BREASTFEEDING OR BUST: THE NEED FOR LEGISLATION TO PROTECT A MOTHER'S RIGHT TO EXPRESS BREAST MILK AT WORK

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I. INTRODUCTION

Breast milk, specially designed by a mother's body to nourish her baby, is the perfect form of sustenance for infants. Surprisingly, forty percent of American mothers never even try breastfeeding.[2] The workplace barriers that prevent new mothers from being able to express breast milk at work may partially explain the under-whelming rate of breastfeeding. Barriers to expressing breast milk at work have been reinforced by the courts despite a variety of theories advanced to eliminate them. This Note explores the shortcomings of existing federal legislation, including Title VII, the Americans with Disabilities Act and the Family and Medical Leave Act, in protecting women who express breast milk at work. The Note argues that although existing federal legislation may be construed to protect women who express breast milk at work, a federal statute protecting the act would offer the best solution. In the meantime, several states have begun offering statutory protection to women who express breast milk at work.

This Note begins by describing the advantages of breastfeeding to mothers, infants and employers. Part III examines whether today's working mothers actually have a choice in how to sustain their infants, or whether workplace barriers have eliminated a working mother's choice to breastfeed her infant. Parts IV and V discuss the ways in which the judiciary has failed to protect an employee's right to express breast milk at work by denying protection under Title VII, the Pregnancy Discrimination Act of 1978, the

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[1] Special thanks to Katherine H. Parker for introducing me to the topic of this note and to Professor Arthur Jacobson for his thoughtful comments. Thanks also to my husband Seth, my family and Rachel Goldstein for their encouragement and inspiration.

[2] *See* Alicia Dermer, M.D., I.B.C.L.C., *If Breastfeeding is so Wonderful, Why aren't More Women Doing It?* (Jan. 2, 2000), *at* http://medicalreporter.health.org/tmr0199/breastfeed.html. The initials I.B.C.L.C. stand for International Board of Lactation Consultant Examiners and signify that the individual has passed rigorous eligibility requirements and a standardized exam for lactation consultants. *See id.* Throughout this Note, "expressing breast milk" includes both feeding the infant at the breast and pumping milk using an electronic or manual device. "Breastfeeding" refers to feeding infants with breast milk.

Americans with Disabilities Act, the Family and Medical Leave Act and various state laws. These sections illustrate the courts' unwillingness to prevent discrimination against or accommodation for employees who need to express breast milk at work. Finally, Part VI explores state and federal legislative initiatives designed to protect employees who express breast milk at work.

II. BREASTFEEDING HELPS INFANT, MOTHER . . . AND EMPLOYER

A. Infant

Leading medical organizations promote breastfeeding as the "ideal form of infant nutrition."[3] For instance, the American Academy of Pediatrics advocates breastfeeding "as the optimal form of nutrition for infants."[4] The benefits of breastfeeding for infants include decreasing the incidence and severity of diarrhea, respiratory infection, and allergies and serious illnesses.[5] Breastfeeding also promotes an intimate bond between mother and child and is beneficial to the child's later well-being.[6] Manufactured infant formula, which attempts to modify cow's milk to resemble human milk, fails to imitate the more than two hundred constituents of human milk.[7] A human mother's milk is specifically designed for a baby human, while a mother cow's milk is intended for a baby cow.[8] Overall, the health benefits of breastfeeding for infants are significant.

B. Mother

Breastfeeding is beneficial to mothers by transitioning their bodies through the physical changes that occur after childbirth. Studies have shown that breastfeeding decreases postpartum bleeding, improves bone re-mineralization and reduces the risk for ovarian cancer and pre-menopausal breast cancer.[9] Breastfeeding also helps mothers return to pre-pregnancy

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[3] Dermer, *supra* note 2; *see also* Child Nutrition Amendments of 1992, Pub. L. No. 102-342, 106 Stat. 911 (1992) (requiring that the Secretary of Agriculture establish a national breastfeeding promotion program to promote breastfeeding as the best method of infant nutrition).

[4] American Academy of Pediatrics, *Breastfeeding and the Use of Human Milk Policy Statement*, 100 PEDIATRICS 1035, 1035-39 (1997), *at* http:// www.aap.org/policy/re9729.html (Dec. 1997).

[5] *See id.* Immediately following the birthing of a child, a woman's body produces colostrums, a type of pre-milk, which is filled with antibodies and believed to help an infant fight infection when those antibodies are delivered to the child through breastmilk. *See* SUSAN M. LOVE, M.D., DR. SUSAN LOVE'S BREAST BOOK 34 (Perseus Publishing 2000).

[6] *See* LOVE, *supra* note 5, at 48.

[7] *See id.*

[8] *See id.*

[9] *See* American Academy of Pediatrics, *supra* note 4.

weight.[10] An article appearing in *The New York Times* entitled "Babies Aren't the Only Beneficiaries of Breast-Feeding" details the extensive benefits of breastfeeding to new mothers and surmises that the maternal health benefits of breastfeeding are as important as those of the infants.[11]

The federal government also recognizes the maternal health benefits of breastfeeding. The U.S. Department of Health and Human Services included breastfeeding as part of its Healthy People 2010 Initiative and seeks to increase the rate of breastfeeding to seventy-five percent for the first six months after birth and fifty percent for the first year.[12] Increasing the levels of breastfeeding is one of twenty-eight indicators that Healthy People 2010 uses to gauge the health of the nation.[13] Since 1974, the Food and Nutrition Service of the Department of Agriculture has administered the Special Supplemental Nutrition Program for Women, Infants and Children, commonly known as WIC. [14] WIC endorses breastfeeding as the preferred method of infant feeding.[15] WIC was designed to "improve the health of women, infants and children by providing supplemental foods, nutrition and breastfeeding education, and access to health services."[16] WIC's inclusion of breastfeeding as a way to promote health and nutrition among poor and nutritionally at-risk women demonstrates the government's commitment to breastfeeding.[17]

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10 *See* LOVE, *supra* note 5, at 35.

11 *See* Liz Galst, *Babies Aren't the Only Beneficiaries of Breast-Feeding*, N.Y. TIMES, June 22, 2003, at WH4.

12 For more information on the program, visit http://www.health.gov/healthypeople/default.htm. Healthy People 2010 is a comprehensive set of health objectives for the nation to achieve over the first decade of the new century with a focus on increasing the quality and years of healthy life and eliminating health disparities.

13 *See id.*

14 *See* FOOD AND NUTRITION SERVICE, ABOUT WIC, *at* http://www.fns.usda.gov/wic/aboutwic.htm (last visited Sept. 9, 2003).

15 *See id.*

16 U.S. DEPARTMENT OF AGRICULTURE, FOOD AND NUTRITION SERVICE, SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS, AND CHILDREN (WIC) *at* http://www.cdc.gov/breastfeeding/govtact-wic.htm (Mar. 21, 2002). WIC, which is administered through state agencies, designates a breastfeeding coordinator at each local office; trains staff on the benefits of breastfeeding; and establishes a local plan to ensure that women have access to breastfeeding resources. WIC is a Federal grant program for which Congress authorizes a specific amount of funds each year. In 1994, the passage of P.L. 103-448 required WIC state agencies to spend $21 dollars for each pregnant and breastfeeding woman in support of breastfeeding promotion. *See* Healthy Meals for Healthy Americans Act of 1994, Pub. L. No. 103-448, 108 Stat. 4699 (1994).

17 In 2000, WIC served approximately 7.2 participants each month. To qualify, applicants must meet categorical, income and nutritional risk eligibility requirements. The income eligibility requirement is 185% of the Federal poverty line, which in July 2000 translated into $31,543 for a family of four. WIC provides three types of free benefits: a supplemental food package, nutrition education and referrals to health and other services. The supplemental food package is enhanced if the infant is breastfed instead of formula fed. *See* Jon Weimer, *The Economic Benefits of Breastfeeding: A Review and Analysis* (Mar. 2001), *at* http://www.ers.usda.gov/publications/fanrr13/ (last modified July 24, 2001).

C. *Employer*

Employers also benefit when their employees breastfeed their infants. Mothers who choose bottle-feeding upon returning to work are likely to be absent more frequently than breastfeeding mothers because bottle-fed babies are more likely to get sick.[18] More frequent absences result in less productivity for employers. The savings resulting from decreased absences potentially outweigh the minor costs associated with accommodating employees who express breast milk at work. In 2001, the Economic Research Service of the U.S. Department of Agriculture conducted a study entitled "The Economic Benefits of Breastfeeding: A Review and Analysis" which concluded that society would save a minimum of $3.6 billion if breastfeeding were increased from current levels (64% in hospital, 29% at six months) to those recommended by the U.S. Surgeon General (75% and 55% respectively).[19] This figure represents the cost savings from indirect costs, such as parents' lost earnings; preventing premature deaths ($3.1 billion); "and an additional $0.5 billion in annual savings associated with reducing traditional medical expenditures."[20]

On a policy level, these numbers are convincing, but to individual employers, there is little short-term incentive to accommodate nursing mothers by offering flexible breaks or providing a private space that can be used to express breast milk. Therefore, it is necessary for the government to step in on behalf of breastfeeding mothers.[21]

III. EXPRESSING BREAST MILK AT WORK: THE PROBLEM OF LABELS

A. *Breastfeeding: Choice Or Illusion?*

The decision to breastfeed is highly personal and involves the consideration of dozens of factors. While members of the medical community laud the benefits of breastfeeding, the constraints of everyday life force many new mothers to forego the natural form of infant sustenance for the more convenient formula option.[22] Forty percent of American mothers

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[18] *See* Dermer, *supra* note 2.

[19] Weimer, *supra* note 17; *see also* American Academy of Pediatrics, *supra* note 4. A savings to the parents of more than $400 per child for food purchases can be expected during the first year of breastfeeding.

[20] Weimer, *supra* note 17, at 3. For example, doctors' or hospital visits, laboratory tests, among others. *See id.*

[21] *See infra* Part VI for discussion on proposed tax benefits to employers that accommodate women who express breast milk at work.

[22] *See* American Academy of Pediatrics, *supra* note 4. "The highest rates of breastfeeding are observed among higher-income, college-educated women over 30 years of age living in the Mountain and Pacific regions of the United States." *Id.* *See also Increase [in] the Proportion of Mothers who Breastfeed Their Babies, at*

never even try breastfeeding[23] and only about ten percent of newborns are exclusively breastfed at six months.[24] It is difficult to reconcile these statistics with the overwhelmingly positive value of breastfeeding.

Women simultaneously participate in the labor force while continuing to provide the overwhelming majority of unpaid care for their families. Today, almost sixty percent of women in the United States are employed and they constitute forty-six percent of the entire civilian workforce.[25] Studies indicate that women currently spend three times as much time on care-giving and housework as men.[26] Maintaining these time consuming roles may explain the low rates of breastfeeding, which is another time consuming commitment. Women, especially those who work, may face an illusory choice in determining how to feed their newborns, with breastfeeding often seeming like an impractical option.[27] With these extensive time constraints, it is no wonder that feeding infants with formula is an attractive option.

Balancing the time constraints of work and home life is not the only obstacle women face in choosing whether to breastfeed. Many work environments are not conducive to either feeding the child at the breast or expressing and storing breast milk.[28] An employer's expectation that an

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http://www.healthypeople.gov//document/html/objectives/16-19.htm (last visited Nov. 16, 2002). More college educated women breastfeed throughout the three stages of infant development (early postpartum, 78%; 6 months, 40%; 1 year, 22%) than any other racial, ethnic or education level identified by the study. *See id.*

[23] *See* Dermer, *supra* note 2.

[24] *See id.*

[25] *See* Diana Kasdan, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. REV. 309 n.33-34, (2001) (citing WOMEN'S BUREAU, U.S. DEP'T OF LABOR, TWENTY FACTS ON WOMEN WORKERS Fact 2, *in* FACTS ON WORKING WOMEN (Mar. 2000), *at* http://www.dol.gov/dol/wb/public/wbpubs/fact98.htm). "Although mothers who will return to paid employment choose to breastfeed equally as often as stay-at-home mothers, they tend to stop breastfeeding sooner, with the exception of mothers who work part-time." Dermer, *supra* note 2. More than fifty percent of women with children under the age of one are employed. *See* Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371 n.35 (2001). Compare the current rates of workforce participation and breastfeeding with those at the turn of the century. "At the turn of the century, more than 90% of American mothers breastfed their children." Dermer, *supra* note 2. At that time 21% of women worked outside the home. *See* http://courses.history.ohio- state.edu/history563/data/Percentage_of_Women_Working_Outside_the_Home.htm (last visited Dec. 12, 2003).

[26] *See* Kessler, *supra* note 25, at 379. This care includes keeping house and caring for children, sick or disabled family members and elderly family members. *Id.*

[27] *See* Martinez v. N.B.C., 49 F. Supp. 2d 305, 306 (S.D.N.Y. 1999) (recognizing "few would deny that the problems facing women who wish to bear children while pursuing challenging careers at the same time remain substantial," yet denying mother's request for accommodation for her breastfeeding needs).

[28] *See* American Academy of Pediatrics, *supra* note 4. A breastfeeding mother can express milk with a manual pump and store the milk for a later feeding when she is unable to feed her child at her breast. Milk can be expressed from the breast manually or by using a commercially available breast pump. The milk should then be stored in a sterile container in a refrigerator or freezer and may be fed to the child at a later time using a bottle. Pumping, or expressing, milk is helpful when the child is not available at the workplace for periodic feeding. *See* LOVE, *supra*

employee will put work priorities first by being available for all meetings, overtime and travel conflicts with the needs of a breastfeeding woman who requires periodic breaks to express breast milk and perhaps a temporary suspension of travel so that she can transport her milk to her child.

Women who wish to express breast milk at work require several minor accommodations. A woman could provide enough milk for her child by expressing milk immediately before and after work and by taking one to two breaks during the workday to maintain her child's supply. Each pumping session takes approximately twenty to thirty minutes to complete.[29] She needs a private, clean place to express milk.[30] She also needs a refrigerator to store the bottled milk.[31] The absence of workplace accommodations makes the opportunity to breastfeed an illusion, not a choice.

The short window of time a woman has after birth and before her supply of breast milk refuses to let down provides a very limited period for her to work out a suitable arrangement with her employer.[32] Attempting to create an arrangement allowing breastfeeding during working hours prior to the birth of a baby may provoke a discriminatory reaction by her employer.[33] Currently, that type of behavior is legally permissible.[34]

In rare instances where the newborn's health demands breastfeeding as sustenance, a woman does not have a choice in how to feed her infant. The Southern District of New York has been the only jurisdiction presented with

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note 5, at 39.

[29] *See* LOVE, *supra* note 5, at 39.

[30] Just as adults prefer, for obvious reasons, not to eat in restrooms, it is unacceptable to banish breastfeeding mothers to restrooms to feed their babies. *See* Derungs v. Wal-Mart Stores, Inc. 162 F. Supp. 2d 861, 864 (S.D. Ohio 2001). After being told by a store employee to vacate the dressing room bench where she was breastfeeding her child and relocate to the restroom, the mother "then inquired whether the employee would eat her meal in the restroom." *Id.*; *see also* Shana M. Christrup, *Breastfeeding in the American Workplace,* 9 AM. U.J. GENDER SOC. POL'Y & L. 471, 472 (2001) (expressing criticism of the social rules which banish breastfeeding mothers to restrooms to breastfeed their babies).

[31] *See* LOVE, *supra* note 5, at 38.

[32] Milk supply can recede in as few as two to three days. Milk supply is determined according to the laws of supply and demand. *See* LA LECHE LEAGUE, *Frequently Asked Questions, at* http://www.lalecheleague.org/FAQ/pumpwork.html (last modified Nov. 19, 2002).

[33] *See, e.g.,* Fortier v. U.S. Steel Group, No. 01-CV-2029, 2002 WL 1797796 (W.D. Pa. June 4, 2002). After announcing her pregnancy and intent to breastfeed, plaintiff's immediate supervisor harassed her about breastfeeding and warned that it could negatively interfere with her work performance. Following this announcement, she received a highly unfavorable work evaluation, despite her prior unblemished record. The court held that "even if 'women who breastfeed' were a class protected by either Title VII or the PDA . . ., [plaintiff] was only a *potential* member of such a class when she left her employment," and her claim must fail. *Id.* at *4.

[34] *See* Wallace v. Pyro Mining Co., 951 F.2d 351 (6th Cir. 1991) (refusing leave of absence for breastfeeding mother where she failed to produce evidence that breastfeeding was a medical necessity); Martinez v. N.B.C., 49 F. Supp. 2d 305, 311 (S.D.N.Y. 1999) (refusing to find discrimination based on breastfeeding status); McNill v. New York City Dep't. of Corr., 950 F. Supp. 564, 573 (S.D.N.Y. 1996) (denying request for compensation under collective bargaining agreement during absence due to breastfeeding).

this type of conflict, and the court refused to extend protection to the breastfeeding woman even in this unusual circumstance.[35] Michele McNill, a New York City corrections officer, bore a son who suffered from a cleft palate that necessitated that she breastfeed her child until he received corrective surgery.[36] The court did not support Ms. McNill's claim under the Pregnancy Discrimination Act that her breastfeeding status prevented her from receiving certain discretionary benefits and she was denied relief, despite her unusual circumstances.[37]

The current workplace environment is not conducive to enabling a woman to express breast milk at work, making it difficult, if not impossible for a woman to realistically decide to breastfeed her child. As subsequent sections will illustrate, there is very little legal protection to support a woman's right to express breast milk at work. Even where it is medically necessary to breastfeed a child, an employee may not have the legal protection to accommodate her expressing breast milk at work.

B. *Is Breastfeeding A Biological Necessity Or A Cultural Choice In Care-giving?*

Modern innovation has provided parents with a choice in how they can feed their infants. Feeding an infant with breast milk is no longer a biological necessity. However, because breast milk is biologically superior to other forms of infant sustenance, it seems strange to consider breastfeeding a cultural choice in care-giving, akin to choosing cloth or disposable diapers. Whether breastfeeding is considered cultural or biological has legal implications.

Rational choice theory plays an important role in the American legal system and has greatly influenced employment law.[38] The theory is based on a system where people act in self-interest based on a cost-benefit analysis. It assumes that every action and decision is under the control of the actor and that when the actor is acting rationally, the actor will seek to maximize utility.[39] However, there are some important decisions that operate outside of the rational choice model. For example, this theory has limited adaptability to successfully integrate work and care-giving obligations.[40] At these decision points, it is necessary for the law to intervene to equalize the instances where the cost or consequence is outside of the actor's control. For example, the time associated with birthing a child interferes with

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[35] *See McNill*, 950 F. Supp. at 570.
[36] *See id.* at 566.
[37] *See id.* at 573.
[38] *See* Kessler, *supra* note 25, at 441.
[39] *See id.* at 441-43.
[40] *See id.* at 441-42.

employment participation and is outside of a woman's control.[41] Congress, through the Pregnancy Discrimination Act ("PDA"), has intervened to neutralize the costs associated with birthing children by protecting a woman from discrimination resulting from her pregnancy.[42]

Choosing to breastfeed a child, a choice that may necessitate expressing breast milk at the workplace, is another decision that operates outside of the rational choice model. However, birthing a child is biological and breastfeeding, some could argue, is not. The Pregnancy Discrimination Act has historically been interpreted to protect only conditions associated with the actual birthing process.[43] Although breastfeeding is the biological process of lactation and immediately follows birth as a result of pregnancy,[44] women who have sought protection for breastfeeding under the PDA have been unsuccessful.[45]

American jurisprudence has tended to root itself in the rational choice model, "recognizing [only] women's immutable biological differences from men, leaving women's cultural care-giving beyond the law's reach."[46] Therefore, considering breastfeeding as a biological phenomenon similar to birthing a child falls within dominant legal theory. However, the decision to sustain an infant through breast milk is not biologically necessary to the woman or infant's health. The existence of alternatives to breastfeeding suggests that a cost-benefit analysis is possible under rational choice theory, which may explain the absence of laws protecting it.

Considering breastfeeding as a cultural choice in care-giving has significant policy implications. Most notably, breastfeeding could not be considered part of the medical conditions associated with pregnancy. Breastfeeding would then be precluded from ever falling under the protection of the Pregnancy Discrimination Act, which is itself limited to pregnancy.[47]

The Family and Medical Leave Act ("FMLA") is the closest Congress has come in suspending rational choice theory by providing employees a

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[41] The decision to get pregnant arguably does involve choice, but whether that decision is made rationally is outside the scope of this Note. The physical process of birthing the child is biological and is outside of the woman's control. Similarly, the decision to breastfeed does involve choice, but the physical process of producing breast milk is biological.

[42] *See* Pregnancy Discrimination Act of 1978 § 703(a)(1), 42 U.S.C. § 2000e(k) (2003); *see also infra* text accompanying note 66; discussion *infra* Part IV.B.

[43] *See infra* Part IV.B discussing at length the history of the PDA and its application to breastfeeding.

[44] The changes a woman's body experiences during pregnancy include changes in her hormone levels in order to prepare the production of milk after the baby is born. *See* LOVE, *supra* note 5, at 33-34.

[45] *See infra* Part IV.B discussing the courts' refusal to extend the PDA's application to breastfeeding.

[46] *See* Kessler, *supra* note 25, at 436.

[47] *See infra* note 67 for a discussion on the Pregnancy Discrimination Act.

choice in how best to provide care-giving in limited instances.[48] The FMLA provides twelve weeks of unpaid leave to care for, among other people, a newborn.[49] While it offers employees an opportunity to spend time caring for their child, like the PDA, it does not begin to adequately address the needs of women who express breast milk at work.[50]

Rational choice theory guides American jurisprudence. Therefore, whether breastfeeding is considered a biological phenomenon akin to pregnancy or a cultural choice in care-giving could have considerable policy implications. Subsequent sections will demonstrate that neither classification has met with much success in the courts, suggesting that Congressional action may be the only way to protect expressing breast milk at work.

IV. LEGAL THEORIES TO PREVENT DISCRIMINATION AGAINST WOMEN WHO EXPRESS BREAST MILK AT WORK HAVE BEEN UNSUCCESSFUL

Women who have sued their employer alleging discrimination due to their decision to express breast milk at work have sought two types of protection. Some women have based their claim in gender discrimination, alleging that the employer's behavior or policy violates Title VII of the Civil Rights Amendment.[51] Other women have sought accommodations for their needs in expressing breast milk at work, either through the Americans with Disabilities Act or the Family and Medical Leave Act.[52]

A. *Title VII of Civil Rights Act of 1964*

An understanding of the courts' treatment of alleged discrimination against women who express breast milk at work begins with an analysis of how the courts have treated pregnancy discrimination. In 1964, Congress passed a Civil Rights Act, which, in its well-known Title VII provision, forbids employment discrimination on the basis of "race, color, religion, sex, or national origin."[53]

The Supreme Court, in *Geduldig v. Aiello*, made clear that discrimination on the basis of pregnancy was not discrimination on the basis

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[48] *See* 29 U.S.C. § 2612(a)(1)(A)-(D) (1994); *infra* § V.C for discussion on the Family and Medical Leave Act's application to breastfeeding.

[49] *See* § 2612(a)(1)(A)-(D).

[50] *See id.*

[51] *See infra* Parts IV.A-C.

[52] *See infra* Parts V.A, C.

[53] Section 703(a)(1) of the Title VII of the Civil Rights Act of 1964 provides that:

> It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a)(1) (2003).

of sex.[54] Jacqueline Jaramillo, who asserted that her pregnancy made her the object of workplace discrimination, sought disability benefits under California's disability insurance program after a complication-free pregnancy.[55] The statute authorizing the disability insurance program expressly provided that, "in no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."[56] The Court reasoned that the insurance program was not intended to be exhaustive or comprehensive of all disabilities and declared that pregnancy was not one of the "compensable disabilities."[57] By doing so, the Court did not have to address the gender differences so clearly associated with pregnancy. In fact, it went on to describe that the program does not differentiate between women and men, but between "pregnant and non-pregnant persons"[58] and observing that "while the first group is exclusively female, the second group contains members of both sexes."[59] Using this reasoning, the Court found no discrimination on the basis of sex.[60]

Two years later in *General Elec. Co. v. Gilbert*, a class of women asked the Supreme Court to determine whether an employer-sponsored disability benefits plan that did not cover absences for pregnancy-related disabilities violated Title VII of the 1964 Civil Rights Act.[61] The women advanced two theories to support their case. First, they asserted that the distinguishing of benefits on the basis of pregnancy was facially discriminatory.[62] Alternatively, they argued that the program had a disparate impact on women. Neither theory was successful. Once again, the Court essentially removed the gendered nature of pregnancy by determining that because the insurance plan did not purport to cover *all* disabilities, the plan could not be criticized for failing to cover pregnancy-related disabilities.[63] By reaching this conclusion, the Court rejected a 1972 Equal Employment Opportunity Commission (EEOC) guideline stating, "[benefits] shall be applied to disability due to pregnancy [or] childbirth . . . on the same terms and

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54 *See* 417 U.S. 484 (1974) (holding that an insurance program that did not extend disability benefits for any condition arising in connection with the condition of pregnancy to be valid under the Equal Protection Clause); *see also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (finding that an employee sponsored benefits plan that did not cover absences for pregnancy related disabilities was not in violation of Title VII).

55 *Geduldig*, 417 U.S. at 489.

56 CAL. UNEMP. INS. CODE § 2626 (West 1973).

57 *Geduldig*, 417 U.S. at 497 n.20.

58 *Id.*

59 *Id.*

60 *See id.*

61 *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 127 (1976).

62 *See id.*

63 *See id.* at 134.

conditions as they are applied to other temporary disabilities."[64] The Court defended its rejection of this guideline by noting that Congress did not authorize the EEOC to promulgate rules or regulations pursuant to Title VII.[65] The Supreme Court made clear its intentions that discrimination on the basis of pregnancy was not sex discrimination in violation of Title VII.

At that point, no woman had sought Title VII protection for expressing breast milk at work. These cases laid the foundation for future legislation addressing pregnancy.

B. *The Pregnancy Discrimination Act*

Two years after *Gilbert*, Congress expressed its disagreement with the Supreme Court's approach to the treatment of pregnant women by passing the Pregnancy Discrimination Act, an amendment to Title VII.[66] This amendment, passed fifteen years after Title VII, expands the "terms 'because of sex' or 'on the basis of sex'" as used in Title VII, to include "because of or on the basis of pregnancy, childbirth or related medical conditions."[67] The effect of the PDA is to make gender discrimination on the basis of "pregnancy, childbirth, or related medical conditions" a *per se* violation of Title VII.[68] The PDA allows a court to find that a plaintiff whose employer discriminates against her on the basis of pregnancy has made out a *prima facie* case of sex discrimination under Title VII.[69] Congress established that the Pregnancy Discrimination Act was to prohibit discrimination in all aspects of employment: "hiring, reinstatement rights, seniority, and other conditions of employment covered by Title VII as well as to disability benefits."[70] The result of the PDA is to make clear that discrimination on the basis of pregnancy is discrimination on the basis of sex.[71]

Congress confined the coverage of the PDA, stating that:

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64 29 C.F.R. § 1604.10(b) (1975).

65 *See Gilbert*, 429 U.S. at 141.

66 42 U.S.C. § 2000e(k) (2003) provides:

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

Id.

67 Fortier v. U.S. Steel Group, No. 01-CV-2029, 2002 WL 1797796, at *3 (W.D. Penn. June 4, 2002).

68 § 2000e(k) (2003).

69 *See* Kessler, *supra* note 25, at 395.

70 *Discrimination on the Basis of Pregnancy, 1977: Hearing on S. 99 Before the Subcomm. on Labor of the Second Comm. on Human Resource*, 95th Cong. 51-52 (1977) (statement of Drew S. Days III, Assistant Attorney General, Civil Rights Division).

71 *See* § 2000e(k) (2003).

> The only time the employer will be required to allow pregnant workers to use this leave is during the time they are medically unable to work, during the same time they are medically unable to work, during the same period of time and under the same terms applicable to other employee[s]. For example, if a woman wants to stay home to take care of the child, no benefits must be paid because this is not a medically determined condition related to pregnancy.[72]

While Congress did not specifically address breastfeeding or expressing breast milk at work, it clearly set forth its intention to set limits to the Act's application. Although the Pregnancy Discrimination Act provides broad protection to pregnant women, Congress was not willing to extend the protection of the PDA to any type of condition based on childcare.

Throughout the twenty-eight years of the PDA's existence, only two circuit courts have had an opportunity to interpret the statute as it relates to breastfeeding.[73] The issue of whether the PDA applies to breastfeeding has never reached the Supreme Court. The developing jurisprudence relies on the Fourth Circuit's often quoted proposition that because "breastfeeding is not a medical condition related to pregnancy or childbirth," it does not come within the meaning of the PDA.[74] Members of the medical community who have concluded that breastfeeding is a condition related to pregnancy do not support this statement.[75] The courts that have considered the PDA's application to breastfeeding have upheld an employer's prerogative to terminate, demote or otherwise sanction women who have expressed breast milk at work.[76]

Courts have suggested, in dicta, that breastfeeding, when promulgated

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[72] H. R. REP. NO., 95-948, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N 4749, 4753.

[73] *See* Wallace v. Pyro Mining Co., No. 90-6249, 1991 WL 27083 (6th Cir. Dec. 19, 1991); Barrash v. Bowen, 846 F.2d 927 (4th Cir. 1988); *see also* Notter v. N. Hand Prot., 1996 WL 342008 at **5 (4th Cir. June 21, 1996) (distinguishing Notter's bona fide medical condition relating to pregnancy from *Barash* which held that breastfeeding is not a medical condition relating to pregnancy).

[74] *Notter*, 1996 WL 342008, at **5.

[75] *See supra* text accompanying note 44.

[76] *See* Jacobson v. Regent Assisted Living, Inc., No. CV-98-564-ST, 1999 WL 373790, at *11 (D. Or. Apr. 9, 1999) (finding that to the extent that plaintiff bases termination based in discrimination on the assertion that her employer would not allow her to pump her breast milk, she fails to state a claim); Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1491 (D. Colo. 1997) (finding that breastfeeding is not a condition related to pregnancy within the PDA, therefore, plaintiff failed to make a Title VII claim); *Wallace*, 1991 WL 27083, at **2 (affirming summary judgment to fire claimant where she could not prove that breastfeeding her son was a medical necessity and thus, improperly took leave). *See also Fortier*, 2002 WL 1797796, at *4 (W.D. Penn. June 4, 2002) (holding that even if she had alleged protection under the PDA after she had been forced to resign after announcement of her intent to breastfeed, she was only a *potential* member of the protected class; the court did not address whether breastfeeding women fell within the protected class).

by a medical necessity, may fall under coverage of the PDA.[77] However, few women have made a showing that their decision to breastfeed was, in fact, based on a medical necessity. For example, in 1988, the Fourth Circuit in *Barrash v. Bowen* refused to grant a woman's request for six months of unpaid leave to breastfeed her baby without a showing from her physician that six months was medically necessary for the health of her or her child.[78] The court asserted that "[u]nder the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000(e)(k), pregnancy and related conditions must be treated as illnesses only when incapacitating."[79] The court did not address the issue of whether a woman's request for extended leave must be accommodated where there is medical showing of its necessity.[80]

In *Wallace v. Pyro Mining Co.*, Wallace, who requested six weeks of leave without pay so that she could stay home and breastfeed her baby, was denied relief.[81] Although she argued that the Pregnancy Discrimination Act applied to her situation, the Sixth Circuit held that because "she failed to produce evidence supporting her contention that breast feeding her child was a medical necessity," the court did not reach the issue of the Act's applicability.[82]

The Southern District of New York fractured the issue of medical necessity into even more complexity in *McNill v. New York City Dep't. of Corr.* Here, the mother demonstrated her son suffered from a cleft palate, which necessitated that she breastfeed, him.[83] The court asserted that "[c]onditions related to pregnancy or childbirth would directly involve the condition of the mother . . . . An infant's malformed palate and lip does not directly affect the condition of the mother."[84] The court added the further requirement that the medical necessity be related only to the mother, eliminating any showing that an infant's medical necessity could trigger protection under the PDA.

The lower courts seem reluctant to expand the PDA to cover breastfeeding and are following the same logic the Supreme Court used when it denied Title VII protection to pregnant women.[85] Just as the Supreme Court, prior to the passage of the PDA, was reluctant to determine

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77 *See, e.g., Barrash*, 846 F.2d 927.

78 *See id.*

79 *See id.* at 931.

80 *See id.* at 930.

81 *See Wallace*, 1991 WL 27083 at *3.

82 *Id.*

83 *See* McNill v. New York City Dep't. of Corr., 950 F. Supp. 564, 566 (S.D.N.Y. 1996).

84 *Id.* at 569-70.

85 *See* Kasdan, *supra* note 25, at 331 (arguing that the courts' narrow interpretation of the PDA as it relates to breastfeeding will serve to increase tension between childbirth and employment).

that discrimination on the basis of pregnancy was discrimination on the basis of sex, the lower courts are unwilling to hold that discrimination on the basis of breastfeeding, a physical condition resulting *from* pregnancy, is discrimination on the basis *of* pregnancy.

C. *Other Title VII Claims*

1. Sex-Plus Theory of Discrimination

The Pregnancy Discrimination Act is not the only grounds for a breastfeeding woman's Title VII claim. Women who express breast milk at work may still have a narrow window of protection under Title VII by advancing a sex-plus theory of discrimination or a disparate treatment claim. Under the sex-plus theory of discrimination, employers may not treat employees differently on the basis of their sex plus some facially neutral characteristic. This theory was first articulated in *Philips v. Martin Marietta* where the plaintiff argued that her employer had different hiring practices for women with children than men with children.[86] The Court held that it was impermissible to have "one hiring policy for women and another for men each having pre-school-age children."[87] However, narrow judicial interpretation of the sex-plus theory of discrimination has limited the sex-plus theory's application to only those cases where the facially neutral characteristic is either an immutable characteristic or a fundamental right.[88] Because breastfeeding, although biologically based, is perceived as a choice, it is unlikely that a theory considering breastfeeding as an immutable characteristic would be successful.

The difficulty with classifying breastfeeding, or more specifically, expressing breast milk at the workplace, as a fundamental right involves determining what aspect of the activity is fundamental. For example, "while commentators and courts often have cited *Philips v. Martin Marietta Corp.*[89] for the proposition that 'having children' is a fundamental right, no court ever has translated this fundamental right to 'have' children into a fundamental right to receive workplace accommodations to care for them."[90]

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86 400 U.S. 543, 542 (1971).

87 *Id.*

88 The first case to narrow the applicability of the sex-plus theory was *Willingham v. Macon Tel. Publ'g. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975). *See also* Kessler, *supra* note 25, at 400. Kessler argues that sex-plus care-giving claims are unlikely to be successful and observes that there are no cases where a court has found that a woman's status as primary caregiver is an immutable characteristic. *See id.*

89 *See* 400 U.S. 542 (1971) (holding that a company's policy which explicitly excluded women with school aged children, but not men who were similarly situated, did not violate Title VII).

90 Kessler, *supra* note 25, at 400. *Cf. infra* Part V.A for a discussion of the Southern District of New York's denial of workplace accommodation for breastfeeding in *Martinez v. NBC.*

Is the fundamental right a protection against discrimination based on one's desire to express breast milk at work? Or, does the fundamental right require employers to accommodate the needs of a woman to express breast milk at work? Protection against discrimination corresponds with the protections afforded in the PDA and would not address accommodation. Although there remains the possibility to advance a sex-plus theory of discrimination to protect a woman's breastfeeding status under Title VII, success does not seem likely.

2. Disparate Impact Claim

A disparate impact claim may be raised when an employee alleges that a "neutral" employment policy "in fact falls more harshly on one group than another and cannot be justified by business necessity."[91] Disparate treatment analysis is really an exercise in classifications. The hypothetical plaintiff who is alleging discrimination based on her breast feeding status will argue that she should be classified in a group encompassing all women because Title VII has designated gender as a protected class.[92] A *prima facie* disparate impact claim relies on the plaintiff's production of "statistical evidence of a kind and degree sufficient to show that the practice in question" has caused the prohibited discrimination.[93] In the hypothetical example, even if the plaintiff is the only woman who is expressing breast milk at work, she will likely be able to produce appropriate statistical evidence that the employment practice has a disparate impact on women. However, if the plaintiff is classified in a group consisting solely of women expressing breast milk at work, or even mothers, the court could easily find that Title VII protections do not apply to these non-protected classes.[94] Courts have limited the groups that constitute a protected class to those groups enumerated in Title VII.[95]

The Southern District of New York rejected a disparate impact claim in *Martinez v. N.B.C.*[96] After the plaintiff returned from maternity leave, she

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[91] Int'l Bd. of Teamsters v. U.S., 431 U.S. 324, 355 n.15 (1977).

[92] *See* § 2000e-2(a)(1).

[93] Kessler, *supra* note 25, at 416.

[94] *See* Payseur v. Grainger, Inc., Nos. 88 C 5707, 88 C 5708, 1989 WL 152583 at *1 (N.D. Ill. Nov. 28, 1989) ("[N]ew mothers, as individuals seeking child care leave . . . are not members of a protected class. To the extent, then, that plaintiff's claim is based upon disparate impact on new mothers, it must fail.").

[95] Protected classes are limited to race, color, religion, sex and national origin. *See* § 2000e-2(a)(1).

[96] *See* 49 F. Supp. 2d 305, 308 (1999). It should be noted that in *Martinez*, the plaintiff did not make a claim that breastfeeding was protected by the PDA, but rather based her Title VII claim on the disparate impact theory. *But see Fortier*, 2002 WL 1797796, at *3 (denying motion to dismiss and finding a "claim for discrimination or harassment based on [plaintiff's] status as a pregnant woman" after plaintiff announced that she was pregnant and planning to return to work while breastfeeding her child).

made an arrangement with her employer where she could take three twenty minute breaks a day to use an electronic pump in an unused studio to express breast milk.[97] After being interrupted several times by unannounced visitors, she approached her supervisor and human resources officials to discuss alternative arrangements.[98] She rejected, for a variety of undisclosed reasons, their suggestion to put a "do not disturb sign" on the door and their offers of a number of alternative sites to use.[99] The judge quickly disposed of her Americans with Disabilities Act (ADA) claim, reasoning that the ADA is only required to accommodate for what the "ADA so provides."[100] The court then said that, "the drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other, while in a given case perhaps deplorable, is not the sort of behavior covered by Title VII."[101] The court held that Title VII could not apply to situations where discrimination is based on a characteristic unique to one gender.[102]

Establishing a *prima facie* case of discrimination does not guarantee a plaintiff a successful disparate impact claim. An employer then has the opportunity to justify its business practice by proving that it is a "business necessity."[103] Although the woman can attack the employer's claim of business necessity on the grounds of pretext by demonstrating a less discriminatory alternative,[104] courts have adopted the position that they are "generally less competent than employers to restructure business practices."[105] The court's position makes it hard for the plaintiff to rebut. However, employers have not had to justify their business practices that discriminate against breastfeeding women because no court has held that the plaintiff has met her *prima facie* burden.

V. LEGAL THEORIES TO PROMOTE ACCOMMODATION FOR EXPRESSING BREAST MILK AT WORK HAVE BEEN UNSUCCESSFUL

A breastfeeding friendly work environment would ideally offer two types of protection to women who express breast milk at work. First, just as it is illegal to generally discriminate on the basis of sex, discrimination against

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97 *See Martinez*, 49 F. Supp. 2d at 307.

98 *See id.*

99 *Id.*

100 *Id.* at 309; *see also infra* Part V.A for a discussion of the ADA's application to breastfeeding.

101 *See Martinez*, 49 F. Supp. 2d at 309.

102 *See id.*

103 The Supreme Court first recognized the "business necessity" defense in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The Court held that if a discriminatory employment practice "cannot be shown to be related to job performance, the practice is prohibited." *Id.*

104 *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801, 804-05 (1973)).

105 Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978).

women who express breast milk at work would be illegal. In the same manner that the Pregnancy Discrimination Act prohibits discrimination on the basis of pregnancy, employers would be required to treat employees who express breast milk at a work in a manner identical to that of other employees.[106] In other words, an employer could not discriminate against an employee based on the employee's status of expressing breast milk at work.

Second, the employer would actually accommodate women who desire to express breast milk at work by providing: a private place with an electrical outlet, sink and mirror; door that locks; comfortable chair; footstool; table; best-in-class breast-pump; refrigerator for storing pumped milk; access to board certified lactation consultants; prenatal breastfeeding education and onsite breastfeeding classes; and manager training.[107] If all of these accommodations are not possible, some simple accommodations such as, a private space to express milk and flexibility in break time, to accommodate the cycles of lactation, would also suffice. In fact, employers such as American Express, Citigroup, Colgate-Palmolive and General Mills offer workplace lactation programs.[108]

While the Pregnancy Discrimination Act and Title VII protections have the potential to protect women from discrimination based on their status as women who express milk at work, women have to turn to other federal laws for further accommodations, such as the Americans with Disabilities Act and the Family and Medical Leave Act.[109] Further, some states have passed legislative accommodations for women who express breast milk at work.[110]

A. *Seeking Accommodation to Express Breast Milk at Work: Breastfeeding as a Disability*

1. Americans With Disabilities Act

Women who sought, through the courts, accommodation for expressing breast milk at work, such as extended breaks for nursing or breast-pumping, have argued that their condition is a disability, thus the

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106 *See supra* Part IV.B for a discussion about the Pregnancy Discrimination Act.

107 These are the components of a workplace breastfeeding program, according to Lifecare, an organization committed to promoting family-friendly policies at work. Not all suggestions are required. A survey performed by *Working Mother* magazine revealed that ninety-nine of the "100 Best Companies for Working Mothers" have a workplace lactation program, compared to nineteen percent of all companies nationwide. *See* Press Release, Lifecare, At Work Breastfeeding Programs Common Among "100 Best Companies for Working Mothers" (Sept. 30, 2002) *at* http://www.lifecare.com/pressroom/archives/mawforum/html.

108 *See id.*

109 Title VII merely provides women with the right to be free of employment discrimination, but places no affirmative duties on employers. *See* Kessler, *supra* note 25, at 413.

110 *See infra* notes 175-77 discussing state legislation that promotes breastfeeding accommodation.

Americans with Disabilities Act of 1990 requires employers to accommodate their needs.[111] According to the Act, a "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[112] The ADA specifically requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability... unless such covered entity can demonstrate that the accommodation would impose an undue hardship."[113]

To qualify as disabled, an individual must meet the three-part test outlined in the Americans with Disabilities Act. First, the individual must demonstrate a "physical or mental impairment."[114] A "physical or mental impairment" is a physiological disorder or condition that affects one or more body systems, including the reproductive system.[115] That impairment must substantially limit the individual in one or more major life activities.[116] An individual is "substantially limited" by an impairment if she is "[s]ignificantly restricted as to the condition, manner or duration under which [she] can perform a particular major life activity as compared to the condition, manner and duration under which the average person in the general population can perform that same major life activity."[117] Major life activities include the following non-exhaustive list: "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[118]

Once again, it is critical to examine this statute as applied to pregnancy to provide a greater understanding of the challenges in applying it to expressing breast milk at work. Courts have held that, "pregnancy and related medical conditions do not, absent unusual conditions, constitute a disability under the ADA."[119] Furthermore, the EEOC, which is granted significant deference in interpreting the ADA, has excluded pregnancy as a

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111 *See* 42 U.S.C. § 12101(b) (1994). *See, e.g., Martinez*, 49 F. Supp. 2d at 308; Tozzi v. Advanced Med. Mgmt., No. S00-2363, 2001 U.S. Dist. LEXIS 17910, *27 (D. Md. May 24, 2001).

112 42 U.S.C. § 12111(8) (1994).

113 42 U.S.C. § 12112(b)(5)(A) (1994). Reasonable accommodation may include "[m]odified work schedules... acquisition or modification of equipment or devices...." § 12111(9)(B). Undue hardship generally includes "an action requiring significant difficulty or expense, when considered in light of" the nature and cost of the accommodation and the over financial resources of the facility. § 12111(10).

114 29 C.F.R. § 1630.2(h)(1) (2002).

115 *Id.*

116 *See* 42 U.S.C. § 12102(2)(A) (2003).

117 § 1630.2(j).

118 *Id.*

119 Lacoparra v. Pergament Health Ctrs., Inc., 982 F. Supp. 213, 228 (S.D.N.Y. 1997) (quoting Villareal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D.Tex. 1995); *see also* Bond v. Sterling Inc., 997 F. Supp. 306, 311 (N.D.N.Y. 1998); *Martinez*, 49 F. Supp. 2d at 308-09.

condition covered by the ADA.[120]

Courts that have interpreted the Americans with Disabilities Act as it applies to breastfeeding have never reached the tripartite analysis in holding that breastfeeding is not a disability within the meaning of the law. For example, in *Martinez v. NBC*, the court simply relied on the statement "pregnancy and related medical conditions do not, absent unusual conditions, constitute a disability under the ADA" to decide the issue.[121] Further, courts interpreting the ADA have viewed pregnancy and lactation as a single, prolonged physical condition and relied on cases that hold that pregnancy is not a disability under the ADA.[122] In contrast, courts interpreting the PDA have held that pregnancy and lactation are separate physical conditions.[123]

Although it is far from clear whether breastfeeding would constitute a "physical or mental impairment," or whether it "substantially limits," it is also difficult to determine whether breastfeeding is a "major life activity" or whether an independent "major life activity" is affected by breastfeeding.[124] In 2001, the District Court for the District of Maryland, in *Tozzi v. Advanced Medical Management*, asked "whether breastfeeding is a major life activity."[125] The court observed that this issue had never been decided in any reported decisions.[126] The court "acknowledge[d] the importance of breastfeeding and the special relationship it establishes between a mother and child;" however, it "decline[d] to expand the outer margins of the ADA by holding that it is a major life activity for purposes of that statute."[127]

Recently, the Supreme Court in *Toyota Mfg. Kentucky, Inc. v. Williams* narrowed the scope of "major life activity."[128] In *Toyota*, the respondent, claiming to be disabled because of carpal tunnel syndrome and other related impairments, sued her former employer for failing to provide her with a reasonable accommodation as required by the ADA.[129] In its decision, the Court modified the ADA's requirement that the disability impair a "major life activity" with the phrase "activities of central importance to most people's

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120 *See* 29 C.F.R. § 1630.2(h). The ADA excludes "conditions, such as pregnancy, that are not the result of a physiological disorder." *Lacoparra*, 982 F. Supp. at 228 (quoting *Villareal*, 895 F. Supp. at 152).

121 *Martinez*, 49 F. Supp. 2d at 308.

122 *See, e.g., id.* at 309.

123 *See, e.g.*, Barrash v. Bowen, 846 F.2d 927 (4th Cir. 1988); Wallace v. Pyro Mining Co., No. 90-6249, 1991 WL 27083 (6th Cir. Dec. 19, 1991).

124 29 C.F.R. § 1630.2(h)-(j) (2002).

125 2001 U.S. Dist. LEXIS 17910, *27 (D. Md. May 24, 2001) (finding that plaintiff was not disabled under the ADA by reason of her mastectomies).

126 *See id.* at *27-28.

127 *Id.* at *28.

128 *See* 534 U.S. 184, 197 (2002).

129 *See id.* at 187.

daily lives."[130] The Court also added to the condition that "[t]he impairment must also be permanent or long-term."[131] The Court held that the employer was not required to provide accommodation because the respondent's condition did not affect her performance of tasks that were of central importance to most people's daily lives.[132] The result of *Toyota* was to limit severely what constitutes a disability to those conditions that affect the performance of tasks that are of central importance to most people's daily lives.[133]

Employees who seek accommodation under the Americans with Disabilities Act to express breast milk at work now have an even harder argument to make. Breastfeeding, a biologically compelled way to nourish infants, does not and should not affect the performance of the "activities that are of central importance to daily life."[134] Further, the *Toyota* Court established that "the impairment's impact must be permanent or long-term," which breastfeeding is not.[135] The nature of accommodations for expressing breast milk at work, including a modified work schedule during the finite period of breastfeeding and minimal equipment to effectively and comfortably express milk, do not squarely fall within the parameters of the ADA.[136] However, the potential exists for the ADA to accommodate women who express breast milk at work.

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130 *Id.* at 197.

131 *Id.* at 198.

132 *See id.* at 202. In addition, according to respondent's deposition testimony, even after her condition worsened, she could still brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house. The record also indicates that her medical conditions caused her to avoid sweeping, to quit dancing, to occasionally seek help dressing, and to reduce how often she plays with her children, gardens, and drives long distances. But these changes in her life did not amount to such severe restrictions in the activities that are of central importance to most people's daily lives that they establish a manual-task disability as a matter of law. *See id.* (internal citation omitted).

133 Although the Supreme Court in *Toyota* limited it's holding to manual tasks that are of "central importance to daily life," 534 U.S. at 197, lower courts have broadened the application to other types of major life activities. *See* Weixel v. Bd. of Educ. of N.Y., 287 F.3d 138 (2d Cir. 2002) (finding claimant disabled under *Toyota* with regard to major life activities of walking, exerting herself and attending school).

134 *Toyota*, 534 U.S. at 197. Breastfeeding is a natural part of pregnancy and can be integrated into everyday life. *See* Dermer, *supra* note 2, at 3.

135 *Toyota*, 534 U.S. at 198. The American Academy of Pediatrics recommends that breastfeeding may continue for over twelve months if mother and baby are enjoying it, but emphasizes the benefits of exclusively breastfeeding for the first six months. *See* American Academy of Pediatrics, *supra* note 4.

136 Lower courts have followed the Supreme Court's example and have continued to narrow what conditions are substantially limiting. *See, e.g.*, EEOC v. UPS, 306 F.3d 794 (9th Cir. 2002) (monocular vision is not substantially limiting); Mays v. Principi, 301 F.3d 866 (7th Cir.) (2002) (individuals with back problems who can perform light work are not disabled). Although there have been no accommodation claims with regard to breastfeeding since *Toyota*, it seems unlikely that a plaintiff could ever be successful with an ADA accommodation claim.

2. State Disability Claims: New York, A Representative Example

Women have also been unsuccessful in challenging state disability laws for accommodation to express breast milk at work. In 1998, Christine Bond asked the District Court for the Northern District of New York to determine whether her termination on the basis of her breastfeeding violated New York's Human Rights Law.[137] The court observed that breastfeeding is not an impairment and noted "[i]t is simply preposterous to contend that a woman's body is functioning abnormally because she is lactating."[138] It concluded that Bond's termination did not violate New York's Human Rights Law.[139] In contrast, "[T]he New York City Human Rights Law's (NYCHRL) expansive definition of 'disability' arguably encompasses lactation and requires New York City employees with four or more employees to provide, upon request, reasonable accommodation of a female employee's need and/or desire to express breast milk at work."[140] This interpretation of disability has never been litigated as it relates to lactation.

In contrast, the Supreme Court of New York, Third Department offered a "liberal[] and humane[] interpret[ation]" of the state Workers' Compensation Law in *Kallir v. Friendly Ice Cream* when a question of breastfeeding arose.[141] The plaintiff's child was born suffering from an allergy that required that the child receive breast milk.[142] As a result, the plaintiff filed for an extension of workers' compensation benefits, which were granted by the Workers' Compensation Board.[143] The court interpreted the workers' compensation statute's requirement that "disability occurring as a result of a complication of such pregnancy" to apply to this unique situation.[144] Determining that, "the child's condition is both biologically and realistically inextricably connected with the pregnancy," the court determined that the purpose of the Workers' Compensation Law

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137 *See* Bond v. Sterling, 997 F. Supp. 306 (1998). The New York Human Rights Law defines "disability" as: "(a) a physical or mental impairment resulting from anatomical [or] physiological . . . conditions which prevents the exercise of a normal bodily function . . . or (b) a record of such impairment or (c) a condition regarded by other as such impairment . . . ." N.Y. EXEC. LAW § 292 (McKinney 2003).

138 *Bond*, 997 F. Supp. at 311.

139 *See id.*

140 Katherine H. Parker, *Bill Would Require Accommodating Breastfeeding*, N.Y.L.J., Sept. 10, 2001, at 1. The NYCHRL defines disability as "any physical, medical, mental or physiological impairment or record of such impairment." NYC ADMIN. CODE, § 8-102(16) (2001). Though the issue of whether lactation is included in the law's definition of disability has never been litigated, the New York City Human Rights Commission determined that pregnancy is a per se disability in *Willis v. New York City Police Department* and their rationale can also include lactation.

141 *See* 93 A.D. 2d 246, 247 (N.Y. App. Div. 1983).

142 *See id.* at 246.

143 *See id.*

144 *Id.* at 247; *see also* N.Y. WORKERS' COMP. LAW § 205(3) (McKinney 2003).

intended to cover this type of situation.[145]

3. Policy Considerations: Breastfeeding Should Not be Considered A Disability

Considering breastfeeding a disability contravenes the public health policies of encouraging breastfeeding as a natural and healthy way to feed infants.[146] Further, treating breastfeeding as a disability marginalizes breastfeeding women to the extent that they are no longer members of a protected class, women, and are instead, subject to a case-by-case consideration of their condition under the ADA.[147] Allowing breastfeeding to fall within the definition of disability could force employers to provide accommodation for other short-term conditions or natural body processes, thus potentially diluting the ADA's effectiveness for the traditional disabilities it was designed to protect.[148]

On the other hand, Hilary Von Rohr, author of *Access to Justice: The Social Responsibility of Lawyers: Recent Development: Lactation Litigation and the ADA Solution: A Response to* Martinez v. NBC published in the *Washington University Law Journal*, advocates that breastfeeding should in fact be considered a disability within the meaning of the ADA.[149] She proposes that breastfeeding meets the tripartite requirements of the ADA and that the ADA is the appropriate legislation to provide accommodation.[150] Notably, Rohr also argues that considering breastfeeding a disability would not "reinforce gender prejudices or foster discrimination," rather it would

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[145] *Kallir*, 93 A.D.2d at 247. The *Bond* court distinguished *Kallir* by determining that the New York Human Rights Law relies on a different interpretation for disability than the Workers' Compensation Law. The *Bond* court also criticized the *Kallir* court's reliance on a "'liberal and humane interpretation'" of the purpose of the Workers' Compensation law. *See Bond*, 997 F. Supp. at 310.

[146] *Compare* Christrup, *supra* note 30, at 487 *and supra* Parts II. A-C (discussing the health benefits of breastfeeding), *with* Hilary Von Rohr, *Access to Justice: The Social Responsibility of Lawyers: Recent Development: Lactation Litigation and the ADA Solution: A Response to* Martinez v. NBC, 4 WASH. U. J.L. & POL'Y 341, 342 (2000) (recognizing that although 'disability' may not be the most preferential term, the disability framework can be appropriately applied to the condition of breastfeeding mothers).

[147] *See* Christrup, *supra* note 30, at 487-88; *see also Toyota*, 534 U.S. at 199 (finding "an individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person").

[148] *See* Christrup, *supra* note 30, at 488.

[149] Rohr, *supra* note 146, at 342.

[150] *See id.* at 353-54. Rohr argues that lactating falls within the ADA's "physical or mental impairment" requirement in that it is a physiological condition that affects one or more bodily systems. *Id.* Lactating affects the "major life activit[ies]" of mobility and the ability to work in that the woman is under the constant constraint of having to release milk before she experiences pain and leakage. *Id.* Finally, the woman is "substantially limited" by her breastfeeding condition because she is significantly limited in the performance of particular major life activities as compared to a non-lactating person performing the same activity. *Id.*

recognize the long ignored impairments a woman faces when lactating.[151] The New York courts have also adopted this approach in interpreting the state disability laws.

B. *Breastfeeding As A Cultural Choice in Care-Giving: Protection Under The Family And Medical Leave Act*

Women who express breast milk at work have also sought accommodation for their modified work schedules through the Family and Medical Leave Act. In 1993, Congress passed the Family and Medical Leave Act which provides up to twelve weeks of unpaid leave for both men and women within one year after the birth of a baby; after the adoption of a child or placement of a foster child; when a serious health condition renders the employee unable to perform job functions; or when the employee needs to care for a spouse, parent or child with serious health conditions.[152] The Senate recognized that, "private sector practices and government policies had failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family."[153] This legislation is extraordinary for recognizing that employees have responsibilities beyond the workplace and that those responsibilities may not always be predictable and neatly scheduled ahead of time.

Because the Family and Medical Leave Act recognizes that employees need flexibility to balance work and family care-giving obligations, it seems like an appropriate piece of legislation to accommodate expressing breast milk at work. The twelve weeks of leave could accommodate a breastfeeding mother's need to introduce her child to breastfeeding and to establish a nursing relationship.[154] The FMLA addresses many of the shortfalls of the PDA, Title VII and the ADA. Unlike the PDA, the FMLA does not require a "condition related to pregnancy or childbirth."[155] The FMLA was designed to apply equally to both sexes, and by doing so, it tries to neutralize incentives employers may have for choosing male employees over female

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151 *Id.* at 357.

152 *See* § 2612(a)(1)(A)-(D). To qualify for leave, an employee must work for an employer with at least fifty employees at that worksite or fifty employees within a seventy-five mile radius. The employee must have been working for that employer for twelve months and for at least 1,250 hours in that year. *See* 29 U.S.C. § 2611(2) (1994).

153 S. Rep. No. 103-3, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 6.

154 *See* Christrup, *supra* note 30, at 489.

> Although there is no ideal age at which a baby can be separated from his mother, it is best to delay the separation until your baby is at least six to eight weeks old, a time when your milk supply is firmly established. If you return to work at this point, you will have a good chance for success.

CANDACE WOESSNER ET AL., BREASTFEEDING TODAY 154 (Avery Publishing Group, Inc. 1991).

155 42 U.S.C. § 2000e(k) (2003).

employees, thus avoiding gender issues associated with Title VII.[156] Under the ADA, accommodations are only provided when the individual meets certain requirements.[157] Because the FMLA requires employers to provide up to twelve weeks of leave to eligible employees, the employers must accommodate the period of extended absence.[158]

Although innovative in its recognition that American workers do in fact balance work and family care-giving obligations, the FMLA's effect has been far from revolutionary in all manner of family care-giving, including assisting women who express breast milk at work. The inadequacy of the FMLA falls mainly on women, who provide most of care-giving and clearly all breastfeeding.[159] Most significantly, the FMLA does not provide paid leave.[160] Professional and more educated employees are more likely to negotiate temporary leave without the FMLA.[161] Poorer employees, likely with fewer employment benefits that most need the government's protection to be able to care for their families while maintaining employment, can not afford to take advantage of the government's offer of unpaid leave.[162] Further, due to the employer eligibility restrictions, the FMLA only covers about fifty percent of the workforce, exempting ninety-five percent of American businesses from its purview.[163] These limitations have the effect of excluding many women from coverage under the FMLA. Women are more likely than men to work for small businesses and to work part-time.[164] Further, women are more likely than men to fail the twelve months of work requirement due to interruptions to their career resulting from care-giving responsibilities.[165]

Even if a woman manages to surpass the numerous hurdles of the

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156 *See id.* The findings of the Family and Medical Leave Act specifically state that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." 29 U.S.C. § 2601(a)(6) (1993).

157 *See supra* Part V.A for a discussion of ADA requirements.

158 *See* Christrup, *supra* note 30, at 489. Christrup argues that employers may have to hire temporary employees or juggle other employees' responsibilities to accommodate FMLA leave.

159 *See supra* Part III.A for a discussion of amount of care women provide relative to men.

160 *See* 29 U.S.C. § 2612(a)(1)(A)-(D) (1994). It is especially difficult for poor and single mothers to take twelve weeks without pay to care for their newborns. Therefore, the FMLA does not provide support for WIC programs, which support poor women and encourage breastfeeding. However, WIC does not provide income to its participants. The government has not resolved how it can encourage breastfeeding while simultaneously failing to provide paid leave to facilitate the process. *See supra* Part II.B and notes 15-16 for a description of the WIC program.

161 *See* Christrup, *supra* note 30, at 489. However, "women in lower socioeconomic groups are less likely to breastfeed and to breastfeed for a shorter time than women in higher socioeconomic groups." Weimer, *supra* note 17, at 5.

162 *See* Christrup, *supra* note 30, at 489.

163 *See* Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2190 (1994).

164 *See* Kessler, *supra* note 25, at 422.

165 *See id.*; *see also* 29 U.S.C. § 2162(a).

FMLA, the twelve-week limit may not accommodate the needs of a mother who has to express breast milk at work. First, as studies have shown, sixteen weeks is the ideal length of time needed for the infant to develop the appropriate muscles that would allow her to successfully switch from feeding at the breast to feeding from a bottle.[166] The FMLA leave provision falls short of this guideline minimally by four weeks, and likely by more time when the mother may take time off at the end of her pregnancy near the birth of her child.

The FMLA requires that "leave [for the birth of a baby] shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and employer of the employee agree otherwise."[167] This means that a woman does not have the flexibility to arrange her four hundred and eighty hours of family and medical leave in a way that optimally accommodates her breastfeeding or pumping needs.[168] For instance, without agreement from her employer, she cannot designate a period of time as FMLA time each day to use to express milk. The issue of specific accommodation for breastfeeding under the FMLA has not been litigated.

One author considers the FMLA as another example of the law's gradual acceptance of pregnancy in the workplace.[169] Just as the PDA made discrimination based pregnancy *per se* discrimination, the FMLA, for the privileged few who can use the family and medical leave, provides a limited amount of time for women to birth and bond with their baby. She notes:

> At most, the FMLA addresses the limitations of the model of formal equality in the areas of pregnancy and childbirth by requiring employers to provide women with job security when they must be absent from work for the immediate, physical event of childbirth and its aftermath, including a relatively short period to recover and bond with a newborn.[170]

The FMLA is an important step toward recognizing the conflicting demands of work and family; however, due to its many limitations, it also fails

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166 *See* Christrup, *supra* note 30, at 490; *see also* Irene B. Frederick & Kathleen G. Auerbach, *Maternal-Infant Separation and Breast-Feeding: The Return to Work or School*, 30 J. REPROD. MED. 523, 524 (1985). Some jurisdictions, including California, District of Columbia, Louisiana, Rhode Island, Tennessee and Connecticut provide for longer leave. *See infra* Part VI.A for a discussion of state legislation.

167 29 U.S.C. § 2612 (b)(1) (1994).

168 *See* David Cantor et al., Balancing the Needs of Families and Employers: Family and Medical Leave Surveys § 2.1.5, at 2-12 to 2-13 & tbl.2.13 *available at* http://www.dol.gov/asp/fmla/main.htm (last visited Dec. 12, 2003). "Given this provision, only fifteen percent of employees using family and medical leave to care for a newborn, newly adopted, or newly placed foster child do so on an intermittent basis." Kessler, *supra* note 25, at n.291.

169 *See* Kessler, *supra* note 25, at 426.

170 *See id.*

to protect breastfeeding mothers from workplace discrimination or accommodate their needs to express breast milk at work.[171]

VI. FORWARD THINKING: LEGISLATIVE SOLUTIONS

The judiciary has been unwilling to interpret federal employment legislation to extend legal protection to women who express breast milk at work. Protecting a woman who expresses breast milk at work from discrimination or accommodating her specific needs may be effected through legislation. A number of states have addressed various aspects of breastfeeding through legislation. A federal bill offering protection to women who express breast milk at work has been proposed to Congress, but it has not met with success.

A. *Only Nine States Have Passed Legislation To Protect Breastfeeding At Work*

At of the close of the 2002 legislative sessions, only nine states have passed legislation to protect women who breastfeed at work.[172] Of these nine laws, six require employers to proactively provide accommodation,[173] while the remaining three forbid employment discrimination based on breastfeeding status.[174] Twenty-seven states either allow women to breastfeed in any private or public location or exempt breastfeeding from public indecency laws.[175]

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171 *Barrash v. Bowen* is the closest a court has come to litigating accommodation of extended leave for breastfeeding; however, it was decided in 1988, six years before the passage of the FMLA. *See* 846 F.2d 927 (4th Cir. 1988) (denying request for extended leave); *see also supra* Part IV.B.i (discussing *Barrash*).

172 *See* National Conference of State Legislatures, Maternal and Child Health Breastfeeding Laws by State (July 2002), *at* http://www.ncsl.org/programs/health/breast.htm [hereinafter NCSL] (California, Connecticut, Georgia, Hawaii, Illinois, Minnesota, Tennessee, Texas and Washington).

173 For example, Connecticut requires employers to provide reasonable time each day to an employee who needs to express breast milk for her infant child and to provide accommodations where an employee can express her milk in privacy. *See* 2001 Conn. Acts § 01-182 (Reg. Sess.). Georgia, Illinois, Minnesota and Tennessee require employers to provide daily unpaid break time for a mother to express breast milk for her infant child and to make a reasonable effort to provide a location (other than a toilet stall) in close proximity to the work place for this activity. *See* GA. CODE ANN. § 34-1-6; (2001); Ill. Laws 68; MINN STAT. § 181.939 (1998); TENN. CODE ANN. § 50-1-305 (1999). California, among other provisions applicable to state and private employers, "memorialize[s] the governor to declare by executive order that all State of California employees be provided with adequate facilities for breastfeeding and expressing milk." Ca. Assembly Concurrent Resolution 155 (1998).

174 Hawaii prohibits employers from forbidding an employee from expressing milk during any meal period or other break period. *See* HAW. REV. STAT. § 367-3 (1999). Texas and Washington allow employers who meet certain requirements to be designated as "mother friendly." *See* TEX. HEALTH & SAFETY CODE ANN. § 165.001 et seq. (Vernon 1995); WASH REV. CODE § 43.70.640 (2001).

175 *See* NCSL, *supra* note 172. *But see* Derungs v. Wal-Mart Stores, Inc., 162 F. Supp. 2d 861 (S.D.Ohio 2001) (finding that in the absence of a state statute protecting a woman's right to breastfeed in public, motion for summary judgment must be granted, foreclosing claims of

Two thirds of the states that have passed legislation protecting women who express breast milk at work from discrimination based on their breastfeeding status also include provisions to accommodate them.[176] In these states, if a woman sues her employer for discrimination based on her breastfeeding status, the burden falls to the employer to prove compliance with the breastfeeding statute by demonstrating that accommodations were provided. Three states, Hawaii, Texas and Washington, do not make discrimination based on breastfeeding status a *per se* violation.[177] Rather, they generally require the employer to offer flexibility as to where a mother may express milk at work.[178]

In any event, there is a dearth of litigation surrounding the state breastfeeding laws. The concurrent demands of caring for an infant and working outside the home leave little time or energy to go to court to litigate the interpretation of a state law. Particularly, there may be little motivation to litigate where a woman has not lost her job but had the unfortunate experience of being denied accommodation or being subjected to discrimination during her limited period of breastfeeding. It is difficult to determine the impact of these laws without, in fact, putting the issue of whether a woman does have a right to express breast milk in the workplace before the courts.

B. *Changes at the Federal Level*

Federal legislation promoting a woman's right to express breast milk at work would demonstrate the nation's commitment to breastfeeding by extending protection to women in all fifty states. New York Congresswoman Carolyn D. Maloney, D-N.Y., has proposed federal legislation that makes discrimination against breastfeeding women a *per se* violation and promotes accommodation for expressing breast milk at work by providing a tax credit to employers who establish facilities for women to use to express milk at work or provide other related services.[179] Representative Mahoney's findings in

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intentional infliction of emotional distress and tortious interference with mothers' right to breastfeed brought by three mothers who breastfed their children in Wal-Mart stores). However, even states that have passed legislation allowing a woman to breastfeed in public are not without problems. Despite New York's law exempting breastfeeding from public indecency laws, a woman breastfeeding her child was approached at the New York Public Library by security guards and asked to leave. The next day the library apologized for their security staff's errant behavior. *See* Bridget Harrison, *Breast Unrest*, N.Y. POST, Oct. 2, 2002, at 7.

176 *See supra* note 173 and accompanying text. The states that require accommodation are Connecticut, Georgia, Hawaii, Illinois, Minnesota, Tennessee, Texas and Washington.

177 *See supra* text accompanying note 174.

178 *See id.*

179 *See* Breastfeeding Promotion Act, H.R. 285, 107th Cong. §§ 103, 201 (2001). The Breastfeeding Promotion Act § 103 provides: Section 701(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(k)) is amended— (1) by inserting "(including lactation)" after "childbirth," and (2) by adding at the end of the following: "For purposes of this subsection, the term 'lactation'

support of the need for this Act include the fact that "women with infants and toddlers are a rapidly growing segment of the labor force today;" the benefits of breastfeeding to mother, infant and employer; and that Congress intended to protect breastfeeding in the Pregnancy Discrimination Act.[180] Entitled the Breastfeeding Promotion Act, the legislation contains two provisions that would affect expressing breast milk at the workplace. [181] Currently, the bill has forty-five co-sponsors.[182] The first provision would amend the Civil Rights Act of 1964 to include lactation (including expression of milk) within the definition "because of sex" or "on the basis of sex" for purposes of such Act.[183] The second provision, entitled 'Credit for Employer Expenses for Providing Appropriate Environment on Business Premises for Employed Mothers to Breastfeed or Express Milk for Their Children,' amends the Internal Revenue Code to allow a limited credit to employers for expenses incurred enabling employed nursing mothers to breastfeed.[184] The last two provisions do not address workplace issues.[185] This legislation would complement the 'Right to Breastfeed Act' which, passed in 1999, allows that "a woman may breastfeed her child on any portion of Federal property where the woman and her child are otherwise authorized to be."[186]

VII. CONCLUSION

Dr. Benjamin Spock, renowned pediatrician, optimistically observed "If you're able to make the special effort that's needed to get support for your breast-feeding, at work and at home, working and breast-feeding can succeed, no matter what your schedule or situation."[187] Unfortunately, Dr. Spock's encouraged instruction has not proven true. Even those women who have made a 'federal case' out of protecting their right to express breast milk

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means a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast." *Id.* Section 201details the tax credit that would be provided to employers who provide "appropriate environment on business premises for employed mothers to breastfeed or express milk for their children." *Id.; see also* Katherine H. Parker, *Bill Would Require Accommodating Breastfeeding,* N.Y.L.J., Sept. 10, 2001, at 1 (applauding the New York City Human Rights Law's potential to encompass lactation and protect breastfeeding woman at work, but criticizing state and federal governments who have not yet made that practice a public civil right).

180 H.R. 285, *supra* note 179.

181 *See id.*

182 *See* Bill Summary & Status for the 107th Congress H.R. 285, *at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR00285:@@@L&summ2=m& (last visited Sept. 4, 2002).

183 *See* H.R. 285, *supra* note 178; 42 U.S.C. § 2000e-2(a)(1) (2003).

184 *See* H.R. 285, *supra* note 178.

185 Title III addresses breast-pump safety and Title IV concerns an Internal Revenue Code provision. *See* H.R. 285, *supra* note 179.

186 Right to Breastfeed Act, H.R. 1848, 106th Cong. § 2 (1999). Rep. Mahoney was a co-sponsor of this bill.

187 DR. BENJAMIN SPOCK, M.D. & MICHAEL B. ROTHENBERG, M.D., DR. SPOCK'S BABY AND CHILD CARE 126 (E P Dutton 1992).

at work have been unsuccessful. Despite the overwhelming agreement among pediatricians and health organizations lauding the benefits of breastfeeding and its significant cost-savings to employers, breastfeeding remains a secondary method of infant sustenance. Although the possibility of protecting an employee's right to express breast milk at work may be foreclosed under current legislation, the trend of breastfeeding-specific legislation among the states and at the federal level is encouraging.