

## Questionable reaction to expressing breast milk cant pump up claim

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*Several statutes offer accommodation for or protection to nursing mothers in the workplace. The Fair Labor Standards Act (FLSA) requires employers to provide nonexempt employees with reasonable (paid or unpaid) break time and a suitable place to express milk for up to one year after the employee gives birth. Title VII of the Civil Rights Act of 1964 and the Arizona Civil Rights Act (ACRA) also protect nursing mothers from discrimination based on their need to express milk at the workplace. Title VII, the ACRA, and the Arizona Employment Protection Act (AEPA) prohibit retaliation against nursing mothers for taking breaks to express milk or for filing a discrimination charge based on failed accommodations. Considering the many statutory protections for nursing mothers, employers must know the accommodation requirements and be aware of the several ways in which their actions can subject them to liability.*

### **Background**

Danielle Behan worked as a bartender and server for Lo-Lo's Chicken and Waffles. Following maternity leave, she took paid breaks during her shift from March to September 2016 to express breast milk.

Lo-Lo's had a policy that employee breaks were to be unpaid. Another Lo-Lo's employee, Tracy Williams, discovered Behan's use of paid breaks and resulting policy violations on September 26, 2016. Williams confronted Behan to remind her that company policy required all breaks to be off-the-clock. In addition, she told Behan she couldn't express breast milk if she had tables to attend to.

Behan also believed there was no suitable place for her to pump, although her manager had offered her office space where she could pump privately. Behan

claims she stopped pumping at work after her conversation with Williams. She also stopped breastfeeding altogether in December 2016.

In February 2017, Behan filed a discrimination charge with the Arizona Civil Rights Division of the state Attorney General's Office, alleging Lo-Lo's failed to provide the necessary accommodations for her to express breast milk. The federal Equal Employment Opportunity Commission (EEOC) subsequently took jurisdiction because the charge was automatically dual-filed under the state and federal agencies' work-share agreement, and the EEOC dismissed Behan's charge within weeks of it being filed.

According to Behan, following her conversation with Williams and the discrimination charge filing, Lo-Lo's cut her scheduled hours and later terminated her employment on April 14, 2017. In response to those events, she sued for failure to provide necessary accommodations to her as a nursing mother under the FLSA, sex discrimination, and retaliation. Lo-Lo's asked the court to dismiss the claims, disputing her allegations that it had violated her rights.

### **No change in pay? No FLSA claim**

To prevail on her FLSA accommodation claim, Behan needed to show Lo-Lo's failed to provide a reasonable break time and private place, other than a bathroom, for her to express milk *and* that she lost wages attributable to this failure. Keep in mind that the FLSA doesn't require you to compensate employees for breaks. It merely creates liability for lost wages related to an employer's failure to accommodate the necessary break time and private place to express milk.

To her claim's demise, Behan conceded that Lo-Lo's alleged failure to provide breaks didn't cause her to lose any wages. Without lost wages, the FLSA doesn't provide a remedy to an employee for failure of

accommodation. Therefore, even if it had violated the statute, she would still be left without a remedy because she had no lost wages attributable to the lack of break time. The court dismissed her FLSA claims for this reason.

### ***Suggestive circumstances insufficient evidence of retaliation***

Behan claimed that after conversing with Williams and filing her discrimination charge, Lo-Lo's cut her scheduled hours. Then, in April 2017, it terminated her employment. She raised those points as her bases for the retaliation claim.

For Behan to prevail on her retaliation claim under Title VII, she needed to show (1) expressing breast milk or filing a discrimination charge is protected activity, (2) Lo-Lo's subjected her to an adverse employment action, and (3) there was a causal link between the protected activity and the adverse action. Then, the company needed to demonstrate a legitimate, nonretaliatory reason for the adverse employment actions taken, if any. If it did so, she needed to provide evidence its reason was pretextual (a cover for retaliatory motives).

The court sided with Lo-Lo's on Behan's retaliation claims. Regarding her reduced hours, the court acknowledged a reduction in hours constitutes an adverse employment action but stated there must be evidence of an actual reduction that materially affected her employment. Although her scheduled hours had been reduced, her hours and earnings during the relevant time had actually increased by more than 30 percent because she picked up shifts to make up for the cut in her schedule. Because she saw an increase in her hours, the court saw no materially adverse action and thus no retaliation on that basis.

Lo-Lo's asserted it had a legitimate nonretaliatory reason for terminating Behan's employment. She took a photo of a customer's contact information without permission. She didn't deny taking the photo. Instead, she claimed she had a legitimate reason for doing so. The court noted her motive was irrelevant to the legitimacy of Lo-Lo's discharge decision.

The court also disagreed with Behan's assertion that Lo-Lo's purported reason for the discharge was pretextual. It noted that evidence of the firing and denial of breaks alone fell short of the specific evidence of pretext needed for her to prevail. Likewise, her argument that the "very close" timing

between her break requests, discrimination charge, and discharge established pretext didn't persuade the court. Although it acknowledged the time line was "certainly suggestive," the several months' lapse between the conversation with Williams and discrimination charge filing and the discharge wasn't enough, on its own, to establish pretext.

### ***Sex discrimination requires more than unfavorable treatment***

Behan's evidence of sex discrimination also fell short. To prevail on her sex discrimination claim under either Title VII (as amended by the Pregnancy Discrimination Act (PDA)) or the ACRA, she needed to show:

1. Expressing breast milk made her part of a protected class;
2. She was qualified for her job;
3. Denying her the ability to express breast milk at work was an adverse employment action; and
4. Similarly situated employees outside her protected class were treated more favorably.

Although the issue of whether breastfeeding is a protected classification under the PDA hasn't been conclusively established, the court assumed Behan was protected for the purposes of resolving the case.

Behan's discrimination claim failed nevertheless because she was unable to demonstrate she was treated less favorably than similarly situated individuals. First, the court noted other servers who were permitted to take breaks to express milk weren't suitable comparators because they weren't outside her protected class.

The court also disagreed with Behan that the kitchen staff and other servers, who were allowed food and smoke breaks, were similarly situated to her. It explained the comparison didn't shed light on whether Lo-Lo's denial of breaks was related to breastfeeding. An acceptable comparator would be an employee with a similarly limiting medical condition to breastfeeding. Without a sufficient comparator, the court dismissed her claim.

### ***A cautionary tale***

A slight additional misstep by Lo-Lo's could have resulted in liability rather than dismissal of Behan's

claims against it. If she had lost money from its alleged failure to provide her with breaks or a private space, the outcome of her FLSA claim likely would have been different. Similarly, she may have had a sufficient retaliation claim if she hadn't worked so hard to gain back her hours.

Other Arizona employers haven't been so lucky. For instance, in a case covered by *Arizona Employment Law Letter* in September 2018 (see "Questionable accommodations allow nursing mother's claims to advance" on page 1 of that issue), Carrie Clark sued the Tucson Fire Department (TFD) for retaliation after she complained about its failure to provide her with appropriate lactation space. She got past the procedural hurdle that Behan did not, and in April 2019, a jury awarded \$3.8 million in damages in her favor.

Arizona employers should take note of the court's several important messages. You must provide a reasonable break time and a private place, other than a bathroom, for nursing mothers to express milk. Also note that a cut in scheduled hours constitutes an adverse employment action and that a discharge soon after protected activity can sometimes constitute sufficient evidence of retaliation. Finally, take care to provide the same accommodations for nursing mothers as you do for employees with other similarly limiting medical conditions.

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