The Causal Relationship of Sex, Pregnancy, Lactation, and Breastfeeding and the Meaning of "Because of . . . Sex" Under Title VII

L. Camille Hebert
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I. INTRODUCTION

Given the indisputable facts that only women become pregnant, that generally only
women who have recently been pregnant and given birth lactate,¹ that only women who are
lactating are able to breastfeed, and that only women who are breastfeeding need to pump or
manually express milk from their breasts, the chain of causation from sex to pregnancy to
lactation to breastfeeding to expressing milk would appear to be fairly clear. These causal
relationships, however, not only have not been universally accepted by members of the legal
community, but there has been active resistance by some members of that community to the

¹It is possible to induce lactation by medication in women who have not given birth and
some women will spontaneously begin to lactate even when they have not been pregnant,
normally because of hormonal imbalances. In addition, in very rare circumstances, men have
been able to lactate and breastfeed. See Jared Diamond, Father’s Milk, DISCOVER MAGAZINE
___ (Feb. 1995) (discussing physiology of male lactation and instances of female lactation
without pregnancy); Nikhil Swaminathan, Strange But True: Males Can Lactate, SCIENTIFIC
AMERICAN ___ (Sept. 6, 2007) (discussing instances of male lactation and breastfeeding). These
unusual situations, however, do not change the fact that lactation is, in almost all cases, a direct
result of pregnancy and childbirth.
notion that action taken against women because of lactation, breastfeeding, or expressing milk, particularly in the context of the workplace, violates prohibitions against discrimination on the basis of sex or gender. In fact, the majority of courts that have had to address these issues have concluded that women are not protected from adverse action on the basis of lactation, breastfeeding, or expressing milk in the context of employment as a matter of sex discrimination. Other courts have simply avoided answering this seemingly straightforward issue.

Recent legislative action, while imposing some duty of accommodation with respect to women who need to express milk during the work day, does not recognize the fundamental causal relationships between sex or gender and these activities, thereby providing less than complete protection to breastfeeding women and allowing employers to take other adverse actions against women affected by breastfeeding and the need to express milk during the workday.

This article will demonstrate that the current protection provided by the anti-discrimination laws should be found to extend to women affected by breastfeeding, without the need for additional legislative action, but instead based on the intent of Congress in enacting the Pregnancy Discrimination Act of 1978, which amended Title VII’s provisions on sex discrimination, as well as the plain language of the statute. This article will show that the conclusion of courts to the contrary is based on a too-narrow interpretation of those anti-discrimination provisions, as well as a reliance on disfavored and legislatively overruled precedent. Courts should instead employ settled theories of the anti-discrimination laws to conclude that taking adverse action against women for reasons related to lactation, breastfeeding,
or expressing milk is classic discrimination on the basis of sex.

II. THE COURTS’ STRUGGLES WITH WHETHER BREASTFEEDING AND LACTATION ARE GENDER- OR SEX-LINKED TRAITS

Two recent decisions under state sex anti-discrimination statutes have raised the issue of whether discrimination on the basis of breastfeeding or lactation constitutes sex discrimination, which requires a determination of whether lactation, breastfeeding, and expressing milk are traits linked to sex and pregnancy. Disparate conclusions were reached on this issue in those two decisions, and those two decisions provide a snapshot of the fundamental analytical disagreements presented by the status of breastfeeding and lactation as sex- or gender-linked traits. Although these decisions involved interpretations of different state statutes, in both cases, the statutory language at issue was quite similar, because both state statutes include language based on the Pregnancy Discrimination Act of 1978, which amended Title VII of the Civil Rights Act of 1964 to clarify that the phrase “because of sex” includes “but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.”

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2 42 U.S.C. § 2000e (k) (date). See CAL. GOV’T CODE 12926(p) ("Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.”); OHIO REV. CODE § 4112.01(B) (“the 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, childbirth, or related medical conditions”).
The Fair Employment and Housing Commission of the State of California concluded in the case of *Department of Fair Employment and Housing v. Acosta Taco*\(^3\) that discrimination based on the fact that an employee was breastfeeding constituted sex discrimination under the California Fair Employment and Housing Act because “breastfeeding is an activity intrinsic to the female sex.” In that case, an employee who had taken a pregnancy disability leave sought to return to work one month after giving birth to a premature infant. The Commission found that the employee was initially told that she could not return to work because her position, as a cashier at a taquera, was no longer available because it had been filled, but she was called in the next day to cover the shift of an absent employee. That evening, during her half-hour lunch break, she breastfed her infant in her car and then returned to work; her partner had brought the child to the employee to be nursed. The employee was also called in to work the next night, but halfway through her shift—when the manager discovered that she was filling in again—the manager told her that he had learned that she had breastfed her baby during her lunch break and that she was not allowed to do so. The manager told her that he would call her back to work once she ceased lactation. When the employee objected and told the manager that she could not afford to wait to return to work until after she stopped breastfeeding, the manager told her that “if that was her attitude and response, he could no longer use her.”\(^4\)

\(^3\)Case No. E-200708 T-0097-00se, C 08-09-017, 09-03-P, 2009 CAFEHC LEXIS 2 (June 16, 2009); Decision Nunc Pro Tunc (June 19, 2009).

\(^4\)Case No. E-200708 T-0097-00se, C 08-09-017, 09-03-P, 2009 CAFEHC LEXIS 2 (June 16, 2009); Decision Nunc Pro Tunc (June 19, 2009).
In addition to finding that the employer had violated the California statute by refusing to return the employee to the position that she held before her maternity leave, the Commission also found that the employer discriminated against the employee on the basis of sex in connection with her termination. The Commission found the fact that the employee was breastfeeding was a causal factor in the decision to terminate her, whether or not it was the dominant cause of her termination. The Commission concluded that her act of breastfeeding, on her own break time,\textsuperscript{5} was an act “intrinsically to Chavez’s sex” and therefore being terminated because she asserted her right to breastfeed was based on her sex. The Commission reached this conclusion even though it did not decide whether breastfeeding was a pregnancy-“related medical condition,” which might have qualified her for additional disability leave, which she was not seeking.\textsuperscript{6}

The clear import of the Commission’s decision is that even if breastfeeding and lactation are not “medical” conditions related to pregnancy—an issue that Commission declined to decide—\textsuperscript{5}

\textsuperscript{5} Case No. E-200708 T-0097-00se, C 08-09-017, 09-03-P, 2009 CAFEHC LEXIS 2 (June 16, 2009); Decision Nunc Pro Tunc (June 19, 2009). The Commission noted that even though the employee had not asked for a break in order to breastfeed her infant, California law requires an employer to allow an employee a reasonable amount of break time “to accommodate an employee’s breastfeeding.” Case No. E-200708 T-0097-00se, C 08-09-017, 09-03-P, 2009 CAFEHC LEXIS 2 (June 16, 2009); Decision Nunc Pro Tunc (June 19, 2009) (citing California Labor Code § 1030 (date)).

\textsuperscript{6} Case No. E-200708 T-0097-00se, C 08-09-017, 09-03-P, 2009 CAFEHC LEXIS 2 (June 16, 2009); Decision Nunc Pro Tunc (June 19, 2009).
and therefore not protected as an aspect of pregnancy discrimination, breastfeeding and lactation are activities or conditions related to sex and therefore protected as an aspect of sex discrimination. The Commission made this holding explicit in its Decision Nunc Pro Tunc issued three days after its initial decision, when it noted that it was designating the decision “as precedential on the basis of the holding that breastfeeding is an activity intrinsic to the female sex” and that the employer’s action of refusing to allow her to return from pregnancy disability leave because she was still breastfeeding was discrimination on the basis of sex.7

Just a little over two months later, a decision by the Ohio Supreme Court provoked headlines8 and blog entries9 when the court declined to decide an issue on which it had granted

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7Case No. E-200708 T-0097-00se, C 08-09-017, 09-03-P, 2009 CAFEHC LEXIS 2 (June 16, 2009); Decision Nunc Pro Tunc (June 19, 2009).

8See “New mom’s firing upheld; Woman should have worked out breast-pumping breaks with employer, justices say,” The Columbus Dispatch, News p. 01B (August 28, 2009). See also “Oh, those lactation regulations, Plain Dealer (Cleveland) Opinion p. A7 (September 2, 2009).

review, that is, “whether Ohio law prohibits an employer from discriminating against a female employee because of or on the basis of lactation.” The court, in a per curiam decision, indicated that it did not have to decide the underlying substantive question because summary judgment had properly been granted against the employee in that action, in that the evidence below showed that the employee had been terminated for taking unauthorized breaks, constituting insubordination. The court indicated that the plaintiff had not raised a triable issue


11Although the majority of the court indicated that the “evidence in the record demonstrates that Allen took unauthorized breaks from her workstation, and Isotoner discharged her for doing so,” 2009-Ohio-4231,P6, 2009 Ohio LEXIS 2284, * 1, the court of common pleas did not make such a finding nor conclude that reasonable minds could reach only that conclusion. In addressing the employer’s contention that the plaintiff’s gender discrimination claim failed, the court cited three arguments made by the employer: that breastfeeding was not covered under the Ohio statute; that even if breastfeeding were covered, the employer had no duty to accommodate the plaintiff; and that the “plaintiff was not discharged because she needed to take breaks to pump her breasts, but because she took unauthorized, extra breaks.” The court, however, reached no conclusion, factual or otherwise, concerning that third point, because after concluding that lactation was not covered by the Ohio statute, the court noted that “it is not necessary to discuss the remainder of Totes’ arguments.” Case No. CV06 03 0917. It was the
of fact that her termination for failure to follow directions was a pretext for discrimination on the basis of pregnancy or a condition related to pregnancy.¹²

The “unauthorized” breaks, however, were taken in order to allow the employee to pump court of appeals that apparently reached that factual conclusion, although the court did not cite to the record in doing so and did not note any conflicting evidence relied on by the plaintiff. Instead, the court made the following conclusory statement:

Notwithstanding appellant’s claims of pregnancy discrimination and violation of public policy, appellant was not terminated because she was lactating, pumping breast milk, or needed to take a break to pump breast milk. Rather, she was simply and plainly terminated as an employee at will for taking an unauthorized extra break (unlike the restroom breaks which were authorized and available to all of the employees, appellant included).

Allen v. Totes/Isotoner Corp., Case No. CA2007-08-196 pp. 2-3 (Ohio Ct. App. 12th Dist. April 7, 2008). In reaching this factual conclusion, the court of appeals does not appear to have applied the appropriate standard for reviewing the grant of a summary judgment motion, that all disputed facts and inferences from those facts be drawn in favor of the non-moving party, the plaintiff.

her breasts, to relieve their engorgement with breast milk, to collect milk in order to feed her child in her absence, and to presumably to maintain her milk supply, so that she would continue to lactate. Accordingly, the effort of the court to separate the termination of the plaintiff from the fact of her lactation and her efforts to pump her breasts is disingenuous. In addition, in spite of the plaintiff’s supposed admission in her deposition that she took breaks to pump her breasts without her employer’s authorization, it is not clear at all that the breaks were in fact unauthorized under the employer’s generally applicable rules. On a motion for summary judgment, as the court of common pleas below recognized, the employee, as the party opposing summary judgment, was entitled to have all conflicting evidence construed in her favor and all inferences from the facts viewed in the light most favorable to her. The plaintiff alleged, in her affidavit opposing summary judgment and in her deposition, that employees were generally allowed to take restroom breaks when needed, to urinate, to change tampons or sanitary pads, or presumably to attend to other necessary personal business, without express authorization. If

13 Allen v. Totes/Isotoner Corp., Case No. CV06 03 0917 (Court of Common Pleas, Butler County, Ohio July 31, 2007) (citing Temple v. Wean United, Inc., 50 Ohio St. 2d 317 (1977); Bowen v. Kil Kare, Inc., 63 Ohio St. 3d 84 (1992)).

14 Affidavit of LaNisa Allen, Allen v. Totes/Isotoner Corp., Case No. CV06-03-0917 (Court of Common Pleas, Butler County, Ohio December 6, 2006); Deposition of LaNisa Allen, p. 55, Allen v. Totes/Isotoner Corp., Case No. CV06-03-0917 (Court of Common Pleas, Butler County June 14, 2006) (“Q: Did you know of anyone else, any other employees, that were taking breaks at different times than the specified breaks? A: You know, they could walk off and go to the bathroom at any time; you didn’t have to ask.”).
these facts were true, as both of the lower courts and the Supreme Court were required to assume, then the breaks taken by the plaintiff were not in fact unauthorized. Or, if her breaks to express milk from her breasts had to be explicitly authorized, while the bathroom breaks of non-lactating employees did not, then the court was simply wrong to assert that the plaintiff produced no evidence that her termination for failure to follow directions was pretextual. If the employees were allowed to attend to any personal business in the bathroom other than to pump their breasts, then the employer’s articulated justification for the plaintiff’s termination—failure to follow directions—was not non-discriminatory with respect to lactation. Neither, then, would her termination have been justified as insubordination; employees are not generally required to follow discriminatory orders or directions on pain of termination.15

Finally, the employer’s and the court of appeals’ indication that the plaintiff was solely at fault for taking unauthorized breaks rather than seeking accommodation from her employer

15See, e.g., Slack v. Havens, 7 Fair Emp. Prac. Cases (BNA) 885, ___ (S.D. Cal. 1973), aff’d as modified, 522 F.2d 1091 (9th Cir. 1975)(“Had Pohasky not discriminated against the plaintiffs by demanding they perform work he would not require of a white female employee, they would not have been faced with the unreasonable choice of having to choose between obeying his discriminatory work order and loss of their employment.”); Futran v. Ring Radio Co., 501 F. Supp. 734, 741 (N.D. Ga. 1980) (“the defendant discriminated against Ms. Futran on the basis of her sex by asking her to add to her job essentially clerical duties that males were not similarly requested to perform and in retaliatory termination of her employment when she protested the assignment of clerical duties as discriminatory”).
ignores the atmosphere in which the plaintiff was working, in which the employer arguably showed hostility to the plaintiff’s efforts to pump her breasts. Certainly the facts as alleged by the plaintiff, which the courts were required to accept as true in the context of summary judgment, would have supported such a jury finding if the plaintiff had been allowed to try her case. The plaintiff alleged that she informed the employer’s representative shortly after she was hired that she would need to pump her breasts and indicated that she did not know whether she could wait until her lunch break, four and one-half hours into her eight hour shift.\(^{16}\) In spite of her concerns, she was told that she had to wait until her lunch break; her later request to extend her morning break by five minutes—to fifteen minutes, which was the time she indicated that she needed to pump her breasts—was denied. She asked for a private place to pump her breasts, and she was told that she could use the company restroom, a distinctly not private place. She asked for a chair to be placed in the restroom so that she could sit down while pumping her breasts, and her request was refused, because of the feared reaction from other employees who also would

\(^{16}\)Although the plaintiff’s deposition testimony indicated that she was told that she had to pump her breasts in the restroom only on her lunch break, and that she could not sit on a chair in the restroom while pumping her breasts, by a representative of the temporary agency by which she was initially hired, Deposition of LaNisa Allen, pp. 34-38, Allen v. Totes/Isotoner Corp., Case No. CV06-03-0917 (Court of Common Pleas, Butler County, Ohio June 14, 2006), the defendant admitted in its responses to the plaintiff’s request for admissions that the temporary agency was working as an agent of the employer with respect to the plaintiff’s employment. Defendant’s Responses to Plaintiff’s Requests for Admission, Allen v. Totes/Isotoner Corp., 3, 7, 8, 9, 10, 13, 22 (Court of Common Pleas, Butler County, Ohio Oct. 26, 2006).
want to sit down.  Although the employer asserted that it “granted permission to Plaintiff to use her breast pump even though it was under no obligation to do so,” the employer in fact provided no accommodation to the plaintiff’s condition of lactation: the plaintiff was presumably allowed to stand in the company bathroom during her lunch break if she wanted to. Accordingly, the Ohio Supreme Court properly should have been required to decide whether favoring non-lactating persons over lactating women constitutes discrimination on the basis of sex or pregnancy, given that there was considerable evidence from which a jury could have concluded that the plaintiff was actually disadvantaged because she was lactating.

Three justices of the Ohio Supreme Court disagreed with the decision of the majority not to decide the substantive issue of whether lactation is protected as an aspect of pregnancy or sex discrimination, although two of those justices agreed with the majority to uphold summary judgment against the plaintiff, while one believed that the plaintiff should have been allowed to go to trial on her claim. Justice Maureen O’Connor, with whom then-Chief Justice Thomas Moyer concurred, agreed with the majority that this plaintiff had not made a sufficient showing to prevail because of the unauthorized nature of her breaks, but believed that the court should

17 Deposition of LaNisa Allen, pp. 34-38, Allen v. Totes/Isotoner Corp., Case No. CV06-03-0917 (Court of Common Pleas, Butler County, Ohio June 14, 2006).

18 See Allen v. Totes/Isotoner Corp., Motion for Summary Judgment, pp. 8-9, Case No. CV06 03 0917 (Court of Common Pleas, Butler County, Ohio) (referenced in Allen v. Totes/Isotoner Corp., Case No. 08-0845, Memorandum in Support of Jurisdiction of Appellant LaNisa Allen (Ohio Supreme Court filed May 1, 2008)).
have found lactating women to be protected against discrimination. Justice O’Connor challenged the reasoning of the trial court, which had concluded that discrimination on the basis of lactation was not prohibited gender discrimination. The trial court had noted:

[The plaintiff] 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, [the plaintiff’s] condition of lactating was not a condition relating to pregnancy but rather a condition related to breastfeeding. Breastfeeding discrimination does not constitute gender discrimination.  

Justice O’Connor noted that the Ohio Fair Employment Practices Act defines discrimination “because of sex” and “on the basis of sex” to include “because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions.” She argued that given the expansive meaning of “related,” the condition of lactation was related to pregnancy because hormone levels during pregnancy and after childbirth stimulate lactation. O’Connor agreed that lactation was linked to breastfeeding, as the lower court concluded, but that lactation also had a “clear, undeniable nexus


19Allen v. Totes/Isotoner Corp., Case No. CV06 03 0917 (Court of Common Pleas, Butler County, Ohio (July 31, 2007).

20Ohio Rev. Stat. § 4112.01(B).

21Justice O’Connor indicated, citing Merriam’s Webster’s Collegiate Dictionary (10th ed. 1993), that the term “related” means “connected by reason of an established or discoverable relation” and the “relation” means “an aspect of quality (or resemblance) that connects two or more things or parts as being or belonging or working together or as being of the same kind.” 2009-Ohio-4321, P34 (O’Connor, J., concurring).
with pregnancy and with childbirth” and therefore was “related” to both. Accordingly, Justice O’Connor would have concluded that gender discrimination claims relating to lactation were cognizable under the Ohio Fair Employment Practices Act, as amended by Ohio’s Pregnancy Discrimination Act.  

Justice Paul Pfeifer, dissenting from the decision of the court, would have concluded both that discrimination on the basis of lactation was unlawful sex discrimination under Ohio law and that the plaintiff was entitled to proceed to trial on her claim of discrimination on the basis of lactation. He would have concluded that the prohibition of discrimination on the basis of pregnancy protects women dealing with the “aftereffects of their pregnancy,” including lactation.  

He would have rejected the conclusion of the court of appeals, adopted by the majority of the court, that the plaintiff was fired for taking unauthorized breaks rather than for pumping her breasts. He reasoned:

The appellate court does not explain why Allen’s trips to the restroom outside of scheduled break times were different from the restroom trips other employees made outside of 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?

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22 2009-Ohio-4231, P33-P38 (O’Connor, J, concurring).


24 2009-Ohio-4321, P53.
If the answer to Justice Pfeifer’s question is that Ms. Allen’s breaks were different because she was using her breaks to pump her breasts—conduct that the employer had restricted to her lunch break—that answer suggests not that Ms. Allen was being treated the same as other employees but that she was being treated differently precisely because she was pumping her breasts. If the answer to his question is that her breaks were different because they were unauthorized, while the breaks of other employees were allowed without authorization or were implicitly or explicitly authorized, again the answer suggests different treatment. If there is another answer to his question unrelated to the activity that she was performing in the restroom, such as the time that she took on her breaks, it would appear that there was at least a disputed issue of fact as to the true reason for her termination, given the lack of evidence about any time limits imposed on the bathroom breaks of other employees.

The Ohio Supreme Court’s apparent hesitancy to see lactation as a sex-linked trait is not unique. In fact, courts were originally reluctant even to see pregnancy as an aspect of sex, and early cases by the United States Supreme Court resulted in the conclusion that discrimination on the basis of pregnancy did not constitute discrimination on the basis of sex; that holding was overcome only by congressional action.

In General Electric Co. v. Gilbert, the United States Supreme Court addressed the lawfulness of an employer’s disability plan that denied benefits to women disabled because of

pregnancy, while covering other disabilities, even those unique to men.\textsuperscript{26} The Court held that a classification based on pregnancy was not sex-based, relying on the following footnote in its prior opinion in \textit{Geduldig v. Aiello},\textsuperscript{27} in which it had upheld a similar plan from challenge under the Equal Protection Clause:

\begin{quote}
The lack of identity between the excluded disability and gender as such under the insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second group includes members of both sexes.\textsuperscript{28}
\end{quote}

The \textit{Gilbert} Court reasoned that the policy excluding benefits based on pregnancy was “facially nondiscriminatory” with respect to sex or gender because, even though pregnancy-related disabilities constituted an additional risk unique to women that was not covered by the employer’s policy, “[t]here is no risk from which men are protected and women are not.”\textsuperscript{29}

What the Court presumably meant by this analysis is that men also would not be entitled to

\textsuperscript{26} Justice Brennan in his dissent noted that General Electric’s disability plan covered “prostatectomies, vasectomies, and circumcisions that are specific to the reproductive systems of men and for which there exist no female counterparts covered by the plan.” \textit{Id.} at 152 (Brennan, J., dissenting).

\textsuperscript{27} 417 U.S. 484 (1974).

\textsuperscript{28} \textit{Id.} at 497 n.20. The Court in \textit{Geduldig} also reasoned that the exclusion of pregnancy from the state disability program did not work to discriminate against any identifiable group because “[t]here is no risk from which men are protected and women are not.” \textit{Id.} at 496-97.

\textsuperscript{29} \textit{Gilbert}, 429 U.S. at 138-39.
disability benefits if they suffered an absence from work because of their own pregnancy. This analysis, of course, while true to some notion of formal equality—men and women are treated exactly the same with respect to a condition that affects only women—, this analysis does not promote any notion of true equality, in which men and women are given equivalent workplace rights.

Justice Stevens, in his dissenting opinion, succinctly explained why the employer’s exclusion of benefits for pregnancy constituted overt sex-based discrimination:

[T]he rule at issue places of risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on the basis of sex; for it is the capacity to become

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Justice Brennan noted the natural result of the majority’s conclusion that underinclusiveness of disabilities unique to women is not sex discrimination in the following passage:

Had General Electric assembled a catalogue of all ailments that befall humanity, and then systematically proceeded to exclude from coverage every disability that is female-specific or predominately affects women, the Court could still reason as here that the plan operates equally: Women, like men, would be entitled to draw disability payments for their circumcisions and prostatectomies, and neither sex could claim payment for pregnancies, breast cancer, and other excluded female-dominated disabilities.

429 U.S. at 364 n. 5 (Brennan, J., dissenting).
pregnant which primarily differentiates the female from the male. 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 plan.\textsuperscript{31}

Justice Stevens reasoned that the classification at issue in the case did not distinguish between pregnant and non-pregnancy persons but between those who face a risk of pregnancy and those who do not. Accordingly, there were risks from which men but not women were protected: men were protected from risks of disability associated with conditions unique to men, while women were not protected from risks of disability associated with the most common condition unique to women.\textsuperscript{32}

Congress, of course, addressed and overruled the \textit{Gilbert} decision in the Pregnancy Discrimination Act of 1978.\textsuperscript{33} In the Report of the House Committee on Education and Labor, it is explicitly stated that the majority’s opinion in \textit{Gilbert} was contrary to the original intent of Congress in enacting Title VII and that “the dissenting Justices correctly interpreted the Act.”\textsuperscript{34}

\begin{flushright}
\footnotesize
\textsuperscript{31}429 U.S. at 161-62 (Stevens, J., dissenting).
\textsuperscript{32}Id. at 126 n. 5 (Stevens, J., dissenting).
\textsuperscript{34}H.R. No. 95-948, 95\textsuperscript{th} Cong., 2d Sess. (March 13, 1978), reprinted in 1978 U.S. CONG. & ADMIN. NEWS 4749, 4750. See \textit{id. at} 4751 (“In enacting Title VII, Congress mandated equal access to employment and its concomitant benefits for female and male workers. However, the
The House Report went on to indicate that the scope of the Pregnancy Discrimination Act was broad, “to change the definition of sex discrimination in Title VII to reflect the commonsense view and to ensure that working women are protected from all forms of discrimination based on sex.” The House Report further clarifies that “[i]n using the broad phrase ‘women affected by pregnancy, childbirth and related medical conditions,’ the bill makes clear that its protection

Supreme Court’s narrow interpretations of Title VII tend to erode our national policy of nondiscrimination in employment.”); id. at 4752 (“If . . . Congress were not to clarify its original intent, and the Supreme Court’s interpretations of Title VII were allowed to stand, Congress would yield to an intolerable potential trend in employment practices.”); id. at 4756 (“Since the bill is merely reestablishing the law as it was understood prior to Gilbert by the EEOC and the lower courts and as it now exists in many States, a protracted delay in implementation would not be appropriate.”). *See also* California Federal Savings & Loan Assn v. Guerra, 479 U.S. 272, 277 n. 6 (1987) (“The legislative history of the PDA reflect’s Congress’ approval of the views of the dissenters in Gilbert.”).

35 H.R. No. 95-948, 95th Cong., 2d Sess. (March 13, 1978), reprinted in 1978 U.S. CONG. & ADMIN. NEWS 4749, 4751. The Report goes on to note that “[b]y making clear that distinctions based on pregnancy are *per se* violations of Title VII, the bill would eliminate the need in most instances to rely on the impact approach.” This language clearly suggests that disparate impact analysis remains available to challenge discrimination based on pregnancy and related conditions, even though reliance on that analysis may be less often necessary to establish liability under Title VII.
extends to the whole range of matters concerning the childbearing process.”36

In the Senate debate leading up to the adoption of the Conference Report, Senator Williams, in presenting the Conference Report, explained that the legislation would “overcome the decision of the Supreme Court in the Gilbert against General Electric case,” which he indicated was contrary to the intended effect of Title VII “to protect all individuals from sex discrimination in employment.” He went on to indicate that the legislation was necessary “to provide fundamental protection against sex discrimination for our Nation’s 42 million working women” and that it would “go a long way toward insuring that American women are permitted to assume their rightful place in our Nation’s economy.”37 None of this language suggests a narrow disapproval of just the holding of *Gilbert* but a broad disapproval of the entire decision. Nor does this language suggest that the Act was intended to provide only narrow protection to women affected by pregnancy. To the contrary, the language suggests broad rights given by the statute, including a specific reference to allowing women to pursue claims sounding in disparate impact. Senator Williams noted that this legislation was not only focused on fringe benefit programs, but would “prohibit other employment policies which adversely affect pregnant workers.”38 Senator William’s explanation of the legislation contained in the Conference Report,


38S. 995, Pregnancy Disability Act, 95th Cong., Congressional Record S18975, S18977-
about to be adopted by the Senate, also dispels any notion that the amendment was narrowly limited to medically incapacitating conditions. In seeking to respond to concerns that voluntary maternity leave would be prohibited by the amendment, he explained that “[t]he legislation would require only that the opportunity to take a parenthood leave to meet the requirements of childcare during early infancy be provided on a nondiscriminatory basis,” meaning that both men and women be allowed to take such leaves.  

In spite of the express congressional disapproval of the Court’s holding and reasoning in Gilbert and the Supreme Court’s later explicit recognition that Congress had in fact disapproved of both the holding and reasoning of Gilbert, that case has refused to die. A number of lower


40The United States Supreme Court in Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Commission, 462 U.S. 669, 678 (1983), expressly held that Congress “unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the Gilbert decision.” The Newport News’ dissent’s protests to the contrary were unavailing. See id. at 686 (Rehnquist, C.J., dissenting) (“it is the Court, and not Congress, which is now overruling Gilbert”). See also California Federal Savings & Loan Assn v. Guerra, 479 U.S. 272, 284-85 (1987) (“By adding pregnancy to the definition of sex discrimination prohibited by Title VII, the first clause of the PDA reflects Congress’ disapproval of the reasoning in Gilbert. Rather than imposing a limitation on the remedial purpose of the PDA, we
courts have continued to rely on the reasoning of that case to justify their failure to extend workplace protections to women affected by pregnancy, childbirth, and related conditions, including breastfeeding and lactation. For example, the United States District Court for the

believe that the second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied.”).

Even in the Court’s recent decision in *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962 (2009), in which the Court allowed an employer to rely on *Gilbert* in refusing to provide full service credit for women’s pensions for time out on maternity leave for the period before the effective date of the Pregnancy Discrimination Act, the majority acknowledged that the Pregnancy Discrimination Act had “superseded *Gilbert*”; the majority’s statement that the employer’s different treatment of pregnancy before the enactment of the Pregnancy Discrimination Act was not gender-based discrimination “as a matter of law, at that time” gives no indication that the present Court believes that any aspect of *Gilbert*’s definition of “sex” survives as good law today. Justice Ginsburg’s dissent in the *Hulteen* case is more explicit on the wrongness—currently and at the time—of the *Gilbert* case. She calls the *Gilbert* Court’s declaration that exclusion of pregnancy was not gender based “astonishing” and notes that the Court “erred egregiously” in disregarding the opinions of other courts and the EEOC in reaching that conclusion. *Id.* at 1977 (Ginsburg, J., dissenting). She notes that “Congress interred *Gilbert* more than 30 years ago,” *id.* at 1975, and indicates that she “would explicitly overrule *Gilbert* so that the decision can generate no more mischief,” *id.* at 1980.
Western District of Kentucky in *Wallace v. Pyro Mining Co.*\(^{41}\) relied on the reasoning of the *Gilbert* case to conclude that the plaintiff could not rely on the disparate impact theory to challenge a failure to extend her maternity leave to allow her to continue to breastfeed her child, who was resisting weaning and refusing any food other than the breast.

The district court in *Wallace* held that the plaintiff’s could not rely on the disparate impact theory to make her claim, finding it foreclosed by the Court’s decision in *Gilbert*, which the district court read as establishing the rule that disparate impact analysis could not be used to challenge a less than inclusive disability policy, regardless of whether conditions unique to women were the only conditions excluded. The court reasoned:

We see no significant difference between the situation in *Gilbert* and the case here. Pyro’s decision here. Pyro’s decision does not deny anyone personal leave on the basis of sex—it merely removes one situation, breast-feeding, from those for which personal leave will be granted. While breast-feeding, like pregnancy, is a uniquely female attribute, excluding breast-feeding from those circumstances for which Pyro will grant personal leave is not impermissible gender-based discrimination, under the principles set forth in *Gilbert*\(^{42}\).

The district court went on to reason that the Pregnancy Discrimination Act of 1978 did not change this result because that state extended protection only against discrimination on the basis of “pregnancy, childbirth, or related medical conditions,” and that breastfeeding was not a “related medical condition.” The district court reasoned:


\(^{42}\)789 F. Supp. at 868-69.
While it may be that breast-feeding and weaning are natural concomitants of pregnancy and childbirth, they are not “medical conditions” related thereto. Admittedly, the act does not define what constitute “related medical conditions.” However, the substantive references to “related medical conditions” within that legislative history are all in the context of the extent to which female employees can be denied medical benefits, such as sick leave and health insurance coverage, arising from pregnancy and childbirth. . . . We believe these factors indicate Congress’ intent that “related medical conditions” be limited to incapacitating conditions for which medical care or treatment is usual or normal. Neither breast-feeding and weaning, nor difficulties arising therefrom, constitute such conditions. 43

The district court also relied on the legislative history of the Pregnancy Discrimination Act indicating that benefits would not have to be paid to a woman who wanted to stay home to take care of a child, concluding that this reasoning would also apply to a woman who wanted an additional leave to breastfeed. The court held that “[n]othing in the Pregnancy Discrimination Act, or Title VII, obliges employers to accommodate the child-care concerns of breast-feeding female workers by providing additional breast-feeding leave not available to male workers.” 44

The district court’s analysis is faulty on numerous grounds. First, the district court’s reliance on either the holding or the reasoning of Gilbert is impermissible, given that that case was legislatively overruled. The district court relies on the reasoning of Gilbert to find breastfeeding–like pregnancy–to be gender-neutral, even though the district court expressly recognizes what the Court in Gilbert did not–that breastfeeding and pregnancy are “uniquely

43 789 F. Supp. at 869.

44 789 F. Supp. at 869-70.
female attribute[s].” More importantly, however, Congress has recognized that pregnancy and related conditions were not gender-neutral; that was the point of the congressional overruling of the *Gilbert* decision. Second, the district court in *Wallace* reads the Pregnancy Discrimination Act narrowly to extend protection against discrimination only to “pregnancy, childbirth or related medical conditions”; however, the amendment is written broadly, to provide that the meaning of “because of sex” includes, but is not limited to, those conditions. The Pregnancy Discrimination Act was intended to expand—not limit—Title VII’s prohibitions of sex discrimination. The amendment accordingly cannot be read as limiting the circumstances under which an employer can be found liable to sex discrimination to those involving pregnancy, childbirth, or related medical conditions. Instead, an employer who acts on the basis of a condition unique to women—such as breastfeeding or lactation—is subject to the normal prohibitions against sex discrimination, whether or not the employer’s actions can be characterized as pregnancy discrimination. Finally, the district court’s narrow reading of “related medical conditions” to mean only conditions that are incapacitating and for which

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45See Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Commission, 462 U.S. 669, 684-85 (1983) (“By making it clear that an employer could not discriminate on the basis of an employee’s pregnancy, Congress did not erase the original prohibition against discrimination on the basis of an employee’s sex.”). See also O’Hara v. Mt. Vernon Board of Education, 16 F. Supp. 2d 868, 885 (S.D. Ohio 1998) (“In short, the PDA obviously did not in any way restrict the prohibition against gender based discrimination in Title VII; it clarified that protection by expressly including discrimination based on pregnancy, childbirth or related medical conditions.”).
medical care is usual or normal is not warranted by the language of the statute, nor its legislative history. The statutory language nowhere references the requirement of incapacity; indeed, pregnancy itself is clearly within the protection of the statute even if no incapacity occurs until childbirth. In addition, that Congress seemed to reference incapacitating conditions related to pregnancy or childbirth when referring to denied of medical leave is not surprising, given that medical leave is normally associated with incapacitating conditions. Elsewhere in the legislative history of the Act, however, members of Congress referenced the importance of women being able to maintain both their jobs and family life. An exclusion of breastfeeding and lactation from the coverage of the statute would clearly implicate those congressional concerns.

Nor would a recognition of protection for breastfeeding mean that employers would have

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46 See also Notter v. North Hand Protection, 1996 U.S. App. LEXIS 14954, * 14-16 (4th Cir. 1996) (disapproving of its prior dicta in Barrash v. Bowen, 846 F.2d 927, 931 (4th Cir. 1988), that pregnancy and other related conditions “must be treated as illnesses only when incapacitating”; the Notter court noted that the text of the Pregnancy Discrimination Act imposes no such requirement and that the Barrash and other cases do not compel the reading of such a requirement into the statute).

47 See California Federal Savings & Loan Assn v. Guerra, 479 U.S. 272, 289 (1987) (“As Senator Williams, a sponsor of the [Pregnancy Discrimination] Act stated: ‘The entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workplace, without denying them the fundamental right to full participation in family life.’”).
to provide women and not men child care leave.\footnote{Unfortunately, it is not only the courts that have confused issues of breastfeeding with issues of child care generally. In a pathbreaking article on family care discrimination, the authors seem to dismiss the possibility that protection might be extended to breastfeeding under the Pregnancy Discrimination Act with the following language:

A number of cases have failed because attorneys have argued that the PDA protects workers’ rights to extend leave or to adopt flexible schedules in order to breastfeed. However, the law is quite clear that the PDA does not protect adverse employment action suffered as the result of the need to care for a child once born.}

Regardless of whether breastfeeding is found to be a “medical” condition or not, it is certainly a condition unique to women and separate from the gender-neutral obligation and desire that both men and women may have to engage in childcare. In any event, the protection of the prohibition of sex discrimination can be extended

\textit{See} Joan C. Williams & Nancy Segal, \textit{Beyond the Maternal Wall: Relief for Caregivers Who are Discriminated Against on the Job}, 26 HARV. WOMEN’S L. J. 77, 140 (Spring 2003). This bold assertion is made without any recognition that issues of breastfeeding might differ from issues of child care under both the Pregnancy Discrimination Act or Title VII more generally or that the cases referenced in the article might have been incorrectly decided. This failure is made more ironic in that the authors seem to chide other scholars for gathering negative case law that “can be expected to appear in employer’s briefs” and “be used to defeat women’s claims in court.” \textit{Id.} at 111. It is not unlikely that the authors’ bold statement about the legal protection provided to breastfeeding might find a similar use.
to breastfeeding and lactation without mandating that employers provide unlimited paid or
unpaid leave to employees who wish to breastfeed, unless, of course, they provide such leave to
other employees who are not breastfeeding or lactating.

Although the district court decision was affirmed by the United States Court of Appeals
for the Sixth Circuit, the court of appeals did not directly rely on the Gilbert decision to justify
its conclusion that the plaintiff could not state a claim under Title VII.⁴⁹ Instead, the court of

⁴⁹ Although the court of appeals in the Wallace case did not rely on Gilbert directly to
support its affirmance of the district court, the Sixth Circuit in a later case did suggest that the
reasoning of Gilbert continues to have some validity. In Derungs v. Wal-Mart Stores, Inc., 374
F.3d 428 (6th Cir. 2004), the court faced the issue of whether the Ohio public accommodations
statute’s prohibition of sex discrimination should be interpreted to extend to breastfeeding. In
reaching a negative answer, the court of appeals commented on the plaintiffs’ claim that the
district court had erroneously relied on the Gilbert decision to conclude that discrimination on
the basis of breastfeeding was not sex discrimination. The court of appeals stated: “While the
Plaintiffs are correct that the Court’s holding in Gilbert has been overruled, they are mistaken
that the comparability analysis used by the Supreme Court has been completely obliterated in all
factual contexts.” Id. at 435. The court of appeals then went on to rely on precisely the reasoning
of Gilbert—that discrimination on the basis of a trait unique to women is gender neutral—that had
been rejected by Congress. In spite of the court of appeals’ explicit recognition that Gilbert had
been explicitly overruled in the employment context, it cited to both the Wallace case and the
Martinez case discussed below and noted that both of those cases “directly cite to Gilbert as
appeals held that it did not have to consider the plaintiff’s disparate treatment claim because she had failed to establish that breastfeeding her child was a medical necessity, presumably reading the Pregnancy Discrimination Act’s protection for “related medical conditions” as applying only to conditions involving medical necessity.\(^{50}\) For the reasons explained above, that reasoning is faulty, because the amendment imposes no such requirement. The court of appeals rejected the plaintiff’s disparate impact claim because of her failure to show that the employer treated women less favorably than men, even if unintentional.\(^{51}\) This reasoning, however, fundamentally misconceives the underlying premise of the disparate impact theory, which is based not on treating men and women differently—that is the premise of the disparate treatment theory—but because of neutral rules that adversely affect women. The plaintiff should have been given the opportunity to establish that a policy of prohibiting leaves for breastfeeding had a disparate impact of women, regardless of whether she was treated the same or differently than men who

controlling authority for their decisions even though they deal with employment cases after the passage of the PDA.” Id. at 439. However, rather than using the fact that Wallace and Martinez rely on overruled authority as a reason for discounting those cases, the court of appeals seems to view that reliance as reason to rely on the authority of those cases. Interestingly, the Derungs case was itself legislatively overruled when the Ohio legislature enacted OHIO REV. CODE§ 3781.55, which provides that “[a] mother is entitled to breast-feed her baby in any location of a place of public accommodation wherein the mother otherwise is permitted.”


requested leaves for other reasons.\textsuperscript{52}

Even though the reasoning of the \textit{Wallace} decision—\textit{and therefore the conclusion that discrimination on the basis of breastfeeding is not sex discrimination under Title VII—is so obviously wrong, it cannot be dismissed as an anomaly, because a number of other courts have cited the case with approval in justifying their determinations not to provide protection to lactating women.\textsuperscript{53} For example, citing only to \textit{Wallace} and another case relying on \textit{Wallace}, the ________________

\textsuperscript{52}It is entirely possible, of course, that the plaintiff might not have been able to make a showing of disparate impact based on her evidence. It is also possible that, even if the plaintiff did make out a prima facie case of disparate impact, that the employer might have been able to establish a defense to that showing. I do not mean to suggest that women are necessarily entitled to additional leaves for breastfeeding in all circumstances. What I do mean to suggest is that a disparate impact claim cannot be defeated by a failure to show different treatment of men and women and that this case should not be read as good authority for rejecting disparate impact challenges to employer rules concerning breastfeeding, lactation, and expressing milk.

district court in *Jacobson v. Regent Assisted Living, Inc.*\textsuperscript{54} summarily concluded:

\begin{quote}
[T]o the extent that Jacobson bases her discrimination claim on her assertion that Gish would not allow her to pump her breast milk, she fails to state a claim. Title VII and the PDA do not cover breast feeding or childrearing concerns because they are not “medical Discrimination Act did not reach conditions related to pregnancy, such as breastfeeding, unless they were incapacitating).
\end{quote}

conditions related to pregnancy, childbirth or related medical conditions.”


Unlike in some of the other cases, such as Wallace, the plaintiff in Jacobson was not seeking leave from her job in order to breastfeed her child. Instead, the employee in that case had returned to work on a part-time basis—largely at her employer’s urging—days after giving birth; she was at the office when her water broke the day before she gave birth, she took work to the hospital with her, and her supervisor had called her at home less than a week after she gave birth to ask her when she was planning to return to work full-time. She alleged that on two occasions, her supervisor prevented her from expressing milk or, when she stopped by to work for a new hours, prevented her from leaving to breastfeed her son, resulting in her leaking breastmilk, once in public. 1999 U.S. Dist. LEXIS 7680, * 9-12 The district court not only rejected her claim based on these incidents, but the court granted summary judgment for her employer on her claim that she was unlawfully terminated shortly after returning from maternity leave, not only finding that she failed to make out a prima facie case of sex or pregnancy discrimination, but also concluding that she failed to establish that the concerns expressed about her performance were pretextual, even though she presented evidence that negative comments had been made about the fact that she was pregnant and concern expressed about “what will her commitment be to the company when she has this baby?” 1999 U.S. Dist. LEXIS 7680, * 7.

The district court found that the negative comments about her pregnancy were not sufficient to establish discrimination or pretext because they were not direct evidence or
substantial enough: the court noted that the plaintiff could point to no statement such as a comment that her supervisors “did not like pregnant women or women with newborn children working for Regent.” 1999 U.S. Dist. LEXIS 7680, * 38. The district court dismissed the plaintiff’s subjective fear that she would lose her job if she did not return to work immediately after giving birth by noting that she “obviously” knew about her legal right to take leave under state law, which “would obviate any fear of losing her job if she did not return to work before the end of the 12 week leave period.” 1999 U.S. Dist. LEXIS 7680, * 39. This statement is particularly ironic, given that she did lose her job shortly after returning to work, even though she did not take the leave to which she was entitled. The court rejected the evidentiary value of the comment about her “commitment” by noting that the comment was neutral and “may well relate to Bowen’s dislike of pregnant women who take a maternity leave and miss too much work” or “may simply refer to employees who do not adequately perform their job for whatever reason.” 1999 U.S. Dist. LEXIS 7680, * 42. This analysis is suspect, given that the comment about commitment expressly referenced the plaintiff’s pregnancy. In any event, not only was the district court clearly wrong in not construing all of the evidence in the light most favorable to the plaintiff—which it acknowledged that it was required to do, 1999 U.S. Dist. LEXIS 7680, *4– but the court’s recitation of the facts seems to betray the court’s own hostility to the plaintiff’s claim, when the court noted that “[a]lthough [Jacobson] was pregnant [at the time that she was hired], she did not inform Regent of her pregnancy or any plans to take maternity leave.” 1999 U.S. Dist. LEXIS 7680, * 6. The plaintiff, of course, was under no obligation to do so, because it would have been unlawful for the employer to have refused to hire her because of her pregnancy or any intent to take maternity leave.
The influence of the erroneous decision in *Wallace* has extended even further than the cases that rely directly on it, because other courts have cited cases, like *Jacobson*, to justify their refusal to extend the protection of Title VII to women affected by lactation.\(^{56}\)

At least one court has gone even further in embracing the reasoning of the Supreme Court in the *Gilbert* case, relying on the reasoning of that case and failing to even mention that the case had been overruled by Congress in the Pregnancy Discrimination Act. In *Martinez v. M.S. N.B.C. Inc.*,\(^{57}\) the plaintiff asserted that she had been discriminated against on the basis of gender because of conduct to which she had been subjected because she was breastfeeding, including negative offensive comments made by a co-worker about her actions in expressing milk.\(^{58}\) In rejecting her claim of sex discrimination, the court explained:

> Title VII forbids gender discrimination in employment, but gender discrimination by definition consists of favoring men while disadvantaging women or *vice versa*. The drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other, while in given cases perhaps deplorable, is not the sort of behavior covered by Title VII.\(^{59}\)

In support of this statement, the district court noted that “[t]his was made clear more than twenty


\(^{57}\)49 F. Supp. 2d 305 (S.D. N.Y. 1999).

\(^{58}\)Id. at 307.

\(^{59}\)Id. at 309.
years ago in *General Electric Co. v. Gilbert.*” The court went on to note that this reasoning had been applied in the *Wallace* case to find no protection for breastfeeding. ⁶⁰

The clear import of the court’s statement is that discrimination on the basis of a trait unique to women cannot be sex discrimination because that trait cannot apply to men; instead, discrimination on the basis of a trait unique to women is discrimination among women, but cannot be considered discrimination against women. Under this analysis, of course, neither pregnancy, childbirth, nor related conditions, such as lactation, could be considered sex discrimination. In addition to the facial implausibility of this argument— in that discrimination on the basis of a trait experienced only by women would appear to be the most obvious form of sex discrimination, because, by definition, only women and not men would be disadvantaged by the employer’s criteria— the most astonishing aspect of the court’s opinion is the court’s failure to mention that while *Gilbert* had been decided twenty-three years prior to the court’s decision, it had been overruled twenty-one years before that decision. ⁶¹

The court’s treatment of what it characterized as the plaintiff’s claim of “sex-plus”

⁶⁰ *Id.* at 309.

⁶¹ The only reference to the Pregnancy Discrimination Act in the opinion is in a parenthetical to a case cited by the court as a “see also” to its citation to the *Wallace* decision. The court gives no indication, however, that the Act might be relevant to the authority of the *Gilbert* case or to cases, such as *Wallace*, that rely on *Gilbert*. *See id.* at 309 n. 16.
discrimination makes clear the court’s belief that discrimination on the basis of a trait unique to women is simply not actionable under Title VII. The court went on to say the following about “sex-plus” discrimination and why the plaintiff’s claim could not fit within that theory:

It is impermissible to treat men characterized by some additional characteristic more or less favorably than women with the same added characteristic. But that is not plaintiff’s complaint. It cannot be for the quite simple reason that men are physiologically incapable of pumping breast milk, so plaintiff cannot show that she was treated less favorably than similarly situated men. Rather, she claims that she was the victim of gender discrimination because the employer allegedly subjected her to unfavorable treatment on the basis of a characteristic—breastfeeding—that is unique to women. But the “sex-plus” theory does not go so far. Indeed, it logically cannot do so.62

Accordingly, under the court’s analysis, discrimination on the basis of trait unique to women can be neither gender or sex discrimination nor sex-plus discrimination, simply because the trait affects only women. Under this analysis, discrimination on the basis of trait that disadvantages only women cannot be unlawful under Title VII.63 This simply cannot be so and, of course, after

62Id. at 310.

63The court’s analysis is particular ironic in light of the way in which the court begins its decision, suggesting a sympathy to the plight of the plaintiff belied by the rest of its decision. The first paragraph of the decision states:

The transformation in the role of women in our culture and workplace in recent decades and the civil rights movement perhaps will be viewed as the defining social changes in American society in this century. Both have resulted in important federal, state and local legislation protecting those previously excluded from important roles from
the overruling of the *Gilbert* case, it is not so.

III. THE PROPER TREATMENT OF BREASTFEEDING AND LACTATION UNDER TITLE VII AND THE PREGNANCY DISCRIMINATION ACT

Given that the analysis of the most of the existing opinions addressing whether adverse employment action taken on the basis of lactation and breastfeeding constitutes sex discrimination is suspect, one might reasonably ask what would be the appropriate manner in which those issues should be addressed under the existing law. The resolution of this issue requires the application of two sets of related, but somewhat different, issues. The first step involves the application of the provisions of the Pregnancy Discrimination Act of 1978 specific to “pregnancy, childbirth, and related medical conditions.” That is, the Pregnancy Discrimination Act extends the definition of discrimination because of or on the basis of sex to discrimination on the basis of “pregnancy, childbirth, and related medical conditions.” Accordingly, the first step in the analysis requires an inquiry into whether lactation or breastfeeding are “medical” conditions “related” to pregnancy or childbirth. While the analysis below will show that lactation is in fact a medical condition related to pregnancy and childbirth, discrimination in pursuit of the goal of equality. Nonetheless, few would deny that the problems facing women who wish to bear children while pursuing challenging careers at the same time remain substantial. This case illustrates one of those problems.

*Id.* at 306. However, it is the court’s erroneous interpretation of the federal prohibition against sex discrimination, and its ignoring of legislation aimed precisely at allowing women to both bear children and pursue careers, that poses the most serious problem to women’s equality.
this is just the first step in the analysis. Because even if lactation were not a “medical” condition “related” to pregnancy or childbirth, it must also be asked whether adverse action taken on the basis of lactation or childbirth constitutes discrimination on the basis of sex under the primary prohibition against sex discrimination. That is, even before Title VII was amended by the Pregnancy Discrimination Act, Title VII prohibited discrimination because of sex; the Pregnancy Discrimination Act expanded or clarified that prohibition, it did not supplant it. Accordingly, even if lactation and breastfeeding are not specifically covered by the provisions of the Pregnancy Discrimination Act, the second step in the analysis requires a determination of whether adverse action on the basis of conditions or traits unique to women constitutes discrimination on the basis of sex.

A. Lactation and Breastfeeding as “Related Medical Conditions”

The phrase “related medical conditions” is not defined in the Pregnancy Discrimination Act; accordingly, one must make an inquiry into the meaning of that phrase from other sources, such as the normal meaning of the words used or the appropriate legislative history that might suggest a meaning for those words. Dictionary definitions of the term “related” as used in this context include “connected or associated, as by origin or kind”⁶⁴ and “connected by reason of an established or discoverable relation.”⁶⁵ The term “medical” is defined in common dictionaries to


mean “or of connected with medicine or the practice or study of medicine” and “of, relating to, or concerned with the practice of medicine often as distinguished from surgery.” “Medicine” is in turn defined as “the science and art of diagnosing, treating, curing, and preventing disease, relieving pain, and improving and preserving health” and “the science and art of dealing with the maintenance of health and the prevention, alleviation, or cure of disease.” The term “conditions” is defined to mean “attendance circumstances,” “existing state of affairs,”


67 Webster’s Third New International Dictionary of the English Language Unabridged 1402 (Philip Babcock Gove, editor in chief 2002).


69 Webster’s Third New International Dictionary of the English Language Unabridged 1402 (Philip Babcock Gove, editor in chief 2002).

70 Webster’s Third New International Dictionary of the English Language Unabridged 473 (Philip Babcock Gove, editor in chief 2002). Another definition of the term “conditions” is “used to indicate abnormality,” id., but this meaning would not appear to be consistent with the context in which the word appears. The Pregnancy Discrimination Act extends protection to “pregnancy, childbirth, or related medical conditions.” Given that the specific examples that proceed “related medical conditions”—pregnancy and childbirth—are not abnormal conditions, it would be strange for the more general term to have that meaning. Instead, it would appear that “conditions” would refer to all medical conditions related to
“manner or state or being,” or a “state of health.”

Under the common meaning of the words that make up the phrase “related medical conditions,” it would appear that any health-related status of an individual connected with, or caused by, pregnancy or childbirth would be within the scope of that phrase, regardless of whether the health-related status was caused by disease. While “breastfeeding”—which is an action undertaken by nursing mothers in order to nourish their newborn and older children—pregnancy and childbirth, not just abnormal conditions.


72 Although the term “related” does not seem to require a causal relationship, the existence of causal relationship would seem to be sufficient to satisfy the requirement of “related.”

73 As explained above, nothing about the common meaning of these words would suggest that a health-related condition had to be incapacitating in order to be a “related medical condition[ ].”

74 The dictionary definition of the term “breast-feed” is “to feed (a baby) from a mother’s breast rather than from a bottle.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 273 (Philip Babcock Gove, editor in chief 2002). See also WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 174 (2d College Ed., David B. Guralnik, editor in chief 1986)(defining “breast-feed” as “to feed (a baby) milk from the breast”).
may not be such a status,75 “lactation” would appear to be such a condition or status. Lactation is
the physical condition by which the mammary glands of the breasts of a woman who has recently
given birth produce milk after birth,76 whether or not a woman chooses to breastfeed. It is true,
of course, that women will not generally continue to lactate unless they engage in breastfeeding
or otherwise express milk from their breast. Accordingly, breastfeeding and lactation are
generally related in a cause and effect sort of way. That “lactation” is a condition related to
breastfeeding, however, does not mean that it cannot also be a physical status related to
pregnancy and childbirth.

75 I am not convinced that breastfeeding itself cannot be considered to be a medical
condition under the common meaning of these terms, because it might well be considered to be a
status related to health. While undertaking research for this article, I came upon a medical
journal titled “Breastfeeding Medicine,” which is the official journal of the Academy of
Breastfeeding Medicine; the articles in that journal address a wide range of medical issues
related to breastfeeding and lactation medicine. See BREASTFEEDING MEDICINE, ISBN: 1556-
8253, Online ISBN: 1556-8342 (Ruth A. Lawrence, M.D., editor in chief).

76 The dictionary definition of the term “lactation” is “the secretion and yielding of milk
from the mammary gland.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE
ENGLISH LANGUAGE UNABRIDGED 1262 (Philip Babcock Gove, editor in chief 2002). See also
WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 787 (2d College Ed., David
B. Guralnik, editor in chief 1986) (defining “lactation” as “the secretion of milk by a mammary
gland”).
Medical sources indicate that lactation should be considered a medical condition related to pregnancy and childbirth, in that it appears to be recognized as a medical condition causally related to pregnant and childbirth. For example, in *Current Diagnosis & Treatment: Obstetrics & Gynecology*, the physiology of lactation is described, including the growth of the mammary glands and the formation of lactiferous ducts during pregnancy and the balance of hormones necessary for lactation that occurs based on pregnancy and childbirth. Three stages of lactation are described: (1) mammogenesis, or mammary growth and development; (2) lactogenesis, or initiation of milk secretion; and (3) galactopoiesis, or maintenance of established milk secretion. Breastfeeding is also discussed in this source, including a discussion of the advantages and disadvantages for the mother and the child, as well as a discussion of the techniques of breastfeeding. Also discussed are the disorders of lactation and methods of inhibition or suppression of lactation. A discussion of breastfeeding and the physical aspects of

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79 “The Normal Puerperium,” in *Current Diagnosis & Treatment: Obstetrics & Gynecology* (Alan H. DeCherney and Martin L. Pernoll, editors, 8th ed. 1994). As the source indicates, suppression of lactation formerly was accomplished by medication, while currently, lactation is normally suppressed by avoiding nipple stimulation or removal of the milk from the breast. It seems unlikely, however, that the fact that lactation formerly was subject to “treatment” by medication and now is not means that lactation has ceased to be a medical
lactation are also discussed in *Current Medical Diagnosis and Treatment 2010.*

This review of medical sources indicates that lactation is a physical condition recognized by medical experts as related to the health of a woman who is pregnant or has given birth, whether or not she is breastfeeding. Of the three stages of lactation mentioned above, the first stage—mammary growth and development—occurs during pregnancy and the second stage—initiation of milk secretion—is prompted by childbirth and the resulting change in the woman’s hormonal balance. Only the third stage of lactation—maintenance of established milk secretion—requires breastfeeding or other expression of milk from the breast. Accordingly, it is not medically accurate to say that lactation is only causally related to breastfeeding, rather than to pregnancy and childbirth. It would be more accurate to say that the earlier stages of lactation are causally related to pregnancy and childbirth, while the later stage of lactation is causally related to pregnancy, childbirth, and breastfeeding.

Analysis of the commonly understood and medical meaning of words used by Congress is some evidence, although perhaps not conclusive evidence, of what Congress meant by using particular words. One might also look to the legislative history of the Pregnancy Discrimination

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80“Obstetric and Obstetric Disorders,” in *Current Medical Diagnosis and Treatment 2010* (Stephen J. McPhee and Maxine A. Papadakis, editors, 49th ed. 2010).
Act for insight into the meaning that Congress intended to attach to the phrase “pregnancy, childbirth, and related medical conditions.” The legislative history of that act generally suggests that that phrase was supposed to be interpreted broadly. For example, in the Report of the House Committee on Education and Labor, the following explanation of that phrase occurs:

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. At the same time, the bill is intended to be limited to effects on the woman who is herself pregnant, bearing a child, or has a related medical condition, and not to include any effect upon one woman due to the pregnancy of another.81

This legislative history suggests a broad, rather than narrow, meaning to be given to the phrase “related medical conditions.” It is difficult to imagine that the members of Congress choosing this language would have viewed the physical status of lactation—which follows inevitably from pregnancy and childbirth—not to be considered part of the “whole range of matters concerning the childbearing process.” In fact, other than abortion and miscarriage, it is not clear what other medical conditions might be considered more a part of the “whole range of matters concerning the childbearing process” than lactation.

It is true that the House Report, in its section on “disability and sick leave benefits,” also makes reference to the need for disability leave to be provided in a non-discriminatory manner, such that benefits would be payable to women affected by pregnancy, childbirth, and related medical conditions only during a period of actual disability. For example, the House Report indicates that “if a woman wants to stay home to take care of a child, no benefit must be paid

because this is not a medically determined condition related to pregnancy.”

This language does not suggest, however, that the Pregnancy Discrimination Act extends only to conditions that are medically incapacitating. Instead, what the House Report indicates is that disability and sick leave benefits are payable only if a woman is actually sick or disabled— a not surprising conclusion. But non-incapacitating medical conditions related to pregnancy can still be subject to other protection against discrimination, even though not meriting disability or sick leave. Nor does an indication that childcare is not a “medically determined condition related to pregnancy” mean that lactation—or even breastfeeding—is not such a condition. Both men and women engage in childcare; only women, and not men, engage in lactation and breastfeeding and, as explained above, lactation, at least, is a “medically determined condition related to pregnancy.”

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83Further evidence that the phrase “related medical conditions” is not limited to conditions that are medically incapacitating is found in the House Report, stating that women who choose to terminate their pregnancies are within the scope of the Pregnancy Discrimination Act. H.R. 95-948, 95th Cong., 2d Sess. 7 (March 13 1978). Abortions, particularly those in the early stages of pregnancy, are not necessarily physically incapacitating, but this legislative history clearly indicates an intent that an abortion is a medical condition related to pregnancy. See also Joint Explanatory Statement of the Committee on Conference, H.R. 95-1786, 95th Cong., 2d Sess. 4 (“Because the conference substitute applies to all situations in which women are “affected by pregnancy, childbirth, and related medical conditions,” its basic language covers decisions by women who choose to terminate their pregnancies.”
The House Report specifies that the Pregnancy Discrimination Act is relevant beyond the provision of disability leave, when it indicates in a separate section on “other employment policies,” that “[i]n addition to the impact of this bill on fringe benefit programs, other employment policies which adversely affect pregnant workers are also covered,” and then a range of different employment practices are listed.\textsuperscript{84} The Report also makes clear that the purpose of the act was to do more than provide disability leave to women affected by pregnancy:

Although recent attention has been focused on the coverage of disability benefit programs, the consequences of other discriminatory employment practices on pregnant women and women in general has historically has a persistent and harmful effect upon their careers. Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits will go a long way toward providing equal employment opportunities, the goal of Title VII of the Civil Rights Act of 1964.\textsuperscript{85}

Protecting working women against discrimination on the basis of lactation is consistent with—and indeed necessary for achieving—the goal of proving employment opportunities to women equal to those provided to men.

Other legislative history of the Pregnancy Discrimination Act also indicates that lactation falls with the definition of “related medical conditions” and therefore is included within the act’s prohibition of discrimination on the basis of sex. The Report from the Senate Committee on Human Resources indicates that the purpose of the Senate Bill 995 was “to change the definition

\textsuperscript{84}H.R. 95-948, 95\textsuperscript{th} Cong., 2d Sess. 6 (March 13 1978).

\textsuperscript{85}H.R. 95-948, 95\textsuperscript{th} Cong., 2d Sess. 6-7 (March 13 1978).
of sex discrimination in title VII to reflect the ‘commonsense’ view and to insure that working women are protected against all forms of employment discrimination based on sex.” Just as it is would offend commonsense to suggest that pregnancy is not sex-based, it would also defy commonsense to suggest that lactation is not related to pregnancy and therefore sex-based.

The Senate Report also provides:

This bill is intended to make plain that, under title VII of the Civil Rights Act of 1964, discrimination based on pregnancy, childbirth, and related medical conditions is discrimination based on sex. Thus, the bill defines sex discrimination, as proscribed in the existing statute, to include these physiological occurrences peculiar to women; it does not change the application of title VII to sex discrimination in any other way.

This legislative history is important for two reasons. First, it confirms, as discussed below, that the Pregnancy Discrimination Act simply clarified or expanded the definition of sex to include pregnancy and related conditions, but did not otherwise change the law of sex discrimination. Accordingly, this language confirms that all aspects of the law of sex discrimination under Title VII remain in force, including the general prohibition of disparate treatment and disparate impact on the basis of sex. Second, this legislative history seems to equate the phrase “pregnancy, childbirth, and related medical conditions” with pregnancy itself.

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86 S. Report 95-331, 95th Cong, 1st Sess 3 (July 6, 1997). The Report’s reference to “commonsense” was a reference to Justice Brennan’s dissent in the Gilbert case, quoted directly above in the report, in which he stated that “[s]urely it offends commonsense to suggest . . . that a classification revolving around pregnancy is not, at a minimum, strongly ‘sex related.’” Id. at 2.

87 S. Report 95-331, 95th Cong, 1st Sess 3-4 (July 6, 1997).

88 See notes 101 to 125, infra.
childbirth, and related medical conditions” with “physiological occurrences peculiar to women.” Pregnancy and childbirth are clearly “physiological occurrences peculiar to women”; so is lactation.

B. Lactation and Breastfeeding as Traits Intrinsic to Sex or Gender

Even if lactation, breastfeeding, and expression of milk were not considered to be medical conditions related to pregnancy and childbirth, this would simply mean that these actions or conditions were not entitled to the protections against discrimination found in the Pregnancy Discrimination Act. This would not answer the question of whether discrimination on the basis of lactation, breastfeeding, or expression of milk are included within Title VII’s general prohibition of discrimination on the basis of sex.

Title VII’s prohibition against sex discrimination has existed since 1964, with the enactment of the original statute. Although the term “sex” was not defined in the original act, and there has been much controversy about the meaning of the phrase “because of . . . sex,” even under the most narrow interpretation of the statute, the term “sex” has been interpreted to

mean “biological sex,” that is, whether a person is a man or a woman. Accordingly, it would appear that traits that are intrinsic or inherent to biological sex would be within the definition of “sex” as Title VII was originally enacted. Given that issues associated with reproduction are the most obvious ways in which biological sex is defined, one would expect that issues and conditions associated with reproduction would generally be within the definition of biological sex. Although the Court in *Gilbert* originally rejected that conclusion, instead finding pregnancy to be a gender-neutral trait, as explained above, the *Gilbert* analysis along these lines was rejected by Congress in the Pregnancy Discrimination Act of 1978. Regardless of whether lactation and breastfeeding are specifically included in that act, this does not change the fact that Congress specifically disapproved of the analysis of *Gilbert* that led to the conclusion that conditions unique to women are gender-neutral. Accordingly, the reasoning of *Gilbert* cannot be

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90 *See, e.g.*, Dobre v. National R.R. Passenger Corp., 850 F. Supp. 284, 286-87 (E.D. Pa. 1993) (“the term ‘sex’ in Title VII refers to an individual’s distinguishing biological or anatomical characteristics”). I do not mean to give any credence to the assertion that “sex” in Title VII refers only to biological sex. I have explained in other contexts why that assertion is incorrect. *See* L. Camille Hébert, *Transforming Transsexual and Transgender Rights*, 15 *William & Mary J. of Women and the Law* 535, 567-69, 579 (2009) (explaining that limitation of the term “sex” in Title VII to biological sex is not consistent with the United States Supreme Court’s interpretation of the statute). Instead, my point is that, even if “sex” in Title VII were to be limited to biological sex, lactation and breastfeeding should still be considered to be aspects of sex under Title VII.

91 *See* text accompanying notes 25 to 39, *supra*. 

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relied on to find that conditions unique to women, including lactation and breastfeeding, are
gender-neutral. If such a conclusion is to be defended, it must be on other grounds.

Nor can the enactment of the Pregnancy Discrimination Act be interpreted as a limitation
on the meaning of “sex,” either with respect to conditions or traits linked to pregnancy and
childbirth or otherwise. Congress made clear that the Pregnancy Discrimination Act was
intended to broaden or clarify the meaning of ‘sex,” not to limit it. This is made clear primarily
by the language of the Pregnancy Discrimination Act, which indicates that the words “because of
sex” and “on the basis of sex” “include, but are not limited to,” because of pregnancy, childbirth,
and related medical conditions. The inclusion of the words “but are not limited to” contradict
any attempt to assert that this amendment sought to place limits on the scope of sex
discrimination. Secondly, the legislative history of the act also makes clear that the Pregnancy
Discrimination Act only expands the scope to Title VII’s prohibition of sex discrimination to
conditions related to pregnancy, but does not “change the application of title VII to sex
discrimination in any other way.” Certainly, the context in which the Pregnancy Discrimination
Act was enacted suggests no attempt to limit the scope of the sex discrimination laws, given
Congress’ expressed concern that it was the Supreme Court in *Gilbert* that interpreted Title VII
too restrictively.

Accordingly, the issue of whether lactation and related activities—breastfeeding and
expressing milk—are within the definition of “sex” must depend on ordinary Title VII analysis
about the scope of protected classes under Title VII. Therefore, the question is whether
discrimination on the basis of a characteristic or trait that is present only in members of a group
protected under the statute constitutes discrimination on the basis of that protected group.

As a matter of both common sense and the normal standards used to define groups protected by the anti-discrimination laws, it would appear that discrimination on the basis of a trait unique to—or commonly associated with—members of a protected group would, at least in most cases, constitute discrimination against that protected group. Accordingly, if an employer were to take adverse action against persons with a dark skin color, the employer would generally be seen as acting on the basis of race, in spite of the general absence of similarly situated white employees, that is, white employees with a dark skin color. If an employer gave unfavorable

92 The major exception to this general rule is the treatment given to grooming codes, even when those codes implicate hairstyles or a manner of dress associated with certain racial groups or impose different standards of dress for men and women. See BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 279, 517-21 (BNA 4th ed. C. Geoffrey Weirich, editor-in-chief 2007).

93 Even in the early days of the development of anti-discrimination law under Title VII, it was a generally held view that discrimination on the basis of characteristics peculiar to particular races constituted discrimination on the basis of race. See BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 235 (BNA 1976)(“Disparate treatment based on immutable characteristics such as physical features indigenous to racial minorities would violate Title VII”). See also Mack A. Player, EMPLOYMENT DISCRIMINATION LAW 230 (West 1988) (“Relying on physical characteristics typical of some races (i.e., “thick lips” or “blond hair”) is a form of race discrimination. The characteristics may be so inherently related to the
jobs to individuals with a foreign accent, any lack of native-born Americans with a foreign accent would presumably not prevent a claim of national origin discrimination from being asserted. And if an employer refused to hire persons with penises, it would be difficult for the employer to defend its action on the ground that it could not have discriminated against men because generally only men, and not women, have penises. Instead, common sense would dictate that the law’s prohibitions of discrimination on the basis of race, national origin, and sex would prevent an employer from acting on the basis of traits, such as skin color, accents, and anatomy, that are commonly thought to define the protected group and distinguish members of that group from non-members of that group.

There are additional reasons that discrimination on the basis of lactation or breastfeeding should generally be viewed as within the scope of discrimination on the basis of sex. At least since the United States Supreme Court’s decision in Price Waterhouse v. Hopkins, the courts

94 Although not all courts have recognized discrimination on the basis of accent as a form of national origin discrimination, the reasons that courts have rejected these claims has not been based on the absence of a group of employees with a foreign accent but not a foreign national origin. See Barbara T. Linde mann & Paul Grossman, Employment Discrimination Law 327-30 (BNA 4th ed. C. Geoffrey Weirich. editor-in-chief, 2007).

95 For purposes of this discussion, I ignore the reality that transgender women, who are in the process of becoming women or who have a female gender identity, may well have a penis.

96 490 U.S. 228, 251 (1989)(plurality opinion) (“As for the legal relevance of sex
have recognized that adverse employment decisions that are the product of sexual stereotyping constitute actionable sex discrimination. Accordingly, to the extent that employers take action against lactating and breastfeeding women because of the operation of sexual stereotyping, those actions should be viewed as being taken, at least in part, because of sex or gender.\textsuperscript{97} Both commentators and Congress itself have recognized that discrimination on the basis of pregnancy in the context of employment often is a result of sexual stereotyping, either because employers believe that pregnant women lack a commitment to the workplace necessary to make them good employees\textsuperscript{98} or because employers believe that pregnant women should leave the workplace in stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group. . .”); \textit{id. at 272} (equating consideration of failure to conform to gender stereotypes with “discriminatory input into the decisional process”).

\textsuperscript{97}An employment action motivated only in part by sex still violates Title VII’s prohibition against sex discrimination, because of the operation of § 703(m) of the Act, which provides that the statute is violated as long as sex is a “motivating factor” in a challenged employment decision, even if other factors also motivated the challenged practice. 42 U.S.C. § 2000e-2(m) (date). Accordingly, whether lactation is consider a “related medical condition” of pregnancy or childbirth or as intrinsic to sex, the motivating factor analysis applies.

\textsuperscript{98}House Report 95-948, 95\textsuperscript{th} Cong., 2d Sess. 3 (March 13, 1978) (“As testimony received by the committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs.”).
order to dedicate themselves to their primary function of childbearing and childrearing. Similar stereotypes appear to be in operation when lactating and breastfeeding women face discrimination in the workplace. Marina Chavez was told by her supervisor to stay home with her one-month old infant until she was finished breastfeeding, even though her only transgression was to breastfeed her child on her own time in her car on the employer’s premises. LaNisa Allen was denied the right to take adequate and timely breaks to express milk, even though the evidence indicated that other employees were not limited in the timing or the duration of bathroom or other work breaks. These actions suggest that the employers in question held negative views about breastfeeding in general or the presence of lactating women in the workplace, views likely influenced by stereotypical views about women and their role in childrearing.

99 See Neil S. Siegel & Reva B. Siegel, Pregnancy and Sex Role Stereotyping: From Struck to Carhart, 70 OHIO STATE L. J. 1095, 1099-1102 (2009) (discussing the arguments of commentators, including Ruth Bader Ginsburg, that discrimination on the basis of pregnancy was based on sex-role stereotyping). See also Joan C. Williams & Nancy Segal, Beyond the Maternal Wall: Relief for Caregivers Who are Discriminated Against on the Job, 26 HARV. WOMEN’S L. J. 77, 90-101 (Spring 2003) (discussing negative stereotypes to which pregnant women are subject).

100 There is evidence that women who have children face sexual stereotyping about their commitment to their jobs and about their competence even after they give birth and return to work. Studies have indicated that once a woman’s status as a mother becomes salient, she will begin to be perceived as a “low-competence caregiver rather than as a high-competence business
Accordingly, whether lactation is viewed as within the scope of “sex” as a medical condition related to pregnancy, whether lactation and breastfeeding are considered intrinsic to and therefore inseparable from sex, or whether discrimination on the basis of lactation and breastfeeding is the product of unlawful sexual stereotyping, lactation and its related activities—breastfeeding and expressing milk—should properly be considered to be within the scope of “sex” under Title VII.

C. Disparate Treatment Claims Based on Lactation and Related Activities

Assuming that lactation, breastfeeding, and expressing milk are within the scope of the term “sex” in Title VII, either under the definition of “because of sex” in the Pregnancy Discrimination Act or within the meaning of “sex” in the original enactment, the next question to be addressed is what employment actions relating to breastfeeding or expressing milk constitute violations of the statute. If an employer takes adverse employment action in whole or in part because a women is lactating, breastfeeding, or expressing milk, claims are likely to be asserted under the disparate treatment theory.

women.” For example, a female lawyer who was given the work of a paralegal upon her return to work from maternity leave reported that she wanted to say “I had a baby, not a lobotomy.” See Joan C. Williams & Nancy Segal, Beyond the Maternal Wall: Relief for Caregivers Who are Discriminated Against on the Job, 26 HARV. WOMEN’S L. J. 77, 90 (Spring 2003). It would seem that the action of a woman of breastfeeding—and taking breaks to express milk while at work—is likely to bring particular attention to her status as a mother.
Because the disparate treatment theory emphasizes the need for equal treatment of similarly situated individuals, claims related to lactation made under this theory are likely to involve claims that women are disadvantaged based on their lactating status even though they are like others with respect to their ability to perform their jobs. So, for example, a woman might claim that an employer refused to hire her or took other adverse action against her because she was breastfeeding a child, even if the woman made no requests for accommodation, such as breaks to express milk. The claim asserted by Marina Chavez in front of the California Fair Employment and Housing Commission was such a claim. She asserted that she was refused to right to return from maternity leave because she was still breastfeeding; the supervisor acted against her at least in part because he objected to her breastfeeding her child in her car while she was on her lunch break.  

Similarly, a woman might claim that she was fired or otherwise disadvantaged because she requested or took breaks to express milk or breastfeed a child, and those breaks were refused or she was punished for taking those breaks, even though other employees were given similar breaks for other purposes, such as to smoke or to attend to other personal needs. LaNisa Allen made such a claim, when she argued that she (or other employees) were allowed unrestricted breaks to go to the bathroom; under the employer’s rule, apparently the only thing she was specifically not allowed to do in the bathroom was to express milk.

\[101\] See text accompanying notes 3 to 4, \textit{supra}.  
\[102\] See text accompanying notes 10 to 18, \textit{supra}. For purposes of the discussion in this section, I am assuming no federal or state obligation, apart from the anti-discrimination laws, imposed on employers to provide breaks to express milk to lactating women. For a discussion of
It is difficult to imagine how employers would successfully defend against such disparate treatment claims, if in fact the plaintiffs were able to show that they either required no breaks or required no breaks in addition to or different from those provided to other employees; if an employee is given 15 minutes or more to go to the bathroom or other location apart from his or her work site, it would seem to make little difference to the employer’s legitimate business interests whether the employee was smoking, urinating or defecating, or expressing milk (or, for that matter, breastfeeding a child, unless the employer has a legitimate interest in not having an infant at its worksite).

More difficulty would be posed by a claim by a lactating woman that she required more than the breaks normally provided to other employees to attend to their personal needs because of her lactation or need to breastfeed a child or express milk. Such a claim might still be cognizable under the disparate treatment theory, but only if the employer should establish that its treatment of the plaintiff was motivated at least in part by the fact of her lactation. That is, even if an employer asserts that its reason for refusing the plaintiff a longer or more frequent break–or a longer leave of absence, past the period of time for recovery from childbirth– is based on a neutral policy applied to all employees, the plaintiff might be able to establish that the employer’s refusal is in fact based on her sex or in part on her sex. This proof might be shown by evidence that the employer harbored a negative attitude toward pregnancy or breastfeeding, if the recent federal obligation imposed on employers to provide reasonable breaks for the expression of milk, see text accompanying notes 129 to 132, infra.
it could be inferred that the employer’s refusal might have been influenced by this negative attitude. Or there might be evidence that the employer would have considered a deviation from its break or leave policy if a request for a similar break or leave had been made by an employee with another reason for the break or leave than the need to express milk or to breastfeed. For example, there might be evidence that the employer would have more favorably considered a request from an employee for a longer restroom break because of a personal (non-disability-related) reason or for an unpaid leave to pursue some personal interest of the employee.

If a plaintiff asserts a right to a longer or more frequent break than is provided to other employees to breastfeed or to express milk\textsuperscript{103} and does not provide evidence of an intent to discriminate on the part of the employer in refusing that request, the plaintiff will likely not be able to assert a successful disparate treatment claim. The basic prohibition against discrimination on the basis of sex does not include an accommodation requirement. At least with respect to pregnancy— which naturally could have been interpreted to impose a duty of accommodation, given that the provision of true equal employment opportunity requires a recognition of the unique burdens that pregnancy imposes on women—the courts have generally followed the rule that, at least for purposes of disparate treatment, employers are entitled to treat pregnant women as badly as they treat everyone else.\textsuperscript{104} Accordingly, if plaintiffs in this

\begin{footnotesize}
\textsuperscript{103} Again, for purposes of this disparate treatment discussion, I am disregarding any obligation, other than under the anti-discrimination laws, placed on employers under federal or state law to provide breaks for breastfeeding or expressing milk. \textit{See} note 102, \textit{supra}.

\textsuperscript{104} \textit{See, e.g.,} Troupe v. The May Department Stores Co., 20 F.3d 734, 738 (7\textsuperscript{th} Cir. 1994)
\end{footnotesize}
situation are to be able to challenge the employer’s refusal to provide accommodation for lactation, they will have to do so under the disparate impact theory.

D. Disparate Impact Claims Based on Lactation and Related Activities

The disparate impact theory might be implicated in two ways with respect to claims involving lactation or breastfeeding. If lactation or breastfeeding are deemed to be aspects of “sex,” then a “lactation-neutral” policy, while not constituting intentional discrimination under the disparate impact theory, might adversely affect lactating women, and therefore be unlawful unless justified by job relatedness and business necessity. Alternatively, even if lactation and breastfeeding were deemed to be gender-neutral and, therefore, disparate treatment claims were not cognizable because the discrimination was not deemed to be sex-based, the disparate impact theory might still be relevant. In that instance, even a lactation-specific policy would be considered to be gender-neutral, but such a policy would likely have a disproportionate negative impact on women, who would be the only persons affected by such a policy.

The argument has been made that the disparate impact theory is not available for claims of sex discrimination that proceed under the authority of the Pregnancy Discrimination Act, based on the contention that the language of the act precludes such claims. The relevant language is the provision of the act indicating that “women affected by pregnancy, childbirth, or

("[e]mployers can treat pregnant women as badly as they treat similarly situated but nonpregnant employees").
related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”

The essence of the disparate impact theory is that a neutral policy can be unlawful because of its unjustified and disproportionate adverse effect on a protected group—that is, that in certain circumstances, it can be unlawful to treat people the same. Therefore, the argument goes, the mandate to treat women affected by pregnancy “the same” as other similarly situated people must preclude a claim that “the same” treatment is unlawful.

This argument is unpersuasive. The context in which the Pregnancy Discrimination Act was enacted and the legislative history of the act belies the suggestion that Congress meant to restrict the application of normal Title VII principles to discrimination based on pregnancy; as discussed above, the legislative history of the Pregnancy Discrimination Act indicates that the act was not intended to change the application of Title VII in any way other than to expand or clarify the meaning of “sex.”

Additional evidence that Congress did not intend to prohibit the application of the disparate impact theory to cases under the Pregnancy Discrimination Act is


106Justice White, in his dissent in California Federal Savings & Loan Assn v. Guerra, 479 U.S. 272, 298 n.1 (1987), makes this argument with the following language: “Whatever remedies Title VII would otherwise provide for victims of disparate impact, Congress expressly ordered pregnancy to be treated in the same manner as other disabilities.”

107See text accompanying notes 33 to 39, supra.
found in a case decided by the Supreme Court between the Supreme Court’s decision in *Gilbert* and the overruling of that case by the Pregnancy Discrimination Act, as well as Congress’ treatment of that decision. In the case of *Nashville Gas Co. v. Satty*, the Supreme Court applied the disparate impact theory to find that a classification based on pregnancy violated Title VII. The employer’s policy required pregnant women to take a formal leave of absence, did not provide them with sick leave or disability pay while on leave, and then deprived women returning from leave of their seniority accumulated before the leave; employees who took leave because of a non-occupational injury received sick pay and did not forfeit accumulated seniority because of a leave. Because of the Court’s prior decision in *Gilbert*, the Court had to treat the employer’s policy as facially gender-neutral. But the majority in *Satty* indicated that the part of the employer’s policy that deprived women taking leave for pregnancy of their accumulated seniority, even though facially neutral, constituted a violation of § 701(a)(2) because that policy “acts both to deprive them ‘of employment opportunities’ and to ‘adversely affect [their] status as an employee.’” That the Court was applying the disparate impact theory is confirmed by the

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109 *Id.* at 137-39.

110 *Id.* at 140 (citing *Gilbert* and noting that “Petitioner’s decision not to treat pregnancy as a disease or disability for purposes of seniority retention is not on its face a discriminatory policy”).

111 *Id.* at 141. The Court’s citation to *Griggs* and its reference to “policies neutral on their face but having a discriminatory effect” leaves no doubt that it is applying the disparate impact theory.
Court’s finding of no proof of the business necessity of the practice;\textsuperscript{112} business necessity, of course, is the defense to claims of disparate impact.

Because the Supreme Court relied on the disparate impact theory to find a violation of Title VII’s prohibition against sex discrimination, that theory remains viable unless Congress overruled that aspect of the \textit{Satty} case when it enacted the Pregnancy Discrimination Act. But in contrast to the plentiful evidence that Congress meant to overrule the \textit{Gilbert} decision by that act, there is absolutely no indication that Congress meant to overrule \textit{Satty}. Instead, the relevant legislative history suggests that Congress approved of at least the disparate impact aspects of the \textit{Satty} decision. In the Report of the House Committee on Education and Labor, there is a discussion about the difficulty of reconciling the holding of \textit{Gilbert} and the holding of \textit{Satty} and the difficulty of applying the distinction that the \textit{Satty} Court made about withholding benefits from women affected by pregnancy—not providing disability benefits for pregnancy— not having a disparate impact on women, while imposing burdens—forfeiture of accumulated seniority—did have such an impact. The House Report then indicates that the definition of “because of sex” added by the bill would have the following positive effect: “By making clear that distinctions based on pregnancy are \textit{per se} violations of Title VII, the bill would eliminate the need in most instances to rely on the impact approach, and thus would obviate the difficulties in applying the distinctions created in \textit{Satty}.”\textsuperscript{113} This language cannot reasonably be read to reject the Court’s conclusion in \textit{Satty} that the disparate impact theory was available to challenge instances of

\footnotesize{\textsuperscript{112}Id. at 143.}

\footnotesize{\textsuperscript{113}H.R. 95-948, 9\textsuperscript{th} Cong, 2d Sess. 3 (March 13, 1978).}
pregnancy discrimination. That the disparate impact theory might be needed less often because facially discriminatory policies could be appropriately challenged under the disparate treatment theory does not mean that the disparate impact theory is unavailable to challenge practices that are in fact facially neutral either as a matter of sex in general or pregnancy in particular.\footnote{The use of the term “most instances” would seem to clearly suggest that the disparate impact theory would continue to be relied on in some instances involving pregnancy or related conditions.}

The majority of courts to have considered whether the disparate impact theory is available with respect to claims relating to pregnancy have concluded that such claim are cognizable under the theory. By way of example, the United States Court of Appeals for the Seventh Circuit in \textit{Scherr v. Woodland School Community Consolidated District No. 50}\footnote{867 F.2d 974 (7\textsuperscript{th} Cir. 1988).} rejected the claim of the United States as amicus curiae that the Pregnancy Discrimination Act precludes reliance on disparate impact. In reaching that conclusion, the court of appeals not only relied on the legislative history discussed above, but also rejected the claim that the language providing for the “same treatment” meant that treatment of pregnant women must be identical to the treatment provided other employees. Not only did the court indicate that such a requirement would be inconsistent with the purpose of the act to ensure that women affected by pregnancy were guaranteed the right to full participation in both work and family life, but the court also indicated that the Pregnancy Discrimination Act merely added a definition of “because of sex” to
Title VII and did not provide a “substantive rule to govern pregnancy discrimination.” 116 Accordingly, the court reasoned: “Because the PDA is part of Title VII and derives its substance and procedures from the Act as a whole, a claim of pregnancy discrimination, like any other claim of discrimination under Title VII, may be based either on a theory of disparate treatment or a theory of disparate impact.” 117 A number of other cases have reached the same conclusion. 118

A lactation-neutral policy (or even a lactation-specific policy, if such a policy were considered to be gender-neutral and not sex-based) 119 might well be subject to challenge under the disparate impact theory. In order to make such a claim, the plaintiff would have to show that a refusal of the employer to provide adequate breaks for breastfeeding or expression of milk had a disproportionate effect on lactating women (or, if a lactation-specific policy was considered to

116 Id. at 979-80, 978.

117 Id. at 978-79 (collecting cases using the disparate impact theory under the Pregnancy Discrimination Act).


119 This would be true, for example, if all of the arguments contained in the text accompanying notes 64 to 100, supra, were found to be unpersuasive.
be gender-neutral, that that failure had a disproportionate negative effect on women in general). Such a showing might be possible, with respect to refusal to provide breaks for expression of milk or breastfeeding, if it could be established that the length or configurations of breaks provided during the workday generally allowed non-lactating employees to attend to their necessary personal business, but precluded lactating women from expressing milk or breastfeeding. A similar showing was successfully made in the case of *E.E.O.C. v. Warshawky and Co.*\(^{120}\) with respect to pregnancy when an employer adopted a policy of no-leave during the first year. The district court reasoned that a prima facie case of disparate impact had been made out because pregnant first-year employees were discharged at a significantly higher rate than non-pregnant first-year employees because the pregnant employees needed more time off than the non-pregnant employees. The court reasoned that this showing demonstrated disparate impact based on sex: “[b]ecause only women can get pregnant, if an employee denies adequate disability leave across the board, women will be disproportionately affected.”\(^{121}\) This analysis would appear to apply equally to lactating women, if the employer provided no breaks or breaks that were inadequate for breastfeeding; because only women breastfeed, such a policy would presumably have a disparate impact on lactating women in particular but also women in general.

With respect to a request for additional leave time, such a showing might be more difficult, but it might be possible in some instances to make a showing that the provision of leave—or the lack of any leave time beyond a period of disability—allowed employees generally to

\(^{120}\) 768 F. Supp. 647 (N. D. Ill. 1991).

\(^{121}\) *Id.* at 654.
attend to personal requirements, but precluded lactating women from establishing a breastfeeding routine. It might be particularly difficult for lactating women to make this showing if they were guaranteed the right to express milk during the workday and therefore were able to continue to breastfeed their children without an extended leave of absence from work.

Of course, even if lactating women are able to make this prima facie showing of disparate impact, employers would not necessarily be required to provide the requested breaks or leaves, because employers might be able to show that their refusal to provide this leave was job related and consistent with business necessity. Making this showing would presumably require more than just mere inconvenience on the part of the employer as a reason not to provide the requested breaks or leaves, but that because of the nature of the job, requiring the employer to provide the breaks or leave would pose real detriment to the employer’s business. The requirement of business necessity and job relatedness has been defined in a number of ways, but all current


123 Under the strictest interpretation of job relatedness and business necessity, the employer must prove that the challenged action or criteria is “necessary to safe and efficient job performance.” Under a more relaxed definition of the requirement,—which seems to have been disapproved of by Congress in the Civil Rights Act of 1991— the challenged requirement must “significantly serve” an employer’s “legitimate business interests.” See BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 148-52 (BNA 4th ed. C. Geoffrey Weirich, editor-in-chief 2007)(discussing different meanings of “job related” and “business necessity” used by the lower courts).
definitions of those requirements under Title VII require at least that the employer have a legitimate business interest and that the employer’s practice further that interest in a significant way. Mere inconvenience, unrelated to the requirements of a particular job, would not satisfy this standard.

In addition, even if the employer were to establish that its refusal to provide breaks or leave was justified as a matter of job relatedness or business necessity, the employee would still have the opportunity to show the existence of alternative employment practices with less adverse impact that the employer refused to adopt.\textsuperscript{124} The employee would generally have to show that the alternative practice would also serve the employer’s legitimate interests in a comparably effective way.\textsuperscript{125} While the employee might not be able to make this showing with respect to the provision of further leave to allow the employee to establish a breastfeeding routine, if, for example, the employer could show a real need for the employee’s return to work, the employee might well be able to show that minor modifications in breaks provided to employees, either as a matter of timing or duration, would allow the employee to express milk without adversely affecting the employer’s business.


\textsuperscript{125}See Barbara T. Linde\textsuperscript{man} & Paul Grossman, Employment Discrimination Law 152-56 (BNA 4\textsuperscript{th} ed. C. Geoffrey Weirich, editor-in-chief 2007). (discussing meaning of “alternative employment practices” as applied by the lower courts).
IV. LEGISLATIVE TREATMENT OF BREASTFEEDING AND LACTATION

Legislation has been proposed that would confirm that lactation, including breastfeeding and expressing milk from the breast, is protected by Title VII’s prohibition against discrimination on the basis of sex. The proposed Breastfeeding Promotion Act of 2009 would amend Title VII of the Civil Rights Act of 1964 to add lactation to the definition of protected sex discrimination. As amended, the relevant provision of Title VII would provide:

The terms “because of sex” and “on the basis of sex” includes, but are not limited to, because of or on the basis of pregnancy, childbirth (including lactation), or related medical conditions; and women affected by pregnancy, childbirth (including lactation), or related medical conditions shall be treated the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work.\(^{126}\)

“Lactation” would be defined under the proposed amendment to “a condition that may result in

\(^{126}\text{Breastfeeding Promotion Act of 2009, H.R. 2819, 111}^{\text{th}}\text{ Cong., 1}^{\text{st}}\text{ Sess. (introduced June 11, 2009); S. 1244, 111st Cong., 1}^{\text{st}}\text{ Sess. (introduced June 11, 2009). Among the findings of the proposed bill are a statement that Congress intended to include breastfeeding and expressing breast milk as protected conduct under the Pregnancy Discrimination Act of 1978, but that a few courts have failed to reach the conclusion that breastfeeding and expressing milk in the workplace are within the scope of Title VII. One of the stated purposes of the proposed bill is “to clarify that breastfeeding and expressing milk in the workplace are protected conduct” under that statute. Similar bills have previously been proposed in earlier sessions of Congress. See, e.g., Breastfeeding Promotion Act of 1997, H.R. 2236, 110}^{\text{th}}\text{ Cong., 1}^{\text{st}}\text{ Sess. (introduced July 17, 2007).}
the feeding of a child directly from the breast or the expressing of milk from the breast.\textsuperscript{127} The proposed bill would also amend the Fair Labor Standards Act to require employers to provide reasonable break time for employees to express milk for a nursing child up to one year of age and to make reasonable efforts to provide a private place, other than a restroom, for the employee to express milk. The employer would not be required to compensate an employee for any time spent expressing milk.\textsuperscript{128}

While the anti-discrimination provisions of the proposed Breastfeeding Promotion Act of 2009 are languishing in the House Education and Labor Committee and the Senate Committee on Finance, the provisions dealing with breaks and a private place to express milk recently became law with the enactment of the Patient Protection and Affordable Care Act in March 2010.\textsuperscript{129} Section 7 of the Fair Labor Standards Act, dealing generally with maximum hours, now provides:

\begin{quote}
(r)(1) An employer shall provide—
(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express her milk; and
\end{quote}

\textsuperscript{127} Breastfeeding Promotion Act of 2009, H.R. 2819, 111\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (introduced June 11, 2009).

\textsuperscript{128} Breastfeeding Promotion Act of 2009, H.R. 2819, 111\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (introduced June 11, 2009).

\textsuperscript{129} Patient Protection and Affordable Care Act, H.R. 3590, 111\textsuperscript{th} Cong., 2d Sess., § 4207, P.L. 111-148.
(B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.130

This provision makes clear that the employer is not required to compensate the employee for the break time.131 Employers with less than 50 employees can escape the requirements of this provision if those requirements would “impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.”132

Although the protection extended to lactating and breastfeeding women by this amendment to the Fair Labor Standards Act is significant and will require employers to provide reasonable accommodation to the needs of a lactating woman to express milk during the work day, this provision is not an adequate substitute for the protections provided by the anti-discrimination laws. While this provision may assist the LaNisa Allens of the world in obtaining reasonable breaks from their duties in order to express milk and freedom from having to perform that function in the restroom, it will not protect them from an employer’s rule that places strict limits on the timing of their breaks to express milk while allowing unrestricted breaks to other employees to perform other personal functions. And the provision will presumably offer no


132 29 U.S.C. § 207(r)(3). The statute expressly provides that state laws that provide greater protection to employees than this provision are not preempted. 29 U.S.C. § 207(r)(4).
protection to the Marina Chavezs of world, who are refused the right to return to work and support their families because they are still lactating and who are fired because they have the nerve to insist that they have the right to breastfeed their own children, in their own property, on their own time.

The anti-discrimination laws provide two types of protections to employees—the protection against discrimination and the requirement that employers provide reasonable accommodation to members of certain protected groups. In general, while the prohibition against discrimination extends broadly to most protected classifications—to race, sex, religion, and national origin under Title VII, to age under the Age Discrimination in Employment Act, and to disability under the Americans With Disabilities Act—the requirement of accommodation applies only with respect to the categories of religion and disability. The duty of accommodation provides important protections to employees beyond the protection provided by the anti-discrimination laws; for example, if a duty to accommodate pregnancy were explicitly included in or read into the anti-discrimination laws, it would no longer be true that pregnant women could be treated as badly as anyone else, because employers would be required to take their pregnancy into account in making employment decision, just as employers are required to take an employee’s religion or disability into account in certain situations.

But the prohibition of discrimination provides protections in addition to those provided by a duty to accommodate, including the obligation to treat employees within the protected group equally to other similarly situated employees. As a practical matter, the additional
protection provided by the prohibition on discrimination is likely to apply to lactating women who are being asked to be treated equally—not worse than—other employees. This might apply, for example, in the situation of a woman who wants to return to work and receive the same types of assignments or work that she received when she was not breastfeeding. Accordingly, a prohibition against discrimination on the basis of lactation would serve to prevent employers from treating employees in a patronizing or other unequal manner because of their choice to breastfeed.  

But the recognition that the prohibition against discrimination, as well as the duty of accommodation, applies to lactating women is of theoretical as well as practical importance. In order to provide full protection against discrimination on the basis of sex, it is important for courts to recognize that true equality between men and women—freedom from workplace discrimination as well as the provision of equal employment opportunity—requires a recognition not only of the ways in which men and women are the same but also of the ways in which they are different.  

There is no inherent conflict between the obligations imposed on employers with respect to the duties not to discriminate and the duty of reasonable accommodation. The duty not to discriminate, at least under the disparate treatment theory, requires employees to treat similarly situated employees the same. The duty of accommodation, on the other hand, requires employers to take into account the ways in which certain employees are differently situated. Both duties are consistent with a notion of providing real substantive equality to members of different groups, even if the duty of accommodation is often viewed as inconsistent with notions of formal equality.
are different. Just as it is discrimination to treat men and women differently when they are the same,\footnote{134} it is discrimination to treat men and women the same with respect to ways in which they differ,\footnote{135} particularly when that “same” treatment is based on a “male” model of a worker who requires no leave from work to deliver and feed his children. Accordingly, providing true equality to women, particularly lactating women, requires that they be entitled to not only the requirement of reasonable accommodation, but also the protection against discrimination.

\footnote{134}{This is the underlying justification for the disparate treatment theory, which prohibits intentional action on the part of employers to treat similarly situated persons differently. See Teasmster v. United States, 431 U.S. 324, 335 n. 15 (1977). See also BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 10-11, 23 (BNA 4th ed. C. Geoffrey Weirich, editor-in-chief 2007).}

\footnote{135}{This, on the other hand, is the underlying justification for the disparate impact theory and the duty of reasonable accommodation that generally applies with respect to religion and disability. The disparate impact theory invalidates neutral rules with a disproportionate adverse impact on protected groups, while the duty of reasonable accommodation requires employers to make variations from those neutral rules in order to accommodate the needs of members of particular protected groups. See BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 109-10, 265 (BNA 4th ed. C. Geoffrey Weirich, editor-in-chief 2007). See also E.E.O.C. v. Warshawsky and Co., 768 F. Supp. 647, 652 (N.D. Ill. 1991) (“Disparate impact analysis recognizes that not all employees are similarly situated and, thus, a facially neutral employment policy may effect one group more than another because of the differences in the group.”).}
V. CONCLUSION

The courts have generally shown considerable reluctance to providing rights to lactating and breastfeeding mothers against discrimination in the workplace, rejecting those rights by following disfavored and overruled precedent and counterintuitive conclusions about the lack of a causal relationship between sex, pregnancy, lactation, and breastfeeding. Courts appear to reach these conclusions because of a concern about providing “special” treatment to women based on their reproductive capacity, apparently based on a concern that men and women not presently affected by childbirth might be disadvantaged as a result. But these concerns are

136 In a number of cases, the courts have referred to that the fact that lactating and breastfeeding women are seeking “extra” breaks not provided to other employees. See, e.g., Allen v. totes/Isotoner Corp., 123 Ohio St. 3d 216, 2009-Ohio-4231 pp. 1-2 (August 27, 2009); Puente v. Ridge, 324 Fed. Appx. 423, 428 (5th Cir. 2009). This language, however, suggests that lactating women are enjoying leisure time that other employees are not enjoying and obscures the fact that these extra minutes, if indeed the minutes really are extra, are spent alone in a room, often a bathroom, sometimes perched on a toilet, with a vacuum device attached to one’s breasts or manually expressing as much milk as possible. Viewed this way, it is hard to imagine that men and non-lactating women are being disadvantaged by not having this experience. In addition, it is not clear at all that the women are indeed asking for preferential treatment rather than asking to be treated the same as other employees with respect to breaks. For example, in the Allen case, the plaintiff alleged that other employees were allowed to take “extra” breaks to go to the bathroom and that the amount and duration of those breaks were not monitored or limited.
based on a notion of equality—formal equality—that does not reflect the reality of workers who are lactating. Allowing employers to take adverse action against lactating and breastfeeding women promotes equality only in the sense that men and non-lactating women are also denied the ability to breastfeed or express milk without endangering their jobs. But, of course, those other workers are being denied a freedom from discrimination that they will have no occasion to need, while lactating women need this freedom from discrimination in order to realize the promise of equal employment opportunity described by the United States Supreme Court in *California Federal Savings & Loan Ass'n v. Guerra*: “to guarantee women the basic right to participate fully and equally in the workplace, without denying them the fundamental right to full

Similarly, in the *Puente* case, the plaintiff—whose claim was dismissed for failure to state a claim—alleged that after she began to use her breaks to express milk, her supervisors closely monitored her breaks while ignoring “the breaks taken by the male BPA and the BPA who smoked tobacco.” Assuming that these facts were true, as the courts were required to assume, the plaintiffs in these cases were not seeking “special” treatment but were in fact asked not to be singled out because of their need to express breast milk during their shifts.

137 The employer in the *Allen v. Totes/Isotoner* case made this argument explicitly, when it argued as follows: “Men obviously were not allowed to leave their workstations to pump breast-milk or, for that matter, bottle-feed their infants, nor are women—and again, there is no discrimination in that respect.” *Allen v. Totes/Isotoner Corp.*, Merit Brief of Defendant-Appellee, Totes/Isotoner Corp., Case No. 08-0845, p. 9 (Ohio Supreme Court filed December 5, 2008).
participation in family life.”138 That is, in this instance, real equality requires looking beyond the dictates of formal equality.

The recent congressional action to provide some lactating women the right to take reasonable breaks and to a sanitary and private place to express milk does provide important protection to these women. But that legislative action fails to provide the full protection against discrimination and the promise of equal employment opportunity that would be secured by a proper interpretation of the existing prohibition against discrimination on the basis of sex contained in Title VII of the Civil Rights Act of 1964. Under a proper interpretation of Title VII, lactation is not only a medical condition related to pregnancy and therefore protected under the Pregnancy Discrimination Act, but lactation and breastfeeding are intrinsic to sex and therefore protected by Title VII’s general prohibition of discrimination because of sex. As such, no woman should be able to be subject to adverse employment action simply because she chooses to continue to breastfeed after returning to work, nor should lactating women be subject to special rules or restrictions imposed by their employers to which non-lactating employees are not.