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Let 'Em Work, Let 'Em Nurse: Accommodation for Breastfeeding Employees in West Virginia

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I. INTRODUCTION

The breastfeeding of infants and toddlers is the rare activity that combines a multitude of benefits with virtually no downside. Breastfeeding has been recognized and promoted by a staggering number of physicians, agencies, and political bodies as the ideal form of nutrition for infants and toddlers. Breastfeeding is also an excellent way for mothers to bond with their babies and improve their own health at the same time. One might expect an activity with this level of benefits to have a downside, like a prohibitive price tag (everyone should eat healthy, but healthy food is more expensive). Instead, breastfeeding is cheap, even after accounting for the cost of breastmilk expressing equipment ("pumps") and the additional food needed by a breastfeeding mother. Unfortunately, despite the overwhelming benefits of breastfeeding, the law has been slow to recognize the needs of women who want to work and breastfeed.

While a growing minority of states have passed legislation regarding breastfeeding in the workplace, many jurisdictions, including West Virginia, have taken no action. For mothers in jurisdictions lacking any helpful state legislation, claims have to be brought under existing federal legislation, and

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1 See infra Part II.
2 See infra Part II.
3 See infra notes 180, 181, and accompanying text.
4 See infra Part V.
these attempts have been very unsuccessful. As discussed below, claims of discrimination and claims for accommodation brought under Title VII and the Americans with Disabilities Act ("ADA"), respectively, have been widely rejected. The Family and Medical Leave Act would seem to be the source of an appropriate remedy, but it only allows for twelve weeks of unpaid leave, and this amount of time is woefully inadequate as women are widely encouraged to feed their infants only breastmilk for at least the first six months of life.

The lack of legislation in West Virginia is especially discouraging. The number of West Virginia women who initiate breastfeeding and continue to breastfeed for at least six months are much lower than the national averages. The state is consistently ranked among the worst in the nation for health and poverty, and an increase in breastfeeding could be a factor in reversing both trends. Given the health and economic benefits of breastfeeding, the West Virginia legislature needs to do its part by requiring employers to accommodate the needs of breastfeeding employees.

The purpose of this Note is two-fold: (1) to discuss the various arguments available for making the accommodation of breastfeeding employees a requirement and (2) to encourage the passage of legislation to benefit breastfeeding employees. Part II summarizes the benefits of breastfeeding and the difficulties and needs of women who want to continue breastfeeding after returning to work. Part III analyzes the various legal ways in which accommodation in the workplace can be achieved. First, in theory, accommodation could be obtained through an argument that breastfeeding is covered under Title VII as amended by the Pregnancy Discrimination Act (PDA) of 1978. This argument takes two forms: (1) forcing breastfeeding into the existing language of the PDA and (2) persuading courts to focus on the congressional intent behind the passage of the PDA. However, since both of these arguments have been made and largely rejected, other possibilities must be explored.

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5 See infra Part III.
6 29 U.S.C. § 2612(a)(1)(A) (2006). In addition to only providing twelve weeks of leave, the Act only applies to employers with fifty or more employees. Furthermore, to become eligible, employees must work for the company at least twelve months full-time. 29 U.S.C. § 2611(2)(A)(i)-(ii). By comparison, the benefits provided by analogous legislation in other countries are often much more generous. For example, at one extreme, Sweden’s parental leave legislation allows 480 days of paid leave. See SWEDISH INSTITUTE, GENDER EQUALITY IN SWEDEN (2007), available at http://www.sweden.se/upload/Sweden_se/english/factsheets/SI/SI_FS82q_Gender_equality_in_Sweden/Gender_equality_in_Sweden_FS82q_Low.pdf.
7 See infra notes 15, 16 and accompanying text.
8 See infra notes 175, 176, 185-188 and accompanying text.
9 See infra note 179 and accompanying text.
11 See infra Part III.
Another potential avenue to employer liability under Title VII is through the Act's anti-retaliation provision. Courts interpreting the anti-retaliation provision of Title VII require plaintiffs to prove that the conduct to which the employer allegedly retaliated was based on a reasonable belief that the employer violated Title VII. The biggest hurdle to a breastfeeding plaintiff's prima facie case would be proving a reasonable belief that an employer who denied breastfeeding accommodations violated Title VII, especially given the courts' aversion to breastfeeding discrimination claims under Title VII. However, an argument could be made that such a belief is reasonable in light of the increasing amount of state breastfeeding legislation and the introduction of two important federal bills.

Part IV discusses the unique possibility of requiring accommodation under the West Virginia Human Rights Act. Unfortunately, the argument depends upon a classification of pregnancy and breastfeeding as disabilities. However, if the argument was successful, the benefits to mothers and infants would outweigh the cost of making the unfortunate classification. Finally, in Part V, the Note concludes with a survey of current state legislation and an encouragement to the West Virginia legislature to pass strong breastfeeding legislation to help improve the health and well-being of the state.

II. BENEFITS OF BREASTFEEDING; NECESSARY WORKPLACE ACCOMMODATIONS

Breastfeeding is the most natural and nutritious way for mothers to feed their babies. In the words of Dr. William Sears, a prolific and well-known pediatrician, "human milk truly is the gold standard when it comes to infant nutrition." The World Health Organization declares breastfeeding "the ideal way of providing young infants with the nutrients they need for healthy growth and development" and encourages exclusive breastfeeding for the first six months. The American Academy of Pediatrics officially proclaims that "[t]he benefits of

13 For state legislation, see infra Part V. For federal bills, see infra notes 59-62 and accompanying text.
14 WILLIAM SEARS & MARTHA SEARS, THE FAMILY NUTRITION BOOK 232 (1999) [hereinafter SEARS]. Dr. Sears and his wife Martha are two of the leading proponents of the "attachment parenting" theory, which emphasizes the formation of close emotional bonds with children at an early age and includes breastfeeding as an integral part. Dr. Sears is the author of over thirty parenting books, including THE BREASTFEEDING BOOK (2000). See also LA LECHE LEAGUE INTERNATIONAL, THE WOMANLY ART OF BREASTFEEDING 6 (7th rev. ed. 2004) [hereinafter LA LECHE] ("When you breastfeed your baby, you're providing him with the best possible infant food. No product has ever been as time-tested as mother's milk.").
breastfeeding are so numerous that the Academy strongly encourages the practice during the first six to twelve months of life.\textsuperscript{16}

These endorsements are well justified. Studies have suggested that breastfeeding results in a decrease in the chances of sudden infant death syndrome during the first year of life.\textsuperscript{17} Breastfed babies are less likely to contract a wide variety of diseases and infections like the flu and strep throat.\textsuperscript{18} Discussing the immunological defenses conferred by breast milk, Dr. Sears writes: "[h]uman milk is more than food. It’s a complex living substance, like blood, with a long list of active germ-fighting ingredients. These help protect babies against all kinds of infections, including ear infections, respiratory illnesses, and diarrhea."\textsuperscript{19} But the health benefits of breastfeeding are not limited to a person’s early years. Studies indicate that adults who were breastfed enjoy lower risks of contracting type 1 and type 2 diabetes, lymphoma, leukemia, and Hodgkin diseases.\textsuperscript{20} Studies also indicate a reduced risk of becoming overweight and suffering from asthma.\textsuperscript{21} Breastfeeding has even been connected with an improved level of cognitive development.\textsuperscript{22 25}

The benefits of breastfeeding also extend to the mother. Studies have shown that benefits to the mother can include a reduction in the amount of bleeding that typically follows childbirth, known as postpartum bleeding, which can otherwise last for almost two months.\textsuperscript{23} The benefits to the mother also include a decreased risk of breast cancer and ovarian cancer.\textsuperscript{24} Studies even suggest a possible decrease in the chances of hip fractures and osteoporosis in the mother’s post-menopausal period.\textsuperscript{25}

Unfortunately, barriers exist for women who want to work and breastfeed. This problem is especially unfortunate when one considers that the effort required of most employers to provide the necessary accommodations will usually be quite minimal. The basic necessary accommodation is simply time to express or pump breastmilk. As a matter of biology, lactating mothers cannot go without breastfeeding or pumping for an eight-hour shift and then hope to

\textsuperscript{16} \textit{La Leche}, supra note 14, at 9.

\textsuperscript{17} 115 No. 2 \textsc{Am. Acad. of Pediatrics}, \textsc{Pediatrics} 496 (2005) [hereinafter \textsc{Pediatrics}], available at http://aappolicy.aappublications.org/cgi/reprint/pediatrics;115/2/496.pdf.

\textsuperscript{18} \textit{Sears}, supra note 14, at 239.

\textsuperscript{19} \textit{Id.} at 238-239.

\textsuperscript{20} \textsc{Pediatrics}, supra note 17, at 496-97.

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} \textit{Id.} at 497. A study published in the \textit{Archives of General Psychiatry} in May 2008 compared the IQ scores and teacher evaluations of thousands of six-year olds and found that the children who were breastfed exclusively for a prolonged period scored several points higher on IQ tests and were rated slightly better by teachers on reading and writing. Breastfeeding and Child Cognitive Development, http://archpsych.ama-assn.org/cgi/content/short/65/5/578.

\textsuperscript{23} \textsc{Pediatrics}, supra note 17, at 497.

\textsuperscript{24} \textit{Id.}; see also \textit{La Leche} supra note 14, at 7.

\textsuperscript{25} \textsc{Pediatrics}, supra note 17, at 497; see also \textit{La Leche} supra note 14, at 7.
continue breastfeeding for any significant amount of time.26 The female body’s production of breastmilk is a supply and demand system.27 Childbirth induces the first supply, but further production only occurs in response to sucking – whether by a child or a breast pump.28 This means that a woman’s supply of breastmilk will literally dry up if she is unable to nurse or pump for periods of eight hours or more for several consecutive days.29

Further important accommodations might also include refrigerator space to store the expressed milk and a private location for pumping. For the vast majority of employers, these accommodations will be easy to make. Many places of employment already have a refrigerator available to employees. Additionally, many work locations have at least one vacant room or office that can be kept private for fifteen to twenty minutes while the employee pumps.

Some employers may fear an unnecessary loss of productivity. However, even if extra break time is required, the employer might actually find that the accommodations lead to an increase in productivity.30 A mother who is able to continue breastfeeding her child because her employer made the necessary accommodations might be more positive at work and, thus, more productive.31 Many employers already recognize that providing accommodations is a great way to retain good employees and keep those employees happy and productive.32 One such employer is Meadowbrook Insurance Group.33 In 2005, when Meadowbrook built a new branch office, it went so far as to include two “lactation” rooms with couches and chairs so new mothers had a comfortable place to pump in privacy.34 The vice president of human resources explained the company’s policy of accommodation: “[I]n order for us to retain quality people who already have a proven track record, we need to help them balance their work and personal lives . . . [i]t’s a win-win. We’ll have a more focused employee.”35 Moreover, accommodating employers will find an increase in the productivity of breastfeeding employees for years to come as the medical benefits of breastfeeding will decrease the amount of time off needed to take sick children to the

26 GALE PRYOR & KATHLEEN HUGGINS, NURSING MOTHER, WORKING MOTHER 50 (rev. ed. 2007).
27 Id.
28 Id.
29 In addition to having her supply of breastmilk dry up, a woman who is unable to breastfeed or express for an extended period of time may experience uncomfortable fullness, plugged ducts, and breast infections. LA LECHE, supra note 14, at 151.
31 Id.
33 Id.
34 Id.
35 Id.
doctor's office. Given the minimal demands on most employers that these accommodations would require and the benefits of breastfeeding to children, mothers, and—arguably—employers, the law should encourage breastfeeding by requiring these minimal accommodations. 

III. TITLE VII

A. Coverage under the Pregnancy Discrimination Act (PDA)

It might seem that accommodation for breastfeeding employees could be obtained through Title VII. After all, Title VII prohibits discrimination on the basis of sex, and only women can breastfeed. However, past attempts to include breastfeeding have been unsuccessful. Prior to these attempts, there was a similar struggle to include pregnancy-related classifications. Two 1970s Supreme Court cases highlighted this struggle and provided the motivation for Congress to pass the PDA. In Geduldig v. Aiello, the Court upheld the exclusion of pregnancy-related disabilities from California's disability insurance program. The Court reasoned that the exclusion was not a sex-based classification because, while only women could experience the excluded disabilities, women as a whole were still eligible for the disability benefits. The Court solidified this holding two years later in General Electric Co. v. Gilbert, holding again that an exclusion of pregnancy-related disabilities was not a violation of Title VII. Congress was motivated by these cases to amend Title VII with the PDA in 1978. The PDA provides the following:

36 Newman & Pitman, supra note 30, at 398.
37 Of course, the law should include a reasonableness factor to exempt employers that would suffer undue hardship.
38 The relevant language of Title VII provides: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (2006).
41 Id. at 496-97.
42 Id. at 497 n.20.
43 429 U.S. 125 (1976).
44 Id. at 145-46.
45 Congressional intent to overrule Geduldig and Gilbert was acknowledged by the Court when it decided its first PDA case. In Newport News Shipbuilding & Dry Dock Co. v. EEOC, the Court concluded that "[w]hen Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the Gilbert decision." 462 U.S. 669, 678 (1983).
The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected in their ability or inability to work.46

There are two basic ways to argue that discrimination against breastfeeding employees is prohibited under Title VII as a result of the PDA. First, breastfeeding should be considered a “related medical condition.” However, this argument has been rejected by several courts.47 Second, Title VII prohibits breastfeeding discrimination because excluding it from coverage is contrary to the stated congressional intent behind the PDA amendment to Title VII. To the first argument, courts have typically responded that breastfeeding is a choice made by the mother, while the phrase “related medical conditions” should be limited to “incapacitating medical conditions for which medical care or treatment is usual and normal.”48 These decisions have been critiqued by scholars who point to the natural, biological occurrence of lactation following childbirth and the multitude of medical benefits accruing to the mother who breastfeeds, especially its tendency to help the mother’s body return to its pre-pregnancy condition.49 Unfortunately, even if a court finds this argument convincing, the claim could still be defeated by a technical—though legitimate—reading of the PDA’s second clause.

Recall that after the PDA includes “pregnancy, childbirth, or related medical conditions” into the terms “because of sex” or “on the basis of sex,” it then provides that women affected by these conditions only have to be treated the same as other employees who are not so affected.50 In other words, even if it was agreed that breastfeeding was a “related medical condition,” an employer could argue that the female employee affected by the “condition” was not treated any worse because of the condition than any other employee. For example, assume an employer is obligated to provide at least ten minutes of break time for every four hours of work. For a breastfeeding employee, this may not

50 42 U.S.C § 2000e(k).
be a sufficient amount of time to express or pump breastmilk. Accordingly, the breastfeeding employee might ask for additional break time and be disciplined or terminated as a result. If the employee brought suit, the employer could respond that the action was not taken because the employee wanted to breastfeed, but rather because she made a demand for extra break time, which no employee is permitted to have. Thus, an employer could respond to a PDA challenge by asserting that they simply treated the mother the same as any other employee "not so affected in their ability or inability to work." The burden would then shift back to the employee to prove that the employer's response was a pretext for discrimination; the ideal proof being that other employees demanded more break time without being disciplined or terminated. If such proof was unavailable, many courts would find for the employer, and it must be conceded that such a finding would be based on a fair reading of the statute.

The primary reason for the failure of the argument outlined above is the choice of words used by Congress when it drafted the PDA. Multiple authors have argued that the courts should focus on the intent of Congress and away from whether breastfeeding is a related medical condition to pregnancy, and that courts should also avoid the continued use of Geduldig/Gilbert type reasoning in reference to the second clause. Unless one is completely devoted to a textualist theory of statutory interpretation, these arguments should be quite convincing. The PDA's legislative history actually reveals a degree of congressional shock over the Court's inability to see classifications based on pregnancy as classifications based on sex. For example, one prominent congressman felt the PDA should have been wholly unnecessary. Like several of his colleagues, he

51 It is recommended that mothers pump for 15-30 minutes at least once every three hours. Pryor & Huggins, supra note 26, at 127.

52 This analysis follows the litigation process outlined by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), which provides (1) factors needed for plaintiff's prima facie case, (2) an opportunity for the defendant to offer a legitimate non-discriminatory reason for the employment action, and (3) an opportunity for the plaintiff to respond that the defendant's proffered reason is merely a pretext for discrimination.

53 See, e.g., Diana Kasdan, Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women, 76 N.Y.U. L. Rev. 309, 333-36 (2001) (regardless of whether breastfeeding is a related medical condition to pregnancy, workplace discrimination against breastfeeding women is inconsistent with the purpose of the PDA, which is to "prevent all forms of sex discrimination against women."); Henry Wyatt Christup, Litigating a Breastfeeding and Employment Case in the New Millennium, 12 Yale J.L. & Feminism 263, 279-82 (2000) (stating that the courts' use of Geduldig/Gilbert type reasoning ignores congressional intent behind passage of the PDA).

54 See generally 123 CONG. REC. 10581-10583 (1977) (Remarks of the late Augustus Freeman Hawkins. Rep. Hawkins was California's first black congressman. He served in the House of Representatives from 1962-1990, where his contributions included sponsorship of the equal employment section of the original Title VII.). See also S. Rep. No. 95-331, 95th Cong., 1st Sess. 2-3 (1977), Legislative History at 7-8 ("the bill is merely reestablishing the law as it was understood prior to Gilbert . . . ."); 123 CONG. REC. 29647 ("this bill is simply corrective legislation, designed to restore the law . . . .").
believed that the PDA did not really add anything to Title VII and was simply restoring Title VII to its pre-
*Gilbert* interpretation. Simply put, it should have been clear that pregnancy discrimination was prohibited by Title VII's prohibition against sex discrimination. "It seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy." The Court recognized the intent of Congress in *Newport News Shipbuilding & Dry Dock Co. v. EEOC* when it concluded that with the passage of the PDA, Congress "unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision."

The intent of Congress in passing the PDA should lead to the conclusion that breastfeeding is also covered under Title VII. As quoted above, the purpose of the PDA was to restore the purpose of Title VII as it related to sex discrimination. The drafters of Title VII assumed that a prohibition on sex discrimination necessarily included a prohibition on all discrimination against women based on conditions unique to women, such as pregnancy. Why then would Title VII's prohibition against sex discrimination not include protection against breastfeeding discrimination when the ability to breastfeed is just as unique to women as pregnancy and childbirth?

The answer, of course, is that Title VII should be read to include a prohibition against breastfeeding discrimination. The courts have not been open to such an argument. However, Congress might be close to stepping in again. Just as Congress had to intervene with the PDA to restore Title VII, it appears Congress might be close to intervening again on the issue of breastfeeding. Like the courts of the 1970s, the courts of recent years have been unwilling to recognize protection for a condition unique to the female sex. Accordingly, a bill was introduced by New York Representative Carolyn B. Maloney on May 9, 2007, that would amend the PDA to explicitly include breastfeeding. On the same day, a bill entitled the Help America Act was introduced by Iowa Senator Tom

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55 123 CONG. REC. 10581-10583.
56 *Id.* at 10581.
58 123 CONG. REC. 10581 (remark during consideration of the PDA by Rep. Hawkins, one of the original sponsors of Title VII) ("[The PDA] does not really add anything to Title VII as I and, I believe, most of my colleagues in Congress when title VII was enacted in 1964 and amended in 1972, understood the prohibition against sex discrimination in employment.").
59 H.R. 2236, Thomas (Library of Congress), http://thomas.loc.gov/billsearch/html (search "breastfeeding"; then follow "H.R. 2236" hyperlink; then follow "text of legislation" hyperlink) (last visited Feb. 28, 2009). The bill contains findings on the prevalence of women with infants and toddlers in the workforce and the benefits of breastfeeding. The bill then proposes the addition of "including lactation" after "childbirth" and an explanation that lactation includes both feeding a child directly from the breast and expressing breastmilk. Finally, the bill proposes a tax credit to employers who accommodate breastfeeding employees.
Harkin. Among the Act's many measures aimed at improving the health of children are sections requiring employer accommodations for breastfeeding mothers. While both bills are currently in committee, the introduction alone signals the possibility of another restoration of Title VII, as well as congressional recognition of the importance of breastfeeding and its interest in promoting breastfeeding by requiring affirmative accommodations by employers. These developments, in conjunction with state legislation of the same order, could be enough to persuade a court into reassessing the current judicial trend.

B. Coverage under the Anti-Retaliation Provision

Another possible avenue for recovery on a breastfeeding discrimination claim under Title VII is through a claim for unlawful retaliation. Like most anti-discrimination laws, Title VII has an anti-retaliation provision. Courts have agreed that to state a prima facie case for retaliatory discharge a plaintiff must establish that (1) she engaged in "protected conduct," (2) she suffered "adverse" employment action, and (3) there is a causal link between the protected activity and the adverse action. There are two types of protected conduct contemplated by the statute: participation and opposition. The participation clause is limited to official involvement in a Title VII proceeding, such as filing a claim or offering testimony. Since the participation clause is limited in this way, and comparatively well-defined, it does not come up very often.

61 Id. The bill proposes a task force to investigate issues related to breastfeeding in the workplace and authorizes the Secretary of Labor to formulate required accommodations and remedies.
63 For state legislation, see infra Part V.
64 42 U.S.C. § 2000e3(a) (2006). "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because [she] has opposed any practice, made an unlawful employment practice by this subchapter, or because [she] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Id.
67 Id.
68 When it does come up, the conduct has been given nearly absolute protection. See, e.g., Glover v. S.C. Law Enf. Div., 170 F.3d 411 (4th Cir. 1999) (discharge following deposition testimony was unlawful retaliation even though testimony was allegedly unreasonable) (quoting Love v. Re/Max of America, Inc., 738 F.2d 383, 385 (10th Cir. 1984)); Clover v. Total Sys. Serv. Inc., 176 F.3d 1346 (11th Cir. 1999) (regardless of reasonable belief, employee participation in a sexual harassment investigation was protected conduct under the participation clause).
meaning of “opposition conduct,” on the other hand, is much broader. The term is left undefined by the statute. The statute simply states that it is unlawful to discriminate when the employee “has opposed any practice, made an unlawful employment practice by this subchapter.”69 Opposition conduct in the context of breastfeeding discrimination might be as simple as an informal complaint to a boss who denies extra break time or a private location for pumping. It could also include the organization of other breastfeeding employees with similar complaints.

The primary difficulty for a breastfeeding employee alleging retaliation would be establishing the first element of the prima facie case. Courts have held that to show involvement in statutorily protected opposition conduct, the facts alleged must at least demonstrate that the plaintiff had a reasonable good faith belief, and possibly an objectively reasonable belief, that the opposed practice violated Title VII.70 Therefore, a problem would clearly arise in the breastfeeding context, as a plaintiff might be required to show an objectively reasonable belief that an unaccommodating employer has violated Title VII when all courts have routinely struck down such claims.71

In a retaliation case from the Eleventh Circuit, Harper v. Blockbuster Entertainment Corp.,72 the plaintiffs alleged unlawful retaliation in response to their opposition to an employer’s grooming policy, which allowed long hair on women but not on men.73 The Eleventh Circuit affirmed dismissal of the case because every court in the country had held that such policies were not a violation of Title VII.74 The plaintiffs pled ignorance, but the court charged them with knowledge of the law, which made their opposition to the policy unreasonable.75 The court held that not charging them with substantive knowledge of the law would “eviscerate” the objective component of its standard.76

70 Compare Trent v. Valley Elec. Ass’n Inc., 41 F.3d 524 (9th Cir. 1994) (plaintiff has to show a reasonable belief that the employer conduct was a violation), and Robbins v. Jefferson County Sch. Dist. R-1, 186 F.3d 1253, 1258 (10th Cir. 1999) (“opposition activity is protected when it is based on a mistaken good faith belief that Title VII has been violated.”), abrogated on other grounds by Boyer v. Cordant Technologies, Inc., 316 F.3d 1137 (10th Cir. 2003), with Harper v. Blockbuster Entm’t Corp., 139 F.3d 1385, 1388 (11th Cir. 1998) (belief must be “objectively reasonable.”) and Dea v. Washington Suburban Sanitary Comm’n, No. 97-1572, 2001 U.S. App. LEXIS 13355, at *8-15 (4th Cir. June 15, 2001) (belief must be objectively reasonable in light of the facts and the record).
71 See supra Part III(A).
72 139 F.3d 1385 (1998).
73 Id. at 1387.
74 Id. at 1388. The court also noted that the EEOC had even concluded in its compliance manual that “successful litigation of male hair length cases would be virtually impossible.” Id.
75 Id. at 1388 n.2.
76 Id.
In contrast to Harper, the Seventh Circuit, in Alexander v. Gerhardt Enterprises,77 indicated that there is not an objective component to the analysis.78 In Alexander, the court upheld a retaliation claim by a terminated employee who sent a memorandum to management expressing discontent over a single racist comment.79 If the Seventh Circuit had used an objective component and charged the plaintiff with knowledge of the law, it probably would have found her opposition unreasonable. The plaintiff’s underlying Title VII claim was for racial discrimination creating a hostile work environment.80 To make this claim there must be a showing, inter alia, that the conduct was severe or pervasive,81 with the disjunctive arguably indicating that a single incident could be sufficiently severe to create a claim. However, most courts have been very reluctant to find actionable harassment for single incidents, no matter how offensive, especially when the incident is only verbal, as it was in Alexander.82 Nevertheless, the Seventh Circuit did not charge the plaintiff with substantive knowledge of this area of the law. In fact, it simply relied on the plaintiff’s memorandum and testimony to find that the plaintiff had a reasonable belief that the comment was illegal.83 The court stated that this was enough to indicate that she had a “good faith belief” that the comment was actually illegal.84 Thus, the standard followed by the Seventh Circuit only requires a subjective reasonable belief and avoids charging employees with substantive knowledge of the law.

Even if the Eleventh Circuit’s objective standard is followed, it may not be fair to conclude that a breastfeeding employee who opposes a lack of accommodation is objectively unreasonable. While the courts have uniformly rejected breastfeeding claims under Title VII so far, the number of states passing laws requiring accommodation has significantly increased over recent years and two breastfeeding bills have been introduced in Congress.85 Perhaps, in light of these developments, the average, relatively well-informed employee might reasonably believe that the law governing their employer does, in fact, make a fail-

77 40 F.3d 187 (7th 1994).
78 Id. at 195.
79 Id. at 190. The plaintiff was the only black person at a meeting when the word “nigger” was used, though it was not apparently directed at her. Id.
80 Id. at 191.
82 See, e.g., EEOC v. Champion Int'l. Corp., 1995 U.S. Dist. LEXIS 11808 (N.D. Ill. 1995) (finding single incident insufficiently severe when employee exposed himself to plaintiff and said, “suck my dick, you black bitch”). Cf., Daniels v. Essex Group, Inc., 937 F.2d 1264, 1274 n.4 (7th Cir. 1991) (recognizing that a single incident could be sufficient but providing the example of a black worker’s colleagues showing up to work wearing hoods and robes and proceeding to burn a cross on the premises).
83 Alexander, 40 F.3d at 196.
84 Id.
85 For state legislation, see infra Part V. For proposed federal legislation, see supra notes 59-62 and accompanying text.

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ure to accommodate illegal. Even if the employee is not so well-informed, might they be "charged" with substantive knowledge of the legislative movement? If an employee is to be charged with knowledge of court decisions, why not charge them with knowledge of recently proposed and enacted legislation? At the least, an argument could be made—even in a jurisdiction like the Eleventh Circuit—that opposition conduct, such as complaining about inadequate break time or the lack of a private location to pump, is protected under Title VII from retaliation.

Assuming the first element of the prima facie case could be met, the second element should be significantly easier given the Supreme Court's recent decision in *Burlington Northern & Santa Fe Railway Co. v. White*. For the second element of plaintiff's prima facie case, she must show that she suffered an adverse employment action. In *Burlington*, the Supreme Court clarified the definitions of retaliation and adverse employment action. The opinion states that Congress must have wanted the meaning of the term "discrimination," as it is used in the anti-retaliation provision, to be more expansive than the term's meaning in the basic employment section of Title VII. The types of discrimination prohibited in the basic employment section are limited to employment-related actions and conditions like hiring, firing, and "compensation, terms, conditions, or privileges of employment." In contrast, the term "discrimination" in the retaliation provision contains no such limitations. Therefore, the Court reasoned that the retaliation provision is not limited to actions affecting employment terms and conditions.

The protections of the anti-retaliation provision are broader than the protections of the employment discrimination provisions. Based on this understanding, the Court in *Burlington* upheld the recovery of the plaintiff, who had been transferred to a less desirable position but with no cut in pay. If retaliation was narrowly defined, then what protection would employees have from the prospect of unofficial deteriorations in their working conditions? Accordingly, the Court held that an act of retaliation in response to an employee's opposition activities is simply any act that might "dissuade[] a reasonable worker from making or supporting a charge of discrimination." While the Court made an exception for trivial harms, it would seem that under this definition of retaliation, a breastfeeding employee could easily satisfy the second element with a showing that her opposition conduct resulted in even a subtle change in her working conditions, for instance, denial of a private location for pumping.

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87 Id. at 2412.
88 Id. at 2411-12.
89 Id. at 2412-13.
90 Id. at 2414.
91 Id. at 2409, 2418.
92 Id. at 2415 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).
Finally, to complete the prima facie case, a retaliation plaintiff must establish a causal link between the protected opposition conduct and the adverse employment action. This element is easily met as long as the opposition conduct was made known to the employer. Obviously, if the employer was not aware of the opposition conduct, then the adverse employment action suffered by the plaintiff could not have been connected. Accordingly, the last element of the prima facie case would likely be met, as the most likely opposition conduct to be at issue in the context of breastfeeding accommodations would be a complaint to the employer.

But the analysis does not end there. The employer would then have an opportunity to respond with a legitimate non-discriminatory reason for the adverse action. Employers typically respond that the employee's opposition conduct was unreasonable in the sense that it illegally hampered business or demonstrated disloyalty. However, tactful opposition framed as an attempt to do the health conscious thing for a child should not, and probably would not, support an employer charge of unreasonableness. Most cases in which a finding of unreasonableness has been affirmed have involved quite disruptive and aggravating behavior. Finally, the so-called "disloyalty doctrine" could be abandoned. At least two courts have expressed doubt over whether mere disloyalty should constitute unreasonable opposition, and for good reason; every form of opposition is disloyal in some sense.

IV. ACCOMMODATION IN WEST VIRGINIA

A. Definition of Disability

Although arguments for coverage under Title VII exist and new federal legislation has been introduced, the current judicial trend requires exploration of other possible ways to achieve accommodation for breastfeeding employees. The best response is for state legislatures and Congress to intervene. This con-

93 The analysis here follows the outline provided by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
94 See, e.g., Robbins, 186 F.3d at 1259 (plaintiff acted unreasonably by being "combative" and by making "frequent, voluminous, and sometimes specious complaints" and being "antagonistic" toward her superiors), abrogated on other grounds by Boyer v. Cordant Techs., Inc., 316 F.3d 1137 (10th Cir. 2003); Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 256 (4th Cir. 1998) (plaintiff acted unreasonably by removing and copying documents from her boss's desk and mailing the copies to a coworker to assist in the coworker's discrimination case against the employer); Jennings, 864 F.2d at 1370 (plaintiff acted unreasonably by organizing behind boss's back in order to sabotage a presentation before his superiors); McDonnell Douglas, 411 U.S. at 794 (plaintiff acted unreasonably by participating in a "stall-in" on the main roads leading to the plant).
95 Id.
96 Jennings, 864 F.2d at 1373; EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1014 (9th Cir. 1983).
clusion is not new in the academic literature. However, there might be a way for women in West Virginia to require accommodations from employers in the event that Congress or the West Virginia legislature does not adopt a strong act, or in the meantime before such an act is adopted. Unfortunately, this possibility involves the initial argument that pregnancy is a disability. Then, if pregnancy can be established as a disability under West Virginia law, a subsequent argument can be made that breastfeeding is a natural manifestation of pregnancy that should also be covered. While this argument is not possible under the ADA, it is arguably possible under the West Virginia Human Rights Act regulations, which can be read to include major temporary disabilities, such as pregnancy, as covered disabilities.

Given the possibility of coverage under the West Virginia Human Rights Act but not the ADA, an employer might argue that the ADA preempts West Virginia’s Act and makes it invalid under the Supremacy Clause. To determine whether state law is preempted we must look to the intent of Congress. Congressional intent to preempt state law can be found in several ways. One, Congress can explicitly state that it intends to preempt state law. Two, intent can be inferred from an act that has “left no room” for state law. Finally, intent can be inferred when a state law conflicts with a federal act either because “compliance with both federal and state regulations is a physical impossibility,” or because the state law creates “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Upon analysis, it is clear that none of these possibilities applies to preempt the relevant disability provisions of the West Virginia Human Rights Act. The ADA itself states that it cannot be construed to limit any state remedies that provide “greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter,” and the West Virginia regulations appear to provide greater protection by including pregnancy as a major temporary disability. Furthermore, the allowance for greater protection certainly does not conflict with the stated purposes of the ADA, which include the primary goal of eliminating discrimination against individuals with disabilities.

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97 See, e.g., Reiter, supra note 49, at 22.
98 U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...”).
100 Id.
103 Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
The difference between the ADA and the West Virginia act is not in the basic definition of a disability, but in the regulations promulgated by each to explain and implement the definition. The basic definition under both acts provides that a disability is one or more mental or physical impairments that substantially limit one or more of a person's major life activities. Obviously, pregnancy would have to be considered a physical impairment, as opposed to a mental impairment. The West Virginia regulations define physical impairment as: "any physiological . . . condition . . . affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory; speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine." 107

The dictionary defines "affect" to mean "have an influence on." 108 Since the regulations simply provide that a physical impairment is "any" physiological condition "affecting one or more" of the listed body systems, it is only necessary to show that pregnancy has an influence on one of the named body systems. In fact, pregnancy affects several of the named body systems. For example, pregnancy can affect the endocrine system, which consists of glands throughout the body that secrete hormones into the blood stream. 109 Pregnancy can cause several disorders in the endocrine system, including gestational diabetes, 110 which can result when hormones released by the placenta during pregnancy limit the actions of the insulin hormone. 111 Pregnancy can also cause disorders in the neurological system, including muscle disorders such as muscle cramps, which are extremely common during the third trimester when first waking up. 112

Assuming that pregnancy is a physical impairment, the question then becomes whether it "substantially limits" a major life activity. Before reaching the issue of what constitutes a major life activity, it is necessary to define and consider whether pregnancy "substantially limits." In the federal realm, among the factors that must be considered are the duration of the impairment and its permanent or long term impact. 113 This is not the law in West Virginia. The

109 Id. at 454.
113 29 C.F.R. § 1630.2(j)(2)(ii)-(iii) (2008). This requirement was suggested by the EEOC in its regulations to implement the provisions of the ADA and was adopted by the Supreme Court in Toyota Motor Mfg. Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002).
West Virginia regulations do not require consideration of the permanency of impairments. Instead, the West Virginia regulations provide the following guideline: “substantially limits does not include or mean minor temporary ailments or injuries.”  Of equal importance, there is no provision stating that the meaning of substantially limits does not include or mean major temporary ailments or injuries, thus leading one to conclude that the definition does include major temporary ailments.

While pregnancy is certainly a temporary ailment, a question could be raised over whether it qualifies as a major temporary ailment. According to the regulations, minor temporary ailments include “colds or flu, or sprains or minor injuries.” Given the effect that pregnancy and childbirth have on the functioning of the body systems as discussed above, it should be clear that pregnancy and childbirth are far more significant than a cold or a sprained ankle. It can be argued, therefore, that pregnancy is a major temporary ailment that meets the definition of “substantially limits” provided by the West Virginia regulations.

The definition of substantially limits provided in the West Virginia regulations is clear and unambiguous. If the Human Rights Commission wanted to state that an impairment had to be permanent in order to be considered substantially limiting it could have easily done so. Likewise, if the Commission wanted to state that temporary ailments – major or minor – were insufficient it could have easily done so. Instead, it chose to qualify the phrase “temporary ailments or injuries” with the word “minor.” The clear implication is the exclusion of minor temporary ailments and the inclusion of major temporary ailments. “Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.” Since the exclusion of only minor temporary ailments is clear and unambiguous, it can be reasonably argued that the inclusion of major temporary ailments is also clear and unambiguous. There is no need to resort to any existing agency interpretation, in pari materia, or any other method of statutory interpretation or construction.

Finally, the question then becomes whether pregnancy, as a major temporary ailment, substantially limits a “major life activity.” The regulations define major life activities as “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, transportation, and adapting to housing.” Only “one or more” of these functions must be “substantially limited.” In the case of pregnancy, it might have to be conceded that the only limited function is working.

114 W. VA. CODE R. § 77-1-2.5.3 (1994) (emphasis added).
115 Id.
118 W. VA. CODE R. § 77-1.2.6 (1994).
119 W. VA. CODE § 5-11-3(m)(1).
While the West Virginia regulations currently contain no specialized definition of "substantially limits" when the major life activity is working, the EEOC regulations do, and the possibility of West Virginia adopting the federal regulations at some point warrants their consideration here. Under the federal regulations, for a person to successfully claim that the major life activity of working has been substantially limited, the person must demonstrate that they have been limited in their ability to perform a broad class of jobs.120 The federal regulations specifically state that "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."121

This regulation was discussed by the Supreme Court in Sutton v. United Air Lines, Inc.122 The Court addressed an ADA claim by rejected commercial airline pilots suffering from severe myopia.123 The ailment placed them below the airline's required visual acuity for pilots and was the reason for their rejection.124 As a result, the plaintiffs claimed that their poor vision substantially limited them in the major life activity of working.125 Based in part on the EEOC regulations, the Court held in favor of the airline because the plaintiffs' claims were specific to the job of commercial airline pilot.126 The court found that a claim based on a disability that substantially limits the major life activity of working must state an inability to perform in a broader class of jobs than commercial airline pilot.127 The plaintiffs in Sutton could wear glasses and still perform other jobs in the industry, such as flight instructor, third pilot, or even non-commercial pilot.128

Unlike the plaintiffs in Sutton, a pregnant woman can easily show that she is prevented from performing in a broad class of jobs. It is recommended by most physicians that pregnant women limit the amount of lifting they do, which can, of course, significantly limit the ability to perform in a multitude of jobs.129 In addition, pregnant women are also advised against sitting or standing for long periods of time and twisting or turning at awkward angles, especially in connection with lifting.130 All of these common work activities can contribute to medical problems like back pain, which is especially common towards the end of the

121 Id.
123 Id. at 471.
124 Id.
125 Id.
126 Id. at 493.
127 Id.
128 Id.
130 Id.
pregnancy term when the back becomes more vulnerable. Accordingly, it should be relatively easy for a pregnant woman to show that she is substantially limited in the major life activity of working since she is advised against performing activities that are common in a broad class of jobs. Therefore, each element of the definition of disability—physical impairment, substantially limits, and major life activity—as they are defined by the West Virginia regulations, can be met by a pregnant employee.

It should be emphasized here that the West Virginia regulations discussed in this Note are binding upon West Virginia employers with the same force and effect as law. This is especially true in West Virginia given the ramifications of State ex rel. Barker v. Manchin. This case partially overruled a 1976 amendment to West Virginia’s Administrative Procedures Act that required agencies to submit rules and regulations to a legislative rule-making review committee, which was given exclusive veto power over the submissions. The court declared the granting of the exclusive veto power to the committee to be an unconstitutional violation of the separation of powers doctrine, since the governor has the exclusive power to veto. As a result, the requirement on agencies to submit all rules and regulations to the committee still stands, but the committee must now have a bill drafted authorizing promulgation of the rule and present it to both houses, and its “veto power” is reduced to a “recommendation.” The net result is the unique situation in which every administrative rule or regulation in West Virginia is passed by both houses of the legislature and signed by the governor like a regular law. Thus, the regulations discussed above, which appear to make pregnancy a disability, are clearly binding upon West Virginia employers.

B. Coverage for Breastfeeding

Assuming pregnancy qualifies as a disability under the West Virginia regulations, the next issue is making the jump to breastfeeding. This will be necessary since an employer who is unwilling to accommodate could certainly argue that it should be under no obligation to accommodate breastfeeding, which, standing alone, does not fit the definition of a disability. Thus, how can it be argued that an employer in West Virginia has an affirmative duty to

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131 Id. Ligaments throughout the body, including the back, relax to allow for easier passage of the baby, abdominal muscles are stretched forcing greater reliance on the back, and the woman is increasingly forced to adjust her posture to compensate for the weight of the child. Id.


133 Id.

134 Id.


136 It seems clear that the act of breastfeeding is not a physical or mental impairment as defined by the West Virginia regulations, nor does it substantially limit any of the major life activities, even working.
accommodate a breastfeeding employee? In order to make this jump, one must first avoid the common notion that any special legal rights provided to a new mother should end as soon as possible after birth.\textsuperscript{137} When considering the act of breastfeeding, such a notion is not only contrary to good public policy regarding the health and growth of children, but also biology.\textsuperscript{138} Exclusive breastfeeding for at least six months after birth has significant and proven benefits for both the child and the mother.\textsuperscript{139} Furthermore, breastfeeding is not simply another choice that a mother makes about raising her child, like which brand of diaper to use or when to start potty training. Consider the following argument:

Childbirth automatically induces lactation, and for good reason: breast milk is by far the healthiest form of nourishment for newborns, conferring immunities against many diseases. Breastfeeding also lowers the woman's risk of breast and ovarian cancers, diabetes, and post-menopausal bone loss, and helps reduce unhealthy pregnancy-related weight gain. Thus, the law could, but currently does not, view breastfeeding as the final stage of the pregnancy cycle, readjusting the hormonal balance of the woman's body and continuing the developmentally crucial process of nourishment and bonding that began in the womb.\textsuperscript{140}

Thus, an argument can be made that breastfeeding is more than simply a good choice; it is a natural manifestation of pregnancy and childbirth, and accordingly, it should be covered just as they are. Support for this argument can be found not only from a biological and public policy standpoint but also from the legal reasoning of Judge Posner in \textit{Vande Zande v. State of Wisconsin Department of Administration.}\textsuperscript{141}

In \textit{Vande Zande}, The plaintiff was paralyzed from the waist down because of a tumor of the spinal cord.\textsuperscript{142} This paralysis made her susceptible to pressure ulcers, which required treatment for several weeks at home.\textsuperscript{143} The parties agreed that her paralysis was a covered disability, but the plaintiff wanted the employer to provide a desktop computer for her home so she could work while receiving treatment for the pressure ulcers.\textsuperscript{144} While the court ulti-
mately found that such an accommodation was unreasonable, it rejected the defendant’s argument that there was no duty to accommodate the pressure ulcers. The defendant argued that the pressure ulcers were only “intermittent, episodic impairments” and thus not covered by the federal definition of disability that requires permanency.145 In response, Judge Posner wrote: “an intermittent impairment that is a characteristic manifestation of an admitted disability is, we believe, a part of the underlying disability and hence a condition that the employer must reasonably accommodate.”146 Judge Posner went on to note that often the most disabling aspect of a disability is an intermittent manifestation of the underlying disability.147 This fact is perhaps best illustrated when one considers persons infected with the AIDS virus.148 As Judge Posner points out, having the virus is the disability, but the diseases suffered as a result of the weakened immune system are the truly disabling aspects.149 He states that it would be a “very odd interpretation of the law” to say that employers were not required to accommodate such natural manifestations of a disability.150

Therefore, an argument can be made that employers in West Virginia should have an affirmative duty under existing law to accommodate breastfeeding employees. Starting first with the argument that pregnancy is a covered disability based on the reasonable interpretation of the Human Rights Commission’s definition of “substantially limits,” it can then be argued that breastfeeding is a natural manifestation of that disability. The need of a mother to either breastfeed her child or express milk can be considered an “intermittent, episodic” manifestation of pregnancy and childbirth. As such, the activity can be considered a part of the underlying “disability” of pregnancy and childbirth and therefore a condition that employers in West Virginia must reasonably accommodate.

West Virginia employers in general can only avoid a requirement of accommodation if they can show that the accommodation would be unreasonable to them by creating an undue hardship.151 “Undue hardship” is defined in the regulations as “an action requiring significant difficulty or expense,” with consideration given to the size and nature of each particular employer and the nature and cost of the accommodations needed.152 However, in the context of

145 Id. at 544-45.
146 Id. at 544; see also, Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1491 (D. Colo. 1997) (dismissing a Title VII claim because breastfeeding is not a “related medical condition” but also stating that breastfeeding and child weaning “may be ... natural concomitants of pregnancy and childbirth . . . .”).
147 Vande Zande, 44 F.3d at 544.
149 Vande Zande, 44 F.3d at 543.
150 Id.
151 W. VA. CODE R. § 77-1-4.6 (1994).
152 Id. at §§ 77-1-4.6.1-3 (1994).
breastfeeding, the accommodations required by a breastfeeding employee would be relatively inexpensive and easy to provide for the large majority of employers. In most cases it would be as simple as providing a little extra break time, a private location, and space in the refrigerator. In fact, these simple provisions have been deemed reasonable by a large and growing minority of states that have passed legislation requiring employers to provide these exact accommodations.

V. STATE LEGISLATION

Since the late 1990s, the number of states to pass laws requiring employers to accommodate breastfeeding employees has increased steadily. Twenty-one states and the District of Columbia currently have at least some form of statute addressing the issue of breastfeeding in the workplace. The statutes come in two basic varieties: (1) "encouraging" accommodation and (2) requiring accommodation. The former approach has been adopted by a minority (six) of the jurisdictions.\(^{153}\) Several of the states opting to merely "encourage" accommodation have at least passed promising language extolling the virtues of breastfeeding in general.\(^ {154}\) Such language is often found accompanying a section regarding breastfeeding in public, but not in the employment context.\(^ {155}\) This tendency reflects a greater desire (or freedom) to protect the right of mothers to breastfeed in public, while the right of women to breastfeed or pump at work—and thereby continue to breastfeed at all, from a biological standpoint—is left unprotected.\(^ {156}\)

Currently, fifteen states and the District of Columbia have laws requiring some level of accommodation.\(^ {157}\) The statutes typically require employers

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\(^{153}\) See GA. CODE ANN., § 34-1-6 (West 2007) (employers "may provide reasonable unpaid break time" and "may make reasonable efforts" to provide a private location) (emphasis added); OKLA. STAT. ANN. tit. 40, § 435 (West 2006) (employers "may provide reasonable unpaid break time" and "may make a reasonable effort" to provide a private location) (emphasis added); TEX. HEALTH & SAFETY CODE ANN. § 165.003 (Vernon's 1995) (employers who accommodate may be designated "mother-friendly"); VA. HOUSE JOINT RESOLUTION 145 (2002) ("encourages employers to recognize the benefits of breastfeeding and to provide unpaid break time and appropriate space for employees to breastfeed or express milk") (emphasis added); WASH. REV. CODE ANN. § 43.70.640 (West 2008) (employers who accommodate may be designated "infant-friendly"); WYO. HOUSE JOINT RESOLUTION 5 (2003) (employers who accommodate are "commended").

\(^{154}\) See, e.g., GA. CODE ANN., § 31-1-9 (West 2002); OKLA. STAT. ANN. tit. 40, § 435 (West 2006).

\(^{155}\) Id.

\(^{156}\) Emily F. Suski, In One Place, But Not Another: When the Law Encourages Breastfeeding in Public While Simultaneously Discouraging it at Work, 12 UCLA WOMEN'S L.J. 109 (2001). There are currently forty states and the District of Columbia with laws specifically protecting the right of women to breastfeed in any public place that they are otherwise authorized to be. Id.

\(^{157}\) See CAL. LAB. CODE §§ 1030-33 (West 2001); 2008 COLO. SESS. LAWS. 106; CONN. GEN. STAT. ANN. § 31-40w (West 2008); D.C. CODE ANN. § 2-1402.81 (LexisNexis 2007); HAW. REV. STAT. § 378-2 (1999) (makes it an "unlawful discriminatory practice . . . [f]or any employer or
to allow employees to pump on their normal breaks and to have additional unpaid break time for pumping if the employee needs the additional time. The statutes also typically require employers to make reasonable efforts towards providing employees a private location for pumping. The statutes often state that the private location must be reasonably close to the employee’s work area and specifically prohibit employers from directing employees to use a bathroom stall.

The state of New York recently enacted a very strong accommodation statute. The Nursing Mothers in the Workplace Act gives employees the right to express breast milk at work and requires employers to make reasonable efforts toward providing a private location. It passed the state Assembly by a unanimous 146 to 0 vote. The state Senate passed the statute and the governor signed it into law less than five months later. The statute’s legislative history contained the following justification:

Court cases have held that the right of an employee to express breast milk at work with adequate facilities to do so is not protected under current federal or state law. Nursing mothers have become an important addition to the work force in the last decade. Without the ability to express milk while at work, a mother’s milk begins to harden in her breast causing pain and extreme discomfort. If a mother goes for too long without expressing milk, she loses the ability to breast feed her child.

The state of New York has also enacted strong and detailed language recognizing the importance of breastfeeding in general. Attached to New

labor organization to refuse to hire or employ, or to bar or discharge from employment, or withhold pay, demote, or penalize a lactating employee because an employee breastfeeds or expresses milk at the workplace ... ”); 820 ILL. COMP. STAT. ANN. 260/1-99 (West 2008); Indiana, IND. CODE. § 5-10-6 (2008) (requires state and political subdivision employers to provide reasonable paid break time unless it would “unduly disrupt” operation and make reasonable efforts to provide a private location and refrigeration) (emphasis added); MINN. STAT. ANN. § 181.939 (West 2008); Mississippi, MISS. CODE ANN. § 43-20-31 (2006); MONT. CODE ANN. § 39-2-215 (2007); N.M. STAT. ANN. § 28-20-2 (West 2008); N.Y. LAB. LAW § 206-c (Gould 2008); OR. REV. STAT. ANN. § 653.077 (West 2008) (replaces a statute “encouraging” accommodation; requires employers to provide 30 minutes for every four hours of work unless they can show undue hardship); R.I. GEN. LAWS § 23-13.2-1 (2003) (employers may provide unpaid break time, but must provide a private place) (emphasis added); TENN. CODE. ANN. § 50-1-305 (West 2008); Vermont, 2008 Vt. Acts & Resolves 144.

158 N.Y. LAB. LAW § 206-c (Gould 2008).
159 Id.
161 Id.
162 Id.
York’s act protecting the right of women to breastfeed in public were legislative findings declaring the superiority of breastmilk and lamenting the declining number of breastfeeding mothers. The legislature found that, despite the growing medical evidence on the many benefits of breastfeeding for both child and mother and the Surgeon General’s recommendation that babies be breastfed for at least a year, the statistics showed that only half of mothers chose to breastfeed at birth and that only 6 percent were still breastfeeding when their children reached the age of one. The legislature attributed this decline to “[t]he social constraints of modern society [that] militate against the choice of breast feeding and lead new mothers with demanding time schedules to opt for formula feeding . . . .” The findings concluded with the legislature declaring the following: “the breast feeding of a baby is an important and basic act of nature which must be encouraged in the interests of maternal and child health and family values.”

Unlike New York, West Virginia has been struggling unsuccessfully to pass breastfeeding legislation. Not only has West Virginia failed to join the growing minority of states addressing the issue of breastfeeding in the workplace, it has also failed to join the vast majority of states that have either passed laws protecting the rights of women to breastfeed in public or have at least exempted breastfeeding from public indecency laws. In fact, West Virginia is currently one of only three states with absolutely no breastfeeding legislation at all.

The West Virginia Legislature has been considering the idea for several years. There were attempts to pass legislation during the 2005 and 2006 regular sessions that died before a final vote was reached. Over the course of the 2007 session, three different variations were introduced. These culminated in a bill that included protection for breastfeeding in public, the right to be excused from jury duty, and the establishment of a “program to encourage employers to provide safe and convenient facilities for mothers who are breastfeeding, and to provide for designation and public recognition of those mother/infant-friendly employers who facilitate breastfeeding by employees by providing breaks from work, convenient facilities including available refrigerated storage, flexible

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163 N.Y. CIV.RIGHTS LAW § 79-e (Gould 1994).
164 Id.
165 Id.
166 Id.
167 See infra notes 169-174 and accompanying text.
168 Massachusetts and North Dakota are the other two states.
170 Id.
schedules or other means." The bill passed the House of Delegates and the Senate, but the version presented to the governor was watered-down to a simple exception from public indecency laws. Unfortunately, even this did not become law, as Governor Manchin vetoed the act on March 14, 2007. Governor Manchin believed the exception was so broadly drafted that it would conflict with the state’s indecency law. There were no bills related to breastfeeding introduced in the 2008 Regular Session.

This history is especially disappointing given the state’s dreadfully low levels of breastfeeding initiation and practice. West Virginia needs more than just a watered-down exception to the indecency laws. It needs a requirement—not a “program to encourage” or “public recognition for”—but a requirement, a legislative directive that all employers accommodate breastfeeding employees. National statistics and comparisons indicate strongly that the encouragement of breastfeeding through statutory protections, including a requirement of employer accommodation, is especially necessary in West Virginia. The national average for the number of women who start off breastfeeding is around 70%. The rate for West Virginia is less than 50%. In fact, as of 2006, West Virginia was one of only three states below 50%. The other two states, Louisiana and Mississippi, both recently addressed the problem by passing breastfeeding legislation.

The clear need for legislative encouragement in West Virginia is very similar to that of Mississippi. As of 2007, West Virginia was ranked second

173 Id.
174 Id.
177 The other two states are Louisiana and Mississippi. Vestal, supra note 175.
178 LA. REV. STAT. ANN. § 51:2247.1 (2001) (protection for breastfeeding in public accompanied by legislative findings of the superiority of breastmilk and the need to “end [] the vicious cycle of embarrassment and ignorance” related to breastfeeding in the interest of promoting family values and infant health); MISS. CODE ANN. §§ 13-5-23, 17-5-7, 43-20-31, 71-1-55, 97-29-31, 97-35-3 (West 2008) (addressing, respectively, the right to breastfeed in public, regulations for child care facilities to promote breastfeeding, the rights of mothers to use lawful break time to pump at work, the exemption of breastfeeding from public indecency laws, and the exemption of breastfeeding from disorderly conduct and disturbing the peace laws).
only to Mississippi as both the poorest and the fattest state in the country.\footnote{179} Rankings like these should motivate lawmakers to consider a multitude of activities, including the encouragement of breastfeeding. From an economic standpoint, breastfeeding is, unsurprisingly, less expensive than buying formula.\footnote{180} Breastfeeding is even less expensive than buying formula after subtracting the cost of a breast pump and the cost of the additional food needed by a breastfeeding mother.\footnote{181} In addition, there is evidence to show that the total medical costs for a breastfed infant are about 20% less than formula-fed infants.\footnote{182} From a health standpoint, breastfeeding has been shown to reduce the chances of obesity, type 1 and type 2 diabetes in children and to reduce the chances of type 2 diabetes in mothers,\footnote{183} as well as promote postpartum weight loss.\footnote{184} Accordingly, legislation encouraging breastfeeding should be passed by the West Virginia legislature promptly as a small but important measure towards the reversal of the poverty and obesity problems facing the state.

If further motivation is needed, statistics show that the youngest and least educated women in West Virginia are the ones who are least likely to initiate breastfeeding.\footnote{185} This is problematic since women in these categories are likely to predominate in jobs with employers who are unwilling to accommodate. Pregnant women in West Virginia with less than twelve years of education only initiate breastfeeding at a rate near 25%.\footnote{186} When this number is compared with the national average for all age groups of 70% initiation, the need for action should be clear.\footnote{187} Moreover, a significant number of women who initiate breastfeeding do not continue for the recommended amount of time. The


\footnotetext[180]{La Leche, supra note 14, at 383 ("Recent estimates place the cost of buying infant formula for one child for one year to be somewhere between $1,160 and $3,915, depending on the brand and type of formula used.").


\footnotetext[182]{Id.


\footnotetext[184]{Katherine G. Dewey, M. Jane Heinig & Laurie A. Nommsen, Maternal Weight-Loss Patterns during Prolonged Lactation, 58 AM. J. CLINICAL NUTRITION 162 (1993), abstract available at http://www.ajcn.org/cgi/content/abstract/58/2/162.

\footnotetext[185]{PRAMS Report, supra note 176, at 6.

\footnotetext[186]{Id.

\footnotetext[187]{BREASTFEEDING LAWS AND SOCIETAL IMPACT, supra note 175, at Preface.
national average of 70% drops to 32.5% at six months of age.\textsuperscript{188} One can assume that the West Virginia total average of 50% initiation drops substantially as well, and one can only imagine the rate at six months of age for West Virginia women with under twelve years of education. These statistics should provide urgent motivation for the legislature to intervene with a strong act requiring accommodation by employers and promoting breastfeeding in general.

With these statistics in mind, there are several things the West Virginia breastfeeding legislation should include. To fully accommodate the vital activity of breastfeeding, employers should be required to provide, at the least, all reasonably necessary break time for pumping. Finally, employers should also be required to provide refrigerator space for expressed milk and a private place close to the mother’s work area, but not a toilet stall, for pumping.\textsuperscript{189}

\textbf{VI. CONCLUSION}

The best way to achieve accommodation for breastfeeding employees is through legislation. While this legislation is pending, or if it never passes, there are still arguments to be made. While claims attempting to fit breastfeeding discrimination under Title VII as amended by the PDA have been tried and are not likely to succeed, there might be an untapped argument based on the anti-retaliation provision of Title VII. It is arguable that the movement of state legislation towards a requirement of accommodation and the introduction of strong federal legislation may have created a reasonable belief, as required for a Title VII retaliation claim, that breastfeeding discrimination is unlawful. Then, the recent Supreme Court decision in \textit{Burlington Northern v. White} on the meaning of retaliation and adverse employment action would make it relatively easy to show that retaliation resulting in an adverse employment action had occurred.

In West Virginia, there is yet another option. If the West Virginia legislature fails to pass legislation, or passes weak legislation, employees might succeed by arguing that pregnancy and the related condition of breastfeeding are covered disabilities under the West Virginia Human Rights Act rules and regulations. While it would be unfortunate to have to argue that such a beautiful and natural act is a disability, it may be necessary in the absence of a legislative act.

\textsuperscript{188} \textit{Id.}

\textsuperscript{189} This list was aided by the list prepared by DARLEEN CHIEN, UNITED STATES BREASTFEEDING COMMITTEE, \textsc{STATE LEGISLATION THAT PROTECTS, PROMOTES, AND SUPPORTS BREASTFEEDING} \textsc{7} (2005), http://www.usbreastfeeding.org/Issue-Papers/USBCStateLegisPaper2005.pdf.

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It would be worth the effort and expense if it achieved the accommodations necessary to help improve the prevalence of breastfeeding in West Virginia, and, as a result, the state’s health and well-being.

Matthew L. Williams*