasonable efforts" to provide employees with somewhere private to breastfeed, other than a toilet stall.[70] Unlike Tennessee, however, California allows employers to require employees to express breast milk where they normally work if that location meets the statutory requirements.[71] One publication suggested that employers provide an area close to the workplace where employees can keep pump equipment at all times to minimize their absence from work.[72]

Like California and Tennessee, Georgia also has a law relating to women who choose to breastfeed at work.[73] Georgia's law is like the other two laws in that it applies

---

[64] *Id*.
[65] *Id*. at § 50-1-305(b).
[66] CAL. LAB. CODE §§ 1030-1031.
[67] *Id*.
[68] *Id*. at §1030.
[69] *Id*. at §1032. The use of the word "seriously" in this statute makes it more accommodating than Tennessee's statute, which only requires that the break time "unduly disrupt" the employer. *Id*. at §1032; TENN. CODE ANN. § 50-1-305(a).
[70] *Id*. at §1031.
[71] *Id*.
[72] Elizabeth L. Graves, *Complying with California's New Lactation Accommodation Law*, 25 LOS ANGELES LAW. 20 (Feb. 2003).
[73] GA. CODE ANN. § 34-1-6.

to all employers in the state.[74] Despite this similarity, Georgia's law is much less effective because it is permissive in nature.[75] It only states that employers "may" provide break time and a private area for their employees to express breast milk.[76] This law was passed to encourage employers to make these changes. Because the law is permissive and not mandatory, Georgia courts are not likely to hear lawsuits based on it.[77]

Such legislation is more effective than states that choose not to legislate at all on this issue but is still wholly insufficient. Georgia's advisory legislation acknowledges the problem and helps draw employers' attention to the issue. If employees wanted to suggest such changes to their employer, they at least have legislative support to show that their requests are becoming increasingly accepted. Employees in states without any legislation would not have such persuasive support. However, Georgia's lack of enforcement capabilities makes its legislation essentially ineffectual. While some employees with more bargaining capabilities may be able to use this legislation to their advantage, it is not likely to impact most breastfeeding women in the state. Overall, it is an insufficient attempt to pacify people lobbying for such necessary change.

B. Secondary Sources Effectively Reasoning for Legislative Changes

Because the current law does not protect breastfeeding employees at all, scholars in various disciplines have provided compelling research showing the necessity of legislation explicitly protecting working women who choose to breastfeed.[78] In their

---

[74] *Id*. at § 34-1-6(a).
[75] *Id*. at §34-1-6(b).
[76] *Id*.
[77] JAMES W. WIMBERLY, JR., GEORGIA EMPLOYMENT LAW § 5-23 (3d ed. 2006).
[78] *See, e.g.,* BAUMSLAG & MICHELS, *supra* note 5; DIANE EYER, PH.D., MOTHERGUILT: HOW OUR CULTURE BLAMES MOTHERS FOR WHAT'S WRONG WITH SOCIETY (Random House 1996); BERNICE L. HAUSMAN, MOTHER'S MILK: BREASTFEEDING CONTROVERSIES IN AMERICAN CULTURE (Routledge 2003); Henry Wyatt Christrup, *Litigating a Breastfeeding and Employment Case in the New Millennium*, 12 YALE L.J. & FEMINISM 263 (2000); Christrup, *supra* note 15; Lara M. Gardner, *A Step Toward True Equality in the*

articles, they advocate immediate changes to the status quo to benefit employers, mothers, infants, and society in general. Scholars opposing that change do not seem to feel their position threatened enough to write to protect it or possibly are unable to articulate arguments against the change. Henry Wyatt Christup even writes that "[t]he area is both under-theorized and under-analyzed."[79] While the advocates of change are relatively few, their writings are convincing, and their suggestions are intriguing.

Breastfeeding women need laws requiring employers to provide physical and scheduling accommodations to support their employees' desires to breastfeed. In an effort to help employers and employees, Shana M. Christrup advocates providing women with a place and with the equipment necessary to pump breast milk at work so that their time away from work will be minimal.[80] Similarly, to accommodate scheduling problems, employers could provide nursing breaks, flextime, part-time, job sharing, and the option to work from home.[81] Other suggestions include requiring "employers of *all* sizes to accommodate breastfeeding women by requiring flexibility in work hours, additional, *paid* break time in order to breastfeed or pump, a private, sanitary place to do so, and dedicated storage space to store breastmilk [sic]."[82] Legislation might require more specific changes such as a private location with a door that locks, a comfortable chair, a sink and mirror, access to lactation consultants, breastfeeding classes, a breast-

---

Workplace: Requiring Employer Accommodation for Breastfeeding Women, 17 WIS. WOMEN'S L.J. 259 (2002); Elissa Aaronson Goodman, *Breastfeeding or Bust: The Need for Legislation to Protect a Mother's Right to Express Breast Milk at Work*, 10 CARDOZO WOMEN'S L.J. 146 (2003); Gordon G. Waggett & Rega Richardson Waggett, *Breast is Best: Legislation Supporting Breast-Feeding is an Absolute Bare Necessity—A Model Approach*, 6 MD. J. CONTEMP. LEGAL ISSUES 71 (1994-1995).

[79] Henry Wyatt Christrup, *supra* note 78, at 263.

[80] Shana M. Christrup, *supra* note 15, 495-96.

[81] BAUMSLAG & MICHELS, *supra* note 5, at 211.

[82] Gardner, *supra* note 78, at 260 (emphasis added).

pump, and manager training.[83] Adopting such accommodations would help mothers to best provide for their infants but would also allow employers to have more loyalty from their employees and to experience less absenteeism from their employees with children.

To finance these changes, some scholars have suggested government involvement because of the benefits to society. There are benefits of tax credits for employers who make accommodations for women who wish to express breast milk at work.[84] The government could also provide on-site daycare centers to allow mothers to have more access to their infants.[85] Alternatives to government directly handling the expense are providing daycare subsidies, a national insurance fund, and employer contribution.[86] Shana M. Christrup postulates that public support will be essential to such programs and that thorough cost-benefit analyses will help employers support such changes also.[87] Regardless of the source of funding, change is necessary to protect working mothers.

In addition to physical and scheduling accommodations, scholars also demand laws protecting women against discrimination or retaliation for their decision to breastfeed. Laws should encourage breastfeeding generally but should also make it illegal to discriminate against a breastfeeding mother.[88] On this note, Elissa Aaronson Goodman specifically criticizes current law because it is legal to discriminate against a pregnant employee who arranges to breastfeed during working hours.[89] To remedy this problem, other scholars encourage employment law reform.[90] They want to make it an unlawful employment practice to refuse to hire, discharge, or discriminate against a

---

[83] Goodman, *supra* note 78, at 162.
[84] BAUMSLAG & MICHELS, *supra* note 5, at 211; Goodman, *supra* note 78, at 172.
[85] BAUMSLAG & MICHELS, *supra* note 5, at 211.
[86] *Id.*
[87] Shana M. Christrup, *supra* note 15, at 498-500.
[88] Gardner, *supra* note 78, at 260.
[89] Goodman, *supra* note 78, at 151.
[90] Waggett & Waggett, *supra* note 78, at 121.

breastfeeding woman.[91] They also advocate including breastfeeding under statutes aimed at eliminating sex and pregnancy discrimination.[92]

While almost all researchers agree that change is necessary, the scholars are unable to reach a consensus about how to effectuate change. Some advocates want to modify federal legislation, like the FMLA, to accommodate breastfeeding mothers[93] because modifying an existing law is the option with the greatest likelihood of passage in Congress.[94] Other scholarship urges more comprehensive protection under state and federal laws.[95] Gordon and Rega Waggett criticize states like Texas who have not even legislatively protected a woman's right to breastfeed in public.[96] They urge changes to state health, family, and employment law.[97] States should also modify their worker's compensation, unemployment compensation, and benefits statutes to accomplish similar goals.[98] Lara M. Gardner takes a slightly more radical approach and wants to introduce legislation specifically relating to this issue.[99] Most comprehensively, legislation could provide up to one year of paid leave to ensure that women are able to meet the needs of their infants in the best way possible.[100] To fight for such rights, committed trade unions, elected officials, and policy planners are necessary.[101] Involvement of groups like trade unions is necessary because "women in the lower earning spectrums" need special protection because they are usually the employees who are least likely to negotiate

---

[91] *Id*.
[92] *Id.* at 121-22.
[93] Shana M. Christrup, *supra* note 15, at 495.
[94] *Id.* at 497-98.
[95] Waggett & Waggett, *supra* note 78, at 72-73.
[96] *Id*. at 105.
[97] *Id*. at 117-22.
[98] *Id*. at 122.
[99] Gardner, *supra* note 78, at 259.
[100] *Id*. at 285.
[101] BAUMSLAG & MICHELS, *supra* note 5, at 211. Baumslag and Michels point out that trade unions have been very effective in South Africa in achieving protections for breastfeeding employees. *Id*.

breastfeeding accommodations for themselves.[102] While these writings provide great recommendations for the future, their suggestions fail to provide remedies for women who are experiencing these problems today.

To address the immediacy of this issue, Henry Wyatt Christrup offers a different approach to fight for breastfeeding mothers' protection.[103] He advocates using different litigation strategies from the ones already employed by previous litigants.[104] Breastfeeding plaintiffs should use Title VII and make a sex discrimination disparate treatment claim, relying on the PDA.[105] This litigation approach should focus on "explain[ing] why breastfeeding discrimination *is* sex discrimination."[106] While Mr. Christrup argues that litigants should not wait for new litigation to fight for their right to breastfeed, he chose not to address what new litigation on this issue should entail.[107]

C. Successful Companies Voluntarily Accommodating Breastfeeding

These scholars are not advocating lofty, unachievable goals. Many successful companies already offer similar programs. American Express, Citigroup, Colgate-Palmolive, and General Mills are examples of highly successful companies that voluntarily offer breastfeeding accommodations to their employees.[108] There are even contractors who provide lactation equipment and counseling to other companies' employees.[109] Sanvita, Inc. is such a contractor that has worked for several companies,

---

[102] Gardner, *supra* note 78, at 274.
[103] Henry Wyatt Christrup, *supra* note 78.
[104] *Id*. at 285.
[105] *Id*.
[106] *Id*. (emphasis added).
[107] *Id*. Mr. Christrup tries to offer solutions that might be successful under the current law because his focus in this article seems to be on helping the "1,000,000 breastfeeding women each year who are presently being forced to choose between breastfeeding and work." *Id*.
[108] Goodman, *supra* note 78, at 162.
[109] Tannette Johnson-Elie, *Menasha Corp. Helps Employees Continue Breastfeeding*, MILWAUKEE J. SENTINEL, Nov. 16, 1995.

such as Menasha Corporation and Aid Association for Lutherans.[110] Sanvita claims that their services allow "employers [to] gain $1.50 to $4.50 for every dollar spent on the lactation programs, thanks to 27% less absenteeism and a 35% reduction in illnesses."[111] Contractors may provide the equipment to allow employers to accommodate breastfeeding women without too much change to their existing corporate structure. Other countries such as Sweden, Norway, Brazil, and Honduras allow women to breastfeed at work through on-site nurseries and required breastfeeding breaks.[112]

III. Analysis

A. Current legislation is inadequate

Current legislation simply does not provide adequate protection for breastfeeding workers. All of the unsuccessful breastfeeding claims brought under Title VII, the PDA, the ADA, and the FMLA show that. Courts are unwilling to read existing statutes to protect women who want to breastfeed at work because they argue that those statutes' legislative intent simply is not conducive to that interpretation.

In addition to the problems with the judicial interpretation of existing federal legislation, there are also many problems with a state-by-state approach to this situation. With the mobility in today's society, it is possible that a breastfeeding woman might be forced to either quit work or stop breastfeeding because she moves to another state. The lack of continuity might force women to change their parenting choices simply because of a geographic relocation. Even the most progressive state laws have provisions that excuse companies from providing accommodations if it would be an "undue burden" on

---

[110] *Id*.
[111] *Id*.
[112] BAUMSLAG & MICHELS, *supra* note 5, at 205-06.

them.[113] Such provisions are scapegoats allowing companies to disregard the law. Additionally, changes on the state level often come slowly because of lack of resources. Waiting for change to come in every state could take an indefinite period of time, causing many children, mothers, and employers to miss out on breastfeeding's benefits.

Amending current laws, such as Title VII, the PDA, the ADA, or the FMLA, might be a good alternative but would not likely be broad enough to cover many American mothers. For example, the FMLA, the legislation that seems most adaptable for this purpose, only applies to employers with a minimum number of employees and only applies to employees who have worked a minimum number of hours.[114] Furthermore, the FMLA does not provide paid leave,[115] so only wealthier women, those most likely to have bargaining power, would be able to take advantage of the statutory changes. The focus of the FMLA is too broad to be adapted practically to cover breastfeeding women in the workplace. The FMLA only gives people leave from work after the birth or adoption of a child. Nothing in the FMLA facilitates women's return to the workforce, which the necessary breastfeeding legislation would focus on. Therefore, many women would not benefit from adapting legislation to cover breastfeeding.

Many feminists would argue that the current legislation demonstrates the inadequacies in our system. Dominance theorists would contend that the current laws operate systematically to keep women subordinate by forcing them to stay out of the workplace entirely if they want to breastfeed. Similarly, different voice theorists would hold that the predominantly male legislatures do not fully understand the importance of breastfeeding to mothers, children, and society because men are unable to experience

---

[113] *See, e.g.,* CAL. LAB. CODE §§ 1032; TENN. CODE ANN. § 50-1-305(a).
[114] 29 U.S.C.A. §2611(2) (1994).
[115] 29 U.S.C.A. §2612(a) (1994).

breastfeeding. The different voice advocates would also believe that new laws should put value on these uniquely female processes and give credence to the ethic of care.

From a feminist perspective, formal equality is inadequate to remedy this situation because, in this area, men and women are fundamentally different. Formal equality would require women to assimilate into the current workplace structure by denying their children breast milk, which would do society an injustice. As stated earlier, breastfeeding is a process that is uniquely female and that should be valued as such. While formal equality may be appropriate in other types of childrearing legislation, such as the FMLA, it is inappropriate here. Because of the biological differences between men and women in the area of breastfeeding, substantive equality is the solution. The critical legislation should provide for some special treatment and benefits for women because of their exclusive role as the providers of breast milk for society's infants.

Fighting the status quo with a disparate impact theory is not the best approach because that theory invites defenses from men and from businesses. To have a disparate impact, the practice at issue must be facially neutral but must also discriminate against someone. Here, it would have to be gender discrimination. It is true that the current state of the law has a disparate impact on women because they are the only ones physically capable of breastfeeding and are not protected when doing so. However, fighting current policy only on a disparate impact theory would invite men to argue that a policy allowing women to breastfeed has a disparate impact on men who are not capable of breastfeeding but may want time away from work to do other parenting tasks that they see as in their children's best interest. Furthermore, businesses can often fight a disparate impact claim by asserting that they had business justifications for the behavior. Businesses may assert

the business necessity defense to disparate impact claims regarding breastfeeding. Because of the risks of failure with disparate impact claims, the safest approach would be advocating full-scale reform in this area to ensure the greatest protection for breastfeeding women.

B. New, more expansive legislation is necessary

Because amending current laws would fail to remedy the breastfeeding problem, new, more expansive legislation is necessary. First, the legislation should apply to all employers, regardless of size. Because breast milk must be expressed every few hours to maintain the mother's milk supply, the legislation should also apply to all employees, regardless of whether they are full-time or part-time. Next, the legislation should prevent discrimination against breastfeeding workers. It should prevent discrimination in the hiring process and before and after the child's birth. Retaliatory actions taken as a result of a woman's breastfeeding should be actionable. Preventing this discrimination would allow women to openly approach their supervisors to work out breastfeeding accommodations that are most suitable to them, their child, and their company.

Because the legislation will apply to all American employers, the accommodations required should not be delineated specifically. Women and their employers should work out specific plans that suit their own, unique needs. For example, some employers may find it beneficial to start on-site daycare centers because such a change would benefit more than just their breastfeeding employees. Depending on the employment sector, it may benefit some employers and employees to have programs that allow flextime or job sharing, but that might not work for everyone. The legislation should encourage but not require such sweeping changes.

Regardless of the plan's specifics, it must provide paid break time, a private area to express milk, necessary equipment (refrigerator, breast pump, chair, etc.), and counseling or support for breastfeeding mothers. However, that paid break time should run concurrently with established break time, whenever possible, to prevent an unfair burden on the employers. Women can generally do the things that they would normally do on their break, such as eat, sit down, or relax, while pumping breast milk, so this requirement should not be too burdensome on the mothers. Additionally, the companies should require training for all employees in an effort to prevent backlash and to encourage support for these mothers.

The government should offer support to companies who comply with these laws. The government should offer tax breaks to smaller employers who comply with these rules to help offset the costs of these changes. For larger employers, tax breaks would be unnecessary because their implementation of these accommodations would help their bottom line in the end. As stated earlier, because of the multitude of benefits for everyone involved, these benefits even stand up under the very conservative Law & Economics analysis. Furthermore, very small companies should be able to apply for free equipment and counseling services for their employees. Breastfeeding only occurs for a finite period, and smaller companies may not have continuous need for the supplies. As a result, they can return the supplies to the government to be given to another company for use without too much governmental expense.

Protection for low-income mothers is especially important because of the potential for disparate impact. Low-income women stand to gain the most from these accommodations because breastfeeding saves them money, lowers healthcare costs, and

prevents them from taking unpaid leave if their children are sick. Requiring paid break time is one way of preventing unjust results. Also, employers providing the necessary equipment lowers costs for women. Another critical step might be to amend the National Labor Relations Act.[116] Many unionized companies employ low-income workers with limited bargaining capability, so requiring employers to bargain with unions about breastfeeding accommodations may give some low-income employees equal opportunity for greater benefits. With union help, low-income employers may be able to get some of the discretionary benefits that higher-income workers could negotiate for themselves, such as on-site daycare. Lastly, Congress and states should modify tangential legislation that these changes affect, such as unemployment and worker's compensation and benefits statutes. Such expansive legislation should provide benefits for almost all breastfeeding women, while still considering employers.

C. De facto changes are also necessary to adequately protect women

For this legislation to be successful, de facto changes would be necessary also. Women must take advantage of the opportunities that the legislation provides. While breastfeeding benefits everyone, it is not always easy and requires great commitment on the mother's part. In an effort to encourage others to breastfeed, women who have breastfed before should talk to other people about the advantages they experienced. Breastfeeding counseling will be effective, but it would also be helpful for breastfeeding women themselves to form support groups to share tips or provide support.

Additionally, women will also have to take precautions to ensure that they do not take advantage of the legislation, take more breaks than necessary, or lessen their workload too much. Such actions would be a step backward for women and would

[116] 29 U.S.C.A. §151 et seq. (2005).

perpetuate negative stereotypes. Breastfeeding mothers should be cognizant of the fact that some of their co-workers may resent their accommodations and should make every effort to show the advantages of the legislation.

Additionally, women should make efforts to maintain a fair division of labor within their own households. There is a risk with breastfeeding that most of the childcare duties will fall on the mother. Often, when a mother breastfeeds, she wakes up with the infant in the middle of the night or spends the most time with the child because of her capability of meeting the infant's feeding needs. This unique capability may result in her changing diapers, cleaning bottles, bathing the infant, or meeting the child's needs unrelated to providing breast milk simply because she feels compelled to meet *all* of the child's needs. While some single mothers may have no other alternative, those women who do have other people who are responsible for their children should maintain their own autonomy and should not let the other caregivers take advantage of the fact that the mother is breastfeeding. When a fair division of labor is possible and desired, women should assert their rights and preferences, despite their unique ability to breastfeed.

Lastly, people should not discriminate against women who choose not to breastfeed. Making accommodations for breastfeeding mothers may invite criticism of mothers who choose not to breastfeed, especially when everyone is educated about the benefits of breastfeeding. However, every woman's situation is unique, so it is unfair and irresponsible to criticize women who choose not to breastfeed. Breastfeeding can be difficult and may have some disadvantages. The key to making this legislation work is ensuring that it has an adverse impact on as few people as possible.

D. Response to criticism

This legislation also comes with a great potential for a backlash from employers, fellow female employees, fellow male employees, men generally, women generally, and even feminists. Martha Chamallas talks about the "double bind that faces reformers."[117] She points out that instituting a substantive equality reform, such as the breastfeeding legislation proposed here, "will stigmatize the group as different," which will inevitably "reinforce gender difference."[118] She essentially argues that special treatment might perpetuate negative stereotypes about women, such as that they are best-suited for work in the domestic sphere. This may also promote backlash at work from other employees who are not receiving equivalent benefits.

In addition to problems at work, breastfeeding may also cause problems for women at home. Another argument contends that breastfeeding "may establish a pattern for who is seen as primarily responsible for the child."[119] Some fathers feel left out if they are unable to participate in feeding the child.[120] Furthermore, having the mother seen as the primary childcare provider only adds to her domestic responsibilities after work, her "second shift." Diane Eyer responds to this problem by stating "that breast-feeding has become one more overstated imperative that holds women to an impossible standard and contributes to their guilt."[121] She essentially argues that practices like breastfeeding create false universalisms that imply that all women want to be mothers and breastfeed their children.[122] Her book claims that society irrationally blames mothers for its problems.[123] She later asserts that current attitudes about breastfeeding lead to feelings

---

[117] MARTHA CHAMALLAS, INTRODUCTION to FEMINIST LEGAL THEORY 18 (1999).
[118] *Id*.
[119] DIANE RICHARDSON, WOMEN, MOTHERHOOD and CHILDREARING 11 (St. Martin's Press 1993).
[120] *Id*.
[121] EYER, *supra* note 78, at 73.
[122] *Id*.
[123] *Id*.

that "[s]ince dads don't have breasts or maternal hormones, their job is to stand back and support their wives."[124] Before breastfeeding legislation becomes feasible, it is necessary for scholars to thoroughly address such criticism to gain public support.

The "double bind" problem with breastfeeding legislation becomes less of an issue when society is truly educated on the benefits of breastfeeding. For example, co-workers will be more amenable to changes when they know that their breastfeeding colleagues will miss less work for childcare reasons because of these accommodations. Parents (male and female) missing less work will prevent the colleagues without children from having to work harder when a parent misses work. Co-workers may also be happy to hear that breastfeeding serves as a fairly effective form of birth control, so their colleagues will be less likely to need FMLA leave in the near future. Educating everyone about such benefits will surely ameliorate colleagues' feelings about these accommodations. People tend to support changes when they see what is in it for them.

Additionally, the immutable nature of a woman's ability to breastfeed also makes it less subject to criticism than some other accommodations. A diabetic worker may have to take breaks from work for insulin shots. While he/she may have chosen to take insulin instead of strictly controlling his/her diet, he/she did not choose to have diabetes, so the backlash risk is not too severe. Similarly, while a woman may choose to breastfeed her child, she did not choose to be the only one capable of doing so. Her immutable ability to breastfeed may make others more sympathetic to accommodations for her, especially when they are fully educated about the reasons for her choice.

Furthermore, there certainly are risks that breastfeeding will increase a woman's childcare duties or general domestic duties. However, pumping breast milk does not

[124] *Id*. at 75.

require that the mother be the only person to feed the infant. In fact, pumping breast milk instead of breastfeeding directly provides other caregivers with a greater opportunity to care for the infant because the infant is bottle-fed. Therefore, pumping breast milk gives the mother greater flexibility within the home. Once the infant gets accustomed to taking a bottle, all of the child's caregivers should be able to divide the actual feeding duties however they see fit.

Additionally, this legislation would give women more influence and control in their own lives because they would have the opportunity to work, if they chose, but would not necessarily have to sacrifice the advantages of breastfeeding. "Motherguilt"[125] may have prevented women from working in the past, but this legislation would allow them to return to work if they so desired or would allow them to breastfeed if quitting work was never an option, as for low-income women. Many women may gain confidence from breastfeeding because they can provide for their child. The benefits of breastfeeding for mothers, such as weight loss, may also increase the mother's confidence levels. Similarly, women may gain confidence from working because that enables them to provide financially for themselves and their family. Although there is potential criticism for it, this legislation would give women of all income levels greater autonomy.

IV. Conclusion

Anyone who watches ABC's hit show *Desperate Housewives* knows how important some women believe that breastfeeding is.[126] The March 26, 2006 episode featured a woman who refused to take a job, unless the company accommodated her

[125] EYER, *supra* note 78.
[126] *Desperate Housewives* (ABC television broadcast, Mar. 26, 2006).

desire to breastfeed.[127] Because of the assets that she would bring to the company, the company voluntarily accommodated the woman by providing her with break time and on-site daycare.[128] A real woman, Mary Blanchet Nigro, wrote that "[t]he support network at home and at work was crucial to continuing to nurse after I returned to work."[129] Unfortunately, not every woman in America has such bargaining power and not every company is so progressive.

No federal laws currently protect working women who breastfeed. Very few states have such legislation. Because of the benefits that breastfeeding brings for children, mothers, and society, legislators need to enact specific federal laws protecting a woman's right to pump breast milk at work. The laws should apply to all women, regardless of the size of their employer or how many hours the woman works. Such laws should have provisions like paid break time and a requirement that companies bargain with unions on this issue to ensure that low-income women are not disparately impacted.

While there are criticisms of breastfeeding legislation, it ultimately benefits society as a whole and gives women more autonomy. It benefits areas ranging from healthcare to the environment. Given the strong corporate lobby in Washington, some might also argue that this legislation is untenable at this point in time. However, most progressive legislation seemed impossible at the beginning. Therefore, it is crucial that people assert their rights and advocate for change in this area by voting, educating others, bargaining with their employers, and continuing to litigate breastfeeding cases.

---

[127] *Id*. Discussion of the woman's breastfeeding her 5-year-old son and its possible child abuse implications is, unfortunately, outside the scope of this paper. *Id*.
[128] *Id*.
[129] Mary Blanchet Nigro, *One Nurse's Story*, *in* THE REALITY OF BREASTFEEDING: REFLECTIONS BY CONTEMPORARY WOMEN (Amy Benson Brown & Kathryn Read McPherson, eds., Bergin & Garvey 1998).