

**Questions Regarding The Reach Of Ohio's  
Pregnancy Discrimination Act Remain Unanswered**

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On August 27, 2009, the Ohio Supreme Court missed an opportunity to provide some clarification to Ohio employers regarding whether lactation is protected under Ohio's Pregnancy Discrimination Act. In *Allen v. Totes/Isotoner Corporation*, 2009 Ohio 4231, the Ohio Supreme Court affirmed a decision from the Twelfth District Court of Appeals granting summary judgment in favor of the employer on claims of discrimination based upon the termination of a breastfeeding mother who had taken unauthorized breaks to pump milk.

When the Ohio Supreme Court agreed to hear this case there was an expectation that the Court would address whether Ohio's laws prohibiting pregnancy discrimination require employers to allow a woman breastfeeding to take unscheduled lactation breaks. Instead, the Court held that the evidence established that LaNisa Allen was discharged by Totes/Isotoner Corporation for taking unauthorized breaks from her work station and that there was no evidence from which a jury could conclude that this reason was a pretext for discrimination. Unfortunately, the Court's ruling left unanswered the more important question of whether alleged discrimination due to lactation is included within the scope of Ohio's employment discrimination statute, R.C. 4112.02, as a form of sex discrimination under R.C. 4112.01(B).

In doing so, the Court found that the fact that Allen was a lactating mother requiring these breaks was not relevant to the dispute. At least three of the Justices maintained that once the Court concluded that Allen had been terminated for what she agreed were unauthorized breaks, any decision with respect to whether this constituted discrimination based on lactation would have been an improper advisory opinion.

Justice O'Connor, in an opinion joined by Chief Justice Moyer, recognized that whether Ohio law recognizes discrimination based on lactation is one of great general interest and that not only the parties but all of Ohio's employees and employers "are entitled to the answer and to guidance on the contours of Ohio's employment laws". While Justice O'Connor concurred with the judgment reached by the Court, her opinion demonstrates a willingness to extend the reach of Ohio's pregnancy discrimination laws to lactation. Justice O'Connor expressly rejected the trial court's analysis that resulted in a conclusion that discrimination on the basis of lactation is not the same as discrimination on the basis of pregnancy because "Allen's condition of lactating was not a condition relating to pregnancy but rather a condition relating to breastfeeding."

After explaining the physiological aspects of lactation and acknowledging that lactation is obviously linked to breastfeeding, Justice O'Connor took the analysis one step further, stating that she had "little trouble concluding that lactation also has a clear,

undeniable nexus with pregnancy and with childbirth” and that “it necessarily follows that lactation is ‘because of or on the basis of pregnancy’ and that women who are lactating are women ‘affected by pregnancy [or] childbirth’.”

Nevertheless, based upon the record in the case, Justice O’Connor could not conclude that Allen was discriminated against because of pregnancy. She noted that although Allen’s unauthorized breaks may have been to pump milk, she could not properly engage in such actions without her employer’s knowledge and permission.

Justice O’Connor’s concurring opinion provides a glimmer of hope for Ohio’s employers in that it acknowledges that both Ohio’s Fair Employment Practices Act and Pregnancy Discrimination Act “mandate that an employer treat pregnancy with neutrality, but not preferentiality”. Although it remains unclear whether the other Justices share Justice O’Connor’s interpretation of how these statutes are to be applied, this interpretation suggests that the Fifth District Court of Appeals’ decision in *Nursing Care Management of America v. Ohio Civil Rights Commission* may have gone too far in extending preferential treatment in a pregnancy discrimination case. In *Nursing Care Management of America*, the court held that an employer was required to provide maternity leave to a newly hired employee even though the employer’s general leave policy required an employee to have twelve months of service before being entitled to leave, thereby requiring the employer to provide preferential treatment in cases of maternity leave.

Justice O’Connor’s statement is consistent with the plain language of the statute which provides that “[w]omen 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.” It is also consistent with how the issue is treated under the federal Pregnancy Discrimination Act, on which the Ohio statute is based. Nevertheless, until the Ohio Supreme Court has had an opportunity to rule on this issue, the Ohio Civil Rights Commission will continue to take the position that all employees, regardless of length of service or the applicability of the FMLA, are entitled to maternity leave.

Justice Pfeifer, in his dissent, observed that there was no explanation for why Ms. Allen’s trips to the restroom outside scheduled break times were different from the restroom trips other employees made outside scheduled break times. He noted that the record included no evidence about any limit on the length of unscheduled restroom breaks and no evidence that employees had to seek permission from a supervisor to take an unscheduled restroom break. The evidence established only that unscheduled bathroom breaks were permitted and that Ms. Allen was fired for taking them.

While Justice Pfeifer was obviously troubled by this unresolved factual question, he seemed even more troubled by the Court’s failure to address whether the Pregnancy Discrimination Act protects breastfeeding mothers, stating “Ohio’s working mothers who endure the uncomfortable sacrifice of privacy that almost necessarily accompanies their

attempt to remain on the job and nourish their children deserve to know whether Ohio's pregnancy discrimination laws protect them."

The opinions written by Justice Pfeifer and Justice O'Connor, and Chief Justice Moyer's concurrence with Justice O'Connor's opinion, suggest that at least three members of the Court are prepared to extend the reach of the laws prohibiting pregnancy discrimination to lactation. The remaining Justices may also favor this interpretation of the law although they declined to address the issue in this particular case. Thus, the Court's ruling in the *Allen* case does not foreclose the possibility that the rest of the Court will follow suit when faced with the right factual scenario. The *Allen* decision cautions against any action on the part of the employer that may present an obstacle for employees who have chosen to breastfeed their children and must pump breast milk in the workplace.

Finally, the Court's decision in *Allen* underscores the importance of consistent enforcement of employment policies and procedures and the need for documentation. The employer prevailed in *Allen* because it was able to articulate a legitimate, nondiscriminatory reason for its decision to discharge Ms. Allen that was supported by the evidence. The outcome in the *Allen* case turned entirely upon the fact that Ms. Allen had taken unauthorized breaks from her work station. The fact that the breaks were taken to allow Ms. Allen to pump breast milk seemed to be of little consequence to the Court in the final analysis. Had Ms. Allen's unauthorized breaks not been documented or had similar unauthorized breaks been excused in the case of other employees who were not lactating, the Court may have reached an entirely different result.