



RIGHTS STUFF

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Break Time for Nursing Mothers Under the Affordable Care Act

Earlier this year, the U.S. Department of Labor issued a fact sheet to let people know about their rights and responsibilities under the Patient Protection and Affordable Care Act as far as nursing mothers are concerned.

According to the fact sheet, employers are "required to provide reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth each time such employee has the need to express the milk." Employers are required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by an employee to express breast milk." (This is the federal requirement. Some states have stricter requirements, and if states have greater protections for employed nursing mothers, employers have to comply with the state requirement.)

Under the federal law, employers are required to provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother. A restroom, even if private, is not a permissible location. If the space is not dedicated to the nursing's mother's use, it must be available when needed in order to meet the statutory requirement. The fact sheet says that "a space temporarily created or converted into a

space for expressing milk or made available when needed by the nursing mother is sufficient, provided that the space is shielded from view and free from any intrusion from co-workers and the public."

Employers with fewer than 50 employees are not covered by these federal requirements, if complying with the law would pose "an undue hardship." However, they may be covered by similar state laws. There is no clear definition of what an "undue burden" is; that determination is made by looking at the difficulty or expense of complying and the employer's size, financial resources, nature and structure of the business, among other factors.

Under the federal law, employers are not required to pay employees for breaks taken for expressing milk. But, if an employer already provides compensated breaks, and an employee uses that compensated break time for expressing milk, she must be paid the same way as other employees are paid for break times.

It's illegal under this law to fire someone or discriminate in any way against someone because she filed a complaint or cooperated in an investigation. If you have questions about this law, please consult a private attorney or the U.S. Department of Labor, 1-666-4-USWAGE, TTY 1-866-487-9243.

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EEOC Sues JetStream Ground Services for Religious Discrimination

JetStream, which has its headquarters in Jupiter, Florida, provides ground services to airline fleets across the country. Recently, the Equal Employment Opportunity Commission (EEOC) filed a suit against JetStream in Denver, alleging that it had discriminated against applicants for employment in that city.

According to the EEOC's press release, JetStream had a contract with United Airlines to clean cabins at Denver International Airport. Several Muslim women applied for jobs with JetStream and requested deviations from the company's dress code to comport with their religious beliefs. JetStream rejected their requests, even though many of the women had worked for JetStream's predecessors for years, cleaning cabins while adhering to their religious beliefs on attire. The EEOC said that the JetStream manager criticized the women's appearance, refused to make accommodations for them and denied them jobs.

Fair employment laws require employers to provide reasonable accommodations to employees and applicants so they can practice their sincerely-held religious beliefs. The law requires employers to engage in an interactive process with the employee or applicant to try to come up with solutions that meet everyone's needs.

The EEOC was unable to reach a voluntary settlement and thus filed its lawsuit. It is seeking monetary damages on behalf of the women who were denied jobs, training on anti-discrimination laws, an injunction against further discrimination and posting of non-discrimination notices at the worksite.

Mary Jo O'Neill, an attorney with the EEOC, said, "Under federal law, employers have an obligation to explore options for accommodating religiously observant employees. An employer is required to accommodate employees' reli-

gious beliefs so long as doing so does not create an undue burden on the employer. In many faiths, including certain Baptist and Pentecostal congregations, the Greek Orthodox Church, Orthodox Judaism, and Islam, to name just a few, women have dress requirements as part of their sincerely held religious beliefs. An employer cannot refuse an accommodation or deny women employment simply because it does not like how they dress."

Nancy Sienko, a field director for the EEOC, added, "A deviation from the dress code is one of the simplest and least onerous accommodations an employer can offer. When they refuse to accommodate female dress requirements found across many religions, employers disproportionately isolate women from the workforce and discriminate based on religion."

The press release did not give JetStream's side of the story.

Gentlemen's Club Settles Race and Retaliation Lawsuit

The U.S. Equal Employment Opportunity Commission (EEOC) recently announced that it had reached a settlement with Danny's Cabaret, a gentlemen's club in Jackson, Mississippi. According to the EEOC, the cabaret subjected four African American female entertainers to less advantageous terms and conditions of employment than white entertainers, including openly segre-

gated work schedules. The EEOC said that when one of the women complained, the cabaret retaliated by cutting their work hours and forcing one of them to quit.

Under the terms of the settlement, Danny's Cabaret will pay the women \$50,000. It will also implement new policies and practices designed to prevent racial

discrimination and retaliation, conduct supervisor and employee training on anti-discrimination and retaliation laws and establish a confidential complaint procedure.

If you have questions about your rights and responsibilities under fair employment laws, please contact the BHRC.



Photographer May Not Refuse to Photograph Same-Sex Ceremonies

Vanessa Willock contacted Elane Photography in New Mexico to see if it would be available to photograph her commitment ceremony to another woman. The co-owner of the studio, Elane Huguenin, is personally opposed to same-sex relationships and does not wish to photograph any image or event that violates her religious beliefs. She told Willock that they photographed only "traditional marriages." Willock's partner, Misti Collinsworth, then e-mailed the studio to see if they were available to photograph her wedding. She did not mention her partner's sex. Huguenin sent Collinsworth pricing information.

New Mexico has a law prohibiting discrimination in public accommodations on the basis of sexual orientation. Willock sued Elane Photography, alleging that it had violated New Mexico law, and the New Mexico State Supreme Court recently ruled unanimously that it had.

The studio argued that it had not discriminated on the basis of sexual orientation when it refused to photograph the ceremony. They said they would take photographs of gay people as long as the photographs did not involve or endorse same-sex relationships. And they would turn away heterosexual couples if they wanted photographs in a context that showed support for same-sex relationships. The Court said that the studio was trying to distinguish between a person's status as gay or lesbian and a person's conduct in com-

mitting to a person of the same sex. The Court said "To allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purposes" of the New Mexico anti-discrimination law. The fact that the studio would photograph a gay person so long as the photograph does not reflect the person's sexual orientation "does not cure its refusal to provide other services [such as wedding services] that it offered to the general public."

The studio argued that it creates and edits photographs for its clients so as to tell a positive story about each wedding, and it doesn't want to tell a positive story about same-sex relationships. The Court said that Willock's right to obtain services from a place of public accommodation without discrimination trumped the studio's right to avoid telling such a story. The studio is free to express its views in other ways, and no one would reasonably believe that its photographs were an expression of its religious beliefs. The fact that photography services include artistic and creative work does not give the studio more first amendment rights than say, a drug store that does not want to serve gay and lesbian customers. Both are places of public accommodation, subject to the state law.

The studio also argued that if it spent time taking and editing photographs of same-sex cou-

ples, it would have less time to do its preferred work of providing services to opposite-sex couples. The Court did not find that a compelling argument.

A concurring opinion said that "at its heart, this case teaches us that at some point in our lives all of us must compromise, if only a little, to accommodate the contrasting values of others. A multicultural, pluralistic society, one of our nation's strengths, demands no less. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that affects much of the rest of the world. In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship. I therefore concur."

The case is Elane Photography, LLC v. Vanessa Willock, New Mexico Supreme Court, Docket #33,687, August 22, 2013.





Man Files EEOC Complaint Over Parental Leave Policy

Josh Levs is a reporter for CNN. His employer has a policy that allows birth mothers, adoptive parents or parents who have a baby through the use of a surrogate to take ten weeks of paid leave. Biological fathers are entitled to only two weeks of paid leave under the policy. Levs, who just had his third child, has filed a complaint with the U.S. Equal Employment Opportunity Commission (EEOC) against CNN, claiming that this policy is discriminatory.

CNN's policy, whether or not it is discriminatory, is more gener-

ous than most U.S. employers. Only 15% of employers in the U.S. provide paid paternal benefits. The federal Family and Medical Leave Act requires covered employers to allow employees to take time off, up to 12 weeks, to care for a newborn, but the time does not have to be paid. And the law applies only to employers with 50 or more employees.

There may be legitimate health-related reasons to give new birth mothers more time off than fathers, but it's hard to explain why new adoptive fathers should get

more paid time off than new birth parents. As Mr. Levs said on his Tumblr page, "If I gave up my child for adoption, and some other guy at Time Warner adopted her, he would get ten weeks off, paid, to take care of her. I, however, the biological father, can't."

The case is pending before the EEOC. If you have questions about sex discrimination in employment, please contact the BHRC.

Employer Not Allowed to Obtain Employee's Medical Records in a "Regarded As" Disability Complaint

Scott Butler worked for the Louisiana Department of Public Safety and Corrections. His employer required him to submit to a fitness-for-duty evaluation that he believed was excessive, denied him overtime opportunities and placed him on involuntary leave. He said that the department regarded him as having a disability, and he sued under the Americans with Disabilities Act.

As the lawsuit proceeded, the department asked for a variety of information, including the name of every medical provider who had treated Butler for any psychiatric problems in the previous ten years and copies of all

his medical records from the past ten years. He objected to having to provide this private information, arguing that he was not saying that he had a disability, only that the department regarded him as having a disability, and thus he should not have to provide medical records. The Court agreed with him.

The department said it needed this medical information to show that Butler could not do his job without posing a direct threat to himself or others. They said they placed Butler on leave because of his behavior, and now needed this additional medical information to support

that decision. The Court said the department could not use recently-acquired information to justify a decision it had made in the past. "The medical records that Defendants now wish to obtain were obviously unknown to Defendants at the time when they allege Plaintiff posed a direct threat. Therefore, the records 'could not have motivated the employer's decision [and are] not evidence that tends to illuminate the ultimate issue.'"

The case is Butler v. Louisiana Department of Public Safety and Corrections, 2013 WL 2407567 (M.D. La. 2013).