

PUBLICATION

Breast-Pump Discrimination is Title VII Sex Based Discrimination

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Recently, the Fifth Circuit held that discharging a female employee because she is lactating or expressing breast milk constitutes sex discrimination in violation of Title VII. The appellate decision vacated the District Court's grant of summary judgment in favor of the employer after finding that discharging a female employee because she is lactating or breast-pumping is not sex discrimination. The Fifth Circuit concluded that the EEOC had satisfied the requirements of the *McDonnell Douglas* inferential test for Title VII discrimination such that trial was warranted.

In *EEOC v. Houston Funding II, Ltd*, the EEOC alleged that Houston Funding unlawfully discharged Donnicia Venters ("Venters") because she wanted to breast-pump at work. Venters worked as an account executive at Houston Funding from March 2006 until she was discharged in February 2009. Venters took a leave of absence in December 2008 to give birth. Houston Funding did not have a maternity leave policy and did not specify a date for Venters to return to work. After giving birth, Venters asked her supervisor whether it was possible for her to use a breast pump at work on two occasions. On February 17, 2009, during the second phone call in which Venters asked whether she could use a back room to pump milk, there was a long pause, and her supervisor told her that they had filled her spot. There was no denial of this conversation in the record before the Court. Houston Funding then mailed a termination letter dated February 16 to Venters claiming she was discharged due to job abandonment, effective February 13, 2009.¹ Venters filed a charge of sex discrimination with the EEOC. The EEOC later filed suit claiming Houston Funding discriminated against Venters based on her sex, including her pregnancy, childbirth, or related medical conditions, by ending her employment. Houston Funding claimed Title VII does not cover "breast pump discrimination." The District Court agreed holding that firing someone because she is lactating is not sex discrimination and that lactation is not a related medical condition of pregnancy. The Fifth Circuit reversed and remanded and held that terminating an employee because she is lactating or expressing milk states a cognizable Title VII sex discrimination claim because an adverse employment action "motivated by these factors clearly imposes upon women a burden that male employees need not--indeed, could not--suffer." The Court also held that lactation is a related medical condition of pregnancy.

Although only highlighted in a footnote, one important aspect of the decision is that the Fifth Circuit distinguished cases involving an employer's failure to reasonably accommodate a female employee wanting to use a breast pump at work from the issue before the Court of whether Houston Funding took an adverse employment action (*i.e.*, discharge) against a female employee because she was lactating and expressing breast milk. Venters simply asked Houston Funding whether she would be allowed to use a breast pump at work. Posing this question, the Court reasoned, is not a terminable offense. The Court was clear, however, that an employer is not precluded from a defense that it fired an employee because that employee demanded accommodations.

Nonetheless, one must wonder whether the next step from this decision is that a female employee is entitled to a reasonable accommodation in order to breast-pump. After all, the Court held that "lactation is a related medical condition of pregnancy" for purposes of the Pregnancy Discrimination Act ("PDA"), and the EEOC's Regulations and Guidelines provide that policies concerning reinstatement "shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to

other disabilities." 29 C.F.R. § 1606.10(b). Consequently, if lactation is a "medical condition" being equated to disability, it is not unthinkable that one may next argue she is entitled to some accommodation in order to breast-pump at work. For now, at least in the Fifth Circuit, employers clearly cannot terminate a female employee because she is lactating or breast-pumping.

¹There was plenty of evidence in the record that Venters had been in contact with Houston Funding during her leave and indeed had spent over 115 minutes or more on the phone with them.