Litigating a Breastfeeding and Employment Case in the New Millennium

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I. INTRODUCTION

Every year more than one million women are forced to choose between breastfeeding their children and keeping their jobs.¹ That number will continue to grow as more women enter the paid workforce and as more women learn about the health benefits of breastfeeding. Yet, remarkably little legal literature has been published about breastfeeding and employment.² The area is both under-theorized and under-analyzed. Indeed, despite court decisions that have uniformly left breastfeeding women without legal protection, the courts’ decisions have gone nearly uncriticized and mostly unnoticed. This Article aspires to change that phenomenon.

Part I will briefly review the medical literature that has documented breastfeeding’s substantial health benefits for both the mother and the child. Although these findings are only tangentially related to the main project of this

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¹ The number of women who are forced to choose between breastfeeding and working is difficult to calculate, because a woman’s ability to work and breastfeed influences the likelihood that she will elect to breastfeed in the first place. However, we do know that each year from 1989 to 1996, approximately 4,000,000 women gave birth. Centers for Disease Control and Prevention, National Center for Health Statistics, Fastats A to Z, tbl. 39, at http://www.cdc.gov/nchs/datawh/statab/pub/4611s98h.htm (last visited Nov. 14, 2000). We also know that 67% of all women who are within the childbearing age are workers in the paid labor force. US CENSUS BUREAU, BOOKLET NO.2, WE, THE AMERICAN WOMAN 10 (1985). And we know that virtually none of those women had the option of breastfeeding in their workplaces. See U.S. CENSUS BUREAU, PUB. NO. 703, STATISTICAL ABSTRACT OF THE UNITED STATES 440 (1998) (indicating that only 3% of workplaces provide on-site child accommodations). Finally, we know that approximately 55% of women choose to begin breastfeeding in the hospital, but that only 10% of working women continue to do so. Alan S. Ryan & Gilbert A. Martinez, Breast-Feeding and the Working Mother: A Profile, 83 PEDIATRICS 524 (1989). Even a conservative estimate based on these facts predicts that over a million women each year (1,169,820 to be precise) are forced to choose between continuing to breastfeed their children and returning to work.

² Only four articles have discussed breastfeeding and employment at any length, and none of the four is devoted entirely to that subject. See Darmeriss Cruver-Smith, Protecting Public Breast-Feeding in Theory but Not in Practice, 19 WOMEN’S RIGHTS L. REP. 167 (1998); Candace Saari Kovacic-Fleischer, Litigating Against Employment Penalties for Pregnancy, Breastfeeding and Childcare, 44 VILL. L. REV. 355 (1999); Corey Silberstein Shaimah, Why Breastfeeding Is (Also) a Legal Issue, 10 HASTINGS WOMEN’S L.J. 409 (1999); Danielle M. Shelton, When Private Goes Public: Legal Protection for Women Who Breastfeed in Public and at Work, 14 LAW & INEQ. 179 (1995).
Article, a familiarity with these benefits is essential to understanding the motivation of those women who feel forced to give up their jobs in order to breastfeed their children. Without keeping the enormity of the health benefits in mind, it becomes difficult to understand why a woman would bear the burden of litigation—no less the loss of her job—just to breastfeed, rather than bottlefeed, her child. Part I will also identify employment barriers to breastfeeding and explain how they operate to prevent nearly all women who work in the paid labor force from breastfeeding.

Part II will review the various legal frameworks under which a breastfeeding woman can attempt to balance breastfeeding and work. Among those frameworks are the Family and Medical Leave Act of 1993 (FMLA), the Americans with Disabilities Act of 1990 (ADA), the constitutional right to privacy, the Pregnancy Discrimination Act of 1978 (PDA), and Title VII of the Civil Rights Act of 1964 (Title VII). Part II will conclude that none of these options has proved useful to women attempting to both breastfeed and work.

Part III will argue that future litigation on behalf of breastfeeding workers can be successful despite the failures of the legal frameworks reviewed in Part II. Part III will lay out a relatively simple argument relying on both the PDA and Supreme Court precedent to demonstrate that breastfeeding discrimination is sex discrimination under Title VII. Part III will then briefly explain how this new argument can help breastfeeding women obtain leaves from work or breaks to breastfeed or breastpump during work. Finally, Part III will return to the Title VII and PDA cases reviewed in Part II and offer an explanation of why those cases failed to make the argument advanced in this Article, and why the arguments they did make were unsuccessful.

3. The main project of this Article is to present a convincing argument for the proposition that breastfeeding discrimination is sex discrimination within the meaning of Title VII. The content of that argument can be found in Part III, infra.


8. The terms "work" and "work in the paid labor force" as used in this Article refer to paid, non-household labor. Women engaged in unpaid or household labor can probably be more successful at both breastfeeding and working because their schedules are often more flexible. This Article focuses on women who work away from home and in the paid labor force, where schedules are relatively fixed, and most elements of the work environment are controlled by the employer.

9. For a description of when breaks, as distinct from leave, for breastfeeding would be preferred, and the distinction between breastfeeding leave and maternity leave, see infra note 142 and accompanying text.
II. BENEFITS AND BARRIERS TO BREASTFEEDING AND EMPLOYMENT

A. The Benefits of Breastfeeding

Although there has been a paucity of legal literature written about breastfeeding,10 breastfeeding has been a popular topic of both writing and study in the fields of health and medicine for the past several decades. Medical professionals have found that breastfeeding has substantial benefits for both children and mothers. Children who have been breastfed have a reduced risk of bacterial infection,11 botulism,12 diarrhea,13 respiratory illness,14 viral infection,15 allergies,16 and sudden infant death syndrome17—to name a few.18 In addition to the decreased risk of developing certain ailments, children who have been breastfed also enjoy improved vision,19 cognitive functioning,20 educational achievement,21 and speech development.22 Mothers benefit from breastfeeding as well: Those who breastfeed have reduced risks of breast cancer,23 ovarian cancer,24 gestational diabetes,25 and after-birth bleeding.26 Breastfeeding has also been found to aid mothers in losing excess maternal body fat27 and in returning to their pre-pregnancy shape.28 These potential benefits to the mother and the child also represent a potential benefit to society as a whole. If breastfeeding

10. See supra note 2.
12. Id.
15. David S. Newburg et al., Role of Human-Milk Lactadherin in Protection Against Symptomatic Rotavirus Infection, 351 LANCET 1160, 1161 (1998).
17. Knopf, supra note 11, at 1704.
18. See also Burris Duncan et al., Exclusive Breast-Feeding for at Least 4 Months Protects Against Otitis Media, 91 PEDIATRICS 867 (1993) (ear infections); Donald W. Goodwin et al., Breast-Feeding and Alcoholism: The Trotter Hypothesis, 156 AMER. J. PSYCHIATRY 650, 652 (1999) (Crohn’s disease); Knopf, supra note 11, at 1704 (botulism, necrotising enterocolitis, diabetes mellitus, lymphomas, and ulcerative colitis).
21. Id.
24. RIORDAN & AUERBACH, supra note 22, at 129.
28. Id.
were universal, the reduced incidence of just four of the above mentioned ailments would save $1,000,000,000 in health care costs each year.\textsuperscript{29}

It is important to keep these benefits in mind when analyzing the cases involving breastfeeding and employment, for they both explain the motivation of the mothers who are attempting to balance breastfeeding and work and emphasize the importance of the right at stake. Based on these benefits, many women choose to breastfeed—even sacrificing their jobs—in an attempt to protect their own health as well as that of their child.\textsuperscript{30}

B. Employment Barriers to Breastfeeding

A basic understanding of the physiology of breastfeeding is necessary to understand how employment obstacles function to prevent working women from having the option to breastfeed their children. The expression of breastmilk is an "intricate process of supply and demand which necessitates breastfeeding or pumping at regular intervals."\textsuperscript{31} Hence, women cannot work for eight-hour days during which they neither breastfeed nor breastpump and still continue to breastfeed their babies during the remaining sixteen hours of the day. This is true for two interrelated reasons. First, in the long term, if the breastmilk is not expressed at regular intervals, the woman's body will cease to produce it, and the breastmilk supply will dry up.\textsuperscript{32} Second, in the short term, the failure to express the breastmilk at regular intervals will cause considerable pain for the woman as her breasts fill with milk that her body expects to be expressed.\textsuperscript{33} Thus, for most women in the paid labor force, it is not possible to both work and breastfeed unless they are allowed breaks to express their breastmilk at regular intervals throughout the day.

Expression of breastmilk can be accomplished in one of two ways.\textsuperscript{34} The first method, conventionally called breastfeeding, involves making the nipple of


\textsuperscript{30} The element of choice probably cannot be overemphasized. My purpose in discussing the potential health benefits of breastfeeding is not to suggest that women have a duty to breastfeed, but rather to underscore the importance of allowing women—even women who work—the freedom to breastfeed if they find the benefits sufficiently convincing. It should be remembered that the movement away from breastfeeding to formula began as part of a social movement to liberate women from household responsibilities and to provide them the opportunity to maintain their place within the workforce even after the birth of a child. See Shdaimah, \textit{supra} note 2, at 414. To encourage the return to breastfeeding without addressing the traditional barriers to working and breastfeeding would be to help undo the liberation women achieved when formula was first introduced.

\textsuperscript{31} Shelton, \textit{supra} note 2, at 184.

\textsuperscript{32} THE CHILDREN'S HOSPITAL OF PHILADELPHIA BOOK OF PREGNANCY AND CHILD CARE 195, 199-200, 204-05 (Patrick S. Pasquariello, Jr. et al. eds., 1999).

\textsuperscript{33} \textit{Id}.

\textsuperscript{34} Although this paragraph differentiates between breastfeeding and breastpumping, this Article generally uses the word "breastfeeding" to refer to both breastfeeding and breastpumping. This Article uses the word "breastfeeding" in its limited sense of feeding a child directly from the breast only where that method is specifically compared or contrasted to breastpumping.
the breast directly available to the child for suckling. The second method, conventionally called breastpumping, involves using a simple mechanical device, or the mother’s hand, to pump breastmilk from the breast. The breastmilk is then usually refrigerated in bottles until it is later bottlefed to the child. Regardless of which method a woman utilizes, regular breaks throughout the day are essential to the expression of breastmilk. A breastfeeding woman in the workplace would obviously also require on-site daycare or its equivalent in order to have the child available to breastfeed, while a breastpumping woman would require someplace to breastpump and a small volume of refrigeration space. Few employers are currently willing to provide the facilities and opportunity for women to either breastfeed or breastpump at work.

III. A REVIEW OF BREASTFEEDING AND EMPLOYMENT LAW

Although this Article’s primary focus is on Title VII and the PDA, breastfeeding women who work have attempted to utilize a variety of legal frameworks to assist them. Unfortunately, none of those frameworks have proved very successful. This section will review the attempts of breastfeeding women to utilize the Family and Medical Leave Act, the Americans with Disabilities Act, the constitutional right to privacy, the Pregnancy Discrimination Act, and Title VII of the Civil Rights Act of 1964. This section will also explain why and how each of these frameworks ultimately fails to assist women who seek to both work and breastfeed.

A. The Family and Medical Leave Act of 1993

The Family and Medical Leave Act of 1993 (FMLA) is the most recent federal law that had the potential to assist breastfeeding women. As such, the FMLA probably comes first to many readers’ minds when considering the plight of women wishing to work and breastfeed. Although the FMLA provides some

35. Importantly, mothers wishing to breastfeed must usually begin breastfeeding their newborn soon after birth. This is true because the method that the newborn must use to suckle a breast is different from that used to suckle a bottle. See Irene B. Frederick & Kathleen G. Auerbach, Maternal-Infant Separation and Breast-Feeding: The Return to Work or School, 30 J. REPROD. MED. 523, 524 (1985). Therefore, if a newborn is bottlefed after birth, he or she will often become accustomed to bottlefeeding and will not successfully transition to breastfeeding. The reverse can be true as well. Children who are breastfed from birth can experience difficulty being transitioned to bottlefeeding. This difficulty in switching from breast to bottle and from bottle to breast is often referred to as “nipple confusion.” Id. Studies have indicated that nipple confusion is worst when the child is 12 weeks of age. Id. Ironically, this is the exact length of leave allowed under the FMLA, with the result that women taking leave under the FMLA have to make the transition to bottlefeeding at the time when that transition is the most difficult. See 29 U.S.C. § 2612(a)(1) (1994). Hopefully, the prevalence of this problem will decline as bottles that more closely mimic the milk delivery process of the breast are invented and widely distributed. See Avent America, Inc. v. Playtex Products, Inc., No. 98-C2663, 1999 WL 688519, at *1 (N.D. Ill. June 24, 1999) (involving litigation over development of “a baby feeding system that more closely replicated the breast-feeding process by incorporating an anti-vacuum device into the nipple skirt”).

minimal protection to a subset of women wishing to breastfeed, it offers no
d protection to the vast majority of breastfeeding women, and still forces those
women it does protect to choose between breastfeeding and work.

The FMLA provides up to twelve weeks of unpaid vacation to covered
employees within one year after the birth of a baby. Those women who take
leave under the FMLA can, therefore, breastfeed their children for the first
twelve weeks after birth. Thereafter, the FMLA offers them no protection from
having to choose between breastfeeding and keeping their jobs. The relatively
short duration of the leave provided under the FMLA is not, however, the only
shortcoming of the FMLA as it relates to breastfeeding.

One shortcoming of the FMLA is its narrow coverage. The FMLA only
applies to worksites with fifty or more employees. Furthermore, employees
who work at covered worksites are only covered if they have worked with their
employer for at least twelve months and for at least 1,250 hours in that year.
The result of these restrictions is that only about half of the workforce is covered
by the FMLA. Furthermore, women are less likely to be covered than men,
because they are more likely to have been employed for less than twelve months
and to be working part-time. Hence, the FMLA is completely inapplicable to
more than half of all women working in the paid labor force.

A second major shortcoming of the FMLA is that even those women who are
covered are still forced to choose between breastfeeding and work. The FMLA
allows women to take twelve weeks of leave, but it does not allow them to take
fifteen minute breaks, several times a day, in order to express breastmilk.
In effect, all the FMLA accomplishes for breastfeeding women is providing an
option to return to work after breastfeeding for twelve weeks. Thus, the FMLA
provides no benefit whatsoever to women who could find a similar job to the
one they had prior to deciding to breastfeed. Furthermore, the FMLA provides
no benefit to women who for financial reasons cannot afford to take twelve
weeks off from work.

37. 29 U.S.C. § 2612(a)(1) (1994). The FMLA also provides up to twelve weeks of unpaid vacation to
men and women within one year of the adoption of a child or placement of a foster child; when a serious health
condition renders the employee unable to perform job functions; or when the employee needs to care for a
spouse, parent or child with a serious health condition. Id.

38. For a discussion of why 12 weeks is not the optimal length of leave for breastfeeding purposes, see
Frederick & Auerbach, supra note 35, at 524.

39. In order to achieve the benefits of breastfeeding, it is recommended that breastfeeding begin soon
after birth and continue for at least six months, but the FMLA provides only three months of leave. See S.L.


41. Id.

42. See Samuel Issacharoff & Elyse Rosenblum, Women and the Workplace: Accommodating the

43. See Angie K. Young, Assessing the Family and Medical Leave Act in Terms of Gender Equality,

44. See 29 U.S.C. § 2612(b)(1) (1994) ("Leave . . . shall not be taken by an employee intermittently.").
In short, the FMLA is inapplicable to most women in the workforce and still forces those women who are covered to choose between breastfeeding and work.

B. *The Americans with Disabilities Act of 1990*

The primary goal of the Americans with Disabilities Act of 1990 (ADA) is to prohibit discrimination on the basis of disability. Disability is defined in the ADA as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." Title I of the ADA specifically deals with employment discrimination and requires that employers make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee."

The ADA, therefore, may seem to offer a potential avenue for breastfeeding women to seek accommodation in the workplace. After all, there can be almost no question that a breastfeeding woman is impaired in performing certain major life activities while she is breastfeeding. However, the courts have been uniform in their rejection of breastfeeding as a "physical impairment" within the meaning of the ADA. The courts have relied on interpretive guidelines from the Equal Employment Opportunity Commission (EEOC) which state that an impairment must be "long term" in order to qualify as a disability. And some courts have apparently concluded that the ADA requires the impairment to be an "abnormality" before it can be considered a disability. Hence, the courts, as

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48. Major life activities are "those basic activities that the average person in the general population can perform with little or no difficulty." e.g., walking, breathing, learning, or working." Soodman v. Wildman, 95-C-3834, 1997 WL 106257, at *5 (N.D. Ill. Feb. 10, 1997) (quoting 29 C.F.R. pt. 1630 App. § 1630.2(i)). Although it may seem self-evident that breastfeeding would impair at least some of these activities, at least one district court concluded that "normal pregnancy," which is presumably at least as great an impairment as breastfeeding, "does not impair any major life activity." Lehmuller v. Incorporated Village of Sag Harbor, 944 F. Supp. 1087, 1093 (E.D.N.Y. 1996). Although pregnancy and breastfeeding may not be sufficiently long term to qualify as disabilities within the meaning of the ADA, see infra note 53, the unsupported contention by the Lehmuller court that pregnancy does not impair a major life activity is facially preposterous. See, e.g., Soodman, 1997 WL 106257, at *6 ("[T]he ADA has never required total impairment of a major life activity, substantial impairment is enough.").
49. See, e.g., Martinez v. NBC, Inc., 49 F. Supp. 2d. 305, 308 (S.D.N.Y. 1999) ("Every court to consider the question [whether breastfeeding is protected under the ADA] to date has ruled that 'pregnancy and related medical conditions do not, absent unusual conditions, constitute a [disability] under the ADA.'") (quoting LaCoparra v. Pergament Home Centers, Inc., 982 F. Supp. 213, 228 (S.D.N.Y. 1997)).
50. 29 C.F.R. pt. 1630 App. § 1630.2(j) (1994) ("[T]emporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. . . . Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration."). See also Presutti v. Felton Brush, Inc., 927 F. Supp. 545, 549 (D.N.H. 1995) (dismissing ADA claim because impairment "did not give rise to the level of a permanent disability").
51. See Bond v. Sterling, 997 F. Supp. 306, 311 (N.D.N.Y. 1998) ("It is simply preposterous to contend a woman's body is functioning abnormally because she is lactating.").
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well as the EEOC, have concluded that breastfeeding and even normal pregnancies are not subject to protection under the ADA. Although the language of the ADA leaves such conclusions open to criticism, even commentators who have argued for a more expansive definition of disability under the ADA have conceded that the current language of the ADA does not yet reach pregnancy or breastfeeding.

C. Breastfeeding as a Constitutional Privacy Right

The entire jurisprudence supporting a constitutional privacy right to breastfeed is contained in one case. In *Dike v. School Board*, the Fifth Circuit declared that “[b]reastfeeding is the most elemental form of parental care. It is a communion between mother and child that, like marriage, is ‘intimate to the degree of being sacred.’” Grounding its decision in an array of Supreme Court cases that had established a parent’s right to direct the upbringing and creation of their children, the Fifth Circuit declared that “[i]n light of the spectrum of interests that the Supreme Court has held specially protected we conclude that the Constitution protects from excessive state interference a woman’s decision respecting breastfeeding her child.”

Janice Dike was a school teacher who breastfed her child for three months before her employer, a public school, directed her to stop. Dike would have her husband or babysitter bring the baby to the school during her lunch break, and then Dike would find a private place to breastfeed the baby. Although Dike’s lunch breaks were duty free, she would keep her husband or babysitter standing by while she breastfed, so that she could hand the baby over to him if she were unexpectedly required to perform any work-related duties. After three months, the school required her to stop breastfeeding at work, citing a policy that children

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52. *See, e.g., Martinez,* 49 F. Supp. 2d at 308-09 (“EEOC regulations . . . explicitly exclude ‘conditions, such as pregnancy, that are not the result of a physiological disorder.’”) (quoting 29 C.F.R. pt. 1630 App. §1630.2(h) at 347 (1998)).

53. *See Colette G Matzzie,* *Substantive Equality and Antidiscrimination: Accommodating Pregnancy under the Americans with Disabilities Act,* 82 GEO. L.J. 193, 195 (1993) (“This Note does not suggest that pregnancy is a disability as the term has traditionally been conceived. Instead this Note adopts a more flexible understanding of ‘disability’ as an impairment relative to a particular social context.”).

54. 650 F.2d 783 (5th Cir. 1981).

55. *Id. at 787* (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).


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

58. *Id. at 784-85.*

59. *Id.*

60. *Id.*
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could not be brought to work, and arguing that having her baby at work was, or was at least potentially, disruptive.\(^6\)

Nearly every article that has been written on breastfeeding and employment has focused on \textit{Dike} and its promise to recognize breastfeeding as a constitutionally protected right.\(^6\) This is not particularly surprising given the relatively encouraging language of \textit{Dike} and the lack of success of all other theories protecting breastfeeding workers. However, the jurisprudence over the twenty years since \textit{Dike} has made relatively clear that \textit{Dike} will not be a basis for protecting breastfeeding workers.

First, the subsequent history of \textit{Dike} revealed the weaknesses inherent in the \textit{Dike} opinion itself. Although the Fifth Circuit required the school board to establish that its regulations further "sufficiently important state interests and are closely tailored to effectuate only those interests," the \textit{Dike} court went on to state that the rights of the breastfeeding worker must be balanced against the state's interests in maintaining an orderly workplace.\(^6\) The Fifth Circuit remanded \textit{Dike}, stating:

The school board's interests in avoiding disruption of the educational process, in ensuring that teachers perform their duties without distraction, and in avoiding potential liability for accidents are presumably legitimate. Whether these or other interests are strong enough to justify the school board's regulations, and whether the regulations are sufficiently narrowly drawn, must be determined at trial.\(^6\)

On remand, the same district court that dismissed Dike's original claim ruled in favor of the school board, finding that the school board's policy was narrowly tailored and based on compelling state interests.\(^6\) Although it is impossible to conceptualize how the school board's "no children at school" policy could really have been narrowly tailored, the district court's ruling underscores the lack of protection that the \textit{Dike} balancing test provides breastfeeding women working for state employers.\(^6\)

Furthermore, even to the extent that \textit{Dike} did provide some protection to breastfeeding workers with its odd mix of strict scrutiny and balancing test language, the degree to which \textit{Dike} is still good law has been called into question.

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\(^6\) Id.  
\(^6\) See, e.g., Shelton, supra note 2, at 192 ("In the most significant breastfeeding case thus far, \textit{Dike v. School Board}, the Fifth Circuit held that a public school teacher had a constitutionally protected interest in breastfeeding her child."); Shdaimah, supra note 2, at 419 ("Perhaps the most frequently cited case in the employment context is \textit{Dike v. School Board}.").  
\(^6\) \textit{Dike}, 650 F.2d at 787.  
\(^6\) Id.  
\(^6\) Shelton, supra note 2, at 193.  
\(^6\) It is also important to emphasize that even to the limited (thus far, non-existent) extent that \textit{Dike} provides protection to breastfeeding workers, its effect is limited to women working in state-run workplaces. The state-action requirement insulates states from having to do anything to affirmatively protect the rights of breastfeeding workers. See, e.g., Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).
by later decisions of the Eleventh Circuit.\textsuperscript{67} To the extent that \textit{Dike} ever required more than a simple balancing of interests, the Eleventh Circuit explicitly overruled \textit{Dike}, stating: “To the extent that \textit{Dike} might be interpreted as requiring strict scrutiny review of a government employee’s freedom of intimate association claim, it misstates the appropriate standard; and we overrule it now.”\textsuperscript{68} Furthermore, the Eleventh Circuit went on to call even the balancing test approach into question by characterizing the “actual holding” of \textit{Dike} as requiring nothing more than “that further proceedings were necessary.”\textsuperscript{69} The Fifth Circuit has also narrowed \textit{Dike}, holding it inapplicable to prison inmates, but failing to clarify what review is appropriate in the non-prison context.\textsuperscript{70}

In short, although \textit{Dike} provided some quotable language, the constitutional protection afforded by \textit{Dike} has yet to successfully protect a single breastfeeding worker and the doctrine appears to be shrinking, not growing.

D. \textit{The Pregnancy Discrimination Act of 1978}\textsuperscript{71}

In the 1976 case \textit{General Electric v. Gilbert}, the Supreme Court held that discrimination on the basis of pregnancy was not discrimination on the basis of sex within the meaning of Title VII of the Civil Rights Act of 1964.\textsuperscript{72} Justice Rehnquist, for the majority, wrote that discrimination based on pregnancy is not sex discrimination because the two relevant classes are “pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.”\textsuperscript{73} Thus, in the absence of evidence that the classification is a “mere pretext designed to effect an invidious discrimination against the members of one sex or the other,”\textsuperscript{74} the Court reasoned that sex discrimination exists only where women are disadvantaged in favor of a group comprised exclusively of men.

The Pregnancy Discrimination Act of 1978 (PDA) was enacted two years later in direct response to the Supreme Court’s decision in \textit{General Electric Co. v. Gilbert}.\textsuperscript{75} Congress effectively overruled \textit{Gilbert} by amending Title VII to

\textsuperscript{67} The Eleventh Circuit was carved out of the Fifth Circuit after \textit{Dike} was decided, so the Eleventh Circuit treated \textit{Dike} as binding circuit precedent prior to overruling it.

\textsuperscript{68} Shahar v. Bowers, 114 F.3d 1097, 1101-02 (11th Cir. 1997).

\textsuperscript{69} \textit{Id.} at 1102 n.10.

\textsuperscript{70} \textit{See} Southerland v. Thigpen, 784 F.2d 713, 716 (5th Cir. 1986).

\textsuperscript{71} Considering that the Pregnancy Discrimination Act amended Title VII of the Civil Rights Act of 1964, it may seem odd to the reader of this Article that they are being discussed separately. This Article is taking this approach because those cases that have relied on the PDA were decided with almost no reference to the broader context of Title VII. \textit{See}, e.g., Wallace v. Pyro Mining Co., 951 F.2d 351 (6th Cir. 1991) (unpublished table decision). Similarly, those cases that have relied more heavily on Title VII have attempted to ignore the PDA. \textit{See}, e.g., Martinez v. NBC, Inc., 49 F. Supp. 2d 305, 307 (S.D.N.Y. 1999). This phenomenon will be critiqued in Part III.C., infra.

\textsuperscript{72} \textit{General Electric Co. v. Gilbert}, 429 U.S. 125 (1976).

\textsuperscript{73} \textit{Id.} at 135 (quoting Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974)).

\textsuperscript{74} \textit{Id.} at 136.

\textsuperscript{75} Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 669 (1983) ("In 1978, Congress decided to overrule our decision in \textit{General Electric Co. v. Gilbert} by amending Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy.") (citations and internal quotations
provide a clearer definition of the terms “because of sex” and “on the basis of sex.” Specifically, the PDA 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.76

Congress’ explicit rejection of the Supreme Court’s decision in Gilbert, as well as its explicit protection of “pregnancy . . . or related medical conditions” in the PDA, prompted a few breastfeeding workers77 to demand that they be treated the same as their temporarily disabled male counterparts. For most of these women, the request was for a temporary leave from work,78 but for a few, the request was merely for a few short breaks during the day and the provision of a place to breastfeed or breastpump without interruption.79 The requests of all of these women were denied; they all eventually quit or were fired, and the courts hearing their cases uniformly agreed with the legality of their employers’ behavior.

The reasoning employed by the courts to dismiss the PDA claims of breastfeeding workers was a somewhat evolutionary process that developed as the courts were faced with stronger and stronger claims. The first case in which a breastfeeding worker advanced a claim of discrimination under the PDA was Barrash v. Bowen.80 The Fourth Circuit disposed of Barrash’s PDA claim with a single sentence: “Under the [PDA], pregnancy and related conditions must be treated as illnesses only when incapacitating.”81 The Fourth Circuit offered no further explication of its dismissal of Barrash’s PDA claim. The inference,

omitted). See also H.R. Rep. No. 95-948 (1978), reprinted in 1978 U.S.C.C.A.N. 4749 (“Contrary to these rulings and guidelines, the Supreme Court . . . decided in favor of General Electric’s disability insurance plan . . . . It is the Committee’s view that the dissenting justices correctly interpreted the act.”).

76. 42 U.S.C. § 2000e(k) (1994). This definition principally modifies 42 U.S.C. § 2000e-2(a) (1994) which provides in relevant part: “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”

77. Given the fact that less than 3% of all workplaces have policies which would allow women to both work and breastfeed, see supra note 1, it is amazing how few women have brought breastfeeding discrimination actions under the PDA. A search in the databases of WestLaw and LEXIS reveal only five cases that have relied upon the PDA to state a claim of discrimination against breastfeeding workers. This scarcity of case law may be a result of the accurate prediction that the federal courts would be extremely hostile to the claims.


80. 846 F.2d 927 (4th Cir. 1988).

81. Id. at 931.
therefore, was that breastfeeding is not sufficiently incapacitating to warrant protection under the PDA. The only problem with the Fourth Circuit’s reasoning was that it had no support in the language or history of the PDA.\footnote{82} Indeed, the Fourth Circuit itself was eventually forced to acknowledge its error—in an unpublished opinion—when later defendants argued that, in light of Barrash, it was perfectly legal to discriminate against pregnant women so long as the woman was not completely incapacitated.\footnote{83} The Fourth Circuit neatly disposed of Barrash by bluntly observing that “[t]he text of the Pregnancy Discrimination Act contains no requirement that ‘related medical conditions’ be ‘incapacitating.’”\footnote{84} However, the Fourth Circuit recharacterized Barrash, in conformance with the developing conventional wisdom, as standing “for the narrow proposition that breastfeeding is not a medical condition related to pregnancy or to childbirth.”\footnote{85}

This conventional wisdom was primarily developed by the Sixth Circuit, which reasoned in the second breastfeeding case to be brought under the PDA, that breastfeeding is not a medical condition related to pregnancy unless the plaintiff proves that “breastfeeding her child was a medical necessity.”\footnote{86} Like the Fourth Circuit in Barrash, the Sixth Circuit offered no support for its claim that breastfeeding had to be medically necessary before it could be considered “pregnancy . . . or a related medical condition” for purposes of the PDA. The Sixth Circuit’s conclusion is undermined by the fact that the House Report on the PDA states that the phrase “pregnancy, childbirth, or related medical conditions” was chosen to “make[] clear that [the PDA’s] protection extends to the whole range of matters concerning the childbearing process.”\footnote{87} However, as later cases point out,\footnote{88} the House Report also provides that “if a woman wants to stay home to take care of the child, no benefit must be paid because this is not a medically determined condition related to pregnancy.”\footnote{89} The relevance of this observation is, of course, dependent on whether breastfeeding is equivalent to merely providing “care of the child.”\footnote{90} Every court to address the question has determined—without reflection—that it is.

\begin{footnotes}
\footnote{82} The House Report on the PDA, for example, provides: “In using the broad phrase ‘women affected by pregnancy, childbirth and related medical conditions,’ the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process.” H.R. Rep. 95-948, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 4749. The House Report further indicates that a related condition need not be completely incapacitating providing that “‘same treatment’ may include employer practices of transferring workers to lighter assignments . . . .” Id.


\footnote{84} Id.

\footnote{85} Id.

\footnote{86} Wallace v. Pyro Mining Co., 951 F.2d 351, 352 (6th Cir. 1991) (unpublished table decision).


\footnote{90} Breastfeeding and providing more general child care are obviously distinct activities. The former can be performed only by women, while the latter can be performed by men or women. Hence, this Article argues that Title VII does not support the claim of a woman who wants to “stay home and take care of the child,” but does support the claim of a woman who wants to stay home and breastfeed. See infra note 142.
\end{footnotes}
Even after the Sixth Circuit’s ruling in Wallace, however, there was still the potential for a very narrow band of protection for women who, by virtue of medical necessity, had to breastfeed their children. The third breastfeeding case to be brought under the PDA presented just such a case.91

Michele McNill was a corrections officer with the New York City Department of Corrections.92 She became pregnant and gave birth to a baby boy. McNill’s son was born with a cleft palate and lip that prevented him from being able to bottlefeed, making McNill’s breastfeeding of her son a precondition of his survival.93

The court recognized that there was “a medical necessity that the child be breast-fed, a function which can only be performed by a newborn’s mother.”94 The court also recognized that a case in which breastfeeding was a medical necessity was one of first impression.95 Nonetheless, the court concluded that “[a]n infant’s malformed palate and lip does not directly affect the condition of the mother . . . The PDA only provides protection based on the condition of the mother—not the condition of the child.”96 The court then pragmatically concluded: “If plaintiff’s claim here is covered by the PDA, then a multitude of mothers who have left work involuntarily to attend to their children's medical needs would also have claims. I am unwilling to infer that Congress intended such a broad expansion of the scope of Title VII . . .”97 The court acknowledged that there was a difference between McNill’s case in which the availability of the mother’s breast was the medical necessity, and other cases in which a child requires care that could be provided by men or women, but did not ultimately “find that to be a convincing distinction” for purposes of the PDA and Title VII.98

Thus, the courts have consistently and uniformly read protection for breastfeeding out of the language of the PDA, regardless of its necessity to the health of the child.

E. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 provides that “it shall be an unlawful employment practice for any employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”99 Two principal frameworks

92. Id. at 566.
93. Id.
94. Id. at 571. The court may have over-simplified the matter by stating as a given that only the child’s mother is capable of breastfeeding the child, but because wet nurses are not universally available, the judge’s ultimate conclusion on this point was probably correct.
95. Id.
96. Id. at 570-71. See also infra note 134 and accompanying text.
97. Id. at 571.
98. Id. at 571 n.3. This distinction should, of course, have been convincing. See infra note 142.
have emerged for stating a claim under Title VII: the disparate treatment framework and the disparate impact framework. An oversimplified description of these two frameworks is that disparate treatment involves intentional discrimination, while disparate impact involves facially neutral policies, the results of which fall more harshly on a protected class. Disparate treatment can occur either on an individual or on a systemic level, while disparate impact is always systemic. The courts have uniformly refused to recognize either claim on behalf of breastfeeding workers.

1. Disparate Treatment

The threshold issue for a plaintiff stating a disparate treatment claim under Title VII is demonstrating that she is a member of a protected class. The courts have yet to let a breastfeeding worker cross that threshold.

Every court to consider a breastfeeding disparate treatment claim has concluded that breastfeeding workers are simply not protected by Title VII. Paradoxically, the courts have reasoned that because men do not breastfeed, discrimination against breastfeeding simply cannot be sex discrimination. As one court put it, "[t]he drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other . . . is not the sort of behavior covered by Title VII." This argument undoubtedly sounds familiar, for it is exactly the argument that was advanced by the Supreme Court in General Electric Co. v. Gilbert, and rejected by Congress in the PDA. Indeed, every court to hear a breastfeeding disparate treatment claim—even after the enactment of the PDA—has explicitly cited Gilbert for support. Thus, the lower courts have interpreted the PDA as rejecting Gilbert as it relates to "pregnancy, childbirth, and related medical conditions," but continue to treat the reasoning of Gilbert as controlling law with respect to all other forms of discrimination that can only be visited on a subset of women, and not on men.

100. The paradigmatic individual disparate treatment case is McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a prima facie disparate treatment case, a plaintiff must show: (1) that she is a member of a protected class; (2) that she was performing her duties satisfactorily; (3) that she was subjected to an adverse employment decision; and (4) that the adverse employment decision occurred in circumstances that give rise to an inference of discrimination based on her membership in a protected class. McDonnell Douglas, 411 U.S. at 802; Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994).

101. The paradigmatic disparate impact case is Griggs v. Duke Power Co., 401 U.S. 424 (1971). The plaintiff need not prove a discriminatory intent in a disparate impact case; however, the plaintiff does have the burden of proving that the discriminatory factor or process complained of caused the disparate impact. See, e.g., Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

102. See supra note 100.


104. See supra notes 72-75 and accompanying text.

105. See Martinez, 49 F. Supp. 2d at 309 ("This was made clear more than twenty years ago in General Electric Co. v. Gilbert."); Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990), aff'd, 951 F.2d 351 (6th Cir. 1991) (unpublished table decision) ("While breast-feeding, like pregnancy, is a uniquely female attribute, excluding breast-feeding from those circumstances for which [the employer] will grant personal leave is not impermissible gender-based discrimination under the principles set forth in Gilbert.").
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Those readers who are familiar with Title VII litigation may sense that the courts’ reasoning seems somewhat at odds with a category of Title VII claims that have come to be known as “sex-plus” discrimination. Sex-plus discrimination has been generally recognized by the courts as a form of discrimination in which employers discriminate against only a subset of women. The logic of sex-plus discrimination is that “[i]t is impermissible to treat men characterized by some additional characteristic more or less favorably than women with the same added characteristic.” Thus, an employer cannot legally discriminate against married women unless he discriminates against married men to the same extent. As one court explained: “[W]hen one proceeds to cancel out the common characteristics of the two classes being compared (e.g., married men and married women), as one would do in solving an algebraic equation, the canceled-out element proves to be that of married status, and sex remains the only operative factor in the equation.” However, in keeping with the courts’ reasoning in a regular disparate treatment case, the courts have concluded that “[sex-plus] plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender.” Thus, just as in the straight disparate treatment analysis, the courts conclude that because men do not breastfeed, discrimination against breastfeeding women is not discrimination against women, but rather only discrimination against breastfeeding.

2. Disparate Impact

A disparate impact claim alleges that a facially neutral employment policy falls more harshly on a protected class. Because membership in a protected class is the starting point for both disparate treatment and disparate impact cases, the same reasoning that prevents breastfeeding women from stating a disparate treatment claim, also generally prevents them from stating a disparate impact claim. However, unlike disparate treatment claims where it is almost always impossible to prove that the discrimination was based on sex, as opposed to breastfeeding, in a disparate impact case it is sometimes possible to show that discrimination against breastfeeding has a discriminatory impact on women as a protected class. In other words, because of the statistical nature of disparate impact claims, if enough breastfeeding women are employed at the same place, they might sometimes be able to show that an employer’s leave or break policy

107. Martinez, 49 F. Supp. 2d. at 310.
109. Id. at 1204.
has a disparate impact on them, not as breastfeeding women, but simply as women.\textsuperscript{110} However, even in cases where the protected class is phrased as women instead of breastfeeding women, the courts have been extremely hostile to the claim. In one case, a breastfeeding woman presented data showing that over the preceding three years the number of maternity leaves granted by her employer had declined from several to none.\textsuperscript{111} Over the same period, the plaintiff showed that the number of men on sick leave had steadily increased.\textsuperscript{112} In a reincarnation of the argument used to deny protected status to breastfeeding women, the court dismissed the plaintiff’s showing by concluding that “[o]ne can draw no valid comparison between people, male and female, suffering extended incapacity from illness or injury and young mothers wishing to nurse little babies.”\textsuperscript{113} In other words, even where an employer’s policy denying leaves or breaks to breastfeeding women does have a disparate impact on women’s ability to take advantage of temporary leave relative to men, the courts have still refused to recognize the claim because they are unwilling to view the two incapacities as similar. Instead, they view the incapacity associated with breastfeeding as somehow less significant and worthy of protection than, say, the incapacity caused by a skiing injury.\textsuperscript{114}

IV. LITIGATING A BREASTFEEDING AND EMPLOYMENT CASE

Given the fact that not a single breastfeeding plaintiff has won a case against her employer, one might expect this Article to focus more on legislative reform than on litigation strategy. In the case of bringing a claim under the Family and Medical Leave Act or the Americans with Disabilities Act, that would probably be the case.\textsuperscript{115} In the case of the Pregnancy Discrimination Act and Title VII, \textsuperscript{110} In the vast majority of cases, however, not enough women will be breastfeeding to create the statistical showing necessary to prove that denying breaks or leaves to breastfeeding women has a discriminatory impact on women overall. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (holding that the plaintiff has the burden of proving that the factor or process complained of caused the disparate impact). For example, one breastfeeding woman attempting to state a disparate impact claim based on sex was unable to do so because her employer had granted only three leaves of absence in the past five years—two of them were to women. Wallace v. Pyro Mining Co., 951 F.2d 351 (6th Cir. 1991) (unpublished table decision).

\textsuperscript{111} Barrash v. Bowen, 846 F.2d 927, 931 (4th Cir. 1988).

\textsuperscript{112} Id.

\textsuperscript{113} Id. at 931-32.

\textsuperscript{114} See id. (“One can draw no valid comparison between people, male and female, suffering extended incapacity for illness or injury and young mothers wishing to nurse little babies.”)

\textsuperscript{115} Given that the FMLA does not require the employer to allow intermittent leave, the breastfeeding worker has no viable claim under the FMLA. 29 U.S.C. § 2612(b)(1) (1994) (“Leave . . . shall not be taken by an employee intermittently . . . .”) However, a bill was introduced in 1998 that would have amended the FMLA to require covered employers to provide breastfeeding workers periodic breaks for breastfeeding or breastpumping. New Mothers’ Breastfeeding Promotion and Protection Act of 1998: Hearing on H.R. 3531 Before the House Comm. on Educ. and Workforce, 105th Cong. (1998). The bill never came out of committee.

The ADA’s definition of disability similarly leaves little hope for successfully litigating a breastfeeding and employment case. See supra notes 50-52 and accompanying text. However, for a good argument for
however, there is ample opportunity for a breastfeeding and employment case to be won if argued well and backed with sufficient resources.\footnote{116} This section attempts to construct the strongest available argument for the proposition that discrimination based on breastfeeding is discrimination based on sex within the meaning of Title VII. The resulting argument is considerably stronger than the courts’ decisions in this area so far might lead you to think was possible.\footnote{117}

A. Why Breastfeeding Discrimination Is Sex Discrimination

The argument that breastfeeding discrimination is sex discrimination within the meaning of Title VII can be advanced in a relatively simple three-step progression. The first step is the Supreme Court’s decision in \textit{General Electric Co. v. Gilbert}.\footnote{118} The second step is Congress’ enactment of the Pregnancy Discrimination Act,\footnote{119} and the third step is the Supreme Court’s decision in \textit{Newport News Shipbuilding & Drydock Co. v. EEOC}.\footnote{120} These three developments, taken together and synthesized, lead directly to the conclusion that breastfeeding discrimination is sex discrimination under Title VII.

As explained in Part II.D., the Supreme Court held in \textit{General Electric Co. v. Gilbert} that discrimination based on pregnancy is not sex discrimination because the two relevant classes are “pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.”\footnote{121} Thus, in the absence of evidence of pretext, the Supreme Court concluded that sex discrimination exists only where women are disadvantaged in favor of a group comprised exclusively of men.

\textit{Gilbert} was not, however, a unanimous decision. Justices Brennan, Marshall and Stevens dissented.\footnote{122} 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 recharacterizing the term “disability” within the meaning of the ADA to include pregnancy and breastfeeding, see Matzzie, \textit{supra} note 53.

\footnote{116} The availability of resources might be important in order to pursue the case through appeal. Considering that two circuits have now held breastfeeding not to be covered by Title VII, see \textit{infra} note 117, it might be difficult to convince a district judge to rule against all existing circuit precedent.

\footnote{117} The probability of successfully advancing the argument presented \textit{infra} is also improved by the fact that only the Fourth and Sixth Circuits have ruled on the applicability of Title VII to breastfeeding claims. \textit{Wallace v. Pyro Mining Co.}, 951 F.2d 351 (6th Cir. 1991) (unpublished table decision); \textit{Barrash v. Bowen}, 846 F.2d 927 (4th Cir. 1988). The remaining nine circuits, therefore, have no controlling adverse precedent that must be overcome.

\footnote{118} 429 U.S. 125 (1976).
\footnote{120} 462 U.S. 669 (1983).
\footnote{122} \textit{Id.} at 146-62.
who do not." When viewed from that perspective it becomes clear that the affected class is women, not pregnant women, for as Justice Stevens noted, "it is the capacity to become pregnant which primarily differentiates the female from the male." Thus, the dissenters concluded that "[b]y definition [pregnancy discrimination] discriminates on account of sex . . . . The analysis is the same whether the rule relates to hiring, promotion, the acceptability of an excuse for absence, or an exclusion from a disability insurance plan." Congress wasted little time in siding with the dissenters. Less than two years after the Court's decision in *Gilbert*, Congress passed the Pregnancy Discrimination Act. Neither the House Report nor the Senate Report on the PDA minced words in embracing the dissenters' view of *Gilbert*. The Senate Report quoted from the dissenting opinions and concluded that they "correctly express both the principle and meaning of Title VII." The House Report also quoted from the dissenting opinions, concluding that "the dissenting Justices correctly interpreted the Act." The House Report also went on to state that the purpose of the PDA was to "change the definition of sex discrimination in Title VII . . . . to reflect the commonsense view and to ensure that working women are protected against all forms of employment discrimination based on sex." The "commonsense view" was summarized in the remarks of Representative Hawkins: "[T]he PDA only explicitly overrules *Gilbert* as it relates to "pregnancy, childbirth, or related medical conditions." Therefore, the argument that *Gilbert* is no longer controlling law for purposes of analyzing breastfeeding claims hinges on whether the PDA merely overturned the holding of *Gilbert*, or whether the PDA also overturned the reasoning of *Gilbert*. Successfully arguing the latter may seem nearly impossible considering how hostile the courts have been to breastfeeding and employment claims, but the likelihood of success is improved.

123. Id. at 161 n.5 (Stevens, J., dissenting).
124. Id. at 162 (Stevens, J., dissenting).
125. Id. at 161-62 (Stevens, J., dissenting).
126. *General Electric Co. v. Gilbert* was decided on December 7, 1976. The final version of the PDA was passed by the Senate on October 13, 1978, and by the House on October 15, 1978.
129. Id.
131. It should be emphasized that although the PDA does not explicitly include breastfeeding in its list of conditions that are to be included in the terms "because of sex" or "on the basis of sex," neither does the language of the PDA express an intent to limit the meaning of the terms to only those conditions. See 42 U.S.C. § 2000e(k) (1994) ("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.")(emphasis added).
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significantly by the fact that the Supreme Court has already decided this precise question.

Newport News Shipbuilding & Dry Dock Co. v. EEOC was the first case in which the Court had the opportunity to interpret the PDA after its enactment. Newport News involved a claim by male employees that they were discriminated against because their employer refused to provide pregnancy benefits to their wives. In response to the enactment of the PDA, the employer had included pregnancy coverage for its female employees in its health insurance program but refused to provide the same coverage to the spouses of its male employees. The male workers could not rely exclusively on the statutory language of the PDA to support their claim because they were clearly not being discriminated against on the basis of pregnancy; indeed, they were not capable of becoming pregnant. Furthermore, under the reasoning of Gilbert, they could not have stated a disparate treatment claim because the two relevant classes would have been workers with pregnant spouses and workers without pregnant spouses. One class would have been comprised exclusively of men, and the other of both men and women. Hence, under Gilbert, and in the absence of evidence of pretext, the discrimination would not have been based on sex. The court, however, rejected such a narrow reading of the PDA.

Justice Stevens, one of the three dissenters in General Electric Co. v. Gilbert, wrote for the majority in Newport News:

Although the Pregnancy Discrimination Act has clarified the meaning of certain terms in [Title VII], neither that Act nor the underlying statute contains a definition of the word ‘discriminate.’ In order to decide whether petitioner’s plan discriminates against male employees because of their sex, we must therefore go beyond the bare statutory language. Accordingly, we shall consider whether Congress, by enacting the Pregnancy Discrimination Act, not only overturned the specific holding in [Gilbert], but also rejected the test of discrimination employed by the Court in that case. We believe it did.

After reviewing the legislative history of the PDA, the majority in Newport News concluded that “[w]hen Congress amended Title VII in 1978, it

134. This was the very argument made by Justice Rehnquist in dissent. Newport News, 462 U.S. at 687-88 (“[T]he Pregnancy Discrimination Act .... can only be read as referring to the pregnancy of an employee.”) (Rehnquist, J., dissenting). Considering that the majority rejected this reading of the PDA and concluded instead that the coverage extended even to male workers with pregnant spouses, the validity of the district court’s claim in McNill v. New York City, 950 F. Supp. 564 (S.D.N.Y. 1996), that the “related medical conditions” language of the PDA was not intended to extend to the children of pregnant employees is highly questionable. See supra notes 94-98 and accompanying text.
unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision."

Applying *Newport News* to the claims of breastfeeding workers, it becomes obvious that discrimination against breastfeeding is sex discrimination within the meaning of Title VII. Instead of conceiving of the two relevant classes as breastfeeding workers and non-breastfeeding workers—as every court so far has done—*Newport News* instructs the lower courts to follow the reasoning of the dissenters in *Gilbert* and conceive of the two classes as those workers who face the risk of breastfeeding and those who do not. When the classes are defined in this way, there is no denying that breastfeeding discrimination is sex discrimination. For just like pregnancy, the ability to breastfeed is one of the capacities “which primarily differentiates the female from the male.”

Breastfeeding women are, therefore, a protected class under Title VII as amended by the PDA.

B. *What Is Breastfeeding Discrimination?*

The answer to the question posed in the heading above may seem obvious, but it is nevertheless worthy of discussion considering how easily the courts have become confused when addressing breastfeeding discrimination claims. Furthermore, proving to a court that breastfeeding discrimination is sex discrimination is meaningless without convincing the court that the employer, in fact, discriminated on the basis of breastfeeding.

So what is breastfeeding discrimination? It should be obvious by this point that breastfeeding discrimination is not when employers treat breastfeeding men differently from breastfeeding women. Indeed, it is the impossibility of the existence of a class of breastfeeding men that makes breastfeeding women a protected class in the first place. Having ruled out that possible construction, we turn instead to the construction adopted by Congress in the PDA. The PDA requires employers to treat women, who are affected by conditions that can only affect women, “as other persons not so affected but similar in their ability or inability to work ....” Thus, breastfeeding discrimination is the failure to treat breastfeeding women as other persons not so affected but similar in their ability or inability to work.

This definition still, however, begs the question of which individuals, precisely, should be the comparator group with regard to breastfeeding women. In other words, which individuals are similar in their ability to work to breastfeeding women? In the context of pregnancy, courts have concluded that

136. Id. at 678. The Court has since reaffirmed that position in *Johnson v. Transportation Agency*, 480 U.S. 616, 629 (1987).
138. Although this should be obvious, that is exactly the test that every court faced with a disparate treatment claim based on breastfeeding has attempted to apply.
139. See supra note 137 and accompanying text.
employees with temporary disabilities are similar in their ability or inability to work to pregnant women. Employees with temporary disabilities are probably also the proper comparator group for breastfeeding women who seek leave to breastfeed their children. Identifying the correct comparator group for women who seek to take breaks to breastfeed or breastpump requires a little more imagination. A short, and incomplete, list of comparators would include diabetics who have to take insulin, other employees who have to take prescription medicines at specified times throughout the day, or simply employees who are allowed to take coffee or cigarette breaks. In other words, the proper comparator group is any group of individuals who, similarly to the breastfeeding worker, require, or are allowed to take, periodic breaks from work. Similarly, if other employees are allowed to have their children visit them briefly, women wishing to take breaks to breastfeed should also be able to have their children present. Furthermore, if other employees are allowed to store perishable foods or medicines in a refrigerator located at the workplace, breastpumping women should be allowed to store their expressed breastmilk in the same refrigerator. Whatever the request, the touchstone for Title VII purposes is how the employer treats similar requests by other individuals.

142. Precisely what the standards should be for requiring employers to grant breastfeeding leave as distinct from breastfeeding or breastpumping breaks is a sufficiently complex question to be independently the topic of an entire article. For present purposes, however, the identification of a few difficult issues is sufficient. First, it may be the case that if an employer is willing to give a breastfeeding worker breastpumping or breastfeeding breaks throughout the day so that she can both work and breastfeed, the proper comparator class is no longer temporarily disabled workers. This would be true because the provision of the breaks and services (e.g., child-care or refrigeration) would make the breastfeeding worker more able to work than most other temporarily disabled workers. In other words, the breastfeeding worker would be only sporadically disabled, as opposed to temporarily disabled. Thus, the proper comparator class would no longer be temporarily disabled workers, because temporarily disabled workers are not similar in their ability or inability to work as a breastfeeding woman who has the option of breastfeeding at work. Hence, in most cases where an employer provides accommodations for breastfeeding workers to breastpump or breastfeed at work, the employer would not ordinarily be required under Title VII to grant breastfeeding leaves, unless the employer grants leaves for other sporadically disabled individuals. (Such sporadically disabled individuals might include people who suffer from occasional headaches, muscle pains, or other occasional disabilities that recur but only prevent work for a short period of time.)

Second, the argument above supports the conclusion that Title VII protects breastfeeding women, but not that it protects women seeking to provide more general childcare. The reason for this distinction is that men and women are similarly situated in their ability to provide general childcare. Hence, a Title VII case that sought maternity leave instead of breastfeeding leave should be analyzed by determining whether the employer treated the woman seeking maternity leave less favorably than men seeking paternity leave. In other words, the ability to provide general care for children is not one of the capacities “which primarily differentiate the female from the male.” This distinction may create certain problems in determining whether a given plaintiff is genuinely seeking breastfeeding leave or is actually seeking maternity leave, but such problems are preferable to wholesale discrimination against breastfeeding women.

A possible resolution to both of these problems is an evidentiary presumption that if the employer provides breaks and other accommodations that allow breastfeeding workers to continue to work, then requested leave will be assumed to be maternity (or general childcare) leave unless proven otherwise. Conversely, if an employer does not provide for breastfeeding or breastpumping breaks, then requested leave will be presumed to be for breastfeeding unless proven otherwise. Such a presumption would have the added benefit of avoiding the conflation of breastfeeding and maternity leaves, while still encouraging employers to make it possible for breastfeeding workers to both work and breastfeed.
C. Why Past Cases Have Gone Awry

Considering the relative simplicity of the argument that has been presented in Parts III.A. and III.B. above, the skeptical reader may wonder how the breastfeeding cases that have already been brought under Title VII could have been decided the way that they were. A brief review of how those cases went awry is, therefore, advisable.

As a starting point, it is important to recall that relatively few breastfeeding cases have been brought under Title VII.143 Thus, part of the explanation for why this argument has not yet been presented to a court is that not that many different approaches have been tried.144 Second, unlike many other areas of discrimination law, counsel for breastfeeding workers have not benefited from legal literature that provides analysis of the relevant case law.145 In the area of breastfeeding and employment, academics have, by-and-large, left the practitioners to fend for themselves. Furthermore, the reasoning utilized by the courts in the initial cases undoubtedly warped the arguments that counsel in subsequent cases decided to pursue.

For example, as discussed in Part II.D., the first two PDA breastfeeding discrimination cases made the straightforward textual argument that breastfeeding was a “medical condition” related to pregnancy within the meaning of the PDA.146 In dismissing those cases, the courts indicated that only medically necessary breastfeeding was covered by the PDA.147 Thus, counsel in the next two breastfeeding cases148 were lured into thinking that proving the medical necessity of their client’s breastfeeding would be sufficient to state a successful claim. The courts then backpedaled from the position stated in the first two decisions, and concluded that the PDA does not protect breastfeeding at all.149 In this way, the courts successfully disposed of the first four breastfeeding cases brought under the PDA on strictly textual grounds without ever being confronted with the Supreme Court’s holding in Newport News.

The strategy of the fifth and last breastfeeding case to be brought under Title VII150 appeared to be motivated by a desire to avoid the adverse precedent

143. The five cases cited in this Article are the only cases this author could locate that challenged the legality of breastfeeding discrimination under Title VII or the PDA. See supra notes 78-79 and accompanying text.
144. In almost all of these cases, the briefs and other filings of the attorneys are not readily available. This Article has not, therefore, benefited from reviewing the arguments that were advanced by counsel in those cases, and has assumed that the courts' decisions reflect the arguments of counsel.
145. See supra note 2 and accompanying text.
147. See supra note 86 and accompanying text.
149. See id.
created by the prior four cases. In order to accomplish that goal, counsel for the plaintiff ignored the PDA entirely. This allowed the plaintiff to avoid the narrow textual decisions of the last four cases, and to rely instead on a sex discrimination disparate treatment claim, which counsel styled as a sex-plus-breastfeeding claim.\textsuperscript{151} Unfortunately, and ironically, by not bringing the PDA and \textit{Newport News} into the claim, counsel failed to prevent the court from dismissing the claim based on the Supreme Court’s holding in \textit{General Electric v. Gilbert}.\textsuperscript{152}

The lesson of these five cases is that neither Title VII, nor the PDA’s amendment of it, can be relied upon to the exclusion of the other. Relying exclusively on the PDA allows the courts to craft narrow holdings based merely on the fact that the PDA does not explicitly mention breastfeeding, while relying solely on Title VII allows the courts to ignore \textit{Newport News} and to rule that breastfeeding discrimination is not sex discrimination. Thus, the strongest argument available to a breastfeeding plaintiff under Title VII is one that is styled as a traditional sex discrimination disparate treatment claim, but which relies on the PDA and \textit{Newport News} to explain why breastfeeding discrimination is sex discrimination.

V. CONCLUSION

The Introduction of this Article began by arguing that breastfeeding and employment law is an under-analyzed and under-theorized area of law. This Article has attempted to contribute to the remedy of, at least, the former of those two problems by analyzing the various legal frameworks under which breastfeeding women have brought claims, and by suggesting a new litigation strategy for breastfeeding workers that might be more successful than those strategies that have been attempted thus far.

After discussing the benefits of breastfeeding and reviewing a variety of legal frameworks under which breastfeeding workers have attempted to bring actions, this Article concluded in Part II that not a single breastfeeding worker has successfully litigated a breastfeeding claim against her employer.

Against that backdrop, Part III argued that breastfeeding workers need not wait for new legislation in order to vindicate their rights. Rather, Part III argued that breastfeeding discrimination is sex discrimination within the meaning of Title VII as amended by the PDA. Specifically, Part III argued that the PDA overturned both the holding and reasoning of the Supreme Court’s decision in \textit{General Electric Co. v. Gilbert}, and that the Supreme Court had reached that very conclusion in \textit{Newport News Shipbuilding and Dry Dock Co. v. EEOC}. Part III concluded that given the reasoning of the Supreme Court in \textit{Newport News} and the text of the PDA, the lower courts’ rulings that breastfeeding discrimination is not sex discrimination are wrong as a matter of law.

\textsuperscript{151} \textit{Id.} at 309.
\textsuperscript{152} \textit{See id.}
Although there is probably nothing this Article can do to help the women who have already had their breastfeeding claims rejected by the courts, the hope of this Article is that it can be of assistance to some of the 1,000,000 breastfeeding women each year who are presently being forced to choose between breastfeeding and work, a choice that no man will ever be forced to make.