

## Lactation Litigation And The ADA Solution: A Response To *Martinez v. NBC*

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On October 1, 1999, President Clinton signed into law a bill permitting breast-feeding in federal buildings.<sup>1</sup> After Clinton signed the bill, many hailed its passage as a dramatic step toward reforming the social and legal implications surrounding a woman's choice to breast-feed.<sup>2</sup> Supporters hope that the federal law will encourage the demise of society's supposedly Victorian views concerning motherhood and the breast.<sup>3</sup> The federal law comes on the heels of a number of recently released studies extolling the health and psychological benefits of breast-feeding for mother and child.<sup>4</sup> In almost every state, state legislators are drafting and enacting legislation affecting breast-feeding mothers.<sup>5</sup>

As this wave of public legislation hits a crescendo, recent court decisions, in contrast to new legislation, generally tend to limit the breadth of rights regarding a woman's choice to breast-feed in private employment, albeit on inconsistent grounds.<sup>6</sup> In the midst of diverging popular sentiment and emerging federal and state law,

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1. H.R. 1848, 106th Cong. (1999) (enacted).

2. Sheryl McCarthy, *Feds Decriminalize Nursing of Babies*, ORLANDO SENTINEL TRIB., Oct. 11, 1999, at A13.

3. *Id.*

4. Sandra Blakeslee, *Re-Evaluating Significance of Baby's Bond With Mother*, N.Y. TIMES, Aug. 4, 1998, at F1 (discussing the "attachment theory" which theorizes that a baby's bond to its mother determines subsequent social adjustment); Isabelle Scallreuter Olsen, *Out of the Mouths of Babes: No Mother's Milk for U.S. Children. The Law and Breast-feeding*, 19 HAMLINE L. REV. 269, 271-74 (1995) (citing numerous studies confirming that breast-feeding protects mothers and children from illness and disease and also enhances children's developmental and intelligence test scores).

5. See *infra* notes 12-21 and accompanying text.

6. *Barrash v. Bowen*, 846 F.2d 927 (4th Cir. 1998); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487 (D. Colo. 1997); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 868 (W.D.Ky. 1990) *aff'd*, 951 F.2d 351 (6th Cir. 1991); *Bd. of Sch. Dirs. v. Rosetti*, 411 A.2d 486 (Pa. 1979).

private employers face uncertain and inconsistent guidance on how to avoid litigation by lactating employees. In *Martinez v. NBC*, a New York district court decision highlighted the inconsistencies of this employment law quagmire.<sup>7</sup> The plaintiff in *Martinez*, a producer for an all-news television network, claimed that her employer failed to provide her with a “safe, secure, sanitary and private area to breast pump” and thus violated her rights under the Americans With Disabilities Act.<sup>8</sup> The court denied her claim and held that the ADA does not cover breast-feeding mothers.<sup>9</sup>

In light of *Martinez* and the new federal legislation, a private employer’s duty to accommodate a lactating employee is legally uncertain.<sup>10</sup> This Note argues that, contrary to the *Martinez* decision and recent legislative enhancements, the ADA already provides a workable framework for accommodating private employees who choose to breast-feed. This Note further asserts that courts hesitate to apply the ADA to breast-feeding employees because of the potential social repercussions and stigmas that may result from labeling the female effects of reproduction a “disability.” Although “disability” is not necessarily the most preferable term, it is an adequate description of the condition surrounding a breast-feeding mother. Furthermore, applying the term “disability” will not be an assault on gender equality. In summary, applying the ADA to lactating employees furnishes stable and predictable guidelines for private employers to

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7. 49 F. Supp. 2d 305 (S.D.N.Y. 1998).

8. *Martinez*, 49 F. Supp. 2d at 308; 42 U.S.C. §§ 1201-12213 (1994). On July 26, 1990, President George Bush signed the ADA into law. The statute provides comprehensive civil rights protection to individuals with disabilities. The ADA is divided into five titles. Title I covers discrimination in employment. Title II extends the prohibition against discrimination on the basis of disabilities to all programs, activities, and services of state and local governments or agencies, regardless of whether these entities receive federal financial assistance. Title II also covers public transportation. Title III prohibits discrimination against individuals with disabilities by privately-run places of public accommodation and public transportation services provided by private entities. Title IV covers telecommunications and Title V contains several miscellaneous provisions. *See generally* BNA, THE AMERICANS WITH DISABILITIES ACT: A PRACTICAL AND LEGAL GUIDE TO IMPACT, ENFORCEMENT AND COMPLIANCE 63-76 (1990); Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 397 (1991); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993).

9. *Id.* at 308.

10. Eric Matusewitch, *Workplace Lactation or Litigation? Soon, Employers May Face a Choice*, LEGAL INTELLIGENCER, August 9, 1999, at LQ2.

heed, while at the same time protecting a working mother's right to continue her employment and motherhood simultaneously.

Section I of this Recent Development provides the reader with a summary of current and recently enacted legislation affecting the right to breast-feed. Section II contains a historical synopsis of lactation litigation. Section III of this Recent Development offers a critique of the *Martinez* decision. Finally, section IV suggests a solution to the uncertainty regarding the legal rights of lactating employees.

### I. A SUMMARY OF THE CURRENTLY PROPOSED AND RECENTLY PASSED LEGISLATION AFFECTING BREAST-FEEDING

Congress recently passed a federal law allowing breast-feeding in federal buildings, a bill that received unusually high bipartisan support.<sup>11</sup> Other than this recently passed law, however, Congress typically leaves specific breast-feeding legislation to the discretion of state legislatures.

A number of states formally recognize a woman's right to publicly breast-feed.<sup>12</sup> New York and Connecticut even have passed laws making interference with breast-feeding a civil rights violation.<sup>13</sup> In addition to their legal implications, almost all of these laws specifically speak to the benefits of breast-feeding and encourage women to do so. Florida's breast-feeding statute states that

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11. Congress passed the Act by adding it to a bill financing the Treasury and Postal Service. However, U.S. Representative Carolyn Maloney of New York originally introduced the bill as a separate act and named it the "Right To Breastfeed Act." H.R. 1848, 106th Cong. (1999). Maloney sponsored the bill and currently supports two pending bills relating to women and breast-feeding. H.R. 1478, 106th Cong. (1999) (amending the Civil Rights Act of 1964 to include breast-feeding by new mothers); H.R. 3531, 105th Cong. (1998) (supporting breast-feeding by new mothers and encouraging employers to support workplace lactation programs).

12. CAL. CIV. CODE § 43.3 (West 2000); DEL. CODE. ANN. Tit. 31, § 310 (1997); FLA. STAT. Ch. 800.02 (1998); IDAHO CODE § 2-209 (1998) (providing that nursing mothers may be excused from jury duty until they are no longer nursing); IOWA CODE § 607A (1995); NEV. REV. STAT. § 201.220 (1995); N.Y. CIV. RIGHTS LAW § 79-e (McKinney 2000); WIS. STAT. ANN. §§ 944.20, 948.10 (West 1999-2000).

13. 1997 Conn. Acts 97-210 (Reg. Sess.) (amending CONN. GEN. STAT. ANN. § 46a-64 (West 1995) and declaring that "[i]t shall be a discriminatory practice for a place of public accommodation, resort or amusement to restrict or limit the right of a mother to breast-feed her child."); N.Y. CIV. RIGHTS LAW § 79-e (stating that women who are harassed for breast-feeding can bring a claim for damages as a civil rights violation).

“the breast-feeding of a baby is an important and basic act of nurture which must be encouraged in the interest of maternal and child health and family values.”<sup>14</sup>

Most of these laws, however, do not apply to breast-feeding in the workplace. Only two states have enacted laws requiring employers to reasonably accommodate breast-feeding mothers.<sup>15</sup> Minnesota requires private employers to set aside a private spot “other than a toilet stall” for nursing mothers who want to pump milk during unpaid breaks.<sup>16</sup> In 1999 the Tennessee legislature enacted a similar law.<sup>17</sup> Instead of mandating accommodation, Texas enacted the Texas Breast-Feeding Rights and Policies Law which encourages breast-feeding in the workplace.<sup>18</sup> The Texas law allows businesses that develop policies supporting work site breast-feeding to use the designation “mother friendly” or “baby friendly” in their promotional materials.<sup>19</sup> Moreover, in 1998 California enacted Assembly Concurrent Resolution No. 155 which urges employers to provide support and encouragement to working mothers who want to continue breast-feeding.<sup>20</sup>

While these recent legislative steps highlight the need for legal protection for lactating women, the assortment of current legislation fails to offer consistency and predictability.<sup>21</sup> Consequently, both employees and employers remain unclear about their legal obligations and rights.

## II. A HISTORY OF LITIGATION BY LACTATING EMPLOYEES

Lactating employees have sued their employers under a variety of theories, including the Pregnancy Discrimination Act (hereinafter

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14. FLA. STAT. ANN. § 383.015 (West Supp. 1998).

15. MINN. STAT. ANN. § 181.939 (West 1999); TENN. CODE ANN. § 50-1-305 (1999).

16. MINN. STAT. ANN. § 181.939.

17. TENN. CODE ANN. § 50-1-305 (1999).

18. TEX. HEALTH & SAFETY CODE ANN. §165.001-.034 (Vernon Supp. 2000).

19. *Id.* at § 165.003.

20. CAL. CIV. CODE 43.3 (West 2000).

21. For example, an employer with offices in Minnesota may be required to provide an eight by twelve foot lactating room, while in Missouri, the same employer may only be required to provide a bathroom stall.

PDA),<sup>22</sup> the ADA, the Constitution, and state laws. Women employees asserting the right to breast-feed primarily base their action on the PDA.<sup>23</sup> The PDA bars discrimination on the basis of pregnancy, childbirth, and related medical conditions. These cases typically involve employees denied leaves of absence or work schedule modifications to accommodate breast-feeding.<sup>24</sup>

The great majority of courts, however, hold that breast-feeding is not a pregnancy-related medical condition under the PDA.<sup>25</sup> For example, in *Wallace v. Pyro Mining Co.* the district court held that an employee's discharge did not constitute a termination due to a condition related to pregnancy or childbirth in violation of the PDA. The employer fired her after she did not return to work at the end of her maternity leave because she needed additional time to breast-feed her baby.<sup>26</sup> In addition, the district court in *Fejes v. Gilpin Ventures, Inc.* held that the employer did not violate the PDA when it fired a

22. 42 U.S.C. § 2000e(k) (1994). In 1978 Congress amended Title VII of the Civil Rights Act of 1964 "to prohibit sex discrimination on the basis of pregnancy." The Pregnancy Discrimination Act amended the "Definitions" section of Title VII, 42 U.S.C. § 2000e, adding a new subsection (k) reading in pertinent part as follows:

The terms "because of sex" or "on the basis of sex" [in Title VII] 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, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k) (1994).

23. *Id.*

24. *See infra* notes 25-27.

25. Courts have construed the "related medical conditions" provision of the PDA to cover only those disabilities or illnesses that incapacitate the employee. *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D.Ky. 1990). In *Wallace* the court noted that:

[a]dmittedly, the [PDA] does not define what constitute "related medical conditions." However, the substantive references to "related medical conditions" within [the] legislative history are all in the context of the extent to which female employees can be denied medical benefits, such as sick leave and health insurance coverage, arising from pregnancy and childbirth . . . Neither breast-feeding and weaning, nor difficulties arising therefrom, constitute such a condition . . . If a woman wants to stay home to take care of the child, no benefit must be paid because this is not a medically determined condition related to pregnancy.

*Id.*

26. *Id.*

woman for requesting additional leave time so that her child could adapt to a breast-feeding schedule compatible with her work hours.<sup>27</sup>

In contrast, the Fifth Circuit Court of Appeals explicitly recognized a constitutional right to breast-feed at work. In *Dike v. School Board of Orange County* the court ruled that a Florida public school teacher's "interest in nurturing her child by breast-feeding is entitled . . . to constitutional protection against state infringement under the Ninth and Fourteenth amendments."<sup>28</sup> The court compared breast-feeding to marriage, calling both "intimate to the degree of being sacred."<sup>29</sup>

In state courts, plaintiffs sue their employers under state civil rights and human rights laws. For instance, in *Board of School Directors v. Rossetti*, the Pennsylvania Supreme Court rejected a public school teacher's claim that the school board's refusal to grant her a discretionary extended leave of absence to breast-feed her baby constituted sex discrimination under Pennsylvania's civil rights law.<sup>30</sup> In a contrast, a New York court held in *Bond v. Sterling, Inc.* that an employee made out a prima facie case of pregnancy discrimination under the New York State Human Rights law when her employer terminated her for refusing to attend a business conference without her breast-feeding infant.<sup>31</sup>

In 1998, for the first time, a court addressed the question whether a lactating employee should be protected under the ADA.<sup>32</sup> In *Martinez v. NBC* a female employee unsuccessfully sued her employer, MSNBC, for insufficiently accommodating her need to pump breast milk at work.<sup>33</sup> Martinez brought suit under the ADA and Title VII of the Civil Rights Act of 1964.<sup>34</sup> The Southern District

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27. 960 F. Supp. 1487, 1490-92 (D. Colo. 1997).

28. 650 F.2d 783, 783 (5th Cir. 1981) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

29. *Id.* at 785. The Fifth Circuit decided, however, that the school board should be given the opportunity to show that its rule prohibiting teachers from leaving the premises and from bringing their infants to work, as applied to breast-feeding mothers, furthered important state interests. *Id.* at 787.

30. 411 A.2d 486 (Pa. 1979).

31. 997 F. Supp. 306, 309 (N.D.N.Y. 1998).

32. *Martinez*, 49 F. Supp. 2d 305.

33. *Id.* at 309.

34. *Id.* at 306.

of New York dismissed both of Martinez's claims, holding that neither the ADA nor Title VII afforded her a remedy.<sup>35</sup> Nevertheless, the court acknowledged that "the problems facing women who wish to bear children while pursuing challenging careers at the same time remain substantial."<sup>36</sup>

In *Martinez* the plaintiff left MSNBC on maternity leave and returned to work six months after giving birth to her son.<sup>37</sup> After she resumed working, she chose to continue breast-feeding her infant.<sup>38</sup> Martinez used an electric breast pump to pump breast milk to feed her son when she was at work and could not nurse him.<sup>39</sup> For three months after she returned from maternity leave, Martinez regularly pumped breast milk in an empty edit room at MSNBC's studio.<sup>40</sup> After three months without incident, an employee tried to enter the edit room while she was breast-pumping.<sup>41</sup> Martinez complained to MSNBC's human resource department and rejected suggestions that she hang a "do not disturb" sign on the door.<sup>42</sup> Martinez also began to experience difficulties concerning her work schedule and complained that male co-workers made offensive comments regarding her breast-pumping.<sup>43</sup> Martinez eventually left MSNBC and subsequently filed suit.<sup>44</sup>

The court rejected Martinez's Title VII claim, holding that her desire to pump breast milk was not "sex plus" discrimination.<sup>45</sup> Under Title VII, "sex plus" discrimination occurs "when a person is subjected to disparate treatment based not only on her sex, but on her sex considered in conjunction with a second characteristic."<sup>46</sup> The court reasoned that the "sex plus" theory does not apply where, as in *Martinez*, there was no corresponding subclass of members of the

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35. *Id.* at 308-11.

36. *Id.* at 306.

37. 49 F. Supp. 2d at 306-07.

38. *Id.* at 307.

39. *Id.*

40. *Id.*

41. *Id.*

42. 49 F. Supp. 2d at 307.

43. *Id.* Martinez desired a more regular schedule and refused to work weekends. *Id.*

44. *Id.* at 308.

45. *Id.* at 310-11. The court also summarily rejected Martinez's claim of hostile work environment and retaliation under Title VII. *Id.* at 311.

46. *Id.*

opposite gender.<sup>47</sup>

The court also rejected Martinez's ADA claim by relying on court decisions holding that pregnancy and related conditions do not, absent unusual conditions, constitute disabilities under the ADA.<sup>48</sup> The court specifically quoted the *Bond* decision, which stated that "it is simply preposterous to contend a woman's body is functioning abnormally because she is lactating."<sup>49</sup>

### III. CRITIQUE OF *MARTINEZ*

The ADA statutory requirements and a recent Supreme Court decision provide a framework for understanding the flaws in *Martinez*. The ADA prohibits discrimination<sup>50</sup> in employment on the

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47. *Id.* at 308-09 (citing *Coleman v. B-G Maint. Mgmt. of Colo. Inc.*, 108 F.3d 1199, 1203 (10th Cir. 1997)).

48. 49 F. Supp. 2d at 308-09 (citing *Lacoparra v. Pergament Home Ctrs., Inc.*, 982 F. Supp. 213, 228 (S.D.N.Y. 1997); *Lehmuller v. Sag Harbor*, 944 F. Supp. 1087, 1093 (E.D.N.Y. 1996)).

49. *Id.* at 308-09 (quoting *Bond*, 997 F. Supp. at 311).

50. The ADA provides a statutory definition of discrimination. The definition of discrimination includes:

- (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
- (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship program);
- (3) utilizing standards, criteria, or methods of administration- (A) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control;
- (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
- (5)(B) denying employment opportunities to a job applicant or employee who is a qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;
- (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity is shown to be job-related for the position in question and is consistent with business necessity; and
- (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results

basis of disability by mandating:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.<sup>51</sup>

The ADA defines a “qualified individual with a disability” 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.”<sup>52</sup> The ADA also imposes upon employers an affirmative obligation to “make reasonable accommodations to the known physical or mental limitations of a qualified individual”<sup>53</sup> unless doing so “would impose an undue hardship on the operation of the business of the covered entity.”<sup>54</sup>

accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure) .

42 U.S.C. § 12112(b) (1994).

51. 42 U.S.C. § 12112(a).

52. 42 U.S.C. § 12111(8).

53. The ADA states that the term “reasonable accommodation” may include, but is not limited to: (1) “making existing facilities used by employees readily accessible to and usable by individuals with disabilities,” (2) “restructuring” jobs, (3) allowing “part-time or modified work schedules,” (4) “reassignment to a vacant position,” (5) acquiring or modifying “equipment or devices,” (6) adjusting or modifying “examinations, training materials or policies,” or providing “qualified readers or interpreters.” 42 U.S.C. § 12111(9)(A)-(B). The Equal Employment Opportunity Commission (EEOC) regulations provide that “to determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation.” Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. § 1630 (1999). The duty imposed under the ADA to provide reasonable accommodations to qualified individuals with disabilities is the same affirmative obligation that is imposed upon entities that are covered under the Rehabilitation Act. *See* 29 U.S.C. § 794 (1994).

54. The ADA defines the phrase “covered entity” to mean “an employer, employment agency, labor organization, or joint labor-management committee.” 42 U.S.C. § 12111(2). The federal government is specifically excluded from coverage under the ADA. 42 U.S.C. § 12111(5)(B). However, state and municipal employers are “covered entities” under the ADA. § 12202. The term “employer” means “a person engaged in industry affecting commerce who

To state a claim under the ADA a plaintiff must have a disability, defined as “a physical or mental impairment which substantially limits one or more of the major life activities” of that individual.<sup>55</sup> A “physical or mental impairment” is a physiological disorder or condition which affects one or more body systems, including the reproductive system.<sup>56</sup> “Major life activities” include, but are not limited to, “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.”<sup>57</sup> An individual is “substantially limited” by an impairment if she is “significantly restricted as to the condition, manner and 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.”<sup>58</sup> When determining whether a disability “substantially limits” a person from performing a major life activity, courts consider: 1) the nature and severity of the impairment; 2) the duration and expected duration of the impairment; and 3) the permanent or long term impact, or the expected long term impact of, or resulting from, the impairment.<sup>59</sup>

In addition to the statutory framework, in *Bragdon v. Abbott* the Supreme Court adopted a tripartite analysis for determining whether a mental or physical condition is a disability under the ADA.<sup>60</sup> Under the first step of the analysis, the Court determined whether the plaintiff’s condition constituted a physical impairment.<sup>61</sup> The second step of the analysis required the identification of the particular life activity that is impaired and a conclusion regarding whether the activity was a “major” life activity.<sup>62</sup> Finally, the Court examined

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has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person . . . .” 42 U.S.C. § 12111(5)(A).

55. 42 U.S.C. § 12102(2)(A).

56. 29 C.F.R. § 1603.2(h)(1).

57. § 1630.2(i).

58. § 1630.2(j).

59. § 1630.2(j)(2).

60. 524 U.S. 624 (1998).

61. *Id.* at 624.

62. *Id.* at 638. The Court agreed with the court of appeals that “[t]he plain meaning of the word ‘major’ denotes comparative importance” and “suggest[s] that the touchstone for determining an activity’s inclusion under the statutory rubric is its significance.” *Id.* The Court

whether the plaintiff's physical impairment "substantially limited" the asserted major life activity.<sup>63</sup>

In light of the ADA framework and the *Bragdon* decision, the *Martinez* court incorrectly analyzed whether the ADA applies to breast-feeding employees. Instead of analyzing the conditions of pregnancy and lactation separately, the *Martinez* court apparently viewed pregnancy and lactation as a single, prolonged physical condition.<sup>64</sup>

In support of its refusal to afford lactation ADA protection, the court stated that "[e]very court to consider the question to date has ruled that 'pregnancy and related conditions do not, absent unusual conditions, constitute a [disability] under the ADA.'"<sup>65</sup> The court then cited a number of cases which hold that pregnancy is not a disability under the ADA.<sup>66</sup> However, the cited cases speak to the issue of pregnancy under the ADA, not lactation. Immediately following the case citations on pregnancy, the court quoted *Bond's* belief that "it is simply preposterous to contend a woman's body is functioning abnormally because she is lactating."<sup>67</sup> This immediate transition from cases on pregnancy to a quote on lactation highlights the court's failure to draw a distinction between the two conditions. In sum, the *Martinez* court simply did not address the inherent differences between pregnancy and breast-feeding. By not addressing the physical distinctions between pregnancy and lactation, the court incorrectly concluded that the ADA does not protect breast-feeding employees.

In light of the *Martinez* court's failure to draw a distinction, the significant differences between pregnancy and lactation require

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also rejected the argument that "major life activity" is limited to "those aspects of a person's life which have a public, economic, or daily character." *Id.*

63. *Id.* at 637-41.

64. *See infra* notes 65-67.

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

66. *Id.* at 308. *See* *Lacoparra v. Pergament Home Ctr., Inc.*, 982 F.Supp. 213, 228 (S.D.N.Y. 1997) (holding that pregnancy is not a disability); *Lehmuller v. Sag Harbor*, 944 F. Supp. 1087, 1093 (E.D.N.Y. 1996) (stating that "normal pregnancy . . . does not impair any major life activity."). The court also cited to an EEOC regulation excluding "conditions, such as pregnancy, that are not the result of a physiological disorder." 49 F. Supp. at 309 (citing 29 C.F.R. Pt. 1630 App. § 1630.2(h) (1999)).

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

discussion. Webster's Dictionary defines being pregnant as "containing unborn young within the body."<sup>68</sup> In contrast, lactation is defined as "the secretion and yielding of milk."<sup>69</sup> Moreover, the condition of pregnancy ceases at the moment of the offspring's birth, but the onset and cessation of lactation depends upon a number of variables. Childbirth automatically induces lactation but lactation does not depend upon pregnancy. In the absence of pregnancy, adopting mothers and wet nurses frequently rely upon the suckling of a baby to induce lactation.

Furthermore, the physical impairments associated with pregnancy and lactation differ dramatically. A pregnant woman normally experiences a growth in girth and a variety of occasional discomforts. Absent any complications, however, the condition of pregnancy does not force a woman to substantially modify her lifestyle. She is not yet limited by the constraints of a hungry infant and leaking body parts. In contrast, a lactating woman suffers from a constant and limiting impairment—the need to secrete milk. Without the opportunity to secrete milk, a lactating woman will experience breast pain and leakage.<sup>70</sup> In addition, a breast-feeding infant demands frequent feedings which limit and affect a lactating mother's lifestyle. Therefore, a breast-feeding employee possesses unique and disabling characteristics that a pregnant employee does not.

#### IV. PROPOSALS

##### A. *Lactation Constitutes A Disability Under the ADA*

If one acknowledges the difference in condition between lactation and pregnancy, it is only logical to apply the ADA framework to lactation. The application of the ADA framework requires a

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68. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1788 (1993).

69. *Id.* at 1262.

70. *See Jacobson v. Regent Assisted Living*, 1999 U.S. Dist. LEXIS 7680, at \*1 (D.Or. Apr. 9, 1999). In *Jacobson*, the plaintiff's employer refused to let her pump her breasts even though she was leaking, resulting in humiliation and breast pain. *Id.* at \*7-\*10. Despite the plaintiff's request for a break, the employer refused to allow her any breaks and she was "forced to sit on a plane drenched in breast milk." *Id.* at \*12. Nevertheless, the district court granted summary judgment to the employer after finding credible evidence of shortcomings in the plaintiff's job performance. *Id.* at \*14-\*15.

determination of whether lactation constitutes a “physical or mental impairment that substantially limits one or more of the major life activities of [an] individual.”<sup>71</sup> First, the condition of lactation fits within the definition of a physiological condition that affects one or more body systems, consistent with the ADA’s definition of “physical or mental impairment.”<sup>72</sup> Second, the condition of lactation appears to affect a “major life activity” because it limits a woman’s mobility and ability to work by imposing constant physical constraints upon a woman, namely the need to release milk before experiencing pain and leakage. Third, a woman is “substantially limited” by her lactating condition because she is “significantly restricted as to the condition, manner and duration under which she can perform a particular major life activity,”<sup>73</sup> as compared to a non-lactating individual performing the same activity. To illustrate this point, imagine two female employees in a conference call and one of the female employees is lactating. As the conference call drags on, the lactating employee will either require a break or will experience pain and the humiliation of leaking breasts, thus “significantly restricting” her working activity. In light of the Supreme Court’s recent pronouncement on the breadth of the ADA, lactation might constitute an impairment that substantially limits the major life activity of working, but lactation also substantially limits the major life activity of reproduction.<sup>74</sup>

The duration of lactation will potentially affect the applicability of the ADA.<sup>75</sup> Many courts and commentators characterize lactation as “temporary” and thus undeserving of ADA protection.<sup>76</sup> However, the duration of lactation varies from individual to individual, and some women often lactate for over a year.<sup>77</sup> Moreover, many

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71. 42 U.S.C. § 12102(2)(A) (1994). *See, e.g., supra* notes 51-60 and accompanying text.

72. 29 C.F.R. § 1603.2(h)(1) (1999).

73. 29 C.F.R. § 1630.2(j).

74. *See Bragdon*, 524 U.S. at 638.

75. *See supra* notes 52-59 and accompanying text.

76. *See Okoroki v. District of Columbia*, 1998 U.S. Dist. LEXIS 10704, at \*3 (D.C. Cir. July 8, 1998).

77. Jo L. Freudenheim, *Exposure to Breastmilk in Infancy and the Risk of Breast Cancer*, EPIDEMIOLOGY, May 1994, at 324. Breast-feeding rates declined in the United States from the 1950s through the 1970s. *Id.* In the mid-1970s breast-feeding rates began to climb, reaching highs in the early 1980s. *Id.* Rates again began to decline in the mid-1980s. Statistics for 1997

disabilities that receive ADA protection vary in duration.<sup>78</sup> Finally, the duration of the disability is only one factor that the courts consider.<sup>79</sup>

Instead of applying the ADA, the majority of scholars suggest that the PDA should provide future lactation protection.<sup>80</sup> However, a number of recent court decisions expressly and consistently denounce the possibility of PDA protection.<sup>81</sup> Although the inherent purpose of the PDA is to level the playing field in employment, courts often refuse to grant PDA protection because of the uniqueness of female reproduction and the impossible task of identifying a similar male class.

In contrast, the ADA could afford lactating employees the appropriate protection. Based on the physical symptoms of lactation and its distinctions from pregnancy, lactation should fall under the ADA's definition of disability. Moreover, applying the ADA to a lactating mother satisfies a woman's immediate need for accommodation. Under the PDA the remedy for gender inequality would remain elusive until a court fashioned a remedy.

The potential protection of lactating employees is debated hotly and there are many different views as to the fundamental reasons for affording protection. Those who consider lactation a woman's personal choice and those who consider lactation an unavoidable consequence of pregnancy critique differently the idea of protecting lactation.<sup>82</sup> Critics that view lactation as a choice separate and apart from pregnancy believe that the impairment deserves neither PDA nor ADA protection.<sup>83</sup> On the other hand, a number of scholars prefer to de-emphasize the distinction between pregnancy and lactation, thereby criticizing the idea that lactation is a decision entirely

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show that while 62.4% are breast-feeding their children in the hospital, only 26% are still breast-feeding at six months and 14.5% are breast-feeding at twelve months. *Id.*

78. *See supra* note 59 and accompanying text.

79. *Id.*

80. Candace Saari Kovacic-Fleischer, *Litigating Against Employment Penalties for Pregnancy, Breast-feeding and Childcare*, 44 VILL. L. REV. 355 (1999).

81. *See supra* note 25.

82. *Barrash*, 846 F.2d 927 (characterizing the choice to breast-feed as a personal, private indulgence).

83. *Id.* at 930.

separate from the choice to have a child.<sup>84</sup> Scholars who believe that lactation is an unavoidable result of pregnancy contend that a woman's body, not her conscious mind, makes the decision to lactate when she gives birth.<sup>85</sup> Therefore, a woman must choose to interrupt the flow of milk instead of inducing it.<sup>86</sup> The scholars on this side of the debate usually support PDA protection.<sup>87</sup> This theoretical debate predominantly emerges in the context of the PDA because the PDA protects "medical conditions" related to pregnancy,<sup>88</sup> and many argue that breast-feeding constitutes a "related medical condition" and thus demands protection.

However, the debate over a mother's choice or absence of choice in lactation possesses limited importance in the context of the ADA. The important distinction lies in the distinctiveness of the symptoms associated with each of the two physical conditions, not whether lactation is a body's automatic response to childbirth. According to the Supreme Court, the issue of personal choice must not enter a decision to apply the ADA to a particular impairment.<sup>89</sup> In *Bragdon* the Court held that "in the end, the disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable."<sup>90</sup> Therefore, after the *Bragdon* decision, the debate regarding whether lactation is a choice or an unavoidable consequence of pregnancy appears moot in the context of the ADA. Instead, the primary question is whether or not lactation, as an impairment, constitutes a disability.

Some feminist scholars probably will consider the idea of labeling

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84. Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 230 n.29 (1998). Greenberg asks: "What about the physical changes that come with lactation or the suppression of lactation? Are they not medical conditions related to pregnancy? The line between "biological" and "non-biological" effects of pregnancy is simply not self-evident in the way [courts] would have us believe it is." *Id.* at 230.

85. *Id.*

86. *Id.*

87. *Id.*

88. 42 U.S.C. § 2000e(k) (1994).

89. *Bragdon*, 524 U.S. 624 (holding that HIV infection, even in the asymptomatic phase, is an impairment which substantially limits the major life activity of reproduction).

90. *Id.* at 638.

lactation a disability offensive.<sup>91</sup> A number of feminist scholars argue that it is derogatory to label pregnancy as a disability and that doing so will lead to further stereotyping of women.<sup>92</sup> Therefore, because these scholars criticize the labeling of pregnancy as a disability, they likewise might find fault in the labeling of lactation as a disability.<sup>93</sup>

However, the law is not a prisoner of social mores and must not hesitate to act in decisions of great social importance. Contrary to the popular feminist position, labeling lactation a “disability” will not hinder advances towards gender equality nor will the label categorize lactation as “abnormal.”<sup>94</sup> Unfortunately, courts and scholars hesitate to label lactation a disability because they assume that the label “disability” requires a finding of “abnormality.”<sup>95</sup>

Ironically, the word “abnormal,” or merely the idea of “abnormality,” does not exist in the language of the ADA. The ADA language focuses on the symptoms of a disability and its effect upon an individual.<sup>96</sup> Instead of requiring an “abnormality,” the ADA specifically requires a finding of an “impairment” which is defined as a “physiological condition.”<sup>97</sup> Therefore, any difficulty in labeling lactation a disability should not arise from a reluctance to label lactation “abnormal” because the ADA plainly does not require such a finding.

Perhaps the theories of Professor Robert Burgdorf best explain the reasons for reading the word “abnormal” into the statute.<sup>98</sup> Professor Burgdorf, who drafted the first ADA bill, argued that the ADA

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91. See Andrew Weissmann, Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690, 710 (1983).

92. *Id.*

93. See generally John D. Gibson, Note, *Childbearing and Childrearing: Feminists and Reform*, 73 VA. L. REV. 1145, 1171 (1987). In analyzing several feminist views, Gibson presents the views of Catherine MacKinnon. Catherine MacKinnon criticizes the idea of pregnancy as a disability because doing so assumes that pregnancy and related conditions are a disruptive intrusion into the male workplace rather than a positive fact of life which the workplace should be restructured to accommodate. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 121 (1979).

94. Gibson, *supra* note 93, at 1173.

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

96. See *supra* notes 50-59 and accompanying text.

97. *Id.*

98. Robert L. Burgdorf, Jr., “Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 411 (1997).

possesses a “simple and profound” central premise.<sup>99</sup> He described the premise as: “people denominated as ‘disabled’ are just people . . . Paradoxically, commentators, enforcement agencies and the courts, with manifest good intentions, have frequently interpreted and applied these laws in ways that reinforce a diametrically opposite premise—that people with disabilities are significantly different, special and need exceptional status and protection.”<sup>100</sup>

Furthermore, labeling lactation a disability will not reinforce gender prejudices or foster discrimination.<sup>101</sup> Rather, labeling lactation a disability will potentially reverse the historical tendency to minimize the impairment women experience when they lactate. By recognizing and validating the impairment, women will not suffer increased gender discrimination, but rather will receive increased respect in the workplace. Finally, mandating accommodation legitimizes the importance of a woman’s right to breast-feed and forces an employer to appropriately respect her condition.

### *B. Accommodation Under The ADA*

As a number of states and the federal government attempt to legislate a woman’s right to breast-feed, the law appears increasingly complex and embroiled. On the one hand, popular sentiment and medical findings encourage women to breast-feed.<sup>102</sup> On the other hand, the demands of a woman’s job can negate her choice all together. Moreover, the current state of the law may fail to clearly protect a woman’s right to breast-feed as it simultaneously fails to provide employers with appropriate means for accommodating their lactating employees. Even the *Martinez* court, who mistakenly applied the ADA to the condition of lactation, acknowledged that affording reasonable accommodation to lactating women could be

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99. *Id.*

100. *Id.*

101. See Greenberg, *supra* note 84, at 245. Greenberg argues that labeling female reproduction a disability “invokes a common stereotyped image of pregnant women—women who because of their condition are too tired, too large, or too emotional to carry on their normal activities.” *Id.*

102. See *supra* note 4 and accompanying text.

desirable.<sup>103</sup> The *Martinez* court admitted “[t]his of course is not to say that a statute requiring employers to afford reasonable accommodation to women engaged in breast feeding or breast pumping would be undesirable.”<sup>104</sup>

Therefore, the easiest and most uniform way to protect the rights of working mothers and private employers is to provide protection for lactating employees under the ADA. Moreover, application of the ADA would help to curb and clarify the current proliferation of inconsistent state legislation regarding breast-feeding.

Unfortunately, courts might respond to *Martinez* by rubber-stamping a denial of a nursing mother’s ADA claim instead of independently evaluating the appropriateness of the ADA to the condition of lactation. However, if a court independently evaluates lactation apart from the condition of pregnancy, it should conclude that the ADA affords an appropriate remedy-accommodation to a breast-feeding employee. For example, accommodation could easily take the form of mandated private lactation breakrooms on the employer’s premises that are designated exclusively as lactation stations.<sup>105</sup> Accommodation sounds like a vague remedy, but in light of the past success of the ADA, it would be practical to implement.<sup>106</sup>

## CONCLUSION

Attitudes, enforced by statutes interpreted either correctly or incorrectly by the courts and public, stand as obstacles for women who want to breast-feed their children. These misconceived attitudes conflict with increasing awareness that breast-feeding is the optimal method to feed infants.<sup>107</sup> Furthermore, it sends a message to nursing

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103. *Martinez*, 49 F. Supp. 2d at 309.

104. *Id.*

105. Perhaps organizations such as the American Association of Pediatrics could issue suggestive break schedules in keeping with the needs of the woman and infant.

106. See, e.g., Max Schulz, *Disability Rules Moving in on Smaller Businesses*, WASH. TIMES, Aug. 28, 1994, at B3; Ron A. Vassel, Note, *The Americans with Disabilities Act: The Cost, Uncertainty and Inefficiency*, 13 J.L. & COM. 397 (1994); Stevens B. Epstein, *In Search of a Bright Line: Determining When an Employer’s Financial Hardship Becomes “Undue” Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 394 n.11 (1995).

107. See Celia Farber, *HIV and Breast-feeding; The Fears. The Misconceptions. The Facts.*, 90 MOTHERING 65 (1998).

mothers that they can choose to stay at home or bottle-feed, but do not attempt to work and breast-feed their children.

Labeling lactation as a disability under the ADA formally recognizes the physical constraints lactation imposes upon a woman's body and provides a coherent framework for employers and employees. If we as a society recognize the importance of a woman's choice to breast-feed and a woman's choice to work, then we must provide the accommodations necessary to facilitate both choices. Society as a whole must bear this burden instead of regarding accommodation as solely a women's issue. In sum, labeling lactation a disability under the ADA will further the goal of gender equality by providing assistance for women who choose to breast-feed their infants and also support their families.