
2011

Weaning Ohio Employers off of Lactation Discrimination: The Need for a Clear Interpretation of Ohio's Pregnancy Discrimination Act following *Allen v. Totes/Isotoner Corp.* Note

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**WEANING OHIO EMPLOYERS OFF OF
LACTATION DISCRIMINATION: THE NEED FOR A
CLEAR INTERPRETATION OF OHIO'S
PREGNANCY DISCRIMINATION ACT FOLLOWING
*ALLEN V. TOTES/ISOTONER CORP.***

SHANNON BYRNE*

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* J.D. expected, May 2011, Cleveland State University, Cleveland-Marshall College of Law; B.S. McGill University; B.A. University of Victoria. I would like to thank Professor Stephen Lazarus, Alana Jochum, and Margaret Sweeney for their advice and guidance during the early drafts and topic selection of this Note. I would also like to thank my husband, Mathieu Fortin for his love and support, and Dana and Rita Byrne for their enduring love. All mistakes are mine alone.

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I. INTRODUCTION

What choice does a mother have when she must balance an eight-hour workday with breastfeeding her baby? The answer to this dilemma seems simple at first: express breast milk by utilizing a breast pump at the workplace. But to complicate matters, the employee learns that her work schedule will require her to wait five hours before she can pump. Prior to the commencement of her new job, she approaches her employer with her concerns. She discovers her employer permits all employees to take impromptu breaks to use the restroom to tend to bodily functions, but the employer instructs her to only pump her breasts during her lunch break. She is banished to an unsanitary restroom stall to pump, and her employer even refuses her polite request for a chair to sit down. She tries her best to conform to her employer's demands, but her breasts refuse to operate on a schedule. They become painfully engorged, and by lunch her shirt is wet from leaking breast milk. The pain becomes unbearable so she decides to take an impromptu break to pump, but her employer terminates her for doing so. Is this a case of sex discrimination?

Recently, the Supreme Court of Ohio seemed poised to answer this question when it granted certiorari to hear the appeal of *Allen v. Totes/Isotoner Corp.*¹ It had been widely expected that the court would address this specific issue. Disappointingly, the splintered court in *Totes/Isotoner* decided to completely avoid the question. This result has left Ohio employers and employees unsure about whether discrimination on the basis of lactation is permissible.

The Supreme Court of Ohio's decision to affirm the summary judgment in favor of Totes opened the door for employers to implement facially discriminatory employment policies that single out lactating women. Because the court did not decide whether discrimination on the basis of lactation is prohibited by the Ohio Fair Employment Practices Act² (FEPA), as amended by the Ohio Pregnancy

¹ *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622 (Ohio 2009).

² See OHIO REV. CODE ANN. § 4112.02(A) (West 2008). It is unlawful

[f]or any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire,

Discrimination Act³ (PDA), Ohio's appellate districts will likely conflict over this issue. In the future litigation of a lactation discrimination case, a successful argument can be made to convince an Ohio court that discrimination on the basis of lactation is considered pregnancy discrimination under Ohio law since "lactation is 'because of or on the basis of pregnancy' and . . . women who are lactating are women 'affected by pregnancy [or] childbirth.'"⁴

Part II of this Note will explain the relevant statutory and case law background behind pregnancy and lactation discrimination at both the federal and state levels. Part III.A will explain why the Supreme Court of Ohio's decision to affirm the appellate court's grant of summary judgment was improper. Part III.B will explain why the Supreme Court of Ohio's analysis of the accommodation issue is incorrect. Part IV.A will describe how this improper decision could open the door to facially discriminatory workplace policies that discriminate against lactating employees. Part IV.B will explain how this decision will lead to future conflicts among the Ohio appellate districts. Part IV.C will make a recommendation of how Ohio employers should treat their lactating employees in light of this recent decision. Part V will offer guidance on how to successfully litigate a lactation discrimination case in Ohio. Part V.A will explain why it is important to distinguish breastfeeding from lactation. Part V.B will provide employment law litigators with a strong argument to convince an Ohio court that lactation discrimination is included within the scope of a the Ohio Pregnancy Discrimination statute. Part V.C will explore potential legislative initiatives that would provide protection to breastfeeding employees who need to express breast milk at the workplace.

II. BACKGROUND: PREGNANCY AND LACTATION DISCRIMINATION

A. *General Electric Co. v. Gilbert*⁵

The U.S. Supreme Court case *General Electric Co. v. Gilbert* was the first case to interpret whether pregnancy discrimination could be considered sex discrimination as defined by Title VII of the Civil Rights Act of 1964.⁶ In this case, the employer provided disability benefit coverage for all disabilities except disabilities arising due to pregnancy.⁷ The Court utilized a comparability analysis in which it compared a class of pregnant employees with a class of non-pregnant employees.⁸ The Court noted that the class of pregnant women was comprised entirely of female employees, while the class containing non-pregnant employees

tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

Id.

³ *See id.* § 4112.01(B) (West 2009).

⁴ *Totes/Isotoner*, 915 N.E.2d at 630 (O'Connor, J., concurring) (alternation in original).

⁵ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

⁶ *Id.*

⁷ *Id.* at 127.

⁸ *Id.* at 134-35.

was comprised of both male and female employees.⁹ The Court held that sex discrimination only occurs when a class of women is disadvantaged in comparison to a class comprised entirely of men.¹⁰

Justice Stevens wrote a dissent for the *Gilbert* decision.¹¹ Justices Brennan and Marshall joined the dissenting opinion that argued the proper classifications to determine whether sex discrimination existed were classes comprised of those at risk of pregnancy and those who were not at risk of pregnancy.¹² The three justices concluded that because women were the only sex at risk of becoming pregnant, they were being discriminated against because of their sex.¹³

B. The Federal Pregnancy Discrimination Act of 1978¹⁴

In 1978, two years after the *Gilbert* decision, Congress amended Title VII with the passage of the Pregnancy Discrimination Act (PDA).¹⁵ This amendment reversed the *Gilbert* holding and provided that pregnancy discrimination was a *per se* violation of Title VII because pregnancy discrimination is a *per se* form of sex discrimination.¹⁶ However, several federal courts still apply the logic behind the *Gilbert* majority opinion despite the fact that Congress rejected this logic when it passed the federal PDA.¹⁷ An inquiry into the legislative history behind the federal

⁹ *Id.* at 135.

¹⁰ *Id.* at 136.

¹¹ *Id.* at 160-62 (Stevens, J., dissenting).

¹² *Id.* at 161-62. Justice Brennan pointed out how flawed the majority's sex-neutral approach was when he discussed how the plan also covered male-specific procedures such as circumcisions, prostatectomies, and vasectomies. *Id.* at 152-55 (Brennan, J., dissenting).

¹³ *Id.* at 161-62 (Stevens, J., dissenting). Justice Stevens noted that "[b]y definition, [a benefit policy excluding disabilities arising from pregnancy] discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.*

¹⁴ 42 U.S.C. 2000e(k) (2006) (amending Title VII's terms "because of sex" and "on the basis of sex" to include pregnancy).

¹⁵ The amendment provides:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work

Id.

¹⁶ H.R. REP. NO. 95-948, at 3 (1978).

¹⁷ Cases in which federal courts have dismissed claims brought by female employees based on sex-specific biological differences include: *Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999) (citing the majority opinion in *Gilbert* to deny a claim for sex discrimination based on breastfeeding); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990) (citing the majority opinion in *Gilbert* to deny a claim for sex discrimination based on breastfeeding). "Failing to recognize and provide remedies for women facing discrimination perpetuates an unequal work situation, which is a result of courts attempting to

PDA reveals that Congress outrightly disapproved of the logic in *Gilbert*.¹⁸ Although the legislative history and intent behind the federal PDA reveals that Congress rejected both the reasoning and holding in *Gilbert*, many federal courts have ignored this fact by construing the federal PDA with a very narrow interpretation that the PDA only carved out one exception, pregnancy itself.

*C. The Ohio Pregnancy Discrimination Act and Derungs v. Wal-Mart Stores*¹⁹

In 1980, after Congress enacted the federal PDA, Ohio enacted its own version of the PDA.²⁰ The Ohio General Assembly amended its state Title VII counterpart, Ohio Rev. Code Ann. § 4112.02(A), by instituting the Ohio PDA.²¹ The Sixth Circuit recently interpreted the legislative intent behind the Ohio PDA:

Having incorporated the [federal] PDA's language almost verbatim into the definitional provisions of § 4112, it is clear to us that the Ohio Legislature was aware of the meaning and rationale of *Gilbert*, as well as being aware of the [federal] PDA. The Legislature made a conscious choice to extend the definition of discrimination to include pregnancy even though there cannot be a class of similarly situated males.²²

The Sixth Circuit concluded that the legislature intended to limit the type of pregnancy discrimination claims based on sex discrimination to claims of employment discrimination. The Sixth Circuit took notice of the fact that Ohio adopted its version of the PDA in 1980, which was three years before the U.S. Supreme Court explicitly held that the federal PDA overruled the *Gilbert* decision.²³

Derungs v. Wal-Mart Stores is an important case because it is the first time any court considered whether breastfeeding women qualified as a protected class from discrimination under Ohio law.²⁴ This case dealt with plaintiff mothers who

ignore biological truths in favor of a supposed gender-blind justice and serves only to perpetuate the status quo." Maureen E. Eldredge, *The Quest for a Lactating Male: Biology, Gender, and Discrimination*, 80 CHI.-KENT L. REV. 875, 882 (2005).

¹⁸ "It is the committee's view that the dissenting Justices correctly interpreted [Title VII in *Gilbert*]." H.R. REP. NO. 95-948, at 2. "[I]t seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women . . ." 123 CONG. REC. 10581 (1977) (statement of Rep. Hawkins).

¹⁹ *Derungs v. Wal-Mart Stores, Inc. (Derungs II)*, 374 F.3d 428, 430 (6th Cir. 2004) (holding that Ohio's Public Accommodation Statute, OHIO REV. CODE ANN. § 4112.02(G), does not prohibit owners of places of public accommodation from restricting breastfeeding in such places).

²⁰ OHIO REV. CODE ANN. § 4112.01(B) (West 2009).

²¹ *Derungs II*, 374 F.3d at 436.

²² *Id.*

²³ *Id.* (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983)). This fact seems irrelevant given that the legislative history of the federal PDA clearly evidences that Congress fully intended to overrule the *Gilbert* decision five years prior to *Newport News*. See, e.g., H.R. REP. NO. 95-948.

²⁴ *Derungs v. Wal-Mart Stores, Inc. (Derungs I)*, 141 F. Supp. 2d 884, 889 (S.D. Ohio 2000), *aff'd*, 374 F.3d 428 (6th Cir. 2004) (referring to the issue of breastfeeding

were restricted from breastfeeding at defendant Wal-Mart's stores in Ohio.²⁵ The plaintiffs filed a lawsuit claiming Wal-Mart discriminated against them because of their sex.²⁶ Plaintiffs argued that Ohio's public accommodation statute (OPAS),²⁷ which prohibits sex discrimination, provided breastfeeding mother with the right to breastfeed in any place of public accommodation.²⁸ The district court granted summary judgment in favor of Wal-Mart on the sex discrimination claim.²⁹ The plaintiffs appealed the case to the Sixth Circuit and sought review of the sex discrimination issue.³⁰

The Sixth Circuit's first step in its analysis was to look at the Ohio Legislature's intent behind its enactment of OPAS.³¹ The court determined that the Ohio Legislature intended to limit claims of pregnancy discrimination to employment discrimination claims.³² The second step in the court's analysis was the application of federal employment law by way of a comparability analysis.³³ By utilizing the *Gilbert* comparability analysis, the court curiously compared how Wal-Mart treated breastfeeding women with how it treated breastfeeding men and concluded that there was no sex discrimination because both subclasses were treated in the same manner.³⁴ The court affirmed the district court's grant of summary judgment and

discrimination under Ohio law as a matter of first impression because it has not yet been decided by a federal or Ohio state court prior to this case).

²⁵ *Id.* at 885.

²⁶ *Id.*

²⁷ OPAS provides:

It shall be an unlawful discriminatory practice . . . [f]or any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, military status, national origin, disability, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

OHIO REV. CODE ANN. § 4112.02(G) (West 2008).

²⁸ *Derungs II*, 374 F.3d at 430. This case was initially filed in state court but was removed to federal court on diversity of citizenship. *Id.*

²⁹ *Derungs I*, 141 F. Supp. 2d at 894.

³⁰ *Derungs II*, 374 F.3d at 431 n.1 (stating that plaintiffs waived appeal of their tort and age discrimination claims and were only appealing their sex discrimination claim).

³¹ *Id.* at 436 (stating that because the legislature only amended sections (A)-(F) of the Ohio Civil Rights Act with the Ohio PDA's definition of pregnancy as sex discrimination, the legislature did not intend to include the definition of pregnancy discrimination as sex discrimination in section (G), which pertains to public accommodations).

³² *Id.*

³³ *Id.* at 435-36 (concluding that since Ohio passed OPAS before the Supreme Court overruled *Gilbert* with *Newport News*, the reasoning of the *Gilbert* majority could correctly be applied to the interpretation of OPAS). The court fails to acknowledge that the federal PDA overruled *Gilbert* five years prior to the *Newport News* decision.

³⁴ *Id.* at 437.

found that OPAS does not prohibit restrictions on public breastfeeding because its prohibition does not constitute discrimination based on sex.³⁵

D. Ohio's Protection of Public Breastfeeding

Many states have exempted public breastfeeding from their criminal indecent exposure statutes.³⁶ Ohio does not have statutory language to exempt breastfeeding from its indecent exposure statutes. However, an Ohio Court of Appeals interpreted Ohio's indecent exposure statute as though it excluded the criminalization of exposure of female breasts.³⁷ Following the *Derungs* decision, the Ohio Legislature adopted legislation to protect public breastfeeding.³⁸ This legislation partially overruled the *Derungs* decision.³⁹ This law went into effect on September 16, 2005.⁴⁰

E. Allen v. Totes/Isotoner Corp.

1. Facts of the Case

In July 2005, Totes hired LiNisa Allen through Star Personnel, a temporary service.⁴¹ When Allen was initially hired, she was still breastfeeding her five-month-old baby.⁴² When she was unavailable to breastfeed, she used a breast pump to express the breast milk from her breasts.⁴³ It took Allen approximately fifteen minutes to pump, including the time required to unpack and repack her pump.⁴⁴ Allen needed to pump because "her breasts would enlarge to a point where they would start leaking all over her shirt," and if she became engorged she would suffer from severe back pain.⁴⁵

³⁵ *Id.* at 436-37 (concluding that the statutory language and the legislative history of OPAS do not include breastfeeding discrimination as sex discrimination).

³⁶ *See, e.g.*, N.Y. PENAL LAW § 245.01 (McKinney 2010) (excluding breastfeeding from an indecent exposure statute which prohibits public exposure of female breasts).

³⁷ *State v. Jetter*, 599 N.E.2d 733, 733 (Ohio Ct. App. 1991) (per curiam) (concluding that the Ohio public indecent exposure statute, OHIO REV. CODE ANN. § 2907.09, does not consider female breasts a private part). This effectively exempts public breastfeeding from the Ohio public indecent exposure statute.

³⁸ OHIO REV. CODE ANN. § 3781.55 (West 2005) ("A mother is entitled to breast-feed her baby in any location of a place of public accommodation wherein the mother otherwise is permitted.").

³⁹ *Id.* This law amends the building standards code rather than amending OPAS or the Ohio Civil Rights Act.

⁴⁰ *See id.*

⁴¹ *Allen v. Totes/Isotoner Corp. (Totes/Isotoner trial court)*, No. CV06-03-0917, slip op. at 2 (Butler Cnty. Ct. Com. Pl. July 31, 2007), *aff'd*, 915 N.E.2d 622 (Ohio 2009).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

On July 25, 2006, Allen attended an orientation session at the Totes facility prior to the commencement of her new job.⁴⁶ At this orientation, Allen was provided with her work schedule. Her work day lasted from 6:00 a.m. to 2:30 p.m., with two ten-minute breaks at 8:00 a.m. and at 1:00 p.m. and a half-hour lunch break at 11:00 a.m.⁴⁷

Allen approached Angel Gravett at the end of the orientation session to inform her that she was breastfeeding her baby.⁴⁸ Allen notified her that she needed a place to pump her breasts.⁴⁹ Later in the day, Gravett contacted “Allen by phone and told her she could pump her breasts in the women’s restroom during her lunch break.”⁵⁰ Allen told Gravett that she would attempt to wait until 11:00 a.m. to pump her breasts, but “she didn’t know if she could.”⁵¹ Allen requested a chair so she would have a place to sit, but Totes denied her request.⁵²

After about a week Allen found that she was unable to wait until 11:00 a.m. to pump.⁵³ Consequently, she began taking one additional break at 10:00 a.m. to pump.⁵⁴ On August 16, 2006, Karen Kidder, a supervisor, observed Allen pumping her breasts in the restroom.⁵⁵ Soon afterwards, Gravett confronted Allen about taking an “unauthorized break.”⁵⁶ Allen told Gravett that “she could not wait until 11:00 a.m. to pump her breasts.”⁵⁷

Allen asked Kidder to extend her morning break from 10 minutes to 15 minutes so she would have adequate time to pump her breasts on her break.⁵⁸ Kidder brought Allen’s request to Fred James and he “made the decision to terminate Allen for not following company rules” because she took an unauthorized break.⁵⁹

2. Procedural History

“On March 16, 2006 [Allen] filed a complaint against Totes alleging three counts of discrimination: (1) violation of Ohio’s prohibition against gender discrimination, (2) violation of Ohio public policy, and (3) violation of Ohio’s prohibition against disability discrimination.”⁶⁰ Totes moved for summary judgment on all of the

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 3.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

claims.⁶¹ This Note will focus on Count I of the complaint which alleges sex discrimination. The Court of Common Pleas in Butler County granted summary judgment in favor of Totes; Allen appealed.⁶² The Court of Appeals affirmed the trial court.⁶³ Subsequently, Allen's appeal was allowed by the Supreme Court of Ohio.⁶⁴

The trial court found that Allen failed to assert a prima facie case of pregnancy discrimination.⁶⁵ The court stated, "Allen gave birth over five months prior to her termination from Totes. Pregnant woman [sic] who give birth and chose not to breastfeed or pump their breasts do not continue to lactate for five months."⁶⁶ The court decided that Allen's condition of lactation related to breastfeeding, not to pregnancy.⁶⁷ It reasoned that breastfeeding discrimination is not gender discrimination.⁶⁸

The court of appeals affirmed the summary judgment. However, it held that Allen "was not terminated because she was lactating, pumping breast milk, or needed to take a break to pump breast milk."⁶⁹ Instead, the court concluded she was terminated "for taking an unauthorized, extra break (unlike the restroom breaks which were authorized and available to all of the employees, appellant included)."⁷⁰

The Supreme Court of Ohio accepted Allen's appeal in order to review the issue of whether Ohio law prohibits an employer from discriminating against an employee due to lactation.⁷¹ This appeal resulted in a divided court. Justice Lanzinger would have dismissed the appeal as having been improperly granted.⁷² In a *per curiam* decision the Supreme Court of Ohio held that Totes had articulated a legitimate, nondiscriminatory reason for terminating Allen. She had failed to follow directions and this was not a pretext for pregnancy discrimination.⁷³ Justice Lundberg Stratton, Justice O'Donnell, and Justice Cupp concurred in affirming the summary judgment, however, they decided not to address whether discrimination on the basis of lactation

⁶¹ *Id.* at 3-4.

⁶² *Allen v. Totes/Isotoner Corp. (Totes/Isotoner appellate court)*, No. CA2007-08-196, 2008 Ohio App. LEXIS 5910, at *1 (Ct. App. Apr. 7, 2008), *aff'd*, 915 N.E.2d 622 (Ohio 2009).

⁶³ *Id.* at *4.

⁶⁴ *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622, 623 (Ohio 2009) (*per curiam*).

⁶⁵ *Totes/Isotoner trial court*, slip op. at 6-7.

⁶⁶ *Id.* at 7.

⁶⁷ *Id.*

⁶⁸ *Id.* at 7 (citing *Derungs II*, 374 F.3d 428, 439 (6th Cir. 2004)).

⁶⁹ *Totes/Isotoner appellate court*, 2008 Ohio App. LEXIS 5910, at *3.

⁷⁰ *Id.* (citing *Popp v. Integrated Elec. Servs., Inc.*, No. CA2005-03-058, 2005 Ohio App. LEXIS 4876 (Ct. App. Oct. 10, 2005)).

⁷¹ *Totes/Isotoner Corp.*, 915 N.E.2d at 623.

⁷² *Id.* at 624.

⁷³ *Id.*

is prohibited by Ohio law because they felt their opinion would be advisory.⁷⁴ Justice O'Connor wrote a separate concurring opinion and Chief Justice Moyer joined. This concurring opinion also affirmed the summary judgment but disagreed that an opinion would be advisory on the issue of lactation discrimination.⁷⁵ Justice O'Connor felt that this issue was not rendered moot by granting summary judgment to Totes. Instead, she determined that "the issues are live ones, not remote possibilities or based on controversies that may never occur."⁷⁶ She came to the conclusion that lactation is a condition relating to pregnancy. She stated she would "hold that gender-discrimination claims arising from lactation are cognizable under Ohio's FEPA as amended by the PDA."⁷⁷

Justice Pfeifer was the only dissenting justice. He decided that granting summary judgment to Totes was improper. He was troubled by the fact that the record did not explain why Allen's restroom trips made outside of scheduled breaks were different from the restroom trips other employees made outside of their scheduled breaks.⁷⁸ He noted that Allen was the only one fired for taking these unscheduled restroom breaks and consequently, she should have an opportunity to prove her claim to a jury. Justice Pfeifer would have held "that employment discrimination due to lactation is unlawful pursuant to R.C. 4112.01(B)."⁷⁹

III. ANALYSIS OF THE SUPREME COURT OF OHIO'S DECISION

In its *per curiam* decision, the Supreme Court of Ohio declined to answer whether discrimination due to lactation constitutes sex discrimination.⁸⁰ In particular, the Supreme Court of Ohio failed to determine whether this form of discrimination is included within the scope of the Ohio FEPA, as amended by the PDA.⁸¹ Chief Justice Moyer, Justice O'Connor, and Justice Pfeifer were in agreement that "[sex]-discrimination claims arising from lactation are cognizable under Ohio's FEPA as amended by the PDA."⁸² However, it remains unclear whether the other four justices agreed or disagreed with this premise. Consequently, female employees remain unsure about whether they are protected under Ohio law if they choose to return to work and pump milk in the workplace for their breastfeeding child.

A. *The Supreme Court of Ohio Incorrectly Affirmed the Grant of Summary Judgment*

Under Ohio law, a plaintiff establishes a prima facie case of employment discrimination by applying the standard set forth in *McDonnell Douglas Corp. v.*

⁷⁴ *Id.* at 625 (O'Donnell, J., concurring).

⁷⁵ *Id.* at 625-26 (O'Connor, J., concurring).

⁷⁶ *Id.* at 627.

⁷⁷ *Id.* at 630.

⁷⁸ *Id.* at 633 (Pfeifer, J., dissenting).

⁷⁹ *Id.*

⁸⁰ *Id.* at 624 (per curiam).

⁸¹ *Id.*

⁸² *Id.* at 630 (O'Connor, J., concurring).

Green.⁸³ Under this standard, the plaintiff must establish: “(1) she is a member of a protected class; (2) that she suffered an adverse employment action; (3) that she was qualified for the position; and (4) either that she was replaced by someone outside the protected class or that a comparable, non-protected person was treated more favorably.”⁸⁴ Once a prima facie case is established, “the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its treatment of the plaintiff.”⁸⁵ The record in the present case provides a basis from which a jury could conclude that Totes failed to articulate a legitimate, nondiscriminatory reason for Allen’s termination. Regrettably, the Supreme Court of Ohio agreed with the appellate court when it cited Allen’s unauthorized breaks from her workstation as a legitimate, nondiscriminatory reason for Allen’s termination.⁸⁶

Two arguments can be made to support the fact that summary judgment was improperly granted for Totes. First, there is a genuine issue of fact as to whether Allen carried out any act of insubordination when she used the restroom to pump her breasts during an impromptu break. As offensive as it may be, Totes did in fact classify pumping breast milk as a restroom function.⁸⁷ This is illustrated by Manager Angel Garrett’s actions when she responded to Allen’s request for a private place to pump by telling her to use the restroom.⁸⁸ If the benefit of the facts is given to Allen, as the non-moving party, it is apparent she was following the impromptu break policy permitting “restroom breaks which were authorized and available to all of the employees”⁸⁹ when she was observed pumping milk by her supervisor. This creates a genuine issue of fact as to whether taking “unauthorized breaks” was the true reason for Allen’s termination, or if it was just a pretext for discrimination against a lactating employee.

Secondly, assuming Allen did engage in insubordination, her only act of insubordination in the record was failing to follow an employer’s facially discriminatory impromptu break policy. In light of this alleged insubordination, her claim is still sufficient to survive a motion for summary judgment. Gravett directed Allen to pump her breasts during her 11:00 a.m. lunch break.⁹⁰ Meanwhile, impromptu breaks were available to all employees throughout the workday to tend to

⁸³ *James v. Delphi Auto. Sys.*, No. 04AP-215, 2004 Ohio App. LEXIS 4941, at *4 (Ct. App. Oct. 14, 2004) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

⁸⁴ *Id.*

⁸⁵ *Totes/Isotoner*, 915 N.E.2d at 623 (citing *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm’n*, 421 N.E.2d 128, 132 (Ohio 1981)).

⁸⁶ *Id.* at 624.

⁸⁷ Many states have explicitly stated in their statutes that a woman who wishes to breastfeed or pump breast milk must be provided with a private space that is *not a bathroom stall*. An example of this statutory language can be found in Vermont under VT. STAT. ANN tit. 21, § 305 (2008).

⁸⁸ *Totes/Isotoner trial court*, No. CV06-03-0917, slip op. at 2 (Butler Cnty. Ct. Com. Pl. July 31, 2007), *aff’d*, 915 N.E.2d 622 (Ohio 2009).

⁸⁹ *Totes/Isotoner*, 915 N.E.2d at 627 (O’Connor, J., concurring) (citing *Totes/Isotoner appellate court*, No. CA2007-08-196, 2008 Ohio App. LEXIS 5910, at *3 (Ct. App. Apr. 7, 2008)).

⁹⁰ *Totes/Isotoner trial court*, slip op. at 2.

bodily functions.⁹¹ Lactation is a bodily function, but the record reflects that Totes specifically excluded breast pumping from its impromptu break policy and classified it as an unauthorized break activity.⁹² This break policy is facially discriminatory because it singled out lactating women.⁹³ Justice Pfeifer correctly identified the problems with singling out Allen's breaks in his dissenting opinion:

The appellate court does not explain why Allen's trips to the restroom outside scheduled break times were different from the restroom trips other employees made outside scheduled break times. There is no evidence in the record about any limit on the length of unscheduled restroom breaks and no evidence that employees had to seek permission from a supervisor to take an unscheduled restroom break. There is evidence only that unscheduled bathroom breaks were allowed and that LaNisa Allen was fired for taking them. What made her breaks different?⁹⁴

Consequently, Totes cannot meet its burden of production to articulate a legitimate, nondiscriminatory reason for its treatment of Allen by stating that she failed to follow a facially discriminatory break policy.

The Supreme Court of Ohio should have utilized an analysis similar to the reasoning found in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*⁹⁵ to analyze the present case. In *Newport News*, the U.S. Supreme Court utilized a comparability approach to conclude that the medical plan benefits policy was facially discriminatory *because of sex*.⁹⁶ The Court compared two classes: the husbands of female employees (a class not at risk of pregnancy) with the wives of male employees (a class at risk of pregnancy).⁹⁷ Even though all of the employees'

⁹¹ *Totes/Isotoner*, 915 N.E.2d at 627 (O'Connor, J., concurring) (citing *Totes/Isotoner appellate court*, 2008 Ohio App. LEXIS 5910, at *3).

⁹² *See id.* Allen was terminated for failure to follow directions after she was observed pumping breast milk around 10:00 a.m. *Totes/Isotoner trial court*, slip op. at 3.

⁹³ Justice O'Connor notes that Allen argued the break policy was facially discriminatory:

Allen's claims of discrimination appear predicated on a disparate-treatment theory. She asserts, "The workrule that [she] allegedly violated was the one that restricted the time she could pump her breast milk to her lunch break. Totes placed no such restrictions on any other employee who needed to leave his or her workstation to tend to a bodily function or bodily discomfort, only upon lactating women. The work rule was itself discriminatory, since it placed extra restrictions on women experiencing a physical act of pregnancy."

Totes/Isotoner, 915 N.E.2d at 630 (O'Connor, J., concurring) (alteration in original).

⁹⁴ *Id.* at 633 (Pfeifer, J., dissenting).

⁹⁵ *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983). This was the first Supreme Court decision to interpret the federal PDA after it was passed in 1978. The rationale in this case is relevant to the Ohio PDA because it is adopted of the federal PDA's statutory language verbatim.

⁹⁶ *Id.* at 683-84.

⁹⁷ *Id.* As other authors have noted, Justice Stevens utilized a comparability analysis in the *Gilbert* dissenting opinion:

spouses received the *same* “specified level of hospitalization coverage for all conditions; the wives of male employees receive[d] such coverage *except for pregnancy related conditions.*”⁹⁸ This benefit policy is analogous to the impromptu break policy found in *Totes*. All employees were afforded the opportunity to utilize their impromptu breaks for the *same* authorized bodily functions, such as urination and defecation. However, employees at risk of lactation (women) were afforded these breaks to attend to bodily functions *except for lactation-related activities such as expressing milk*. According to the record, the employer did not place any limitations on the type of bodily functions that employees who are not at risk of lactation (men) were able to take. The employer also did not state that it placed any time restrictions on the length of time employees could spend on an impromptu break to tend to their bodily functions.⁹⁹ Therefore, parallel to the holding in *Newport News*,¹⁰⁰ this employer policy disadvantages only female employees and is facially discriminatory *because of sex*.

Totes was fully aware that Allen was a breastfeeding mother and required a time and a place to express breast milk at the workplace. *Totes* designed its impromptu break policy to exclude pumping breast milk and required Allen to adhere to this break policy when she was physically incapable of doing so. An employee plaintiff can establish a prima facie case by presenting direct evidence of discriminatory intent.¹⁰¹ *Totes*’ impromptu break policy is a facially discriminatory employment policy.¹⁰² “[A] facially discriminatory employment policy . . . is direct evidence of discriminatory intent.”¹⁰³ In a case containing direct evidence of discriminatory intent, once a plaintiff shows that the prohibited classification was a motivating factor in the employment decision, the burden of production and persuasion shifts to the employer. The employer must prove that it would have terminated the employee even if it had not been motivated by impermissible discrimination.¹⁰⁴ *Totes* did not

A principal argument of the dissenters was that the majority had misstated the composition of the two relevant classes. Rather than the majority’s conception of there being a class of pregnant workers and a class of non-pregnant workers, the dissenters argued that the more accurate characterization was “between persons who face a risk of pregnancy and those who do not.”

Henry Wyatt Christrup, Note, *Litigating a Breastfeeding and Employment Case in the New Millennium*, 12 YALE J.L. & FEMINISM 263, 279-80 (2000) (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 161 n.5 (1976) (Stevens, J., dissenting)).

⁹⁸ *Newport News*, 462 U.S. at 684 (emphasis added).

⁹⁹ *Totes/Isotoner*, 915 N.E.2d at 633 (Pfeifer, J., dissenting).

¹⁰⁰ The employer policy in *Newport News* was found to be facially discriminatory because of sex since it disadvantaged only male employees. *Id.*

¹⁰¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion).

¹⁰² See *supra* note 91 and accompanying text.

¹⁰³ *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000) (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 379-80 (6th Cir. 1993)).

¹⁰⁴ *Price Waterhouse*, 490 U.S. at 244-45; *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1081 (6th Cir. 1994).

meet its burden of production or persuasion to prove that it terminated Allen for a reason not motivated by impermissible discrimination.¹⁰⁵

The courts' fixation on "extra, unauthorized breaks" may have blinded both the lower courts and the Supreme Court of Ohio in their analysis. This fixation likely caused the judges to overlook performing a complete analysis to determine whether the impromptu break policy was indeed facially discriminatory. It is logical to believe the judges were motivated to prevent a plaintiff from recovering from an employer after she admitted to taking a paid fifteen-minute break everyday for two weeks. However, this form of *post hoc* analysis is inappropriate and the lower courts, in addition to the Supreme Court of Ohio, should have performed a suitable analysis to determine that the impromptu break was facially discriminatory.

B. The Supreme Court of Ohio Got the Sex Discrimination Analysis Wrong on the Accommodation Issue for Lactating Employees

The Supreme Court of Ohio misinterpreted the lactation accommodation argument made in *Totes/Isotoner*. The accommodation issue argued by Allen was not whether Totes was required to accommodate her lactating condition under the Ohio PDA by providing her with special additional breaks above and beyond what other employees were receiving. Instead, Allen argued her need to express breast milk should have been accommodated by allowing her to spend her impromptu breaks pumping milk to relieve her discomfort. Justice O'Connor rebuts this argument by asserting that "[t]he FEPA and the PDA mandate that an employer treat pregnancy with neutrality, but not preferentially."¹⁰⁶ This premise of law does not support this argument because Allen was not asking for preferential treatment. Alternatively, she was asking to be treated the same as all the other non-lactating employees by not having restrictions placed on the types of bodily functions she was permitted to attend to during an impromptu break. Allen would have been asking for a special accommodation if she had been fired because she took an impromptu break when her employer prohibited impromptu breaks for all of its employees. The Supreme Court of Ohio misinterpreted Allen's argument that her lactation needs should have been accommodated.

IV. IMPACT OF THE SUPREME COURT OF OHIO'S DECISION

A. Opening the Door to Lactation Discrimination in Ohio by Permitting Employers to Rebut a Prima Facie Case of Sex Discrimination with Plaintiff's Violation of a Facially Discriminatory Employment Policy

The Supreme Court of Ohio's reliance on the conclusory analysis at the appellate court level ignores the fact that lactation is a sex-specific bodily function. The appellate court dismissed the idea that the impromptu break policy was discriminatory on its face because Allen "was simply and plainly terminated . . . for taking an unauthorized, extra break (unlike the restroom breaks which were

¹⁰⁵ One way that Totes could have met this burden is by supplying evidence that it terminated other non-lactating employees for taking impromptu breaks that lasted fifteen minutes or longer.

¹⁰⁶ *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622, 631 (Ohio 2009) (O'Connor, J., concurring).

authorized and available to all of the employees, appellant included).¹⁰⁷ The use of this “sex-neutral comparability analysis in [lactation], as in pregnancy employment cases, for example, could potentially allow employers to discriminate based on a characteristic that only women possess as a pretext for discrimination based on their sex.”¹⁰⁸

For example, if an employer permits employees to take impromptu breaks to tend to only particular bodily functions, it can be inferred from the Supreme Court of Ohio’s decision that it would be permissible for an employer to rightfully terminate a lactating employee for tending to any lactation-related activities during such breaks. These lactation-related activities could include changing the wet nursing pads in her bra.¹⁰⁹ She could also be terminated for taking a break to change her shirt when it becomes saturated with breast milk as a result of becoming engorged. As long as the lactating employee was able to take breaks to urinate and defecate, which are sex-neutral and “authorized and available to all of the employees,”¹¹⁰ she can still be rightfully terminated for tending to any sex-specific bodily functions outside these stipulated activities under the guise of a legitimate, nondiscriminatory reason of insubordination. An example of a facially discriminatory employment policy outside of the realm of breaks which would be deemed permissible under this sex-neutral logic includes a policy where an employer could ban the use of breast pumps entirely on the employer’s premise because *all* other employees would also be banned from using a breast pump on the premises.¹¹¹ The implications of allowing an employer to single out lactation-related activities from its employment policies are inherently discouraging to breastfeeding women who are trying to balance their careers while providing what they feel is the best nourishment available to their children.

¹⁰⁷ *Id.* at 627.

¹⁰⁸ Brianne Whelan, Comment, *For Crying Out Loud: Ohio’s Legal Battle with Public Breastfeeding and Hope for the Future*, 13 AM. U. J. GENDER SOC. POL’Y & L. 669, 698 (2005) (citing *Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d 305, 311 (S.D.N.Y. 1999) (“[f]inding that ‘tasteless and offensive’ remarks directed towards an employee pumping her breast milk did not constitute sex discrimination”)).

¹⁰⁹ It is recommended that nursing pads be changed as soon as they become damp to avoid the risk of infection. See *Mastitis While Breast-Feeding – Home Treatment*, WEBMD, <http://www.webmd.com/parenting/baby/tc/mastitis-while-breast-feeding-home-treatment> (last visited Mar. 9, 2011). It is foreseeable that this could result in a lactating employee needing to take frequent breaks. Therefore, it is not unreasonable to believe an employer may wish to terminate an employee that requires more frequent breaks than a non-lactating employee.

¹¹⁰ *Totes/Isotoner*, 915 N.E.2d at 627 (O’Connor, J., concurring).

¹¹¹ It is simple to see that this employment policy is facially discriminatory *because of sex* as only females have the ability to utilize a breast pump because they are the only sex that is able to lactate. Therefore, a sex neutral comparison approach toward evaluating employment policies to see if they are facially discriminatory is entirely inappropriate.

*B. The Supreme Court of Ohio's Refusal to Clarify Whether Lactation
Discrimination Is a Cognizable Claim Will Cause Conflicts Among the Ohio
Appellate Districts*

Totes/Isotoner marks the first time the issue of lactation discrimination has been raised in Ohio.¹¹² Despite this fact, the Supreme Court of Ohio still elected to avoid determining whether Allen had established a prima facie case of pregnancy discrimination.¹¹³ As a result, some of Ohio's appellate districts will likely rely on unsuitable federal court interpretations of the federal PDA in order to interpret the Ohio PDA in future instances of lactation discrimination in Ohio. This is precisely what happened at the trial court level of *Totes/Isotoner*.

The *Totes/Isotoner* trial court relied on the Sixth Circuit opinion in *Derungs v. Wal-Mart Stores, Inc.*¹¹⁴ The extensive reliance on this federal case was inappropriate because this case illustrates the issue of discrimination in a public accommodation context; it does not represent a case of employment discrimination.¹¹⁵ In *Derungs*, the Sixth Circuit reviewed the legislative history of the Ohio PDA and determined that the Ohio General Assembly only intended to permit pregnancy discrimination claims to extend to those claims arising from issues in the workplace, not from issues of public accommodation.¹¹⁶ The court came to this conclusion because the General Assembly amended § 4112.02(A) with the Ohio PDA, but it failed to amend § 4112.02(G). Thereby, the Sixth Circuit reasoned that the Ohio Legislature purposely chose to limit the scope of pregnancy discrimination claims to the workplace context.¹¹⁷ The Sixth Circuit relied strictly on statutory interpretation when it stated "breastfeeding discrimination does not constitute gender discrimination" in the public accommodations context.¹¹⁸ The Sixth Circuit was not

¹¹² See *Totes/Isotoner*, 915 N.E.2d 622.

¹¹³ See *id.* at 623-24.

¹¹⁴ *Derungs II*, 374 F.3d 428 (6th Cir. 2004).

¹¹⁵ OHIO REV. CODE ANN. § 4112.02(G) (West 2008) governs public accommodations while OHIO REV. CODE ANN. § 4112.02(A) (West 2008) governs employment discrimination. It is unlawful discriminatory practice:

For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, military status, national origin, disability, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.

Id. § 4112.02(G).

¹¹⁶ See *Derungs II*, 374 F.3d at 436-37; see generally Katherine A. Macfarlane, Comment, *Derungs v. Wal-Mart Stores: Another Door Shut—A Federal Interpretation Excluding Breastfeeding from the Scope of a State's Sex Discrimination Protection*, 38 LOY. L.A. L. REV. 2319, 2320-22 (2005). The issue of lactation discrimination under Ohio law should not be left to the federal courts to interpret. *Derungs* is a perfect example of a federal court overstepping its bounds to decide matters of state law. The question in this case should have been certified for the Supreme Court of Ohio to decide. *Id.*

¹¹⁷ *Derungs II*, 374 F.3d at 437.

¹¹⁸ *Totes/Isotoner*, 915 N.E.2d at 627 (O'Connor, J., concurring) (citing *Derungs II*, 374 F.3d at 439).

stating that breastfeeding discrimination did not apply to the workplace context because the employment section of the statute had already been amended by the Ohio PDA to prohibit pregnancy discrimination.¹¹⁹ The Supreme Court of Ohio should have clarified that lactation discrimination is a form of pregnancy discrimination in order to prevent Ohio appellate districts from erroneously applying federal cases such as *Derungs*.

Similarly, other Ohio appellate districts may choose to reject the flawed *Derungs* rationale that “breastfeeding discrimination does not constitute gender discrimination.”¹²⁰ The Supreme Court of Ohio never explicitly overruled or affirmed the *Totes/Isotoner* trial court’s reliance on this federal court decision.¹²¹ Instead, it let “stand the appellate court’s holding that LaNisa Allen was fired for leaving her post without permission rather than for pumping her breasts . . . leaving unanswered the question of whether she even asserted a cognizable cause of action.”¹²² Some appellate districts may decide to recognize that lactation discrimination is a cognizable claim if they chose to follow Justice O’Connor’s concurring opinion. Justice O’Connor stated she “would hold that gender-discrimination claims arising from lactation are cognizable under Ohio’s FEPA as amended by the PDA.”¹²³ However, the Supreme Court of Ohio’s refusal to clarify whether lactation discrimination is a cognizable claim of sex discrimination under Ohio law encourages inconsistency in the future decisions among Ohio’s appellate districts because it remains unclear how Ohio’s employment discrimination legislation should be interpreted on this issue.

C. Recommendation for Ohio Employers

Despite the fact that the Supreme Court of Ohio neglected to recognize a facially discriminatory employment policy,¹²⁴ it is advisable that employers should still make a good faith effort to prevent discrimination against lactating employees in the workplace. If another lactation discrimination case arises with a plaintiff who survives the employer’s rebuttal of articulating a legitimate, nondiscriminatory reason for termination, it appears possible that a majority of the Supreme Court of Ohio would hold that lactation discrimination is a form of pregnancy discrimination. Justice O’Connor, the late Chief Justice Moyer, and Justice Pfeifer agreed that sex discrimination includes lactation discrimination. Consequently, Ohio employers should not interpret the *Totes/Isotoner* decision as a *carte blanche* to deny lactating employees equal treatment in the workplace.

¹¹⁹ The *Derungs* decision has since been partially overruled by the Ohio General Assembly when it enacted Senate Bill 41 (2005) which provides: “A mother is entitled to breast-feed her baby in any location of a place of public accommodation wherein the mother otherwise is permitted.” OHIO REV. CODE ANN. § 3781.55 (West 2005).

¹²⁰ *Totes/Isotoner*, 915 N.E.2d at 627 (O’Connor, J., concurring) (citing *Derungs II*, 374 F.3d at 439).

¹²¹ *See id.* at 623-24 (per curiam).

¹²² *Id.* at 632 (Pfeifer, J., dissenting).

¹²³ *Id.* at 630 (O’Connor, J., concurring).

¹²⁴ *See supra* note 91 and accompanying text.

V. NAVIGATING THE LITIGATION OF A LACTATION DISCRIMINATION CASE IN OHIO

Given the fact that the Supreme Court of Ohio failed to articulate whether lactation discrimination is included within the scope of the Ohio FEPA, as amended by the Ohio PDA,¹²⁵ lactating employee plaintiffs must guess as to what the appropriate litigation strategy is that they should utilize in future cases. Incidentally, since the Supreme Court of Ohio did not completely forestall the application of the Ohio FEPA to lactation discrimination cases,¹²⁶ this section will explore the key aspects that should make up a plausible argument for relief to a lactating employee plaintiff who has been discriminated against in the workplace.

Lactation discrimination in the workplace is an issue of first impression in Ohio. Consequently, an argument to provide protection against lactation discrimination must be developed against the relevant federal case law¹²⁷ that has applied the federal PDA. It is useful to evaluate the federal case law interpreting the federal PDA in order to better understand how the Ohio PDA would be applied to similar contingencies. This methodology is logical because “the Ohio PDA is governed by the same principles that govern the federal claim of pregnancy discrimination.”¹²⁸

A. Lactation Is Not Equivalent to Breastfeeding

One federal court has held that the type of discrimination prohibited by Title VII and the federal PDA needs to be based upon “the gender-specific *biological functions of pregnancy* and child-bearing.”¹²⁹ While federal courts have been reluctant to classify breastfeeding as a protected status under the federal PDA,¹³⁰ these courts have not been faced with the argument that there is a significant distinction between breastfeeding and lactation.

Federal courts have often resorted to dismissing breastfeeding discrimination claims on the basis that breastfeeding is a choice.¹³¹ These federal courts have determined that breastfeeding is a form of childrearing rather than a biological function of pregnancy.¹³² Therefore, it is important to distinguish breastfeeding from lactation. The argument that lactation and breastfeeding are separate and distinct was made in the *Totes/Isotoner* case,¹³³ however, the trial court failed to recognize

¹²⁵ See *Totes/Isotoner*, 915 N.E.2d 622 (per curiam).

¹²⁶ See *id.*

¹²⁷ See generally *Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d 305 (S.D.N.Y. 1999); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487 (D. Colo. 1997); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867 (W.D. Ky. 1990).

¹²⁸ *Cleveland v. Fed. Express Corp.*, 83 Fed. App'x 74, 81 n.2 (6th Cir. 2003).

¹²⁹ *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir. 1997) (emphasis added). Further, the court held that the PDA does not include “an individual’s choice to care for a child” because this choice does not constitute “a ‘medical condition’ related to childbirth or pregnancy.” *Id.*

¹³⁰ See generally *Martinez*, 49 F. Supp. 2d 305; *Fejes*, 960 F. Supp. 1487; *Wallace*, 789 F. Supp. 867.

¹³¹ See, e.g., *Martinez*, 49 F. Supp. 2d 305.

¹³² See *id.*

the legal implications between these two terms. Instead, the trial court incorrectly relied on *Derungs* and made the illogical statement that:

Allen gave birth over five months prior to her termination from Totes. Pregnant [women] who give birth and chose not to breastfeed or pump their breasts do not continue to lactate for five months. Thus, Allen's condition of lactating was not a condition relating to pregnancy but rather a condition relating to breastfeeding.¹³⁴

Justice O'Connor noted that she found "that conclusion curious and inaccurate."¹³⁵ She stated, "given the physiological aspects of lactation, I have little trouble concluding that lactation also has a clear, undeniable nexus with pregnancy and with childbirth."¹³⁶ Conversely, breastfeeding is a social behavior, rather than a purely biological process, defined as feeding a child from a mother's breast.¹³⁷ A cause of action exists in a lactation discrimination case when an employer does not treat a lactating employee "the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."¹³⁸ In contrast, a breastfeeding discrimination case would likely be premised on childrearing discrimination.¹³⁹

¹³³ *Totes/Isotoner trial court*, No. CV06-03-0917, slip op. at 6 (Butler Cnty. Ct. Com. Pl. July 31, 2007), *aff'd*, 915 N.E.2d 622 (Ohio 2009).

¹³⁴ *Id.* at 7.

¹³⁵ *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622, 630 (Ohio 2009) (O'Connor, J., concurring). Justice O'Connor continues defining lactation as a biological function:

Lactation—the formation and secretion of milk by the mammary glands—is believed to be stimulated by prolactin, a hormone. During pregnancy, the level of prolactin in a woman is inhibited by high levels of estrogen and progesterone. Following delivery, levels of estrogen and progesterone in the woman fall while the level of prolactin remains high. Prolactin then stimulates and maintains the production of milk.

Colostrum, a substance that contains more protein and less fat and sugar than breast milk, is secreted by the breasts during pregnancy and in the days immediately following childbirth. Milk production begins thereafter, usually on the third or fourth postpartum day, and breast milk appears.

Id. (citations omitted).

¹³⁶ *Id.*

¹³⁷ See MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/breastfeeding> (last visited Mar. 7, 2011).

¹³⁸ *Fortier v. U.S. Steel Group*, No. 01-2029, 2002 U.S. Dist. LEXIS 11788, at *8 (W.D. Pa. June 4, 2002) (omission in original) (quoting 42 U.S.C. § 2000e(k) (2006)). Federal courts have held that employees with temporary disabilities are "similar in their ability or inability to work" when compared to pregnant employees. See, e.g., *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 373 (5th Cir. 1981) (holding the defendant employer failed to treat pregnant employee plaintiff in the "same manner as other temporarily disabled workers").

¹³⁹ For example, an employee may be treated adversely by her employer without fear of engaging in pregnancy discrimination if she requests additional time off work to breastfeed her child or if her request to bring her child to work during her breaks to breastfeed on the employer's premises is denied. Discrimination on the basis of childrearing or childcare is not

B. Lactation Discrimination Is Included Within the Scope of Ohio's Pregnancy Discrimination Statute

1. A Plain Meaning Approach

Statutory interpretation begins and ends with an analysis of the plain meaning of the words a legislature has chosen to utilize in the statute.¹⁴⁰ A close examination of the legislative intent and statutory construction of Ohio's employment discrimination statutes reveals that lactation discrimination should be included within the scope of these two statutes. The Ohio FEPA states that it is unlawful:

For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or *any matter* directly or indirectly related to employment.¹⁴¹

The Ohio FEPA was subsequently amended by the Ohio PDA, which states that:

[T]he terms "because of sex" and "on the basis of sex" include, but are not limited to, *because of or on the basis of pregnancy*, any illness arising out of and occurring during the course of a pregnancy [or] childbirth Women affected by pregnancy [or] childbirth . . . shall be *treated the same for all employment-related purposes* . . . as other persons not so affected¹⁴²

When courts are construing a statute, they "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words."¹⁴³ In this statute, the language has been broadly constructed. For instance, rather than simply using the phrase "because of pregnancy" the legislature deliberately chose to use the more expansive language "because of or on the basis of pregnancy."¹⁴⁴ This trend of utilizing broad language continues with the language "women affected by pregnancy [or] childbirth,"¹⁴⁵ rather than more constrictive language such as "pregnant women." A lactating woman is certainly a "woman affected by pregnancy" because women do

likely to be considered sex discrimination because both men and women can provide childcare duties. Childcare responsibilities do not have a basis in sex-specific biological differences. Conversely, lactation does have a basis in sex-specific biological differences because only females have the capability to lactate.

¹⁴⁰ See Kevin Schwin, Note, *Toward a Plain Meaning Approach to Analyzing Title VII: Employment Discrimination Protection Of Transsexuals*, 57 CLEV. ST. L. REV. 645, 667 (2009) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.")).

¹⁴¹ OHIO REV. CODE ANN. § 4112.02(A) (West 2008) (emphasis added).

¹⁴² *Id.* § 4112.01(B) (West 2009) (emphasis added).

¹⁴³ *Richards v. United States*, 369 U.S. 1, 9 (1962).

¹⁴⁴ OHIO REV. CODE ANN. § 4112.01(B).

¹⁴⁵ *Id.*

not spontaneously lactate without first becoming pregnant and experiencing childbirth. As Justice O'Connor stated in her concurring opinion, "affected" is an "expansive term[]." ¹⁴⁶ The term "related" is also "a generous choice of wording, suggesting that interpretation should favor inclusion rather than exclusion in the close cases." ¹⁴⁷ A lactating woman lactates "because of or on the basis of [her] pregnancy." Furthermore, she is a woman "affected by pregnancy [or] childbirth." The expansive diction used in this statute supports the logical conclusion that the Ohio FEPA, as amended by the Ohio PDA, was designed to protect lactating women.

It is logical to broadly interpret both the Ohio FEPA and the Ohio PDA in order to include the status of lactation as a protected class within these civil rights statutes. The Ohio PDA is almost identically worded when compared to its federal counterpart. Courts have recognized that the federal PDA is a remedial statute that should be liberally construed. ¹⁴⁸ As such, the Ohio PDA should also be liberally construed. The Ohio State Legislature and the Ohio Supreme Court have maintained that the Ohio civil rights statutes should be liberally construed. ¹⁴⁹ Many federal courts have also stated that the federal civil rights counterpart Title VII, which the Ohio civil rights statutes are based on, "is a remedial statute which should be liberally construed." ¹⁵⁰ The tendency to broadly interpret civil rights statutes supports the argument that lactation discrimination fits into the broad definitions of sex discrimination under FEPA and, consequently, pregnancy discrimination under the Ohio PDA.

The Ohio PDA contains language that expressly states that protection is provided to the categories of pregnancy, childbirth, and related medical conditions. ¹⁵¹ Additionally, the statutory language signals the reader to interpret that these three categories of protected-status that are not meant to be an exhaustive list. Both the federal and Ohio PDAs contain a "not limited to" clause placed directly before these

¹⁴⁶ *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622, 629 (Ohio 2009) (O'Connor, J., concurring). Justice O'Connor further defines "affected" as "[having] produce[d] a material influence upon." *Id.* (alteration in original) (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 19 (10th ed. 1993)).

¹⁴⁷ *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402 (N.D. Ill. 1994).

¹⁴⁸ *See, e.g., Williams v. Macfrugal's Bargains-Close-Outs, Inc.*, 79 Cal. Rptr. 2d 98, 100 (Ct. App. 1998) ("There is no question but that the Pregnancy Discrimination Act (PDA) (42 U.S.C. § 2000e(k)) is a remedial statute and should be liberally construed.").

¹⁴⁹ *See* OHIO REV. CODE ANN. § 4112.08 (West 2008); *Ohio Civil Rights Comm'n v. Lysyj*, 313 N.E.2d 3, 6 (Ohio 1974) ("R.C. 4112.02(G) and 4112.01(I) are remedial statutes and are unbounded by the rules of strict construction that governed R.C. 2901.35. When determining the scope of the "public accommodations" amendments to Chapter 4112, the commission, initially, and the courts, upon review, are to construe those statutes liberally in order to effectuate the legislative purpose and fundamental policy implicit in their enactment, and to assure that the rights granted by the statutes are not defeated by overly restrictive interpretation." (citing OHIO REV. CODE ANN. § 1.11)).

¹⁵⁰ *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220 (10th Cir. 2007).

¹⁵¹ OHIO REV. CODE ANN. § 4112.01(B) (West 2009).

three categories.¹⁵² If the Ohio Legislature intended to limit the coverage of the Ohio PDA to *only* pregnancy, childbirth, and related medical conditions, an argument can be made that the Ohio Legislature would have refrained from including the federal “not limited to” language in the state statute.¹⁵³ Thus far, the “not limited to” clauses of either versions of the PDA have yet to be interpreted by a federal or Ohio court.¹⁵⁴ A plain reading of the Ohio PDA reveals its expansive statutory language and supports the conclusion that the Ohio Legislature intended that the statutory language be interpreted broadly to cover biological processes such as lactation, which is highly related to pregnancy.

2. The Legislative History and Intent

The Sixth Circuit noted that the Ohio legislature integrated the federal “PDA’s language almost verbatim into the definitional provisions of § 4112.”¹⁵⁵ Therefore, the federal legislative intent and history can be extrapolated to provide insight into the intent behind the Ohio PDA.¹⁵⁶ As Justice O’Connor noted in her concurring opinion, the Ohio court in *Pacourek v. Inland Steel Co.* looked to the congressional record in order to understand the legislative intent of the federal PDA.¹⁵⁷ Since the Ohio PDA was passed two years after the federal PDA, it can be assumed that the Ohio Legislature was aware of the corresponding federal legislative history. If the Ohio Legislature disapproved of this legislative history, it could have overridden the federal legislative intent with its own state level legislative history. The argument that the Ohio civil rights statutes were devised to include protection for lactating employees is supported by Title VII’s overarching policy objective of eliminating barriers to equal opportunities for all employees in the workplace.¹⁵⁸

¹⁵² *Id.* (defining the terms “because of sex” and “on the basis of sex” while stating that these terms “include, but are not limited to, because of or on the basis of pregnancy, . . . childbirth, or related medical conditions”).

¹⁵³ See Candace Saari Kovacic-Fleischer, *Litigating Against Employment Penalties for Pregnancy, Breastfeeding and Childcare*, 44 VILL. L. REV. 355, 377 (1999) (arguing that federal courts have concluded that breastfeeding is not “pregnancy, childbirth, or related medical conditions [to pregnancy]” and ignored the “plain language” of the federal PDA, which expressly states that discrimination should not be limited to these factors).

¹⁵⁴ See *id.* (asserting that no federal court has interpreted the “not limited to” clause of the federal PDA).

¹⁵⁵ *Derungs II*, 374 F.3d 428, 436 (6th Cir. 2004).

¹⁵⁶ “The amended statutory framework now embodied in Ohio’s FEPA developed similarly to its federal counterpart . . . the federal Pregnancy Discrimination Act of 1978.” Allen v. Totes/Isotoner Corp., 915 N.E.2d. 622, 628 (Ohio 2009) (O’Connor, J., concurring).

¹⁵⁷ *Id.* at 628 (citing *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1402 (N.D. Ill. 1994)). “The essential command of the PDA is that an employer must maintain the same neutrality towards an employee’s pregnancy as it would . . . [any] other protected-class status.” *Id.*

¹⁵⁸ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (“The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”).

Lactation is defined as the “[p]eriod *following* birth during which milk is secreted in the breasts.”¹⁵⁹ The congressional record mentions that “the PDA gives a woman the right . . . to be financially and legally protected before, during and *after* her pregnancy.”¹⁶⁰ Even federal courts that have been hostile toward the idea of extending Title VII protection to breastfeeding discrimination claims have conceded that the federal PDA “does not require plaintiff to be pregnant when the alleged discrimination occurs.”¹⁶¹ The legislative intent indicates that physiological and biological aftereffects of pregnancy, such as lactation, were legislatively intended to be protected under the PDA.

The Congressional record expressly excluded the federal PDA from a few applications that are highly related to pregnancy. For example, the Congressional Record addressed the fear that plaintiffs would attempt to use the federal PDA to force employers to pay for abortions. Congress prevented this application of the statute by stating on the record that the federal PDA expressly limits its application to this contingency.¹⁶² When the Ohio Legislature adopted its version of the PDA it could have followed Congress’s example by expressly excluding the statute’s application to contingencies involving breastfeeding or lactation discrimination. The Ohio Legislature did not expressly exclude these potentially protected categories. Therefore, the legislative history and intent support the inclusion of lactation discrimination as a cognizable claim that can be brought under the Ohio PDA.

The timeline of the enactment of the federal PDA and the subsequent enactment of the Ohio PDA combined with its implication on the Ohio legislative intent must be clearly explained. The *Derungs* court misinterpreted this legislative history when it analyzed the impact that the federal PDA had on the Ohio PDA’s legislative intent. The Sixth Circuit stated:

[W]hen the Ohio Legislature amended the “because of sex” and “on the basis of sex” definition, *Gilbert* had not been expressly overruled by the Supreme Court. *Newport News* came three years later. . . .

¹⁵⁹ See *Medical Dictionary*, WEBMD (emphasis added), <http://dictionary.webmd.com/terms/lactation> (last visited Jan. 4, 2010). Lactation is also defined by in terms of its biological description as the “[p]roduction of milk.” *Id.*

¹⁶⁰ See Kovacic-Fleischer, *supra* note 153, at 370 n.94 (omission in original) (emphasis added) (quoting 124 CONG. REC. 38574 (1978) (remarks of Rep. Sarasin)).

¹⁶¹ *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1493 (D. Colo. 1997). The plaintiff can still be a member of a protected class even though she was not pregnant at the time of the adverse employment action. *Id.* at 1492-93. The *Fejes* court stated:

The statute does not specify whether the discrimination must occur during the pregnancy. However, to read Title VII so narrowly would lead to absurd results such as “prohibit[ing] an employer from firing a woman during her pregnancy but permit[ing] the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place.”

Id. (alteration in original) (quoting *Donaldson v. Am. Banco Corp.*, 945 F. Supp. 1456, 1463-64 (D. Colo. 1996)).

¹⁶² H.R. REP. NO. 95-948, at 7 (1978).

Having incorporated the PDA's language almost verbatim into the definitional provisions of § 4112, it is clear to us that the Ohio Legislature was aware of the meaning and rationale of *Gilbert*, as well as being aware of the [federal] PDA. The Legislature made a conscious choice to extend the definition of discrimination to include pregnancy even though there cannot be a class of similarly situated males. In making this choice, however, the Legislature extended the definition of discrimination in the employment context only.¹⁶³

The reasoning behind the Sixth Circuit's legislative timeline is incorrect because Congress, not the Supreme Court, initially rejected the *Gilbert* analysis when it enacted the federal PDA. In fact, the Court in *Newport News* explained that Congress, in enacting the PDA, both rejected the *Gilbert* result and endorsed the reasoning and interpretation of the dissenting opinions.¹⁶⁴ The Ohio legislature did not need to wait for the Supreme Court's *Newport News* decision to understand that the *Gilbert* analysis had already been rejected by the passage of the federal PDA. At the time of Ohio PDA's enactment, the Ohio Legislature intended for the Ohio PDA to reflect its analogous rejection of the *Gilbert* analysis at the state level.¹⁶⁵ Therefore, applying a *Gilbert* analysis to a case involving the Ohio PDA is improper and goes against the Ohio Legislature's legislative intent.

After the *Derungs* decision, the Ohio Legislature apparently did not feel it was necessary to amend the PDA to expressly include lactation or breastfeeding as a protected class because the Sixth Circuit's decision indicated that the employment sections of Ohio's civil rights statutes were amended by the PDA.¹⁶⁶ Consequently, the Ohio Legislature deemed that the Ohio civil rights statutes already protected breastfeeding women in an employment context, but concluded that a legislative amendment was necessary to protect women who breastfeed in places of public accommodation. The Ohio legislature partially overruled the *Derungs* court when it amended Ohio's building code legislation to protect breastfeeding mothers from discrimination in a public accommodation context.¹⁶⁷ It is inappropriate for an Ohio court to apply the *Gilbert* analysis or the analysis from *Derungs* to a lactation discrimination case because the reasoning behind both cases has been rejected by the Ohio legislature.

C. The Patient Protection and Affordable Care Act

The best way to ensure all lactating employees are protected in the workplace is through additional federal legislation. As recently as 2009, there was pending

¹⁶³ *Derungs II*, 374 F.3d 428, 436 (6th Cir. 2004) (footnotes omitted).

¹⁶⁴ *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676-77 (1983) (noting that Congress enacted the PDA in order to explicitly reject the majority analysis of the Court in *Gilbert*); MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 3:12, at 113 (1994).

¹⁶⁵ *Totes/Isotoner*, 915 N.E.2d at 629 (O'Connor, J., concurring). "In rendering their decisions [in the *Derungs I* and *II* cases], the federal courts applied the *Gilbert* analysis that has been rejected expressly by both Congress and the Ohio Legislature." *Id.* (citing *Derungs I*, 141 F. Supp. 2d 884, 889-92 (S.D. Ohio 2000), *aff'd*, 374 F.3d 428 (6th Cir. 2004)).

¹⁶⁶ *Derungs II*, 374 F.3d at 436-37.

¹⁶⁷ See OHIO REV. CODE ANN. § 3781.55 (West 2005).

federal legislation to amend Title VII in the form of H.R. Res. 2819, 111th Cong. (2009). This legislation would have amended the Civil Rights Act of 1964 by inserting the words “including lactation” after “childbirth.”¹⁶⁸ It also would have defined lactation as “a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast.”¹⁶⁹ Since this proposed federal legislation continues to fail, Ohio’s General Assembly could adopt legislation similar to one of the twenty-four states¹⁷⁰ that have enacted laws to provide protection to breastfeeding mothers in the workplace. For instance, Vermont requires employers to provide reasonable time throughout the day for nursing mothers to express breast milk for three years after the birth of a child.¹⁷¹ It also requires employers to make a reasonable accommodation to provide an appropriate private space that is not a bathroom stall, and prohibits discrimination against an employee who exercises rights provided under this act.¹⁷²

The recent passage of the Patient Protection and Affordable Care Act¹⁷³ included new federal protections for lactating employees. This new legislation amends the Fair Labor Standards Act to require reasonable unpaid breaks for nursing employees.¹⁷⁴ This legislation fails to protect all lactating employees. For example, employers with fewer than fifty employees are not subject to these requirements if they can demonstrate that they would cause an undue hardship on the employer.¹⁷⁵ Furthermore, since this legislation amends the FLSA instead of the Civil Rights Act of 1964, the legislation fails to protect employees from lactation discrimination itself. Therefore, the Ohio Supreme Court’s decision in *Totes/Isotoner* stands as the relevant law in Ohio, and lactating employees remain uncertain about whether they are protected from lactation discrimination. Although an employer is now required to accommodate a lactating employee, without explicit protection from lactation discrimination, this employer is free to refuse to hire lactating employees altogether or engage in adverse employment practices toward lactating employees.¹⁷⁶

¹⁶⁸ H.R. Res. 2819, 111th Cong. (2009).

¹⁶⁹ *Id.*

¹⁷⁰ The states that have laws related to breastfeeding in the workplace are: Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Maine, Minnesota, Mississippi, Montana, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, and Wyoming. This is in addition to the District of Columbia and Puerto Rico. See *Breastfeeding Laws*, NAT’L CONF. OF STATE LEGS. (Sept. 2010), <http://www.ncsl.org/IssuesResearch/Health/BreastfeedingLaws/tabid/14389/Default.aspx>.

¹⁷¹ VT. STAT. ANN tit. 21, § 305 (2008).

¹⁷² *Id.* § 305(a), (c).

¹⁷³ 29 U.S.C. § 207 (2006).

¹⁷⁴ The amendment to the FLSA provides that employers must furnish a private location, other than a restroom, which may be used by the employee to express breast milk. *Id.* § 207(r)(1).

¹⁷⁵ *Id.* § 207(r)(3).

¹⁷⁶ These adverse employment actions could include demoting, refusing to promote, refusing to give pay raises to lactating employees only.

VI. CONCLUSION

The Supreme Court of Ohio's decision to affirm the summary judgment in favor of Totes opened the door for employers to implement facially discriminatory employment policies that single out lactating women. Because the court did not decide whether discrimination on the basis of lactation is prohibited by Ohio's FEPA, as amended by the Ohio PDA, Ohio's courts of appeals will likely conflict over this issue in the future. The Supreme Court of Ohio should establish that discrimination on the basis of lactation is considered pregnancy discrimination under Ohio law as "lactation is 'because of or on the basis of pregnancy' and that women who are lactating are women 'affected by pregnancy [or] childbirth.'"¹⁷⁷

¹⁷⁷ *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622, 630 (Ohio 2009) (O'Connor, J., concurring) (alteration in original).