ALLEN V. TOTES/ISOTONER CORPORATION: A CAUTIONARY TALE FOR BREASTFEEDING WORKING MOTHERS

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INTRODUCTION

The year of 2010 marked the ninetieth anniversary of the ratification of the Nineteenth Amendment, in which women fought for the right to vote and be treated as equals.\(^1\) Despite this achievement, women still fight for equal political, social, and economic status several decades later. This fight for equality remains especially prevalent in the workplace and mainly involves issues including work-life balance and salary disparities. While raising children is an important job for both parents, society views women as the primary childcare providers, imposing on working mothers the burden of balancing these responsibilities and societal perceptions.\(^2\)

Despite an increase of women in the workplace, some employers may be reticent to grant necessary aid to working mothers, requiring these mothers to choose between a career and motherhood. Mothers who cannot afford to forgo a career or hire extra help must stretch themselves between their careers and their children. These struggles bear a stark contrast to the hopes for true equality of the women who advocated for the Nineteenth Amendment just ninety-two years ago.

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\(^1\) With the right to vote, twenty-six million women voted in the 1920 presidential election. ELEANOR CLIFT, FOUNDING SISTERS AND THE NINETEENTH AMENDMENT 207 (2003).

\(^2\) This struggle between women’s roles existed in 1920 as evidenced by a 1920 ode, “To a Modern Woman.” The ode states,

You’ve got the vote and you think it’s your mission,
To go to the polls like a bum politician
And while you are voting, your husband must roam,
For something to eat which he can’t find at home.
He’s getting dyspepsia and can’t work for pain,
Your children neglected, ask for you in vain.
While you make speeches from a broken soapbox.
Your family is wearing soiled clothes and torn socks.

*Id.* at 208.
This article focuses on *Allen v. Totes/Isotoner Corp.*, an Ohio Supreme Court decision affirming summary judgment against the discrimination claim of a breastfeeding mother. Part I employs statistics to study the current status of working women and the perceptions they face at work. Part II examines the history of pregnancy discrimination. Part III evaluates *Allen v. Totes/Isotoner* in comparison to other cases involving breastfeeding discrimination. Part IV analyzes state and federal laws concerning breastfeeding laws and advises how Ohio might approach this issue in the future. Finally, the article concludes by considering what women can achieve through their right to vote and active participation in politics and the workplace.

**PART I: STATISTICS ON WOMEN IN THE WORKFORCE**

As of 2008, the United States workforce consisted of about 68 million women, or approximately 46.5% of the labor force. By 2016, women will likely comprise 47% of the labor force. Women’s presence in the labor force will likely continue to increase as the Baby Boomer generation, currently compose 40% of the labor force, retires.

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3 915 N.E.2d 622 (Ohio 2009).


5 DOUGLAS & MICHAELS, supra note 4 at 208.

6 See BARBARA J. BERG, SEXISM IN AMERICA: ALIVE, WELL, AND RUINING OUR FUTURE 190-91 (2009) (discussing workplace discrimination and gender bias and noting that the future “brain drain” in the workplace with the retirement of the Baby Boomer generation indicates a need to attract younger workers, both male and female, to prevent labor shortages and remain competitive in today’s global economy).
Besides representing nearly half of the labor force, women’s contributions to their family’s income have increased from 26.6% in 1970 to 35.1% in 2005. Correspondingly, a decreasing share of households has only a single-breadwinning husband, compared to an increasing number of single-breadwinning wives. With the rising cost of living, two-income households have risen from 18,888 in 1967 to 33,380 in 2005.

Most (currently, 71%) of these working women have children, which is an increase from 47% in 1975. Working women whose children are often over the age of six or who are unmarried are more likely to be a part of the labor force. Given the high percentage of women in the workforce, employers cannot afford to have women with minor children leave the labor force. With the rising cost of living, neither can two-income household afford to lose women’s income. Further, the general public bears an interest in women’ continued employment; otherwise, the burden would likely shift to the government to provide benefits like Medicare and welfare to families in need.

**PART II: HISTORY OF PREGNANCY DISCRIMINATION**

Although the statistics indicate that women have an increased presence in the work force, their involvement has gradually shifted over time. Colonial

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9 Id.


11 Id.

12 Id. In 2008, 76% of unmarried women with children participated in the workforce compared to only 69% of married women with children. Id.

13 See BERG, *supra* note 6, at 190-91 (noting that the retirement of Baby Boomers could create a labor shortage and a brain drain in various fields).
women worked in the home, and their work was critical to the family’s survival; over time, however, the nature of industries changed.\footnote{Gail Collins, When Everything Changed: The Amazing Journey of American Women from 1960 to Present 4 (2009).} During the industrial era, men’s work shifted from farming to industry, and families moved from the countryside to the city.\footnote{Id. at 4-5.} Among families who could afford the lifestyle, women performed less housework and focused more on the “product” needed to fuel the industrial era: children.\footnote{Id.} Society, as a result, began to perceive women as the family’s moral compass, rather than a contributor to the family’s survival.\footnote{Id. at 5.} This shift in the nature of women’s work, unfortunately, did not correspond with an opposing shift in women’s societal status,\footnote{Id.} as it was common, for example, for fathers to prefer male children.\footnote{Lori D. Ginsberg, Elizabeth Cady Stanton: An American Life 22 (2009) (noting that although his daughter’s abilities pleased him, Elizabeth Cady Stanton’s father still stated, “Ah, you should have been a boy!”).}

This societal perception persisted despite some pioneering women who bucked conventional trends by working.\footnote{Clift, supra note 1, at 15-16 (Susan B. Anthony was a schoolteacher); Collins, supra note 14, at 21-22, 25-26 (noting that one woman pursued a career in the law, and another woman pursued a career in advertising). Although those women discussed by Collins held non-traditional forms of employment, they still endured discrimination regarding their abilities. Id.} Society, however, deemed married working women as oddities.\footnote{See Collins, supra note 14, at 99 (noting that middle class America’s benevolence to working women appeared to be limited to women who were young and single).} When World War II began, the government recruited women to work in factories to inspect weapons and their quality, a crucial factor in the war effort.\footnote{Berg, supra note 6, at 3 (noting that about six million women were recruited into World War II’s labor force); Collins, supra note 14, at 97-98.} Many of these women worked jobs formerly
After World War II ended, employers, as well as society in general, expected women to relinquish these jobs to returning soldiers and return to former traditional roles. Two factors, however, thwarted the complete re-domestication of American women: 1) women’s desire to participate in the labor force, and 2) the American industry’s high rate of exportation of consumer goods to the world.

Nonetheless, women who remained in the workforce still faced difficulties. First, employers openly discriminated against women. A business with a job opening could place a newspaper ad that read: “Help wanted – Men” or “Help wanted – Women” without consequence. While teaching and nursing proved to be among the few professions open to women, these career limitations often arose from concerns about a woman’s health or concerns relating to pregnancy.

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23. **Collins, supra** note 14, at 99 (“Darling – you are now the husband of a career woman.”); see **Berg, supra** note 6, at 3 (stating that eighty percent of women in the labor force during World War II “wanted to stay on the job even after the men returned”).

24. **Berg, supra** note 6, at 3 (noting that most women in the aircraft, electric, and automotive industries lost their jobs after World War II ended and that many companies restored their policies of “refusing to hire married women”).

25. **Collins, supra** note 14, at 98-99 (noting that although Americans comprised only six percent of the global population, they produced about half of the world’s goods during the 1950s).

26. **Berg, supra** note 6, at 23. Even recourse through the Equal Employment Opportunities Commission (“EEOC”) was met with indifference in the 1960s. **Id.** The EEOC wanted to rid newspapers of racial discrimination but allowed gender discrimination to continue due to a desire to maintain the status quo. **Id.**

27. **Collins, supra** note 14, at 102. Although access to a certain field is usually not the issue nowadays, lower salaries due to a high percentage of women are an issue. See **Berg, supra** note 6, at 201 (discussing that certain professions have become feminized which has caused these fields to have lower salaries from what they once paid like veterinarians).

28. **Collins, supra** 14 at 102. For example, Lorena Weeks was denied a switchman’s job at Southern Bell based on a state rule that barred women from lifting over thirty pounds. **Id.** at 89-90. The job required her to use a piece of equipment that exceeded the state rule’s weight limit. **Id.** at 90. She later sued and won. **Id.**
When oral contraceptives became more readily available, the minimized fear of pregnancy allowed women to pursue other careers. However, schools, employers, and fellow employees still hindered women’s admission into male-dominated arenas, and women who succeeded in obtaining employment in male-dominated professions often found themselves relegated to positions “suitable” for women.

Women working in “male-dominated” fields also faced discrimination in salary, as they did not enjoy the pay of their male counterparts, and some tried to seek relief through legal action with mixed results. The Obama administration addressed issues raised in the Supreme Court’s Ledbetter v. Goodyear Tire & Rubber Co. decision, including the statute of limitations issue under Title VII, through the Lilly Ledbetter Fair Pay Act of 2009.

A. Equal Protection

Among the unique challenges facing women that remain are the more subtle forms of pregnant discrimination. Women’s early courtroom victories tended to focus on general gender discrimination matters, rather than discrimination based on pregnancy. Pregnancy became a focus of reform when

29 Id. at 102.

30 FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW 36 (2009). Dean Erwin Griswold of Harvard Law School asked admitted female students, “What each was doing in law school, occupying a seat that could have been held by a man?” Id.

31 Id. at 152-58. Women who sought employment at law firms during the 1960s likely received hints to work in specialties like trusts and estates rather than litigation. Id. at 153, 157.

32 COLLINS, supra note 14, at 102.


35 See Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (determining that the “differential treatment to male and female members of the uniformed services” only to achieve “administrative convenience violated the Fifth Amendment’s Due Process Clause because it required female
women decided to challenge the government’s and most employers’ policy of treating pregnancy as a voluntary condition not coverable for insurance or disability purposes. Several legal cases provide instruction on this trend.

1. *Geduldig v. Aiello*[^37]

In *Geduldig*, several women challenged the provision of California’s disability insurance system barring coverage of “certain disabilities resulting from pregnancy.”[^38] Although the district court held the provision unconstitutional because it violated the Equal Protection Clause, the Supreme Court reversed.[^39]

Citing a previous California Court of Appeals’ decision on insurance statutes, the Supreme Court designated three of the four cases as moot, and for the remaining plaintiff, framed the issue to be whether the program “invidiously discriminates . . . by not paying insurance benefits for disabilities” arising from pregnancy and childbirth.[^40] The Court determined that excluding normal pregnancies from disabilities did not amount to “invidious discrimination under the Equal Protection Clause” because California declined to insure all possible

[^36]: STREBEIGH, supra note 30, at 82-83. Sally Armendariz’s car accident caused her miscarriage. *Id.* at 82. Her insurance program denied her request, and the appeals board also denied her claim. *Id.* The referee told her that “unlike most disabilities becoming pregnancy was voluntary” and under the law, he had no choice but to reject these claims. *Id.* at 83.


[^38]: *Id.* at 486.

[^39]: *Id.* at 490. The district court found the insurance program to be irrational because it paid for a voluntary disability arising from plastic surgery but excluded an involuntary disability arising from a miscarriage after a car crash. STREBEIGH, supra note 30, at 94.

[^40]: *Id.* at 490-92 (noting that the California case construing the statute was Rentzer v. Unemployment Ins. Appeal Bd., 32 Cal. App. 3d 604 (1973) and that the disabilities of three plaintiffs’ merited benefits under this case due to arising in abnormal pregnancies).
risks.\textsuperscript{41} The Court noted that the Equal Protection Clause did “not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.”\textsuperscript{42} Because no evidence existed that the program’s risk selection “discriminated against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program,” the remaining discrimination claim did not violate the Equal Protection Clause.\textsuperscript{43} The program categorized possible recipients as “pregnant women and non-pregnant persons,” so no discrimination occurred because the non-pregnant group included both sexes.\textsuperscript{44}

B. Title VII

Title VII is the employment discrimination section of the Civil Rights Act. The original version did not address sex discrimination; rather, it focused its attention on discrimination “based on ‘race, color, religion, or national origin.’”\textsuperscript{45} Political maneuvering caused sex to be added to the bill, which was later enacted in 1964.\textsuperscript{46}

\textsuperscript{41} Id. at 494.

\textsuperscript{42} Id. at 495.

\textsuperscript{43} Id. at 496. “There is no risk for 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.

\textsuperscript{44} Id. at 497 n.20. In his dissent, Justice Brennan pointed out that the “dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitute[d] sex discrimination.” Id. at 501 (Brennan, J., dissenting). In response, Justice Stevens stated that the program “merely remove[d] one physical condition–pregnancy–from the list of compensable disabilities” Id. at 497 n.20 (majority opinion).

\textsuperscript{45} STREBEIGH, supra note 30, at 111-12.

\textsuperscript{46} Id. at 112-14. Representative Smith of Virginia, though he was an Equal Rights Amendment supporter, proposed the additional language in the hopes of killing the bill. Id. The language was included in the bill with a vote of 168 to 133. Id. The language’s supporters were a motley crew of politicians including women, Republican supporters of women’s rights, and Southern Democrats who wanted the bill to fail. Id. at 113. Many of these politicians then voted against the amended bill. Id. at 114.
1. **General Electric v. Gilbert**

The next major pregnancy discrimination case arose after Title VII’s enactment. In *Gilbert*, General Electric required its pregnant female employees to take a mandatory, uncompensated leave period before giving birth. The plaintiffs sought and were denied disability benefits for this time period and filed a Title VII claim with the EEOC. The district court found General Electric violated Title VII by excluding pregnancy disabilities, and the Fourth Circuit affirmed.

The Supreme Court, however, reversed. The Court noted that Congress had not incorporated prior discrimination concepts into Title VII and that the Court’s decisions were its best resource for interpreting Title VII. The Court thought that Title VII and the Equal Protection Clause were “not wholly dissimilar” in context, and applied *Geduldig* to the case at hand. Since “the concept of ‘discrimination’…was well known” when Title VII was enacted, the Court refused to infer more from Congress’s language and determined that General Electric’s disability benefits plan did not violate Title VII.

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48 *Id.* at 128-29. After these women gave birth, they had to wait six weeks before they could return to their jobs. *Id.* at 150 n.1 (Brennan, J. dissenting).

49 *Id.* at 128-29 (majority opinion).

50 *Id.* at 130-31. The Fourth Circuit initially declined to decide General Electric’s appeal until after the Supreme Court made a decision on the *Liberty Mutual* case. *Strebeigh, supra* note 30, at 123-24. The parties, however, petitioned the Supreme Court to hear the case and then the Fourth Circuit rendered a decision. *Strebeigh, supra* note 30 at 124. The Fourth Circuit did not follow *Geduldig* because it involved the Equal Protection Clause not Title VII. *Strebeigh, supra* note 30 at 131.

51 *Gilbert*, 429 U.S. at 133.

52 *Id.* at 133, 137. The Court also examined the conflicting EEOC guidelines but they provided little guidance. *Id.* at 141-45.

53 *Id.* at 145-46.
Both Justices Stevens and Brennan dissented from the opinion. Justice Brennan believed that General Electric’s employment practices, the programs all-inclusive design, the role of working women, and “the EEOC’s construction of sex discrimination” was in line with Title VII’s goal “to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [sexually] stratified job environments to the disadvantage of women.”54 Justice Stevens believed Geduldig to be inapplicable, stating that the case at hand only involved a question of simple statutory construction.55 He concluded that General Electric’s rule discriminated based on sex and he would have affirmed the Fourth Circuit’s decision.56

C. Title VII Amended: Pregnancy Discrimination Act

In response to the General Electric decision, Congress amended Title VII with the Pregnancy Discrimination Act (“PDA”), which states:

> 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 section 703(h) of this title shall be interpreted to permit otherwise.57

The Act’s purpose was “to clarify Congress’ intent to include discrimination based on pregnancy, childbirth, or related medical conditions in the prohibition against sex discrimination and employment.”58 Congress clarified that the General Electric majority did not correctly interpret Title VII by denying

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54 Id. at 160 (Brennan, J., dissenting).
55 Id. at 161 (Stevens, J., dissenting).
56 Id. at 161-62.
pregnant women its protection.\textsuperscript{59} Indeed, this protection against discrimination would “extend[] to the whole range of matters concerning the child-bearing process,” for women who were “pregnant, bearing a child, or [had] a related medical condition.”\textsuperscript{60} Congress, however, neglected to define the “related medical conditions” included under the PDA.

1. \textit{Newport News Shipbuilding \& Dry Dock Co. v. EEOC}\textsuperscript{61}

In \textit{Newport News}, the Supreme Court addressed an employer’s insurance plan, which covered male and female employees in the same manner except for when dealing with the issue of pregnancy, under the PDA. Male employees’ pregnant spouses received less hospital coverage than pregnant female employees with spouses. A male employee sued, alleging that the plan was discriminatory, but the district court found the plan lawful.\textsuperscript{62} The Fourth Circuit reversed, finding that a disparity in coverage existed between male and female employees, which violated the PDA.\textsuperscript{63} Upon granting certiorari, the Supreme Court considered whether the PDA’s enactment overturned \textit{General Electric}’s holding and test for discrimination.\textsuperscript{64}

Examining the PDA’s legislative history and noting that many PDA proponents felt that the Supreme Court had incorrectly interpreted congressional intent, the Court analyzed the plaintiff’s claim against the backdrop “that Congress had always intended to protect \textit{all} individuals from sex discrimination in employment — including but not limited to pregnant women workers.”\textsuperscript{65}

Since the PDA made clear that discrimination based on pregnancy under Title VII is sex discrimination and “the sex of the spouse is always the opposite of

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} \textit{Id.} at 5, 1978 U.S.C.C.A.N. at 4753.

\textsuperscript{61} 462 U.S. 669 (1983).

\textsuperscript{62} \textit{Id.} at 674.

\textsuperscript{63} \textit{Id.} at 675.

\textsuperscript{64} \textit{Id.} at 676.

\textsuperscript{65} \textit{Id.} at 678-79, 681.
the sex of the employee,” the Court concluded that discrimination against female spouses regarding fringe benefits would qualify as discrimination against male employees.\textsuperscript{66} As a result, the plan’s pregnancy limitation violated Title VII by discriminating against the company’s male employees.\textsuperscript{67}

The dissent felt that the Court’s analysis deviated from the PDA’s plain language and legislative history applied to employees’ pregnancies rather than their spouses.\textsuperscript{68} The dissent reasoned that General Electric still applied because the PDA’s intent was to treat pregnant employees the same, and employees’ spouses were not within the congressional intent of the PDA.\textsuperscript{69}

2. \textit{Other Cases Construing the PDA}

Despite the Newport News decision, courts often take a narrow view of the PDA when plaintiffs attempt to recover for discrimination arising out of their pregnancies.

i. \textit{Maldonado v. U.S. Bank}\textsuperscript{70}

In \textit{Maldonado v. U.S. Bank}, a provisional, part-time bank teller, discharged after informing her boss about her pregnancy, sued her employer.\textsuperscript{71} The district court granted the employer summary judgment; however, the Seventh Circuit reversed.\textsuperscript{72} On appeal, the Seventh Circuit discussed the intent of Title

\begin{itemize}
\item \textsuperscript{66} Id. at 684.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Id. at 686-88 (Rehnquist, J., dissenting).
\item \textsuperscript{69} Id. at 690-95.
\item \textsuperscript{70} 186 F.3d 759 (7th Cir. 1999).
\item \textsuperscript{71} Id. at 761. The plaintiff interviewed for the part-time teller position on February 10th and learned that she was pregnant three days later. \textit{Id}. at 764. The plaintiff began her training on February 20th, and as part of her training she received an employee manual that noted she was a provisional employee for the first three months of her job and that employers were eligible for pregnancy leave after one year of service. \textit{Id}. While still in training, she informed her employer approximately two weeks later that she was pregnant and was subsequently discharged. \textit{Id}.
\item \textsuperscript{72} Id. at 761-62.
\end{itemize}
VII and the PDA, noting that a prevailing party “must show that she was treated differently because of her pregnancy,” which could be done directly or indirectly. 73 The employer did not dispute that it discharged the plaintiff because of her pregnancy, but asserted that it discharged the plaintiff due to an anticipated diminishment in her performance and anticipated unavailability due to her medical condition. 74

The Seventh Circuit reasoned that the PDA allowed women to make independent choices but the PDA “was not designed to handcuff employers by forcing them to wait until an employee’s pregnancy cause[d] a special economic disadvantage.” 75 In other words, the PDA did not create an “artificial divide” between pregnancy and secondary effects affecting job performance. Thus, an employer could, in limited circumstances predict a pregnant employee’s disruptive extra needs, such as breaks and act proportionately to such projections if “it has a good faith basis supported by sufficiently strong evidence, that the normal inconveniences of an employee’s pregnancy will require special treatment.” 76 The Seventh Circuit, while acknowledging that “an employer can dismiss an employee for excessive absenteeism, even if the absences were a direct result of the employee’s pregnancy[,]” noted that the employer had to offer proof of such. 77 The employer in Maldonado did not present any such evidence. 78

Based on the factual record, the Seventh Circuit concluded that summary judgment was inappropriate, noted that “[t]he PDA makes it unlawful for an employer to assume that pregnant women will be less productive than other employees,” and indicated the circumstances in which an employer may discharge an employee based on bona fide occupational qualifications if it has a good faith basis that is “supported by sufficiently strong evidence.” 79

73 Id. at 763 (quotation omitted).
74 Id. at 766.
75 Id. at 767.
76 Id.
77 Id.
78 Id. at 767-68.
79 Id. at 767-69.
ii. *Krauel v. Iowa Methodist Medical Center*\(^{80}\)

In *Krauel v. Iowa Methodist Medical Center*, the plaintiff sued her employer under Title VII and the PDA for failing to cover her fertility treatments in her medical benefits plan.\(^{81}\) The district court granted the employer summary judgment. On appeal, the Eighth Circuit found that the phrase “related medical conditions did not contemplate conditions beyond actual pregnancy and childbirth; additionally, the EEOC guidelines did not refer to infertility, which strengthened the Eighth Circuit’s reasoning.\(^{82}\) The court held that plaintiff’s infertility went beyond the PDA’s scope and affirmed the employer’s denial of coverage.\(^{83}\)

iii. *Fleming v. Ayers & Associates*\(^{84}\)

Similarly, in *Fleming v. Ayers & Associates*, the Sixth Circuit considered whether “related conditions” extend to pregnancy complications suffered by the child.\(^{85}\) Plaintiff’s child was born prematurely and suffered from hydrocephalus, which resulted in an extended hospital stay for the child.\(^{86}\) After the plaintiff’s child was released from the hospital, the plaintiff obtained a job at a nursing home, which was later revoked upon the employer’s determination of the

\(^{80}\) 95 F.3d 674 (8th Cir. 1996).

\(^{81}\) Id. at 676.

\(^{82}\) Id. at 679-80.

\(^{83}\) Id. at 680. The court distinguished this case from the U.S. Supreme Court decision in *Johnson Controls* because potential pregnancy was sex related while infertility could affect both genders. Id.

\(^{84}\) 948 F.2d 993 (6th Cir. 1991).

\(^{85}\) Id.

\(^{86}\) Id. at 995. Hydrocephalus causes accumulation of “cerebrospinal fluid within the brain resulting from developmental anomalies.” Id. at 995 n.1.
associated insurance costs. The district court denied her Title VII claims but determined that the employer had violated ERISA.

The Sixth Circuit noted that the plaintiff failed to establish a link between her employer’s decision and her gender or pregnancy, as the PDA referred to pregnant women’s conditions, not their offspring’s, even if the latter was “present at birth.” The Sixth Circuit determined that (1) the PDA did not encompass adverse employment actions due to a child’s medical condition merely because that condition existed at birth and (2) the plaintiff’s failure to show that the employer’s decision was related to gender as a dependent’s medical expenses were not gender specific.

iv. Abraham v. Graphic Arts International Union

In Abraham v. Graphic Arts International, the plaintiff informed her employer of her pregnancy and took maternity leave from her position as an administrative assistant. She received no definite answer regarding leave before giving birth. Upon her return, she learned of her termination. The EEOC

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87 Id. at 995-96.
88 Id. at 996. The district court requested that the parties address sua sponte “the applicability of ERISA section 510, 29 U.S.C. § 1140, to this case.” Id. While the court was taking the matter under advisement, the plaintiff was allowed to amend her complaint and add an ERISA claim. Id. In its findings of fact and conclusions of law, the district court held that the employer violated ERISA because it had discriminated against the plaintiff “because of her expected use of employee benefits.” Id.
89 Id. at 996-97. The employer’s reasons for her treatment involved her performance and high insurance costs. Id. at 996.
90 Id.
91 Id.
93 Id. at 813.
94 Id.
95 Id.
issued her a right-to-sue letter, but the district court granted summary judgment in favor of her employer.\footnote{96} 

The D.C. Circuit reversed, determining that the plaintiff had made out a prima facie case for trial.\footnote{97} Additionally, the court noted that an employer may not consider the employee’s gender or rely on a unique characteristic (i.e. pregnancy) attributable to only one sex in the decision to discharge.\footnote{98} Because neither the union’s leave policies nor the Department of Labor contract applied to the plaintiff, the court found that the policy conflicted with Title VII.\footnote{99} The court viewed the leave policies as “portend[ing] a drastic effect on women employees of childbearing age an impact no male would ever encounter.”\footnote{100}

\textit{v. In re Carnegie Center Associates}\footnote{101}

The case regarding \textit{In re Carnegie Center Associates}, involves a situation in which the plaintiff’s employers faltered financially during her maternity leave and eliminated her secretarial position.\footnote{102} She sued, alleging discrimination on the basis of race, gender, and marital status; the district court, however, concluded that the company eliminated her position due to her absence and her lack of qualifications (rather than race, gender, pregnancy) and that she did not qualify for the other available positions.\footnote{103}

On appeal, the Third Circuit considered whether absence based on maternity leave qualifies as a legitimate nondiscriminatory reason for

\footnotesize{\begin{itemize}
\item \textit{Id.} at 813-14.
\item \textit{Id.} at 815-16.
\item \textit{Id} at 817.
\item \textit{Id.} 818-19. The Department of Labor contract only allowed for ten days of vacation and ten days of leave. \textit{Id.}
\item \textit{Id.} at 819.
\item 129 F.3d 290 (3d Cir. 1997).
\item \textit{Id.}
\item \textit{Id.} at 294.
\end{itemize}}
termination. The court citing a Seventh Circuit’s decision, ruled that the PDA requires an employer to ignore the pregnancy, but not the pregnancy-related absence caused by the pregnancy unless it would also ignore that of other employees. The court ultimately concluded that the plaintiff’s absence (along with the company’s economic woes) led to her termination. Most importantly, the court declined to find that discharges based on maternity leave absences were per se violations of the PDA.

PART III: ALLEN V. TOTES/ISOTONER CORP. AND RELATED CASES

A. Ohio’s Statutory Context

The aforementioned line of cases provide context to one subsidiary issue to the described concerns facing working mothers — workplace breastfeeding policies. Partly due to the singularity of the issue, legal authority on the matter is sparse. Allen v. Totes/Isotoner Corp., the Ohio case that is the subject of this article, provides a reference for analyzing this matter. Ohio’s lone breastfeeding statute establishes mothers’ rights to breastfeed in public, but does not address an employee’s rights specifically. As a result, Allen brought her suit under Ohio’s version of the PDA.

104 Id.

105 Id. at 296 (construing Troupe v. May Dep’t Stores Co., 20 F.3d 734, 738 (7th Cir. 1994)).

106 Id.

107 Id. at 297.

108 OHIO REV. CODE ANN. § 3781.55. This statute allows mothers to breastfeed “in any location of a place of public accommodation wherein the mother otherwise is permitted.” Id.; see OHIO REV. CODE ANN. § 4112.01 (defining places of public accommodation).

109 See OHIO REV. CODE ANN. § 4112 et. seq. (discussing unlawful discrimination); OHIO ADMIN. CODE § 4112-5 et seq. (discussing discrimination); OHIO ADMIN. CODE § 4112-5-05 (discussing sex discrimination); Allen, 915 N.E.2d 622.
B. Allen v. Totes/Isotoner Corp.

Plaintiff Allen was a temporary probationary employee of the Totes/Isotoner Corporation.\(^{110}\) Allen – mother of a then-five month old son – suffered from significant discomfort when unable to pump breast milk during work hours.\(^{111}\) Allen began taking unauthorized breaks and requested accommodations.\(^{112}\) Her superior decided to terminate her.\(^{113}\) Allen sued under Ohio’s PDA, alleging that her employer discriminated against her based on her choice to breastfeed her child.\(^{114}\) The Court of Common Pleas granted summary judgment for the employer, finding that lactation discrimination is not pregnancy discrimination, did not violate state public policy, and did not constitute disability discrimination.\(^{115}\) The Ohio Court of Appeals affirmed.\(^{116}\)

The Ohio Supreme Court also affirmed, citing Allen’s unauthorized breaks as the legitimate, nondiscriminatory reason for her termination.\(^{117}\) In affiriming the Court of Appeals’ decision, the Ohio Supreme Court did not reach the issue of whether breastfeeding discrimination was contemplated by Ohio’s employment discrimination statute.\(^{118}\)

Justice O’Connor of the Ohio Supreme Court concurred in judgment only.\(^{119}\) Justice O’Connor agreed that Allen had not developed a record that would survive summary judgment, but believed that the trial and appellate courts had “erroneously applied inapposite federal precedent” when analyzing Allen’s

\(^{110}\) Allen, 915 N.E.2d 622 (Ohio 2009).

\(^{111}\) Id.

\(^{112}\) Id.

\(^{113}\) Id.

\(^{114}\) Id.

\(^{115}\) Id.

\(^{116}\) Id. at 624.

\(^{117}\) See id.

\(^{118}\) Id.

\(^{119}\) Id. (O’Connor, J., concurring in judgment only).
claims and that the court should clarify the law.\textsuperscript{120} Justice O’Connor argued that breastfeeding was within the employment discrimination statute’s scope and that the statute would therefore bar discrimination based on that action.\textsuperscript{121} The PDA, she maintained, made clear that pregnancy discrimination was sex discrimination and the employer must act neutrally toward a pregnant employee before, during, and after pregnancy.\textsuperscript{122} Justice O’Connor distinguished a Sixth Circuit case cited by the majority by noting that it involved discrimination based on public accommodation, not employment discrimination.\textsuperscript{123}

Justice O’Connor declined to use other federal courts’ post-\textit{Gilbert} rationales because Ohio’s legislative intent was to reject \textit{Gilbert}.\textsuperscript{124} Justice O’Connor resolved that the trial court’s conclusion that lactation was related to breastfeeding as opposed to pregnancy was “curious and inaccurate.”\textsuperscript{125} Justice O’Connor further suggested that the workplace rule on pumping breast milk may treat lactating women disparately by restricting them to pumping breast milk only at lunch, but not others who needed to tend to bodily functions.\textsuperscript{126} Nonetheless, Justice O’Connor affirmed the summary judgment ruling.\textsuperscript{127} Justice O’Connor agreed that Allen’s unauthorized breaks and the lack of evidence that the employer implicitly ratified other employees’ circumvention of the break rules.\textsuperscript{128}

The dissent believed that the majority avoided clarifying whether the Ohio General Assembly intended to create a cause of action for discrimination based on

\textsuperscript{120} \textit{Id.} at 625.

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.} at 628.

\textsuperscript{123} \textit{Id.} at 628–29.

\textsuperscript{124} \textit{Id.} at 629.

\textsuperscript{125} \textit{Id.} at 630.

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.} at 631.

\textsuperscript{128} \textit{Id.} Justice O’Connor, however, refused to hold that pregnancy and lactation were disabilities because Allen had not shown how she was disabled. \textit{Id.} at 631. Additionally, allowing her claim to proceed under a disability analysis would revive paternalistic attitudes towards women. \textit{Id.} at 632.
the aftereffects of pregnancy.\textsuperscript{129} The dissent pointed to the lower court’s failure to explore the differences between Allen’s unauthorized breaks and that of other employees or the number of the latter.\textsuperscript{130} The dissent would have held that lactation discrimination was employment discrimination and that Allen’s case should proceed to trial.\textsuperscript{131}

\textbf{C. Other Cases}

The \textit{Allen} decision is consistent with other cases decided in the United States, as many courts have similarly concluded that the plaintiff either failed to make a prima facie case of discrimination or that Congress did not contemplate breastfeeding as protected from discrimination.\textsuperscript{132}

1. \textit{McNill v. New York City Dept. of Correction}\textsuperscript{133}

In \textit{McNill v. New York City Department of Correction}, the plaintiff gave birth to a son who suffered from a cleft palate and lip.\textsuperscript{134} Although she was medically cleared to return to work after her maternity leave, she had missed work numerous times to breastfeed her son until his surgery.\textsuperscript{135} Her employer

\begin{itemize}
\item \textsuperscript{129} \textit{Id.} at 632 (Pfeifer, J., dissenting).
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.} at 633.
\item \textsuperscript{133} \textit{McNill}, 950 F. Supp. 564 (S.D.N.Y. 1996).
\item \textsuperscript{134} \textit{Id.} at 566.
\item \textsuperscript{135} \textit{Id.} at 566-67.
\end{itemize}
eventually reclassified her title, then demoted her.\textsuperscript{136} She sued, alleging that her employer’s actions were discriminatory and related to her breastfeeding.\textsuperscript{137}

The district court considered whether breastfeeding fell within the meaning of “pregnancy, childbirth, or [a] related medical condition.”\textsuperscript{138} The district court, construing the PDA,\textsuperscript{139} defined the act of giving birth and pregnancy as the time in which a fetus is gestating in the uterus.\textsuperscript{140} The district court concluded, based on this definition that an infant’s cleft palate and lip was not a condition related to pregnancy or childbirth.\textsuperscript{141} Delving into the Act’s legislative history, the court reasoned that the related medical condition must afflict the mother, not the child, and a cleft palate and lip do not directly affect the mother.\textsuperscript{142} Though the plaintiff’s situation was particularly sympathetic, the district court concluded that she was not part of the protected class and did not allege a prima facie case for discrimination under Title VII.\textsuperscript{143}

2. \textit{Martinez v. N.B.C., Inc.}\textsuperscript{144}

In \textit{Martinez v. N.B.C., Inc.}, the plaintiff worked in production at MSNBC.\textsuperscript{145} Upon returning from her maternity leave, she chose to use a breast pump to collect her breast milk when she could not nurse.\textsuperscript{146} She obtained her employer’s permission to use her breast pump three times a day for about twenty

\begin{footnotesize}
\textsuperscript{136} \textit{Id.} at 567.
\textsuperscript{137} \textit{Id.} at 568.
\textsuperscript{138} \textit{Id.} at 569 (internal quotation marks omitted).
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Id.} at 569-70.
\textsuperscript{142} \textit{Id.} at 570.
\textsuperscript{143} \textit{Id.} at 571.
\textsuperscript{144} \textit{Martinez}, 49 F.Supp.2d 305 (S.D.N.Y. 1999).
\textsuperscript{145} \textit{Id.} at 307.
\textsuperscript{146} \textit{Id.}
\end{footnotesize}
minutes per session.\textsuperscript{147} After a few months, this particular schedule grew more burdensome, and she sought a more regular schedule.\textsuperscript{148} The employer, however, demoted the plaintiff when she could not work the hours required as a producer.\textsuperscript{149} The plaintiff filed for and received a right-to-sue letter from the EEOC to allege that MSNBC had, under the American with Disabilities Act (“ADA”), failed to provide her adequate accommodations to pump her breast milk and, under Title VII, had engaged in retaliatory conduct by demoting her, among other claims.\textsuperscript{150}

The Southern District of New York dismissed her ADA claim because “pregnancy and related medical conditions do not, absent unusual conditions, constitute a [disability] under the ADA” and noted that one judge in the Second Circuit stated that, “it is simply preposterous to contend a woman’s body is functioning abnormally because she is lactating.”\textsuperscript{151} The court further concluded that under Title VII, breast-pumping individuals did not merit a protected status; thus, the plaintiff failed to state a prima facie claim of gender discrimination.\textsuperscript{152} The court also concluded that the plaintiff was not suffering a hostile work environment due to her breast pumping because “there were and could be no men with the same characteristic,” which meant that, at most, it was a “work environment hostile to breast pumping, not a work environment that subjected women to treatment less favorable than was meted out to men.”\textsuperscript{153} The court found that her retaliation claim failed because Title VII did not cover acceptable breast pumping facilities and dismissed her complaint.\textsuperscript{154}

\textsuperscript{147} Id.  
\textsuperscript{148} Id.  
\textsuperscript{149} Id.  
\textsuperscript{150} Id. at 308.  
\textsuperscript{151} Id. at 309 (quoting Bond v. Sterling, Inc., 997 F.Supp. 306, 311 (N.D.N.Y. 1998) (McAvoy, C.J.)).  
\textsuperscript{152} Id. at 311.  
\textsuperscript{153} Id.  
\textsuperscript{154} Id.
3. **Fejes v. Gilpin Ventures, Inc.**\(^{155}\)

*Fejes v. Gilpin Ventures, Inc.*\(^{156}\) presented a similar outcome. The plaintiff, a blackjack dealer, took FMLA leave, which was scheduled to end in June 1994.\(^{157}\) The plaintiff, however, could not return by the scheduled date because she had not set “an appropriate breast-feeding schedule.”\(^{158}\) A month after her scheduled return, the defendant fired her.\(^{159}\) The plaintiff filed gender and discrimination claims with the EEOC and received a right-to-sue letter.\(^{160}\)

The District of Colorado Court granted summary judgment on the plaintiff’s Title VII claim. The court, handling the case on first impression, determined after looking at the act’s language, the act’s legislative history, and other courts’ decisions, that neither childrearing nor breast-feeding are within the PDA’s scope.\(^{161}\) The court surmised that the PDA’s legislative history did not mandate that an employer provide benefits or accommodations for breastfeeding to be paid if the condition was not medically related to pregnancy.\(^{162}\)

Additionally, the court noted that the plaintiff failed to establish that other similarly situated employees received different treatment.\(^{163}\) The court stated that she also failed to establish a prima facie case of gender discrimination because she submitted no evidence that better conditions were provided to male employees who took medical leave.\(^{164}\) The court, however, allowed the plaintiff


\(^{156}\) *Id.* at 1489.

\(^{157}\) *Id.* at 1490.

\(^{158}\) *Id.*

\(^{159}\) *Id.*

\(^{160}\) *Id.* at 1491.

\(^{161}\) *Id.*

\(^{162}\) *Id.* at 1492.

\(^{163}\) *Id.*

\(^{164}\) *Id.* at 1492-94.
to proceed with her FMLA and breach of contract claims, because she provided specific facts to show that genuine issues of material fact existed.\footnote{165}{Id. at 1494-97.}

4. \textit{Stanley v. Abacus Technology Corp.}\footnote{166}{Stanley, 359 Fed. App’x 926 (10th Cir. 2010).}

In \textit{Stanley v. Abacus Technology Corp.}, the plaintiff worked for her employer as a photographer.\footnote{167}{Id. at 926.} She gave birth, returned to work, and was terminated four months after her return.\footnote{168}{Id. at 927.} She received a right-to-sue letter from the EEOC and sued based on pregnancy and gender discrimination.\footnote{169}{Id.} The district court granted summary judgment for the employer.\footnote{170}{Id.}

At the Tenth Circuit, the plaintiff contended that her employer denied her the ability to modify her schedule during her pregnancy or breastfeeding period and gave her a lower performance appraisal during her pregnancy.\footnote{171}{Id. at 928.} The Tenth Circuit determined that she had not established an adverse employment action or that she was treated differently from other employees in similar situations.\footnote{172}{Id. at 928-29.} Because the plaintiff did not present any direct evidence of discrimination, the Tenth Circuit was required to examine her case through the indirect approach using the burden-shifting framework of \textit{McDonnell-Douglas}. \textit{Id.} at 928. As a result, the plaintiff had to establish a prima facie case of discrimination with the following factors: “(1) she [was] a member of a protected class; (2) she suffered an adverse employment action; and (3) she was treated differently from similarly situated employees.” \textit{Id.}

Further, other co-workers did not have
duty-free lunch hours either.\textsuperscript{174} The Tenth Circuit also found her retaliation claim baseless, as she had received a marginal rating in her performance and had received verbal warnings about her violations.\textsuperscript{175} Additionally, the plaintiff failed to explain how the district court erred in its analysis.\textsuperscript{176} Ultimately, the Tenth Circuit determined that there was no reversible error in granting summary judgment on the gender discrimination claim because the plaintiff did not present evidence of different treatment of similarly situated co-workers, which is necessary to establish a prima facie case for such claims.\textsuperscript{177} Thus, the Tenth Circuit affirmed the district court’s judgment.\textsuperscript{178}

5. \textit{Dike v. School Board of Orange County, Florida}\textsuperscript{179}

\textit{Dike v. School Board of Orange County, Florida}\textsuperscript{180} presented a deviation from the previous line of cases. The plaintiff was a kindergarten teacher who breastfed her newborn, arranging for her spouse or her babysitter to bring the newborn to school during her breaks and lunch periods to nurse.\textsuperscript{181} She breastfed the newborn in a locked room where others could not see and she performed all of the duties asked of her by the school.\textsuperscript{182} Citing a school board directive disallowing teachers from bringing their children to work for “any reason,” the principal asked her to stop nursing her newborn on school grounds.\textsuperscript{183} The plaintiff complied and began using a breast pump to accommodate her child’s

\begin{footnotes}
\textsuperscript{174} \textit{Id.} at 929.
\textsuperscript{175} \textit{Id.} at 929-31.
\textsuperscript{176} \textit{Id.} at 930-31.
\textsuperscript{177} \textit{Id.} at 931.
\textsuperscript{178} \textit{Id.}
\textsuperscript{179} \textit{Dike}, 650 F.2d 783 (5th Cir. Unit B July 1981).
\textsuperscript{180} \textit{Id.} at 784.
\textsuperscript{181} \textit{Id.} at 784-85.
\textsuperscript{182} \textit{Id.}
\textsuperscript{183} \textit{Id.}
\end{footnotes}
allergy to formula milk. However, the change in routine affected the plaintiff and newborn, so the plaintiff requested to either be allowed to resume her old routine or be allowed to nurse the child off campus when she was not on duty. This request was denied. The plaintiff was later forced to take a leave of absence when her newborn refused to nurse from the bottle. She sued, however, the district court denied her request for a preliminary injunction and dismissed her complaint.

The Fifth Circuit, determining that the request for a preliminary injunction was moot because the plaintiff had already begun to wean the child, addressed only the issue of back pay. The Fifth Circuit reversed the dismissal of the plaintiff’s complaint, deciding that the district court needed additional facts to weigh the plaintiff’s interests against those of the school board. The Fifth Circuit described breastfeeding as “the most elemental form of parental care” and a “communion between mother and child that, like marriage, is ‘intimate to the degree of being sacred.’” The court concluded that the Constitution protects a woman’s decision to breastfeed, like other personal family and marriage decisions, from excessive state interference. The court, however, also acknowledged that the school board had an interest in preventing disruption of the educational process, ensuring teachers perform their duties, and avoiding potential liability. The Fifth Circuit remanded the case to the district court to determine

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184 Id.
185 Id.
186 Id.
187 Id.
188 Id.
189 Id.
190 Id.
191 Id. at 787; see also Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
192 Dike, 650 F.2d at 787.
193 Id.
whether the school board’s interests merited regulation and were narrowly
drawn.194


In Barrash v. Bowen, the plaintiff worked for the Social Security
Administration and sought six months of maternity leave after the birth of her
second child so she could breastfeed.196 Initially, she only received six weeks of
maternity leave, but she was granted more time after receiving notes from her
doctor.197 Her employer, however, requested that she return to work, and if she
did not return to work, she needed to provide adequate documentation for illness
or would be considered absent without leave.198 After repeated instructions to
return to work and denials of requests for more time, the employer terminated the
plaintiff.199 The review board determined that the discharge was valid, yet the
district court concluded that the policy violated Title VII and awarded her
relief.200

The Fourth Circuit, however, concluded that the review board’s
determination was appropriate.201 After examining the plaintiff’s Title VII claim,
the Fourth Circuit noted that disparate impact analysis was inappropriate because
the grant or withdrawal of the leave was discretionary despite the involvement of
a new mother.202 The Fourth Circuit noted that the number of women receiving
six months of maternity leave was decreasing over the years, and that comparing
the women and men’s leave was not possible because the men were incapacitated

194 *Id.*
195 846 F.2d 927 (4th Cir. 1988).
196 *Id.* at 928.
197 *Id.*
198 *Id.*
199 *Id.* at 929.
200 *Id.*
201 *Id.* at 930.
202 *Id.* at 931.
and the women were not. The Fourth Circuit determined that any disparate impact regarding the leave policy was not of the kind that would invalidate the policy, because it did not show that women received less favorable treatment than men. The court then noted that the unpaid leave of absence policy concerned the excessiveness of the leave and disparate impact could not be shown by information that was unaffected by the directive. The Fourth Circuit reversed the judgment of the district court.

PART IV: SURVEY OF STATE AND FEDERAL LAWS

Women have certainly made strides since the enactment of the Nineteenth Amendment, but opportunities for further progress remain. Allen and the other similar cases mentioned demonstrate how perceptions of women, pregnancy, and the workplace from the days of General Electric and Geduldig persist in some form.

A. Breastfeeding Statutes

Twenty-four states, the District of Columbia, and Puerto Rico have addressed breastfeeding and the workplace. Though these statutes vary in their accommodation of breastfeeding women, they tend to fall into two categories: (1) allowing employees to take unpaid breaks to express breast milk that run

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203 Id. at 931-32.
204 Id. at 932.
205 Id.
206 Id.
concurrently with those breaks already provided by the employer or (2) allowing employees to express breast milk during meal or break periods. Most statutes do not require employers to provide these breaks if doing so would unduly disrupt their operation. As such, even if Ohio enacted a statute similar to those in other states, the Allen court likely would have reached the same result due to the plaintiff taking unauthorized breaks. Most of these statutes indicate that breastfeeding should occur during breaks or concurrent with breaks.

Ohio could, however, model its laws after states that are more accommodating to breastfeeding in the workplace. Colorado requires employers to provide reasonable unpaid break time or allow the employee to use paid break or meal periods to express breast milk for up to two years after the child’s birth. Oregon requires employers to provide breastfeeding employees with a half-hour break for every four-hour shift, unless a different agreement is reached.


211 Id.


employer wants to promote itself as infant- or mother-friendly in North Dakota, Texas, or Washington, it must comply with certain standards of workplace flexibility by scheduling breaks and patterns for expressions of milk, private areas to pump, areas to clean pumping machines, and storage areas for the milk. These accommodations need not coincide with established breaks. Most of these accommodations, however, are voluntary for employers; only Oregon has mandated that employees receive half-hour breaks for every four hours worked. Although voluntary, these arrangements show that some states value their female citizens ability to be both employees and mothers.

The aforementioned examples of state legislation indicate that some states are trying to promote workplace equality. One way to resolve these differing standards among the states is to amend the PDA. In 2005, Representative Maloney of New York introduced a bill to amend the PDA and meet the needs of women with infants, a growing segment of the labor force, to reflect the recommendations of the American Academy of Pediatrics to breastfeed for the first six months of an infant’s life. In addition, the bill asserted that courts’ exclusion of breastfeeding from the meaning of the PDA was inconsistent with congressional intent. The bill, if it had been enacted, would have given employers tax credits for providing dedicated areas for breastfeeding. This bill, however, failed to pass that year or during the 110th or during the 111th Congress.


215 OR. REV. STAT. ANN. § 653.077(1)(c) (2008)(noting that failure to comply can result in a thousand dollar penalty).


217 See id. § 102 (a)(8)-(9).

218 Id. §§ 201, 451.

219 The bill was referred to a House subcommittee on Employer-Employee Relations in May 2005. http://thomas.loc.gov/cgi-
Congress, however, has made progress with the passage of Patient Protection and Affordable Care Act of 2010 ("PPACA"). Section 4207 of the PPACA requires employers to provide a clean and private area and unpaid breaks for mothers to express breast milk.\textsuperscript{222} Although the act applies only to “a fraction of U.S. workers,”\textsuperscript{223} it provides coverage to working mothers in the states who have not addressed breastfeeding in the workplace.\textsuperscript{224} Additionally, the section does not preempt a state’s coverage if the state provides greater protection than the federal law.\textsuperscript{225} Although the PPACA represents progress for working
mothers, the act has just survived several constitutionality challenges and still must face questions and issues arising with implementation.  

**B. The “Mommy Wars”**

In addition to limited statutory protection, media and society have contributed to discrimination against working mothers through the “mommy wars” by speculating as to whether women could have it all. Despite women balancing work and family, the media has spotlighted a recent trend of women “opting out” of their careers to be stay-at-home mothers. This dynamic likely shapes employers’ perception of working mothers, which may result in a “mommy tax” (i.e. depressed earnings over the life of the working mother’s career). Thus, working mothers often earn less than women without children,


227 DOUGLAS & MICHAELS, supra note 4, at 204.

228 LESLIE BENNETTS, THE FEMININE MISTAKE: ARE WE GIVING UP TOO MUCH 149 (2007) (stating that media coverage “focus[es] obsessively on the logistical challenges of [juggling work and motherhood without] exploring the rewards”); see also id. at 33, 180-81.

229 Id. at 33, 180-81. This trend, however, is often available only to those families who are economically able to have one parent at home. See id. at 36 (“To the extent that there are women who are opting out, they are married to men earning over [$200,000] a year and working [90] hours a week. High-income men are married to their jobs, not their families, and that’s who these women who are being written about are married to.”).

230 DOUGLAS & MICHAELS, supra note 4, at 208 (noting that this tension “perpetuated the stereotype that child rearing was strictly a woman’s responsibility” and that it suggested “that deep in their hearts, mothers with careers were finding it all too stressful and, if given a choice, would quit in a heartbeat.”).

231 ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 87-88. Even though this penalty affects both genders, the penalty disproportionately affects women as they are often the primary caretakers. Id. at 99 (noting that men who share domestic responsibilities also suffer an economic penalty as they earn 20% less than men who share no domestic responsibilities).
and if a woman postpones having children until later in life, her earnings will be greater over her lifetime.\footnote{Id. at 94, 103. Overall, the pay gap has been reduced between the sexes, but this reduction appears only to apply to a discrete group. \textit{See id.} at 87 (noting that women make ninety-eight cents to a man’s dollar but this figure only applied to the group of women between the ages of twenty-seven and thirty-three with no children). If all working women are compared to men, then they earn about 59\% of men’s wages. \textit{Id.} at 93.}

A woman who chooses to or must keep working may face some economic penalty and will struggle to find affordable high-quality child care. Unlike several European countries, the United States does not supplement the costs of child rearing.\footnote{Id. at 104. France provides about $10,000 in subsidies to families with two preschool age children. \textit{Id.} Additionally, Swedish women receive a year’s paid leave after they have given birth, as well as a government stipend for child care expenses and a right to a six-hour work day with full benefits until their child attends elementary school. \textit{Id.} at 108.} Among women who need daycare, two-thirds receive some form of care from relatives, friends, or neighbors while others use daycare centers,\footnote{\textit{Id.} at 243.} as past attempts to provide national child care have failed.\footnote{See \textit{id.} at 244-45. The United States almost enacted a Comprehensive Child Development Act in the 1970s, which would have provided child care to all children, but it was vetoed. \textit{Id.} Attempts to reintroduce and enact this bill have failed. \textit{Id.} at 346-49. Then in the 1980s, the federal government reduced funding for children by 18\%. \textit{Id.} at 249.} Thus, these competing concerns motivate some women with means and opportunity to stay at home.\footnote{BENNETTS, \textit{supra} note 219, at 36.} Women who “opt-out” must consider the risk of becoming economically dependent on their significant others\footnote{See \textit{id.} at 47 (noting that few women considered the loss of their income and dependency on their spouse or partner in reaching their decision to opt-out).} or the scarcity of positions if and when they return to the workforce.\footnote{See \textit{id.} at 77 (noting that two-thirds of women who opt-out to raise children and want to re-enter the working world find the situation very difficult). Only 74\% of those seeking involvement in the professional world rejoin it. However, only 40\% have a full time professional job while 24\% have a part time job and 9\% are self employed. \textit{Id.} at 78. Women with “elite credentials” often have the most difficult time returning to the workplace, and even if they return, they will suffer a loss of earning power. \textit{See id.} at 78-79 (noting that women lose about 18\% of their
Such considerations may subconsciously affect courts addressing PDA cases. Although *Allen* did not have to reach the breastfeeding issue because Allen took unauthorized breaks, the court’s opinion indicates that courts still have a narrow view of pregnancy and the workplace. If a female employee had morning sickness and took unauthorized bathroom breaks, would she be terminated? Although impossible to predict, this example demonstrates the subtlety necessary to address the needs of lactating employees.

The difference in treatment of pregnant women and new mothers also presents an issue. An employer that terminated an employee suffering from morning sickness would likely be sued for violating the PDA.\(^{239}\) Legislative history has not clarified why breastfeeding lacks the PDA’s protection though; like morning sickness, lactation arises from a hormone produced “in response to the birth of a new baby.”\(^{240}\) According to the definition, lactation (and as a result, breastfeeding) should be a “related medical condition” to pregnancy because it stems from the pregnancy and is triggered by childbirth. However, as previously demonstrated above, courts disagree with this analysis. This divergence indicates that women in different stages of life have different levels of protections in the workplace.

This subtle divergence may cause women to worry about their choices between breastfeeding and using formula. The American Academy of Pediatrics earning power by opting out and with three or more years, they can lose up to 37% of their earning powers).

\(^{239}\) See 42 U.S.C. § 2000e(k) (stating that “[t]he 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 section 2000e-2(h) of this title shall be interpreted to permit otherwise.”); see also MEDTERM.COM, http://www.medterms.com/script/main/art.asp?articlekey=13406 (defining morning sickness as “nausea and vomiting of pregnancy,” which “is a normal characteristic of early pregnancy”) (last visited Oct. 22, 2012).

encourages breastfeeding for the first six months, and opting for the latter may create several hurdles. Thus, in making this decision, women must consider their workplace. Does the office have a breastfeeding policy? Will they have to seek permission to breastfeed from their employer? Do they risk taking unauthorized breaks and face possible termination? These and other complications, may cause women to determine that opting out of the workplace during the initial years of their child’s life is the path of least resistance especially if they have the financial means to do so. By opting out, these situations and issues will remain unaddressed and future generations will face the same issues.

Furthermore, legislation addressing breastfeeding and the workplace shows some progress. With the PPACA surviving its constitutionality challenges, it will provide a minimum baseline; however, it will now face forthcoming questions of implementation for reliability. To ensure that all women receive protection, states should model any future legislation after Oregon’s laws related


242 Roni Rabin, Breast-Feed Or Else, N.Y. TIMES, June 13, 2006, available at http://query.nytimes.com/gst/fullpage.html?res=9802E1DC1331F930A25755C0A9609C8B63&pagewanted=1 (noting that a U.S. Senator has proposed placing warning labels on infant formulas and feedings of guilt by mothers who could not breastfeed their children); Jennifer Zajfe, Formula, for Disaster, N.Y. TIMES, May 13, 2007, available at http://www.nytimes.com/2007/05/13/opinion/nyregionopinions/13CIzajfe.html (noting that hospitals in some states have stopped providing formula samples in order to promote breastfeeding and arguing that hospitals and government should allow mothers to make the decision regarding how their child receives sustenance).


244 See Sebelius, 132 S. Ct. 2566 (U.S. 2012); see also David M. Herszenhorn & Robert Pear, House Votes for Repeal of Health Law in Symbolic Act, N.Y. TIMES, Jan. 19, 2011 available at http://www.nytimes.com/2011/01/20/health/policy/20cong.html?_r=1&hp (stating that the House of Representatives supported the repeal with a vote of 245 to 189 and that “Leaders of the Democratic-controlled Senate have said that they will not act on the repeal measure, effectively scuttling it”).
to breastfeeding and the workplace. In addition, employers should consider implementing a policy to counter future litigation as well as for their own bottom line.

**CONCLUSION**

Women still struggle for equality. Women have the right to vote, hold jobs that were once exclusively reserved for men, and have more choices than in previous decades. However, women still face obstacles in the workplace from salary disparity to pregnancy discrimination. Moreover, breastfeeding is still not protected under the PDA.

Women are often viewed as mothers and wives first, before considering what other valuable and important roles they can fulfill. However, most women likely want to be perceived as more than just a wife or mother. They want to be perceived in their totality not just in their separate and various roles. Like the suffragists before them, women must raise these issues with their elected officials, courts, employers, and spouses or significant others to raise awareness and promote change, so they can spur their state legislatures into drafting legislation to improve their situations. If they find that their elected official cannot or does not support their cause, they can exercise the right to vote in support of rights and officials that will assist in creating a more fair environment and provide for more choices in that environment, including but not limited to the choice to breastfeed (or not) in the workplace.


246 Julie Manning Magid, *Pregnant with Possibility: Reexamining the PDA*, 38 AM. BUS. L.J. 819, 821 (stating that complaints rose by six percent between 1997-99). The number of receipts filed for pregnancy discrimination decreased from 2008 to 2009. U.S. Equal Emp’t Opportunity Comm’n, *Pregnancy Discrimination Charges*, www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm (last visited Oct. 22, 2012). In 2008, 6,285 receipts were filed while in 2009, only 6,196 receipts were filed. *Id.* This decline could be due to less discrimination or it could be a result of the worsening economy and employee layoffs.