

2005

For Crying Out Loud: Ohio's Legal Battle With Public Breastfeeding and Hope for the Future

Brianne Whelan

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/jgspl>

 Part of the [Civil Rights and Discrimination Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

Whelan, Brianne. "For Crying Out Loud: Ohio's Legal Battle With Public Breastfeeding and Hope for the Future." *American University Journal of Gender, Social Policy & the Law*. 13, no. 3 (2005): 669-705.

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Journal of Gender, Social Policy & the Law* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

FOR CRYING OUT LOUD: OHIO'S LEGAL BATTLE WITH PUBLIC BREASTFEEDING AND HOPE FOR THE FUTURE

BRIANNE WHELAN*

Introduction	672
I. Background	674
A. Ohio's Battle with Legal Protection for Public Breastfeeding	675
1. <i>Derungs v. Wal-Mart Stores</i>	675
2. Ohio's Public Accommodation Statute.....	676
3. Ohio's New Breastfeeding Law.....	677
4. Exclusion of Breastfeeding from State Criminal Statutes	679
B. Federal Framework for Examining Breastfeeding Discrimination Claims.....	680
1. <i>General Electric Company v. Gilbert</i> and Comparability Analysis.....	680
2. Title VII and the Pregnancy Discrimination Act	681
C. Federal Promotion of Breastfeeding	682
D. State Laws and Statistics on Breastfeeding	683
II. Analysis.....	684
A. Ohio's New Law Combats the Lack of Legal Protection for Breastfeeding under Civil Rights Sex Discrimination Law	684
B. The Sixth Circuit's Analysis of Ohio's Public Accommodation Statute: Overruled, Outdated and Out of Place Logic.....	686
1. The <i>Derungs</i> Court Relied on Unsettled and Distinguishable Authority	686
2. The <i>Derungs</i> Court's Application of Employment Analysis to Ohio's Public Accommodation Statute Failed to Address Alternative Sources of Comparison.....	689
3. The <i>Derungs</i> Court Followed an Overruled and Flawed	

* J.D. Candidate, *American University Washington College of Law*, 2006. I would like to thank the *Journal* staff, especially Cynthia, Michael, John, Krista, and Liz for their insightful contributions. Special thanks to my family for their continuous support and encouragement and to Alexander for a great title and abundant love.

670	JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 13:3	
	Federal Framework.....	692
C.	Breastfeeding is a Sex-Specific Act and the <i>Derungs</i> Holding Discriminates against Women.....	695
1.	The <i>Derungs</i> Court Made Implausible Sex-Neutral Comparisons.....	695
2.	Treating Breastfeeding as a Choice Ignores Its Sex-Specific Nature.....	698
3.	Treating Breastfeeding as a Medical Condition Ignores Its Sex-Specific Nature.....	699
D.	Implications and Recommendations.....	700
1.	The Medical and Social Benefits of Breastfeeding Augment the Importance of Legal Protection of Public Breastfeeding	700
2.	Social Implications of Lack of Legal Protection for Public Breastfeeding.....	701
3.	Recommendations for Action by Other States.....	702
	Conclusion.....	704

2005]

FOR CRYING OUT LOUD

671

INTRODUCTION

“As for nursing in the restroom—half the time I don’t even want to use a public restroom for its intended purposes.” Helen, Virginia¹

Until recently, Ohio mothers and their infants had something to cry about due to the state’s lack of protection for women breastfeeding in public.² However, a new law provides hope of protection after the state’s legal battle with public breastfeeding.³ A recent Sixth Circuit case highlighted public breastfeeding as a legal issue and demonstrated that Ohio’s Civil Rights Act, which protects women from sex discrimination, lacks legal protection for mothers who breastfeed in public.⁴ The court, in *Derungs v. Wal-Mart Stores*, concluded that Ohio storeowners and managers of public businesses may restrict or even ban breastfeeding in their stores, despite the state’s explicit prohibition against sex discrimination in places of public accommodation.⁵ In response, Ohio followed a recent state trend and enacted legislation aimed at protecting women who choose to breastfeed in public.⁶ Without state protection, breastfeeding discrimination may occur—which constitutes harassment of, or refusal to provide public accommodations to, women who breastfeed in public.⁷

Ohio’s new law has been implemented in direct response to judicial refusal to extend various existing sex discrimination frameworks to protect

1. See Editorial, *Breast (and Worst) Case Scenarios*, WASH. POST, Aug. 14, 2004, at A10 (recounting several reader responses to a Washington Post staff writer’s article on breastfeeding).

2. See OHIO REV. CODE ANN. § 4112.02(G) (West 2004) (prohibiting discrimination based on sex in places of public accommodation); *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 430 (6th Cir. 2004) [hereinafter *Derungs*] (holding that Ohio’s Public Accommodation Statute (“OPAS”) does not prohibit storeowners or managers of places of public accommodation from restricting or banning breastfeeding in their stores or establishments).

3. See OHIO REV. CODE ANN. § 3781.55 (West 2005) (requiring places of public accommodation to allow mothers to breastfeed their children).

4. See *Derungs*, 374 F.3d at 430 (finding that OPAS does not prohibit a storeowner’s ban on breastfeeding because such a restriction does not constitute discrimination based on sex).

5. See OHIO REV. CODE ANN. § 4112.02(G) (prohibiting storeowners or employees from denying full enjoyment or use of places of public accommodation on the basis of an individual’s sex); see also *Derungs*, 374 F.3d at 439 (holding that prohibitions on breastfeeding do not amount to sex discrimination).

6. See, e.g., CAL. CIVIL CODE § 43.3 (West 1997) (protecting a woman’s right to breastfeed her child in public); accord N.J. STAT. ANN. § 26:4B-4 (West 2004).

7. See *Derungs*, 374 F.3d at 430 (describing Wal-Mart’s prohibition of breastfeeding, which required mothers, such as Ms. Derungs, to stop breastfeeding or leave the store).

women who breastfeed in public from discrimination.⁸ This new law will better protect a woman's choice to breastfeed in public.⁹ Although this law does not directly nullify the *Derungs* decision, it offers protection outside of a sex discrimination or public accommodation framework for women who do breastfeed in public. *Derungs* foreclosed the use of Ohio's Public Accommodation Statute ("OPAS"), part of the Ohio Civil Rights Act, through its prohibition of sex discrimination, as an avenue to protect public breastfeeding.¹⁰ The new law, in part, corrects the judicial refusal to protect public breastfeeding by giving mothers an affirmative right to breastfeed in buildings of public accommodation.¹¹ While this law demonstrates Ohio's intent to correct the effect of the *Derungs* holding, it is not entirely clear whether this law will be as effective in overruling *Derungs* as legislation amending OPAS would have been.¹²

Part I of this Comment examines breastfeeding as a legal issue under both Ohio state law and federal law.¹³ Part II of this Comment argues that, until recently, Ohio law did not adequately protect mothers against prohibitions or restrictions on breastfeeding due to the Sixth Circuit's narrow interpretation of OPAS's prohibition of sex discrimination in *Derungs*.¹⁴ Part II also describes federal courts' use of the Title VII comparability analysis in employment cases and the extension of this analysis to the public accommodation discrimination claim in *Derungs*.¹⁵ Moreover, Part II discusses the *Derungs* ruling as a form of discrimination against women.¹⁶ Finally, this Comment advocates the need for more

8. See *infra* Part II (arguing that, as exemplified by *Derungs*, the prohibition of sex discrimination under OPAS inadequately protects public breastfeeding, because courts have ruled that discriminatory acts towards breastfeeding do not constitute sex discrimination).

9. See *infra* Part II.D (asserting that a woman's choice to breastfeed is affected by her ability to breastfeed in public); see also OHIO REV. CODE ANN. § 3781.55 (West 2005) (Ohio 2005) (giving mothers an affirmative right to breastfeed in places of public accommodation).

10. See *infra* Part II.A (explaining that the *Derungs* court interpreted OPAS to exclude discriminatory acts towards breastfeeding women from the definition of discrimination based on sex).

11. See OHIO REV. CODE ANN. § 3781.55 (West 2005) (allowing women to breastfeed in public by requiring buildings of public accommodation to allow the act).

12. See OHIO REV. CODE ANN. § 4112.05(B) (West 2005) (establishing the procedure for filing a complaint of discrimination with the Ohio Civil Rights Commission). OPAS, unlike the newly amended building standards section of Ohio law, confers a private right of action for victims of discrimination. *Id.*

13. See *generally infra* Part I (outlining the federal programs that promote public breastfeeding, as well as discussing court treatment of breastfeeding discrimination claims, OPAS and subsequent case law holding that OPAS does not prohibit restrictions or bans on public breastfeeding).

14. See *infra* Part II.A (arguing that *Derungs* incorrectly foreclosed the possibility of interpreting OPAS to protect public breastfeeding in Ohio).

15. See *infra* Part II.B (explaining that the comparability analysis is outdated and ignores the fact that, like pregnancy, breastfeeding is sex-specific in nature).

16. See *infra* Part II.C (asserting that the logic behind pregnancy as a sex-specific characteristic, which leads to classification of pregnancy discrimination as a form of sex

states to follow Ohio's steps and enact new laws that promote the legal protection for public breastfeeding through alternative legislation.¹⁷ This Comment concludes that state legal frameworks that do not protect women who breastfeed from discrimination are inconsistent with the federal policy promoting breastfeeding and, therefore, alternative legislation protecting the practice is critical to gain consistency with these policies.¹⁸

I. BACKGROUND

Breastfeeding provides countless health and social benefits for infants, mothers, and society.¹⁹ Federal policy even promotes breastfeeding and recognizes its many benefits.²⁰ Women have a constitutional right to decide to breastfeed their children.²¹ Many state criminal statutes exclude exposure of the female breast while breastfeeding from indecency statutes and most states protect a woman's right to breastfeed publicly.²² However, until earlier this year, the state of Ohio had failed to adopt any such law or policy to protect and promote breastfeeding.²³ Ohio's new law is an attempt to align Ohio law with the laws of other states that explicitly

discrimination, also applies to breastfeeding).

17. See *infra* Part II.D (proposing that the importance of promoting breastfeeding and the lack of protection in the existing sex discrimination frameworks necessitate legislative alternatives to protect against breastfeeding discrimination).

18. See *infra* Conclusion (arguing that *Derungs* exemplifies the need for express legislation protecting breastfeeding); see also *infra* Part I.C (highlighting a number of federal programs promoting breastfeeding including, for example, the Special Supplemental Program for Women, Infants, and Children).

19. See OFFICE ON WOMEN'S HEALTH, DEP'T OF HEALTH & HUMAN SERVS., HHS BLUEPRINT FOR ACTION ON BREASTFEEDING 10-11 (2000) [hereinafter BLUEPRINT] (enumerating the benefits of breastfeeding, including enhancing children's resistance to infection, reducing the risk of certain cancers for breastfeeding mothers and decreasing family medical costs).

20. See, e.g., MATERNAL & CHILD HEALTH BUREAU, HEALTH RESOURCES SERVS. ADMIN., DEP'T OF HEALTH & HUMAN SERVS. [hereinafter CHILD HEALTH BUREAU] (describing the role of the Maternal and Child Health Bureau, which includes providing training and publications for local and state authorities to promote breastfeeding), at <http://www.cdc.gov/breastfeeding/compend-MCHB.htm> (last visited July 24, 2005).

21. See *Dike v. Sch. Bd. of Orange County*, 650 F.2d 783, 787 (5th Cir. Unit B July 1981) (holding that the Fourteenth Amendment's implicit protection of certain privacy interests includes a woman's decision to breastfeed).

22. See, e.g., ALASKA STAT. § 01.10.060(b) (Michie 2004) (excluding breastfeeding from the definitions of "lewd conduct," "lewd touching," "immoral conduct" and "indecent conduct"); FLA. STAT. ANN. § 800.03 (West 2004) (exempting a breastfeeding mother from an indecent exposure statute); 720 ILL. COMP. STAT. ANN. 5/11-9(a)(2) (West 2004) (stating that breastfeeding does not constitute public indecency); N.Y. PENAL LAW § 245.01 (McKinney 1983) (amended 1984) (excluding exposure of the breast during breastfeeding from the criminal indecent exposure statute).

23. See *Derungs*, 374 F.3d at 430 (holding that banning or restricting breastfeeding in places of public accommodation does not violate Ohio's anti-discrimination law). *But see* OHIO REV. CODE ANN. § 3781.55 (West 2005) (amending the building standards code to require places of public accommodation to allow mothers to breastfeed their children in those places).

protect the act of breastfeeding in public.²⁴

A. Ohio's Battle with Legal Protection for Public Breastfeeding

I. Derungs v. Wal-Mart Stores

Three women tested the scope of legal protection for public breastfeeding under OPAS by filing a complaint against Wal-Mart in Ohio state court, alleging that Wal-Mart's restrictions on breastfeeding violated OPAS as discrimination on the basis of age and sex.²⁵ After Wal-Mart removed the action to federal court, the district court granted summary judgment in favor of Wal-Mart for the sex and age discrimination claims.²⁶ The women then appealed to the Sixth Circuit for review of the sex discrimination claim exclusively.²⁷ The Sixth Circuit affirmed the district court's judgment, finding that while Ohio courts should construe civil rights statutes liberally,²⁸ OPAS does not prohibit restrictions on public breastfeeding as a form of discrimination based on sex.²⁹

The Sixth Circuit first looked to the intent of the Ohio Legislature in enacting OPAS and concluded that the legislature intended to limit the inclusion of claims of pregnancy discrimination as a basis for sex discrimination to claims of employment discrimination.³⁰ The court also

24. See OHIO REV. CODE ANN. § 3781.55 (West 2005) (permitting mothers to breastfeed their children in public); accord CAL. CIVIL CODE § 43.3 (West 1997); N.J. STAT. ANN. § 26:4B-4 (West 2004).

25. See *Derungs v. Wal-Mart Stores, Inc.*, 162 F. Supp. 2d 861, 863-65 (S.D. Ohio 2001) (explaining that Dana Derungs and two other women were nursing in Ohio Wal-Mart stores when employees asked them either to nurse in the restroom or leave the store). The women claimed that the store discriminated against them because of their sex because only women can breastfeed. *Id.*, *aff'd*, 374 F.3d 428 (6th Cir. 2004).

26. See *Derungs v. Wal-Mart Stores, Inc.*, 141 F. Supp. 2d 884, 894 (S.D. Ohio 2000) (holding that restrictions on breastfeeding do not constitute discrimination based on sex or age under OPAS).

27. See *Derungs*, 374 F.3d at 431 n.1 (noting that the plaintiffs waived appeal for failure to brief their tort claims and that they affirmatively waived their age discrimination claim).

28. See *id.* at 433 (stating that both the Ohio state legislature and the Ohio Supreme Court support the notion that Ohio courts should construe civil rights statutes liberally); see also OHIO REV. CODE ANN. § 4112.08 (West 2004) (explaining that Ohio courts must construe all provisions under the Ohio Civil Rights Act, including OPAS, liberally); Ohio Civil Rights Comm'n v. Lysyj, 313 N.E.2d. 3, 6 (Ohio 1974) (constructing the definition of a place of public accommodation under OPAS liberally to comply with the congressional purpose behind its enactment).

29. See *Derungs*, 374 F.3d at 436-37 (finding that the language and legislative history of the statute point to a definition of discrimination on the basis of sex that does not include breastfeeding discrimination).

30. See *id.* at 436 (reasoning that, because the legislature amended sections (A)–(F) of Ohio's Civil Rights Act, but not section (G) to adopt the language of the PDA, the legislature only intended to include pregnancy discrimination in the definition of sex discrimination in those amended provisions); see also OHIO REV. CODE ANN. §§ 4112.02(A)–(H) (noting that sections (A)–(F) prohibit employers from discrimination on the basis of sex, while section (H) pertains not to employers, but owners of places of public accommodation).

looked to federal employment law in its analysis.³¹ The court explained that, while Congress meant to overrule the Supreme Court's decision in *General Electric Co. v. Gilbert* by enacting the Pregnancy Discrimination Act ("PDA"), the court may still employ the comparability analysis set forth in *Gilbert*.³² In following this analysis, courts compare women to men in similar circumstances to decide a valid claim of discrimination based on sex. Federal courts and state courts following a federal sex discrimination framework employ this analysis, resulting in the exclusion of breastfeeding from protections for sex discrimination claims.³³

2. Ohio's Public Accommodation Statute

OPAS, like Title II of the federal Civil Rights Act, provides that "[i]t shall be an unlawful discriminatory practice" for:

[A]ny proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, disability, age, or ancestry, the full enjoyment of the accommodations, advantages, facilities, or privileges of the place of public accommodation.³⁴

31. See *Derungs*, 374 F.3d at 434 (explaining that Ohio courts use the Title VII analysis to interpret the Ohio Civil Rights Act).

32. See *id.* at 435 (reasoning that since the Ohio Legislature passed OPAS before the Supreme Court overruled *Gilbert*, the reasoning of *Gilbert* applied to OPAS); see also *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 127-30 (1976) (holding that General Electric's disability plan did not violate Title VII, even though it excluded coverage for pregnancy related medical costs for the spouses of male employees, because there was no benefit the plan provided for men that it did not provide for women).

33. See, e.g., *Derungs*, 374 F.3d at 430, 438 (invoking the *Gilbert* comparability analysis and finding that OPAS does not protect women from discrimination based on breastfeeding).

34. OHIO REV. CODE ANN. § 4112.02(G); see Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000) (prohibiting discrimination based on race, color, religion or national origin in places of public accommodation); see also OHIO REV. CODE ANN. § 4112.01 (A)(9) (including a restaurant, a barbershop, a public store or place of amusement as examples of places of public accommodation).

The statute is part of Ohio's Civil Rights Act, which also prohibits employers, employment agencies, labor organizations, property owners and housing financiers from discriminatory practices.³⁵ The Ohio Legislature amended a number of sections of the Civil Rights Act to include the language of the PDA in 1980.³⁶

The Ohio Supreme Court only had the opportunity to interpret OPAS once, in *Ohio Civil Rights Commission v. Lysyj*, and found that the owner of a trailer park violated the rights of a white resident under the statute.³⁷ Importantly, however, the court decided *Lysyj* when OPAS only prohibited discrimination for reasons of race, color, religion, national origin and ancestry.³⁸ A lower Ohio court later addressed OPAS in *Meyers v. Hot Bagels*, after the legislature amended the statute to include sex, rejecting a claim of sex discrimination.³⁹

3. Ohio's New Breastfeeding Law

In 1994, the Ohio Legislature considered public breastfeeding as a legal issue for the first time.⁴⁰ The legislature, however, failed to enact the amendment, which would have protected a woman's right to breastfeed in public.⁴¹ Several years later, in 1999, Representative Dixie J. Allen proposed a bill to amend Ohio's criminal code to protect public breastfeeding.⁴² However, that bill died in the House Criminal Justice

35. Compare OHIO REV. CODE ANN. §§ 4112.02(A)-(F),(H) (prohibiting discrimination by using the terms "because of" or "on the basis of" race, sex, religion and other categories), with *id.* § 4112.02(G) (prohibiting discrimination "except for reasons applicable alike to all persons regardless of" sex).

36. See *id.* § 4112.01(B) (stating that sections (A) through (F) of the Act are amended to reflect that the terms "because of sex" and "on the basis of sex" should include "because of or on the basis of pregnancy . . .").

37. See 313 N.E.2d at 1, 6 (holding that an owner of a trailer park denied a white woman full enjoyment of the accommodations of the park because she was entertaining black guests).

38. Compare *id.* at 5 (explaining that OPAS, as of 1974, only prohibits discrimination on the basis of race, color, religion, national origin and ancestry), with OHIO REV. CODE ANN. § 4112.02(G) (prohibiting discrimination based on race, color, religion, national origin, disability, age, ancestry and sex).

39. See *Meyers v. Hot Bagels Factory, Inc.*, 721 N.E.2d 1068, 1082-83 (Ohio Ct. App. 1999) (denying a woman's claim that a storeowner's harassment, which was also directed at male employees and customers, violated OPAS as sex discrimination). The court reasoned that the appropriate test for discrimination is simply whether the denial of enjoyment is applicable to all persons. *Id.*

40. See S.B. 342, 120th Gen. Assem., Reg. Sess. (Ohio 1993-1994) (proposing to amend the Ohio code to protect a woman's right to breastfeed in public); see also *Mother and Child: Suitable for Art, But Not Museum Exhibits*, ST. LOUIS POST-DISPATCH, Apr. 17, 1994, at A2 (reporting that the Ohio Legislature considered an amendment to protect public breastfeeding following a Toledo museum's negative response to a breastfeeding mother).

41. See OHIO REV. CODE ANN. § 4112.02 (prohibiting only discrimination in places of public accommodation based on race, color, religion, sex, national origin, disability and age).

42. See H.B. 328, 123d Gen. Assem., Reg. Sess. (Ohio 1999) (proposing to give women an affirmative right to breastfeed in any public or private place, and to exclude exposure of

committee without ever receiving a hearing.⁴³

In August 2004, one month after the *Derungs* decision, Representative Patricia Clancy responded to the holding's effect by sponsoring a bill proposing not to amend OPAS, but instead to amend the code's section on building standards to allow women to breastfeed in public.⁴⁴ The bill passed in the House Committee on Health, but the General Assembly adjourned before the bill could reach the Senate.⁴⁵ At that time, media opinion about the likely success of the bill was relatively negative.⁴⁶

Representative Clancy subsequently won a seat on the Ohio State Senate and reintroduced the proposal during the 126th General Assembly.⁴⁷ The proposed legislation was similar to laws in other states, which protect public breastfeeding by giving mothers an affirmative right to breastfeed in public.⁴⁸ However, the law's sponsor has taken a more conservative approach than other states, evidenced by the statute's position in the building standards code rather than in OPAS or another provision of the Civil Rights Act.⁴⁹

The law passed unanimously in the Senate and passed the House with

the breast during breastfeeding from the definition of "nudity" under sex offense laws).

43. See E-mail from Lakeisha Hilton, Aide to Rep. Dixie J. Allen, Ohio House of Representatives, to Brianne Whelan (Jan. 26, 2005, 09:12 EST) (on file with author) [hereinafter Hilton E-mail] (stating that the bill never received a hearing in the Criminal Justice committee and ultimately expired at the end of the legislative session).

44. See H.B. 554, 125th Gen. Assem., Reg. Sess. (Ohio 2004) (proposing to enact Section 3781.55 of the code, which governs building standards, so that a "mother is entitled to breast-feed her baby in any location of a place of public accommodation wherein the mother otherwise is permitted").

45. See Hilton E-mail, *supra* note 43 (stating that the bill never became law despite it passing through the committee hearing with only one opposition vote).

46. See, e.g., Laura A. Bischoff, *Breastfeeding Bill Introduced in Ohio House*, DAYTON DAILY NEWS, Sept. 24, 2004, at 4B (stating that even the bill's sponsor was not very optimistic about the likelihood of passage, given the fact that it was introduced so close to the end of the legislative session). *But see* Telephone Interview with Erika Cybulskis, Aide to Ohio State Sen. Patricia Clancy (Jan. 28, 2005) [hereinafter Cybulskis Interview] (stating that the media's pessimism was likely based on opinions of those involved with the breastfeeding debate in Ohio for many years who experienced opposition in previous attempts to promote the issue). For example, one woman who testified during a hearing for the 1999 bill recalled how a male legislator harassed her after her testimony. *Id.*

47. See S.B. 41, 126th Gen. Assem., Reg. Sess. (Ohio 2005) (demonstrating Senator Clancy's proposed legislation to protect breastfeeding mothers); *see also* Cybulskis Interview, *supra* note 46 (stating that Senator Clancy planned to introduce the bill on February 1, 2005 with the anticipated support of a large number of senators).

48. Compare OHIO REV. CODE ANN. § 3781.55 (Ohio 2005) (stating that "[a] mother is entitled to breast-feed her baby in any location of a place of public accommodation wherein the mother otherwise is permitted"), with N.J. STAT. ANN. § 26:4B-4 (West 2004) (providing that "a mother shall be entitled to breast feed her baby in any location of a place of public accommodation, resort or amusement wherein the mother is otherwise permitted").

49. See Cybulskis Interview, *supra* note 46 (stating that Senator Clancy considered proposing an amendment to the Civil Rights Act, but anticipated a greater likelihood of opposition from legislators who believe that breastfeeding does not rise to the same level of discrimination as race or sex discrimination).

only five opposition votes.⁵⁰ In the House, one representative offered an amendment that would strike the word “entitled” from the text of the law.⁵¹ This proposal was likely a result of fear that breastfeeding would be equated with other civil rights such as freedom from race discrimination. Even the bill’s sponsor shared this concern and declined to propose the bill as an amendment to the civil rights statute, but instead to the building standards code.⁵² However, a majority of members opposed the proposed amendment and the law was passed as originally introduced.⁵³ The law is effective after September 16, 2005.⁵⁴

4. *Exclusion of Breastfeeding from State Criminal Statutes*

In addition to enacting a new law permitting women to breastfeed in public, other state legislators should be aware that criminal laws present other potential barriers to public breastfeeding.⁵⁵ States have recently begun to exclude breastfeeding from statutes that criminalize indecent exposure.⁵⁶ The Ohio Court of Appeals, for example, interpreted Ohio’s indecent exposure statute as excluding exposure of the female breast from criminal liability, effectively excluding breastfeeding in public from possible punishable offenses.⁵⁷ However, as the previous lack of protection in Ohio demonstrated, a change in criminal liability alone does not necessarily lead to the legal protection of public breastfeeding.⁵⁸

50. See E-mail from Erika Cybulskis, Legislative Aide to Senator Patricia Clancy, Ohio Senate, to Brianne Whelan (May 12, 2005, 02:21 EST) (on file with author) (reporting that Senate Bill 41 passed the Senate by a vote of 32-0); E-mail from Erika Cybulskis, Legislative Aide to Senator Patricia Clancy, Ohio Senate, to Brianne Whelan (May 18, 2005, 04:45 EST) (on file with author) (indicating that Senate Bill 41 passed the House by a vote of 92-5).

51. See E-mail from Erika Cybulskis, Legislative Aide to Senator Patricia Clancy, Ohio Senate, to Brianne Whelan (May 19, 2005, 01:27 EST) (on file with author) (stating that Representative Diana Fessler proposed that the language instead read that promoting breastfeeding is part of the state’s “strong public policy”).

52. See Cybulskis Interview, *supra* note 46 (stating that the bill’s sponsor decided on a more conservative approach than proposing to amend the civil rights statute, an approach that had failed in pass legislatures).

53. See *id.* (stating that the amendment was quashed after a vote of 52-45 in favor of opposition).

54. See OHIO REV. CODE ANN. § 3781.55 (West 2005).

55. See, e.g., ARIZ. REV. STAT. ANN. § 13-1402 (West 2004) (criminalizing exposure of the areola or nipple of the female breast as a sexual offense); DEL. CODE ANN. tit. 11, § 764 (2004) (classifying exposure of the female breast as a sexual offense misdemeanor).

56. See, e.g., N.Y. PENAL LAW § 245.01 (excluding breastfeeding from an indecent exposure statute that prohibits exposure of the female breast).

57. See OHIO REV. CODE ANN. § 2907.09 (defining exposure of a “private part” as a misdemeanor); *State v. Jetter*, 599 N.E.2d 733, 733 (Ohio Ct. App. 1991) (per curiam) (finding that the Ohio public indecency statute does not consider the female breast a “private part”).

58. See *Derungs*, 374 F.3d at 430 (holding that a public store’s policy banning breastfeeding and allowing employees to ask breastfeeding mothers to leave or go to the bathroom did not violate Ohio law); *Jetter*, 599 N.E.2d at 733 (holding that exposure of the female breast does not qualify as a criminal indecency misdemeanor in Ohio).

B. Federal Framework for Examining Breastfeeding Discrimination Claims

1. General Electric Company v. Gilbert and Comparability Analysis

States that do not expressly protect breastfeeding but do protect women from sex discrimination may not be adequately protecting breastfeeding as demonstrated by the court's decision in *Derungs*.⁵⁹ The court used an employment discrimination analysis to examine whether restrictions on breastfeeding amounted to discrimination based on sex.⁶⁰ Before the PDA, the United States Supreme Court effectively excluded distinctions based on pregnancy from claims of employment discrimination based on sex by examining the subgroups that resulted from the challenged practice's division.⁶¹ In *General Electric Company v. Gilbert* and *Geduldig v. Aiello*, the Court defined the comparable groups created by an employer's disability plan as pregnant women and non-pregnant persons, and thus foreclosed the possibility of analyzing the issue as a form of employment discrimination based on sex.⁶²

The Supreme Court, in deciding *Gilbert* in 1976, considered whether differential treatment of pregnant women was a form of sex-based discrimination protected by Title VII.⁶³ The Court analyzed this question using a Fourteenth Amendment Equal Protection test.⁶⁴ The Court held that pregnancy discrimination, in the form of exclusion of pregnancy from an employer's disability plan, did not amount to a type of sex discrimination because pregnancy does not fall under the traditional notion of sex discrimination.⁶⁵

59. See *Derungs*, 374 F.3d at 430 (holding that breastfeeding is not covered by the PDA).

60. See *id.* at 437-38 (holding that Ohio courts apply the federal Title VII comparability analysis in cases challenging the public accommodation statute).

61. See *Geduldig v. Aiello*, 417 U.S. 484, 495-97 (1974) (holding that distinctions based on pregnancy do not constitute sex discrimination under the Equal Protection Clause of the Fourteenth Amendment); see also *Gilbert*, 429 U.S. at 138-40 (holding that as in *Geduldig*, distinctions based on pregnancy do not constitute sex-based discrimination).

62. See *Gilbert*, 429 U.S. at 138-39 (defining pregnancy as a "risk" unique to women and asserting that because the plan does not protect any risk for men that is not protected for women, that distinction cannot be drawn by sex); *Geduldig*, 417 U.S. at 496 n.20 (asserting that the second subgroup, non-pregnant persons, obviously has both female and male members, so that distinction necessarily cannot be drawn by sex).

63. See 429 U.S. at 127-30 (assessing whether General Electric's exclusion of pregnancy from its disability benefits plan violated Title VII's ban on sex-based discrimination).

64. See *id.* at 133-36 (upholding General Electric's disability benefits plan, which excluded disabilities resulting from pregnancy, such as miscarriage or the disabling six-week to eight-week period during a normal pregnancy). The Supreme Court reasoned that distinctions based on pregnancy are not really sex-based distinctions, but instead distinctions between pregnant and non-pregnant persons. *Id.* at 135.

65. See *id.* at 145 (stating that the traditional notion of sex discrimination compares treatment of men to treatment of women in similar circumstances, and that the Court should not infer that Congress sought to broaden this traditional concept of sex discrimination to

In *Derungs*, the Sixth Circuit affirmed the district court's use of Title VII's comparability analysis, which required the court to compare the plaintiff with similarly situated members of the opposite sex to determine whether the challenged practice is discriminatory.⁶⁶ The court, employing this analysis, found Wal-Mart's restrictions valid because the restrictions did not treat women differently than men; the policy did not permit either sex to feed their children in Wal-Mart stores.⁶⁷ States that follow a federal sex discrimination framework will employ this type of analysis; therefore, sex discrimination statutes in these states will not protect public breastfeeding.

The *Derungs* court also addressed the necessity of comparability analysis in sex-plus discrimination claims, where the plaintiff alleges that the discrimination stems from her sex in addition to some sex-neutral factor.⁶⁸ The Sixth Circuit held that sex-plus discrimination also required comparison to a class of similarly situated males possessing the same sex-neutral characteristic in order to prove discrimination based on a woman's sex.⁶⁹

2. Title VII and the Pregnancy Discrimination Act

Two years after the Supreme Court's ruling in *Gilbert*, Congress passed the PDA, which amended Title VII and broadened the meaning of sex discrimination in employment by prohibiting discrimination against pregnant women.⁷⁰ Congress followed the logic of Justice Stevens's dissent in *Gilbert*, finding that distinctions based on pregnancy were indeed distinctions based on sex.⁷¹ Congress sought to ensure that pregnancy

include pregnancy).

66. See *Derungs*, 374 F.3d at 437 (requiring that the court define a comparable class of people to compare with the plaintiffs in order to prove discrimination). The Sixth Circuit found that there was no differential treatment between the sexes and therefore no valid claim of sex-based discrimination. *Id.* at 439.

67. See *id.* at 437 (stating that feeding infants breast milk is not sex-specific so that Wal-Mart's restriction does not treat females differently than males); *Derungs*, 141 F. Supp. 2d at 890 (explaining that Wal-Mart's restriction applied to two groups: (1) women who breastfeed; and (2) individuals who do not breastfeed, and because the second group included members of both sexes, the distinction was not discriminatory).

68. See *Derungs*, 374 F.3d at 438 n.8 (defining sex-plus discrimination as occurring "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"); see also *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (examining whether an individual's sex in addition to a sex-neutral characteristic constituted sex discrimination under Title VII). In *Phillips*, the sex-neutral characteristic was that the plaintiff had preschool-age children. *Id.*

69. See *Derungs*, 374 F.3d at 438-39 (asserting that there was no class of similarly situated breastfeeding men).

70. See Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2000) (defining the Title VII's terms "because of sex" and "on the basis of sex" to include pregnancy).

71. See *id.*; see also *Gilbert*, 429 U.S. at 161-62 (Stevens, J., dissenting) (stating that because the capacity to become pregnant differentiates men from women, the disability plan that did not cover pregnancy benefits discriminated based on sex).

discrimination was a *per se* violation of Title VII.⁷² Thus, courts would not have to apply a Title VII comparability or “impact approach,” but instead could conclude that pregnancy discrimination violated Title VII *per se* as a type of discrimination based on sex.⁷³ In 1983, in *Newport News v. EEOC*, the Supreme Court recognized that Congress intended to overrule *Gilbert* with the passage of the PDA.⁷⁴ The Court in *Newport News* made it clear that a facial distinction between men and women based on pregnancy, at least in an employer’s insurance plan, constituted discrimination based on sex.⁷⁵

C. Federal Promotion of Breastfeeding

Through the creation of a number of agencies and initiatives, the federal government recognized the value of breastfeeding and extended education, counseling, and support to promote the practice.⁷⁶ In 1975, Congress established the Special Supplemental Nutrition Program for Women, Infants, and Children (“WIC”) as a permanent program to provide nutrition counseling and other social services to low-income pregnant and breastfeeding women.⁷⁷ In 1984, the Office of the Surgeon General held its first workshop on breastfeeding.⁷⁸

72. See H.R. REP. NO. 95-948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751 (stating that making such discrimination a *per se* violation of Title VII would eliminate the need to rely on impact analysis because pregnancy discrimination is not, by itself, sex discrimination).

73. See *id.* (stating that the “impact approach,” similar to, yet distinct from the the comparability analysis, left employers and employees to speculate as to which distinctions based on pregnancy would violate Title VII); see also *Nashville Gas Co. v. Satty*, 434 U.S. 136, 141-42 (1977) (employing an “impact approach” as an alternative to the traditional Title VII analysis). The “impact approach” examines whether the alleged discriminatory practice burdens one sex over the other. *Id.* The Court held that a policy that deprived women who take maternity leave of seniority constituted sex discrimination because the policy had a disparate impact on women. *Id.* at 142.

74. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676, 678 (1983) (citing the plain language of the PDA, as well as House and Senate Committee reports, to infer that Congress intended to include pregnancy as a basis for discrimination “because of sex” or “on the basis of sex”).

75. See *id.* at 683-84 (invalidating an employer’s insurance program that differentiated hospitalization coverage for spouses of male employees and female employees).

76. See, e.g., CHILD HEALTH BUREAU, *supra* note 20 (stating that the Department of Health and Human Services established the Children’s Bureau in 1912 as part of a commitment to improving the health of mothers and children).

77. See FOOD AND NUTRITION SERV., U.S. DEP’T OF AGRIC., LEGIS. HISTORY OF BREASTFEEDING PROMOTION REQUIREMENTS IN WIC, [hereinafter LEGIS. HISTORY] (describing a number of services provided under the WIC initiative, including providing breastpumps), at <http://www.fns.usda.gov/wic/Breastfeeding/bflegishistory.htm> (last visited July 24, 2005).

78. See U.S. DEP’T OF HEALTH & HUMAN SERVS., REPORT OF THE SURGEON GEN.’S WORKSHOP ON BREASTFEEDING & HUMAN LACTATION, No. HRS-D-MC 84-2, 78-79 (1984) (stating that initiatives stressed at the workshop included: strengthening of support of breastfeeding in the health care system, improvements in professional education, public education and promotion of breastfeeding, development of community support services, initiation of a national promotion effort directed to working women and expanding research on breastfeeding).

In 1992, Congress officially recognized the importance of encouraging breastfeeding by amending the Child Nutrition Act to include a national breastfeeding promotion program.⁷⁹ This program authorized the Secretary of Agriculture to distribute materials and funds to promote breastfeeding as an acceptable and desirable practice.⁸⁰ The Department of Health and Human Services also promotes breastfeeding through its oversight of the Maternal and Child Health Bureau.⁸¹

D. State Laws and Statistics on Breastfeeding

In 2003, a Center for Disease Control survey revealed that about 64.5 percent of children in Ohio were breastfed at some point during infancy.⁸² Ohio was one of a number of states that performed significantly lower than the Department of Health and Human Services *Healthy People 2010* objective, which was seventy-five percent of mothers breastfeeding children at some point during infancy.⁸³ Some states, like California, which legally protects public breastfeeding, exceeded this objective.⁸⁴ In order to reach the desirable objectives set by the Department of Health and Human Services, more states should follow Ohio's recent legislative response to lacking protection for public breastfeeding.⁸⁵

79. See Child Nutrition Amendments of 1992, Pub. L. No. 102-342, 106 Stat. 911 (1992) (recognizing that breastfeeding is the best method for healthy infant nutrition); see also H.R. REP. NO. 102-645, at 4 (1992), reprinted in 1992 U.S.C.C.A.N. 755, 757 (recognizing that the lack of support for breastfeeding is a major barrier to promoting the practice). The promotion of breastfeeding is necessary because of the physical and emotional benefits of breastfeeding, which include the protection of infants from ear infections, diarrhea and respiratory illness. *Id.*

80. See LEGIS. HISTORY, *supra* note 77 (stating that federal, state and local entities should carry out the program's goals of fostering acceptance of all breastfeeding).

81. See CHILD HEALTH BUREAU, *supra* note 20 (stating that Title V of the Social Security Act authorizes the Bureau to promote breastfeeding through training, publications and participation in the United States Breastfeeding Committee).

82. See NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, DEP'T OF HEALTH & HUMAN SERVS., 2003 NAT'L IMMUNIZATION SURVEY, TABLE 2: GEOGRAPHIC-SPECIFIC BREASTFEEDING RATES [hereinafter IMMUNIZATION SURVEY] (reporting the percentage of U.S. children breastfed in each state as a part of a nationwide survey using telephone and follow-up mail surveys), at http://www.cdc.gov/breastfeeding/NIS_data/state.htm (last visited July 24, 2005).

83. See *id.* (reporting that Ohio, Pennsylvania, Michigan, Oklahoma, Indiana and Kentucky had percentages ranging from 56.5 percent to 64.5 percent, and Louisiana had the lowest rate of 46.4 percent).

84. See *id.* (reporting that 83.7 percent of mothers in California breastfed their infants at some point during the first six months of infancy); see also CAL. CIVIL CODE § 43.3 (West 1997) (protecting a mother's right to breastfeed her child in any private or public location).

85. Compare CAL. CIVIL CODE § 43.3 (West 1997) (giving mothers a right to breastfeed her child) and IMMUNIZATION SURVEY, *supra* note 82 (reporting that 83.4 percent of mothers breastfeed), with *Derungs*, 374 F.3d at 439 (holding that OPAS does not protect public breastfeeding) and IMMUNIZATION SURVEY, *supra* note 82 (reporting that only 64.5 percent mothers breastfeed in Ohio).

II. ANALYSIS

The *Derungs* decision foreclosed the possibility of interpreting OPAS to protect a woman's right to breastfeed in public in Ohio.⁸⁶ While Ohio's new law protects public breastfeeding to a certain extent, it is important for states that lack such legislation to take note of the *Derungs* decision, as it another example of narrow judicial interpretation of the PDA.⁸⁷ The Sixth Circuit's analysis relied on the overruled logic of *Gilbert*, following a trend of resurrecting the pre-PDA analysis in breastfeeding discrimination claims.⁸⁸ As courts continue to ignore the sex-specific nature of breastfeeding and refuse to extend the logic of the PDA to breastfeeding claims, states that do not expressly protect breastfeeding will not adequately protect discrimination against breastfeeding women even if they prohibit sex discrimination.⁸⁹

A. Ohio's New Law Combats the Lack of Legal Protection for Breastfeeding under Civil Rights Sex Discrimination Law

Ohio's new law responded to the effect of the *Derungs* holding by expressly permitting women to breastfeed in buildings of public accommodation.⁹⁰ Until recently, Ohio state law did not adequately prohibit breastfeeding discrimination.⁹¹ While Ohio's Civil Rights statute, specifically OPAS, includes sex as a ground for discrimination, the Sixth Circuit interpreted "sex" as excluding breastfeeding.⁹² The Supreme Court

86. See *Derungs*, 374 F.3d at 439 (holding that OPAS does not prohibit stores from restricting or banning breastfeeding because such prohibition does not constitute sex discrimination under the statute).

87. See OHIO REV. CODE ANN. § 3781.55 (West 2005) (permitting mothers to breastfeed in buildings of public accommodation); *Derungs*, 374 F.3d at 430 (holding that claims of breastfeeding discrimination are not actionable under the PDA).

88. See *Derungs*, 374 F.3d at 438 (following federal cases involving breastfeeding discrimination claims that employed a *Gilbert* comparability analysis); see also, e.g., *Martinez v. NBC, Inc.*, 49 F. Supp. 2d 305, 308-11 (S.D.N.Y. 1999) (mem.) (invoking *Gilbert* as the appropriate analysis and holding that an employer's failure to protect a woman's ability to pump breast milk in private did not violate Title VII's prohibition of sex discrimination).

89. See *Derungs*, 374 F.3d at 430, 439 (stating that although the act requires distinctly female characteristics, restrictions on breastfeeding do not constitute sex discrimination and are therefore not protected under the accommodation statute in Ohio).

90. See OHIO REV. CODE ANN. § 3781.55 (West 2005) (amending the civil code's building standards section to allow women to breastfeed in places of public accommodation).

91. See *Derungs*, 374 F.3d at 439 (holding that OPAS does not prohibit regulation of breastfeeding as a form of sex discrimination). Therefore, the court found that Wal-Mart's policy, which instructed employees to ask breastfeeding women to leave its stores, was not discriminatory under Ohio law. *Id.*

92. See OHIO REV. CODE ANN. § 4112.02(G) (prohibiting owners or managers of places of public accommodation from denying full enjoyment of accommodations for reason of sex); see also *Derungs*, 374 F.3d at 437, 439 (holding that prohibiting public breastfeeding is not a form of sex discrimination because restrictions on breastfeeding do not treat one sex differently than the other).

has not considered this issue, but a number of federal courts agree that restricting or prohibiting breastfeeding is not a form of sex discrimination.⁹³ These cases, relying on the outdated logic of the *Gilbert* decision, refused to extend Congress's intent to establish pregnancy as sex discrimination to breastfeeding.⁹⁴ Ohio's new law, although conservative, is a crucial step in protecting women who breastfeed in public.⁹⁵ The lack of protection after *Derungs* and before Ohio's new law demonstrates the need for states to adopt express legislation protecting breastfeeding because of the possibility of courts to adopt a narrow interpretation of sex discrimination statutes.

Although not specifically addressing breastfeeding, Congress responded to the dilemma that the sex-specific characteristic of pregnancy does not fit into the traditional Title VII analysis, which requires a comparison between men and women, and established pregnancy as a *per se* basis for discrimination.⁹⁶ Courts have ignored that a plausible and logical extension of Congress's *per se* ban on pregnancy discrimination as a form of sex discrimination is to include breastfeeding discrimination as a form of sex discrimination.⁹⁷

Ohio's new law, which expressly confers on women an affirmative right to breastfeed in places of public accommodation, will at least partially correct judicial refusal to extend the logic of protecting pregnancy under prohibitions of sex discrimination to breastfeeding.⁹⁸ In enacting a law that clearly and expressly protects public breastfeeding, Ohio is following a growing majority of states recognizing this judicially-created sex discrimination loophole.⁹⁹ These states legislated around the breastfeeding

93. See, e.g., *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869-70 (W.D. Ky. 1990) (holding that the PDA does not protect the act of breastfeeding); *Martinez*, 49 F. Supp. 2d at 310-11 (finding that banning the activity of breast pumping does not rise to the level of sex discrimination).

94. See H.R. REP. NO. 95-948, at 2-3 (arguing that Justice Stevens accurately interpreted pregnancy as a basis for sex discrimination in his *Gilbert* dissent).

95. See OHIO REV. CODE ANN. § 3781.55 (West 2005) (giving women an affirmative right to breastfeed in places of public accommodation).

96. See *id.* at 3 (stating that distinctions based on the ability to become pregnant naturally constitute *per se* violations of Title VII).

97. See 42 U.S.C. § 2000e(k) (prohibiting sex discrimination based on pregnancy and other related medical conditions); see also H.R. REP. NO. 95-948, at 5 (stating that the PDA is deliberately broad in order to cover all aspects of the childbearing process).

98. See OHIO REV. CODE ANN. § 3781.55 (West 2005) (Ohio 2005) (prohibiting managers and owners of places of public accommodation from restricting or banning public breastfeeding).

99. E.g., CAL. CIVIL CODE § 43.3 (West 2004) (protecting a mother's right to breastfeed her infant in any place of public accommodation or any other place where the mother has a right to be); accord DEL. CODE ANN. tit. 31, § 310 (1997) (permitting mothers to breastfeed any place they are permitted to be); HAW. REV. STAT. § 489-21 (2004) (prohibiting discrimination against breastfeeding mothers in places of public accommodation); N.J. STAT. ANN. § 26:4B-4 (guaranteeing mothers the right to breastfeed in places of public accommodation); VT. STAT. ANN. tit. 9, § 4502(j) (2004) (allowing mothers to breastfeed in places of public accommodation); see also DARLEEN CHIEN, UNITED STATES BREASTFEEDING

discrimination loophole by using public accommodation statutes.¹⁰⁰ Cases like *Derungs* have made it clear that courts render more traditional avenues of protection, namely employment and public accommodation discrimination claims, useless in protecting public breastfeeding by narrowly interpreting sex as a basis for such discrimination.¹⁰¹ Therefore, enacting express legislation permitting women to breastfeed in public is necessary to protect women from breastfeeding discrimination.¹⁰²

B. The Sixth Circuit's Analysis of Ohio's Public Accommodation Statute: Overruled, Outdated and Out of Place Logic

1. The Derungs Court Relied on Unsettled and Distinguishable Authority

The *Derungs* holding is crucial because it demonstrates that Title VII does not protect a woman's right to breastfeed and that state public accommodation statutes that employ the language and framework of Title VII will not adequately protect public breastfeeding.¹⁰³ In *Derungs*, the Sixth Circuit Court of Appeals concluded that a Title VII comparability analysis was appropriate to examine the discrimination claim under OPAS, despite the fact that the Ohio Supreme Court has never ruled on this issue.¹⁰⁴ The court correctly relied on existing precedent,¹⁰⁵ but failed to address the possible controversy in applying the comparability analysis.¹⁰⁶ The Sixth Circuit expressly noted that Ohio courts have not fully adopted the application of federal Title VII analysis in public accommodation claims; however, the court adopted an analysis that the PDA effectively

COMMITTEE, STATE LEGIS. THAT PROTECTS, PROMOTES, AND SUPPORTS BREASTFEEDING (May 25, 2004) [hereinafter STATE LEGIS.] (reporting that currently thirty-six states have legislation protecting or promoting breastfeeding).

100. See, e.g., DEL. CODE ANN. tit. 31, § 310 (adding an express statute protecting a mother's right to breastfeed in any place of public accommodation); *id.* tit. 6, § 4501 (prohibiting sex discrimination in places of public accommodation).

101. See *Derungs*, 374 F.3d at 439 (concluding that restrictions on breastfeeding do not constitute sex discrimination, therefore statutes prohibiting sex discrimination in places of public accommodation do not protect against such restrictions).

102. E.g., OHIO REV. CODE ANN. § 3781.55 (West 2005) (allowing mothers to breastfeed their children in public).

103. See *id.*

104. See *Derungs*, 374 F.3d at 434 (stating that Title VII comparability analysis is an appropriate framework, despite the fact that Ohio courts have not determined whether Title VII applies to OPAS).

105. See *Lawler*, 322 F.3d at 903 (asserting that when a state supreme court has not ruled on an issue, courts should follow the precedent of intermediate courts).

106. See 42 U.S.C. § 2000e(k) (obviating the necessity of the comparability analysis by stating that discrimination based on pregnancy, childbirth and related conditions is *per se* sex discrimination under Title VII); see also Diana Kasdan, Note, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. REV. 309, 338 (2001) (arguing that the comparability analysis is inappropriate in examining breastfeeding claims because it wrongly draws a distinction between pregnant and non-pregnant persons, rather than between men and women).

nullified, at least in examining pregnancy insurance benefits.¹⁰⁷

In *Derungs*, the court examined one Ohio Supreme Court case and a number of Ohio intermediate court cases involving race and sex discrimination in order to demonstrate the applicability of the comparability analysis to OPAS.¹⁰⁸ The court relied on *Lysyj*, *Gegner v. Graham* and *Meyers* to justify the use of comparability analysis in OPAS, but failed to distinguish these cases from the unique issue presented in pregnancy and breastfeeding claims.¹⁰⁹ Furthermore, only *Meyers*, a sex discrimination case, even mentioned the need to define a comparable class.¹¹⁰

The basic test the courts used in these cases was a simple reiteration of the plain language of the statute.¹¹¹ The *Meyers* decision, however, further defined this test by using the comparability analysis.¹¹² In *Meyers*, the court found no violation of OPAS by comparing the store's treatment of women to its treatment of men.¹¹³ Although the *Meyers* court employed the comparability analysis based on a linguistic interpretation of OPAS,

107. See *Derungs*, 374 F.3d at 434 (stating that Ohio courts use federal law in employment claims, but admitting that Ohio courts have not settled on the use of that framework for OPAS). The precedent of Ohio's intermediate courts is controlling absent a showing that the Ohio Supreme Court would have decided the issue differently; however, the court failed to address the departure of an Ohio intermediate court in *Meyers*, from the Ohio Supreme Court's interpretation of the plain language interpretation of the statute in *Lysyj*. *Id.* at 433-434.

108. See *id.* at 433 (implying that existing precedent from the Ohio Supreme Court and state intermediate courts support the use of the comparability analysis in interpreting OPAS); see also *Lysyj*, 313 N.E.2d at 5-6 (addressing race discrimination under OPAS); *Meyers*, 721 N.E.2d at 1083-84 (considering sex discrimination under OPAS); *Gegner v. Graham*, 205 N.E.2d 69, 70-71 (Ohio Ct. App. 1964) (examining race discrimination under OPAS).

109. See *Derungs*, 374 F.3d at 433-34 (finding that *Lysyj*, *Meyers* and *Gegner* support the use of the comparability analysis and are controlling because they are the only cases to interpret discrimination claims under OPAS); *Lysyj*, 313 N.E.2d at 5-6 (analyzing whether a trailer park owner discriminated against a woman based on her race and stating that the test for discrimination is whether the owner discriminated "except for reasons applicable alike" to all); *Meyers*, 721 N.E.2d at 1082-83 (considering whether the owner of a bagel shop discriminated against a female customer when he harassed her, by comparing how the owner treated male customers and employees to how he treated the female customer); *Gegner*, 205 N.E.2d at 70-71 (employing the *Lysyj* test to determine whether a barbershop owner violated OPAS by refusing to cut a black patron's hair).

110. See *Meyers*, 721 N.E.2d at 1082-83 (stating that the "thrust of the statute, by its terms, is the comparability of treatment" and comparing the treatment of the female plaintiff with the treatment of male customers and employees).

111. See *Lysyj*, 313 N.E.2d at 8 (clarifying that "the test is simply whether the proprietor . . . denied to *any* person the full enjoyment of such place for reasons not applicable alike to *all* persons. . . ."); *Meyers*, 721 N.E.2d at 1082 (stating that "[a]ny denial of enjoyment of services must be applicable to all persons").

112. See *Meyers*, 721 N.E.2d at 1082 (stating that OPAS's language implies the need for the comparability analysis).

113. See *id.* at 1083 (stating that the storeowner's hostility and aggression was not limited to females but extended to male customers and employees as well). Therefore, sex did not motivate the owner to harass customers. *Id.*

neither *Lysyj* nor *Meyers* mentioned the federal Title VII analysis.¹¹⁴ The fact that neither case mentions Title VII analysis weakens the persuasiveness of the Sixth Circuit's use of the federal framework in interpreting OPAS.¹¹⁵ The Sixth Circuit adopted a framework for analysis that neither the Ohio legislature nor Ohio courts expressly accepted and that Congress rejected in the federal context.¹¹⁶ This framework will likely be adopted by other courts, as well, thereby failing to protect a woman's desire to breastfeed in public.

The *Derungs* court's use of *Lysyj* and *Gegner* is particularly unpersuasive because both cases dealt with race discrimination, not sex discrimination, and neither case spoke of comparability analysis.¹¹⁷ In *Lysyj*, the court did not compare the plaintiff's race to other residents.¹¹⁸ The *Derungs* court interpreted this case by stating that the discrimination was based on the fact that the owner did not prohibit the resident from entertaining white guests, but black guests only.¹¹⁹ However, the *Lysyj* court did not use the comparability analysis and still found that the woman's race was the motivating factor in the owner's action.¹²⁰

If the *Lysyj* court actually applied the comparability analysis as the *Derungs* court suggested, it is possible that the outcome would have been different. Similar to the district court's reasoning in *Derungs*, the court, using comparability analysis, might have found that the trailer park owner did not discriminate against all white residents as compared with black residents, but rather a subgroup of white residents who entertained black guests.¹²¹ Therefore, the owner did not discriminate against the resident

114. See *id.* at 1082 (stating that the "thrust" of OPAS, based on the terms it employs, is comparability); *Lysyj*, 313 N.E.2d at 6 (stating that the test for discrimination is a simple reiteration of OPAS).

115. See *Derungs*, 374 F.3d at 437-38 (employing a Title VII comparability analysis and reasoning that Ohio courts apply this analysis in deciding OPAS claims but only citing *Lysyj*, *Gegner* and *Meyers* as support for this conclusion).

116. See *id.* at 434 (acknowledging that the use of the federal framework "has not been definitively settled by the Ohio courts in the context of discrimination in places of public accommodation").

117. See *Lysyj*, 313 N.E.2d at 6 (stating that determining unlawful discrimination requires "simply" applying the plain language of the statute); *Gegner*, 205 N.E.2d at 72 (reiterating the language of the statute as the test for discrimination and making no mention of comparison other than limiting practices "for reasons applicable alike" to all).

118. See *Lysyj*, 313 N.E.2d at 6 (finding that the owner discriminated against the woman not because of her race as compared to other residents but because of her race coupled with the race of her guests).

119. See *Derungs*, 374 F.3d at 433 (concluding that in *Lysyj*, the owner's denial of service to the woman did not occur when she entertained white guests, but only occurred after she entertained black guests).

120. See *Lysyj*, 313 N.E.2d at 6 (stating that although the plaintiff's race alone was not the basis for discrimination, the owner discriminated based on the fact that a white woman entertained black guests, thus race was a "principal motivation" for his actions).

121. See *Derungs*, 141 F. Supp. 2d at 893 (holding that discrimination against a protected subclass may be lawful). The actions are unlawful if there is evidence, through comparison of a similar subclass, that the discrimination is in fact based on the larger class's

because she was a white person, but because of her specific conduct—entertaining black guests.¹²² The *Lysyj* court, however, did not employ the comparability analysis, but followed a simple reading of OPAS to find that the owner discriminated against the woman because of her race.¹²³

The Sixth Circuit applied the comparability analysis despite the fact that the cases that invoke comparability analysis under OPAS are factually distinguishable from *Derungs*; not one of the cases examined breastfeeding or pregnancy as a basis of sex discrimination.¹²⁴ Although the *Meyers* opinion decided a claim of discrimination based on sex, the case did not provide an accurate basis for interpreting a claim of breastfeeding discrimination.¹²⁵ Comparability analysis was appropriate in *Meyers*, where a class of comparable men was at least plausible.¹²⁶ Using the *Meyers* rationale in a breastfeeding case ignores the problem the PDA sought to correct for pregnancy: the biological impossibility of a class of comparable pregnant or breastfeeding men.¹²⁷ A federal Title VII analysis requires interpretation of the PDA, rather than a comparison of women to a class of similarly situated males.¹²⁸ By treating discrimination based on pregnancy as a *per se* violation, the PDA recognizes and rectifies the problem presented by the impossibility of finding a comparable group of pregnant or breastfeeding men.¹²⁹

2. *The Derungs Court's Application of Employment Analysis to Ohio's Public Accommodation Statute Failed to Address Alternative Sources of*

protected status rather than the qualification that divides the subclass from the larger protected class. *Id.*

122. See *Lysyj*, 313 N.E.2d at 6 (stating that the test for discrimination is a plain reading of the statute and making no mention of comparability or reference to a comparable class of trailer park residents).

123. See *id.* (holding that the owner's discrimination was motivated in part by the woman's race).

124. See, e.g., *Meyers*, 721 N.E.2d at 1082-83 (examining whether verbal harassment against a female customer constituted discrimination based on sex).

125. See *id.* (interpreting OPAS's prohibition of discrimination based on sex). *But see* Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, in *FEMINIST JURISPRUDENCE* 27, 39-40 (Patricia Smith ed., 1993) (arguing that after the PDA, Title VII analysis in pregnancy claims will be distinct from other Title VII claims using the comparability analysis, because discrimination based on pregnancy *per se* discriminates against a woman based on of her sex and because of the biological impossibility of requiring a comparable class or pregnant males).

126. See *Meyers*, 721 N.E.2d at 1083 (reasoning that because the storeowner also harassed male customers and employees, his harassment of a female customer was not motivated by her sex).

127. See H.R. REP. NO. 95-948, at 2-3 (recognizing that pregnancy is confined to females and concluding that the PDA eliminates the need of *Satty's* impact approach or *Gilbert's* comparability approach, which require courts to compare the employment practice's impact on women to its impact on men).

128. See *id.* (stating that under the PDA, distinctions based on pregnancy are *per se* violations of Title VII).

129. See *id.* (explaining that the PDA repudiates the analysis that the Supreme Court used in *Gilbert*).

Comparison

The Sixth Circuit's use of Title VII employment analysis failed to acknowledge the breadth of the statutory language of OPAS as compared to Title II, the federal public accommodation antidiscrimination statute, which applies to a limited group of protected classes.¹³⁰ The court could have compared OPAS to Title II, because both protect against discrimination in places of public accommodation.¹³¹ Under this analysis, the court could have inferred that the addition of sex as a possible source of discrimination under OPAS, when compared to the federal Title II framework, was at least potentially indicative of Ohio's intent to provide broader protection for sex discrimination than federal law.¹³²

Because the *Derungs* court employed a federal framework to OPAS, it is useful to examine the federal public accommodation statute.¹³³ Under the federal Civil Rights Act of 1964, separate titles govern protections from discrimination based on status or characteristics such as race, religion, sex or national origin in places of public accommodation and in the employment context.¹³⁴ Title II restricts discrimination based only on the ground of race, color, religion, or national origin.¹³⁵ In fact, Title II federal public accommodation protections under the Civil Rights Act do not list sex as a prohibited basis for discriminatory treatment.¹³⁶

In contrast to the federal protections for employment discrimination and discrimination in places of public accommodation, Ohio's Civil Rights Act combines both contexts and prohibits employers, labor organizations, owners of places of public accommodation, real estate agents and landowners from discrimination against individuals under one section of

130. Compare OHIO REV. CODE ANN. § 4112.02(G) (including sex as a characteristic basis for discrimination in places of public accommodation), with 42 U.S.C. § 2000a (excluding sex as a characteristic basis for discrimination in places of public accommodation).

131. Compare OHIO REV. CODE ANN. § 4112.02(G) (prohibiting discrimination in places of public accommodation), with 42 U.S.C. § 2000a (prohibiting discrimination in places of public accommodation).

132. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (indicating that Minnesota, like many other states, included sex in their public accommodation statutes in order to provide broader protections than its federal counterpart).

133. See *Derungs*, 374 F.3d at 434 (stating that Ohio courts use a Title VII analysis in determining employment discrimination claims under OPAS); see also OHIO REV. CODE ANN. §§ 4112.02(A)-(H) (demonstrating that unlike the federal public accommodation statute, the Ohio legislature did not list OPAS as a separate section, but rather placed the provision among the employment discrimination sections of Ohio's Civil Rights Act).

134. Compare 42 U.S.C. § 2000a (prohibiting discrimination in places of public accommodation), with Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e (2000) (prohibiting discriminatory employment practice).

135. See 42 U.S.C. § 2000a (excluding sex as a characteristic for public accommodation discrimination claims).

136. See *id.* (prohibiting discrimination "on the ground of" race, color, religion, and national origin).

unlawful discriminatory practices.¹³⁷ Each of these sections lists the same basic set of protected categories, including race, color, religion, national origin, disability, age, ancestry and sex.¹³⁸

The Sixth Circuit could have concluded that the inclusion of sex as a protected category in OPAS indicates the state's intent to broaden the federal public accommodation framework. Title II does not compel protection against discrimination based on sex in places of public accommodations, but states are free to prohibit such discrimination through legislation.¹³⁹ On its face, OPAS provides a broader protection of prohibited discriminatory acts than Title II, including discrimination based on sex.¹⁴⁰ In comparison, Title VII provides a broader set of protected groups than Title II's protections against discrimination in places of public accommodation, because Title VII expressly prohibits sex discrimination as an unlawful practice.¹⁴¹ OPAS similarly includes a broad class of grounds for discrimination, including sex.¹⁴²

The Sixth Circuit accepted the district court's conclusion that the Title VII comparability analysis is appropriate in analyzing OPAS by interpreting the language of the statute as implying a linguistic necessity for comparison.¹⁴³ While most of Ohio's Civil Rights Act adopted the classic Title VII language "because of" or on the "basis of" sex, OPAS uses the phrase "for reasons applicable alike regardless of" sex.¹⁴⁴ The *Derungs*

137. See OHIO REV. CODE ANN. §§ 4112.02(A)-(H) (prohibiting various discriminatory employment practices, discriminatory housing practices and discrimination in places of public accommodation).

138. See *id.* §§ 4112.02(A)-(C), (E)-(G) (listing the same group of protected characteristics as race, color, religion, sex, national origin, disability, age and ancestry). *But see id.* § 4112.02(D) (omitting age from the list of characteristics); *id.* § 4112.02(H) (naming the same group of characteristics and adding familial status).

139. See, e.g., *Roberts*, 468 U.S. at 624-25 (upholding Minnesota's Public Accommodation statute, which includes sex, although the addition broadened the scope of protection provided by Title II).

140. Compare OHIO REV. CODE ANN. at § 4112.02(G) (prohibiting discrimination "except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, disability, age or ancestry"), with 42 U.S.C. § 2000a (extending protection only to discrimination "on the ground of race, color, religion, or national origin").

141. Compare 42 U.S.C. § 2000a (prohibiting discrimination "on the ground of race, color, religion or national origin"), with 42 U.S.C. § 2000e (prohibiting discriminatory practice "because of" sex, race, color, religion or national origin).

142. See OHIO REV. CODE ANN. § 4112.02(G) (prohibiting discrimination, regardless of sex, in places of public accommodation "except for reasons applicable alike").

143. See *Derungs*, 374 F.3d at 437 (stating that the statute's use of the language "reasons applicable alike" compels a comparison between groups to establish discrimination); *Derungs*, 141 F. Supp. 2d at 891-92 (concluding that there is no reason to distinguish between the analysis necessary to determine discrimination based on sex under OPAS and discrimination based on sex under the Title VII analysis). *But see* OHIO REV. CODE ANN. § 4112.02(A) (stating that employers may not discriminate "because of . . . sex," thus invoking Title VII analysis as defined by the PDA); *cf. id.* § 4112.02(G) (using the language "reasons applicable alike to all persons regardless" of sex and failing to incorporate Title VII's language).

144. Compare OHIO REV. CODE ANN. § 4112.02(A) (adopting the language of the PDA

court acknowledged the difference in language between OPAS and the rest of Ohio's Civil Rights Act, stating that the linguistic difference strengthened the logic behind applying Title VII comparability analysis.¹⁴⁵ However, the *Derungs* court could have concluded that the language indicates intent to use a distinct analysis, rather than employing Title VII's basic framework.

3. *The Derungs Court Followed an Overruled and Flawed Federal Framework*

The Supreme Court accepted the PDA's assertion that pregnancy discrimination is discrimination *per se* and affirmed the inapplicability of comparability analysis for claims of discrimination based on pregnancy. However, federal courts have been unwilling to extend the PDA's logic to include breastfeeding discrimination, like pregnancy discrimination, in the definition of discrimination based on sex.¹⁴⁶ Instead, the federal courts that have examined these claims have resurrected the *Gilbert* analysis and found that practices that fail to protect breastfeeding do not discriminate based on sex.¹⁴⁷ *Derungs* followed this flawed framework for breastfeeding discrimination, and other courts may as well, in states that currently lack protection for breastfeeding women.¹⁴⁸

In an employment context, discrimination or distinctions based on pregnancy form a basis for a valid sex discrimination claim.¹⁴⁹ However, lower courts have not extended this reasoning to prohibit employment discrimination based on a woman's breastfeeding.¹⁵⁰ Consequently, the

and prohibiting employers from discriminating based on sex), and 42 U.S.C. § 2000e(k) (defining the terms "because of sex" and "on the basis of sex" for employment discrimination purposes), with OHIO REV. CODE ANN. § 4112.02(G) (prohibiting discrimination in places of public accommodation).

145. See *Derungs*, 374 F.3d at 437 (reasoning that the distinct language used in OPAS, as compared with the other provisions of the Civil Rights law, implies a need for the comparability analysis to find a violation).

146. See 42 U.S.C. § 2000e(k) (redefining the terms "because of" or "on the basis of" sex to include pregnancy, childbirth or related medical conditions); see also *Newport News*, 462 U.S. at 678 (holding that distinctions based on pregnancy constitute sex discrimination under the PDA). But see, e.g., *Barrash v. Bowen*, 846 F.2d 927, 931-32 (4th Cir. 1988) (per curiam) (holding that breastfeeding discrimination claims are not valid bases for sex discrimination under Title VII).

147. See, e.g., *Wallace*, 789 F. Supp. at 867, 869 (reasoning that a distinction drawn at breastfeeding is not a distinction drawn at sex). But cf. H.R. REP. NO. 95-948, at 5 (asserting that the PDA's broad language clearly extends protection to "the whole range of matters concerning the childbearing process").

148. See *Derungs*, 374 F.3d at 438 (following federal cases, which resurrected the pre-PDA *Gilbert* analysis as the standard for breastfeeding discrimination claims); see also Candace Saari Kovacic-Fleischer, *Litigating Against Employment Penalties For Pregnancy, Breastfeeding and Childcare*, 44 VILL. L. REV. 355, 381 (1999) (stating that continuing to use *Gilbert* logic ignores Congress's intent to overrule *Gilbert's* holding and reasoning).

149. See *Newport News*, 462 U.S. at 678-82 (explaining that, as a result of the PDA, Title VII protects pregnant women from sex discrimination in an employment context).

150. See, e.g., *Wallace*, 789 F. Supp. at 869 (holding that Title VII does not include

Sixth Circuit in *Derungs* was unwilling to conclude that OPAS intended to prohibit restrictions on breastfeeding simply by prohibiting sex discrimination.¹⁵¹ Lower courts resurrected the *Gilbert* comparability analysis in examining breastfeeding discrimination claims,¹⁵² despite the Supreme Court's recognition that the PDA overruled *Gilbert*'s holding.¹⁵³

While the Court in *Newport News* held that the specific challenged practice constituted discrimination based on sex, it did not expressly define the scope of pregnancy discrimination under Title VII.¹⁵⁴ This judicial oversight led most federal courts to conclude that limitations on public breastfeeding and an employer's lack of accommodation for breastfeeding are not forms of sex-based discrimination under Title VII.¹⁵⁵ Specifically, the Fourth Circuit led this trend of ignoring the PDA in assessing the claims of breastfeeding discrimination in *Barrash v. Bowen*.¹⁵⁶

In *Barrash*, an employer denied a female employee's request for six months unpaid leave in order to breastfeed her child.¹⁵⁷ The Fourth Circuit failed to embrace the breadth of the PDA's language and extend the logic to distinctions based on breastfeeding.¹⁵⁸ Instead, the court held that the PDA did not cover discrimination based on breastfeeding.¹⁵⁹ Consequently, the unwillingness of the court to extend the logic of the PDA

breastfeeding as a basis for sex discrimination).

151. See *Derungs*, 374 F.3d at 429 (holding that OPAS's prohibition of sex discrimination does not include breastfeeding discrimination).

152. See, e.g., *Martinez*, 49 F. Supp. 2d at 309 (expressly invoking *Gilbert* as the appropriate analysis); see also Kasdan, *supra* note 106, at 337-38 (arguing that courts have no rational basis for excluding breastfeeding from pregnancy discrimination claims as a bright line rule, given broad scope of the PDA.).

153. See *Newport News*, 462 U.S. at 676 (expressly overruling the holding and reasoning of *Gilbert*).

154. See *id.* at 678 (holding only that the specific insurance plan, which did not give equal pregnancy benefits to the spouses of male employees as it did to female employees, constituted discrimination).

155. See *Wallace*, 789 F. Supp. at 869-70 (holding that breastfeeding is not a medical condition related to pregnancy and, therefore, not a form of pregnancy or sex discrimination under the PDA); see also Kasdan, *supra* note 106, at 309-13, 324 (arguing that courts drew a distinction between sex-based discrimination and discrimination based on breastfeeding and applied the logic of *Gilbert*, rather than the intent of the PDA, to exclude breastfeeding from Title VII protection); Kovacic-Fleischer, *supra* note 148, at 377 (asserting that the courts denied extending the PDA to breastfeeding by comparing "gender specific breastfeeding to sex neutral childrearing . . .").

156. See 846 F.2d at 928 (considering whether the Social Security Administration discriminated against an employee because of her sex in denying her request for six months maternity leave without pay so that she could breastfeed her child).

157. See *id.* (noting that an employer granted an employee a six-month leave for the birth of her first child, but after the employer changed policies regarding pay without leave, the employer denied the same employee another six-month leave for her second child).

158. See Kasdan, *supra* note 106, at 338-40 (arguing that courts should recognize breastfeeding as a possible source of sex discrimination under the intended broad scope of the PDA to ensure that employers do not discriminate against women).

159. See *Barrash*, 846 F.2d at 931 (stating that the PDA only covered "incapacitating" conditions).

to claims of breastfeeding paved the road for two district courts to resurrect the logic of *Gilbert* in analyzing claims of breastfeeding discrimination.¹⁶⁰

Following a trend of relying on overruled logic, a Kentucky district court cited and followed the *Gilbert* analysis in examining a claim of breastfeeding discrimination in *Wallace v. Pyro Mining*.¹⁶¹ In *Wallace*, an employee alleged that her employer's denial of permission for personal leave so that she could wean her child from breastfeeding violated the PDA.¹⁶² First, the court examined the claim under a *Gilbert* analysis, yet interestingly linked breastfeeding to pregnancy, giving false hope that the court might recognize the need to analyze breastfeeding under the PDA.¹⁶³ The court even acknowledged the impact of the PDA on pregnancy claims, but then narrowly interpreted the PDA by confining the analysis to breastfeeding as a medical condition.¹⁶⁴ Citing *Barrash's* requirement of incapacitation, the court dismissed the claim that breastfeeding was a type of medical condition protected by the PDA.¹⁶⁵

In *Martinez v. NBC*, the court neglected to reference the PDA at all.¹⁶⁶ Instead, the court focused on the *Gilbert* analysis and held that the employer did not treat the plaintiff any differently than a "similarly situated" man.¹⁶⁷ While the PDA does not expressly mention breastfeeding as a protected act, the court's reasoning is unpersuasive because it fails to recognize that this comparability analysis, at least in terms of analyzing pregnancy, is exactly the sex discrimination analysis the PDA abolished.¹⁶⁸

These lower court cases establish a framework for analysis of breastfeeding discrimination claims that ignores the logic of the PDA.¹⁶⁹

160. See *Wallace*, 789 F. Supp. at 869 (citing *Gilbert* as controlling precedent); accord *Martinez*, 49 F. Supp. 2d at 309 (stating that *Gilbert* established the basic framework for discrimination claims under Title VII and holding that treating breastfeeding women differently is not prohibited under the *Gilbert* analysis).

161. See 789 F. Supp. at 868-69 (holding that an employer's refusal of an additional leave of absence so that an employee could breastfeed her child did not constitute sex discrimination). The court invoked *Gilbert's* conclusion that if the plan did not confer pregnancy benefits on either sex, it automatically treated men and women equally. *Id.*

162. See *id.* at 868 (stating that the plaintiff requested an additional six weeks of personal leave because her child rejected all forms of food but breast milk).

163. See *id.* at 869 (acknowledging that, like pregnancy, only women can breastfeed, and breastfeeding is naturally and necessarily linked to pregnancy).

164. See *id.* (stating that the PDA protects medical conditions related to pregnancy, but nevertheless does not define these conditions).

165. See *id.* at 870 (stating that under *Barrash*, the PDA protects only incapacitating medical conditions related to pregnancy).

166. See 49 F. Supp. 2d at 309-11 (holding that NBC's failure to provide one of its female employees with an adequately safe and private area to pump breast milk was not discrimination based on sex under Title VII).

167. See *id.* at 309, 311 (stating that breastfeeding, unlike pregnancy, is not a protected basis for sex discrimination under the PDA, so the *Gilbert* analysis applies).

168. See H.R. REP. NO. 95-948, at 3-4 (stating that the PDA considers pregnancy discrimination a *per se* violation of Title VII by treating distinctions based on pregnancy the same as other sex-based distinctions).

169. Compare *Wallace*, 789 F. Supp. at 869 (distinguishing breastfeeding as a medical

The cases applied the analysis of a case that the Supreme Court has specifically overruled.¹⁷⁰ Their application to OPAS is therefore unpersuasive and illogical.¹⁷¹

Additionally, these cases ignore the plain language of the PDA by disregarding the “not limited to” clause.¹⁷² This clause is a strong indication that Congress intended the PDA to provide broad protections against various practices surrounding pregnancy, not limiting protection to the confined state of pregnancy and act of childbirth.¹⁷³ Had Congress intended to limit the statute specifically to pregnancy, childbirth, and related medical conditions, arguably Congress would have omitted the “not limited to” clause.¹⁷⁴ Ignoring the plain language of the statute not only misinterprets the statute itself, but also ignores the underlying intent of the statute: protecting women against various forms of discrimination in the workplace.¹⁷⁵ As long as courts continue to narrowly interpret sex discrimination claims and exclude breastfeeding from protection under the PDA, as the Sixth Circuit reasoned in *Derungs*, states must expressly enact express legislation to adequately protect public breastfeeding.

C. Breastfeeding is a Sex-Specific Act and the Derungs Holding Discriminates against Women

1. The Derungs Court Made Implausible Sex-Neutral Comparisons

Through its use of the comparability analysis, the court in *Derungs* not

condition and asserting that since it is not an incapacitating condition, analysis under the PDA was inappropriate), with H.R. REP. NO. 95-948, at 4 (stating that “pregnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute”), and *id.* at 5 (stating that the statute is deliberately broad to include all stages of the childbearing process).

170. See 42 U.S.C. § 2000e(k) (defining the terms involving sex discrimination to include pregnancy); *Newport News*, 462 U.S. at 676, 678 (arguing that Congress, through the PDA, overturned the specific holding in *Gilbert*).

171. See *Derungs*, 374 F.3d at 438 (following federal cases, which use a *Gilbert* analysis, as the standard for breastfeeding discrimination claims); *Newport News*, 462 U.S. at 676, 678 (holding that the PDA overturned the holding and reasoning of *Gilbert*).

172. See 42 U.S.C. § 2000e(k) (defining “because of sex” and “on the basis of sex” by stating that the terms “include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions”).

173. See Kovacic-Fleischer, *supra* note 148, at 377 (asserting that no court has interpreted the “not limited to” clause of the PDA).

174. See *id.* at 382 (arguing that courts have concluded that breastfeeding is not “pregnancy, childbirth, or a medical condition related to pregnancy” and ignored the “plain language” of the PDA, which states that discrimination may not be limited to these factors); see also H.R. REP. NO. 95-948, at 7 (stating intended exclusions of certain applications of the PDA, but not expressly excluding breastfeeding). The House Report specifically addressed the concern that potential plaintiffs would use the PDA to force employers to pay for abortions and stated that the statute expressly limits this application. *Id.*

175. See H.R. REP. NO. 95-948, at 5 (stating that the PDA’s broad use of language makes it clear that the statute intended to extend to a range of issues concerning pregnancy and childbearing).

only ignored the Supreme Court's acknowledgement that the PDA overruled *Gilbert* in *Newport News*, but also ignored the fact that breastfeeding is biologically a sex-specific act.¹⁷⁶ While states may protect public breastfeeding by enacting legislation like Ohio's new law, decisions like the Sixth Circuit's holding in *Derungs* are important for states to note so that they may design legislation that does not rely on traditional sex discrimination frameworks for protection of breastfeeding.¹⁷⁷ The court's analysis requires a comparison of treatment to a subclass of men that cannot biologically exist.¹⁷⁸ This analysis not only relies on overruled rationale and logic as discussed earlier, but fails to recognize the sex-specific nature of pregnancy and extend that logic to the similarly sex-specific act of breastfeeding.¹⁷⁹ The court cited *Barrash*, *Martinez* and *Wallace* as examples of other instances where comparability analysis was appropriate in breastfeeding claims.¹⁸⁰ The court dismissed a claim of sex-plus discrimination for lacking a comparable subclass of men, rather than explain the inapplicability of sex-plus discrimination claims to breastfeeding discrimination.¹⁸¹ These conclusions fail to acknowledge the unique issue presented by the sex-specific nature of breastfeeding, similar to pregnancy, and its impact on women in the workplace.¹⁸²

Using a sex-neutral comparability analysis in breastfeeding, as in pregnancy employment cases, for example, could potentially allow employers to discriminate based on a characteristic that only women possess as a pretext for discrimination based on their sex.¹⁸³ Congress and

176. See Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER SOC. POL'Y & L. 471, 485-86 (2001) (asserting that ignoring the sex-specific nature of breastfeeding results in inequality of the treatment of men and women in the workplace).

177. See, e.g., *Derungs*, 374 F.3d at 437 (holding that OPAS, which prohibits sex discrimination, does not protect against discrimination against breastfeeding women).

178. See *id.* (requiring a comparison between the manner in which Wal-Mart treated breastfeeding women and the manner in which it treated men).

179. See Kovacic-Fleischer, *supra* note 148, at 377-80 (comparing sex-specific breastfeeding to sex-specific pregnancy); see also Kay, *supra* note 125, at 39-40 (asserting that cases like *Geduldig*, which do not recognize the biological and reproductive differences between men and women, perpetuate inequality between the sexes).

180. See *Derungs*, 374 F.3d at 438-39 (stating that other breastfeeding cases have "universally accepted" the use of the comparability analysis and citing *Wallace*, *Martinez* and *Barrash* as examples of controlling precedent).

181. See *id.* at 439 (stating that a sex-plus claim fails for lack of a comparable subclass of men); see also *Martin Marietta*, 400 U.S. at 544 (holding that an employer's refusal to hire women with pre-school age children but not similarly-situated men violated Title VII as sex discrimination even though the characteristic that served as the distinction, having pre-school age children, was sex-neutral); see also Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 124 (2003) (arguing that the sex-plus analysis that the Supreme Court established in *Martin Marietta* required a sex-neutral characteristic as the "plus" factor).

182. See Kovacic-Fleischer, *supra* note 148, at 355 (asserting that breastfeeding, like pregnancy, is exclusive to women and influences their function as employees and decision to work).

183. See, e.g., *Martinez*, 49 F. Supp. 2d at 311 (finding that "tasteless and offensive"

the Supreme Court eradicated this problem for pregnancy, at least in the employment context, through the PDA.¹⁸⁴ This logic extends naturally to breastfeeding because, like pregnancy, breastfeeding is sex-specific to women.¹⁸⁵ For these reasons, the *Derungs* court applied a faulty and outdated logic in using a Title VII analysis.¹⁸⁶

The *Derungs* court also misinterpreted the applicability of sex-plus discrimination in analyzing breastfeeding discrimination claims by essentially using the same test it would apply in any sex discrimination claim and requiring a comparable class of men.¹⁸⁷ The court ignored the fact that sex-plus claims are inapplicable because these claims deal with a distinction based on sex coupled with a sex-neutral characteristic, which serves as a pretext for the underlying sex discrimination.¹⁸⁸ However, breastfeeding is not a sex-neutral characteristic, like parenting a school-aged child.¹⁸⁹ Therefore, the reasoning the court followed in dismissing the claim because of the lack of a comparable subclass ignored the underlying problem of applying traditional Title VII analysis to pregnancy and breastfeeding claims.¹⁹⁰ The *Derungs* court's comparison of the plaintiff's claim to the *Martinez* sex-plus analysis does not fail because of the lack of a comparable class, but is completely inappropriate in its application because the "plus" characteristic is sex-specific rather than sex-neutral.¹⁹¹

remarks directed towards an employee pumping breast milk did not constitute sex discrimination).

184. See 42 U.S.C. § 2000e(k) (defining the terms "because of sex" and "on the basis of sex" to include pregnancy); *Newport News*, 462 U.S. at 684 (stating the PDA necessitates a finding that distinctions based on pregnancy equal distinctions based on sex and, therefore, violate Title VII).

185. See *Christrup*, *supra* note 176, at 485-86 (arguing that the reasoning courts employ to find that distinctions based on breastfeeding do not amount to discrimination against women, like distinctions based on pregnancy, ignores the sex-specific nature of breastfeeding).

186. See *Kovacic-Fleischer*, *supra* note 148, at 381 (asserting that because Congress overruled the *Gilbert* logic, it did not intend for courts to revive the logic in similar cases).

187. See *Derungs*, 374 F.3d at 438-39 (comparing the plaintiff's claim to the breastfeeding sex-plus claim asserted in *Martinez* and concluding that sex-plus analysis would still require a corresponding subclass of similarly situated men).

188. See *Martin Marietta*, 400 U.S. at 544 (holding that an employer's practice of refusing to hire women with preschool-age children was discriminatory because no similar sex-neutral hiring requirement existed for men who had preschool-age children); see also *Williams & Segal*, *supra* note 181, at 124 (asserting that sex-plus discrimination occurs when an employer treats an employee differently because of sex, in addition to some neutral characteristic).

189. See *Kovacic-Fleischer*, *supra* note 148, at 380 (asserting that breastfeeding is not sex-neutral, like childrearing, but rather stems from biological and reproductive differences between men and women).

190. See H.R. REP. NO. 95-948, at 2-3 (recognizing that the PDA obviates the need for comparison between men and women based on recognition that pregnancy is confined to women).

191. See *Williams & Segal*, *supra* note 181, at 124-27 (citing a number of cases that correctly use sex-plus discrimination claims where the "plus" characteristic is sex-neutral, such as parenting children). Compare *Derungs*, 374 F.3d at 439 (classifying the choice to breastfeed as a "plus" characteristic), with *Martin Marietta*, 400 U.S. at 544 (classifying

The court should have ignored the traditional analysis and, instead, have embraced and extended the logic of the PDA to breastfeeding.¹⁹²

2. *Treating Breastfeeding as a Choice Ignores Its Sex-Specific Nature*

The difficulty many courts face in translating traditional sex discrimination analysis to pregnancy and breastfeeding discrimination arises from the fact that not all women will become pregnant or breastfeed.¹⁹³ In this way, the distinction the courts often draw is that breastfeeding is not directly the result of being a woman, but rather a choice a woman makes.¹⁹⁴ Courts find this problem even more critical in breastfeeding claims as they view a more attenuated link between sex and the act of breastfeeding.¹⁹⁵ The subgroups become smaller, resulting in a group of women who can or will become pregnant, and an even smaller subset of those women, namely those who choose or will be able to breastfeed.¹⁹⁶ The *Derungs* court found this division exceptionally compelling.¹⁹⁷

In pregnancy or breastfeeding discrimination claims, the characteristic that makes women different is their status as pregnant or breastfeeding women, which is not mentioned anywhere in the pre-PDA version of Title VII.¹⁹⁸ As a result, the PDA effectively redefined sex to include a subgroup of distinctions or classes based on sex.¹⁹⁹ Arguably, courts could apply the new definition of sex to include pregnancy as a distinction based on sex, making comparability analysis workable in pregnancy discrimination claims.²⁰⁰ However, this interpretation does not provide a

parenting a school-age child as the “plus” characteristic).

192. See 42 U.S.C. § 2000e(k) (stating that discrimination “based on sex” or “because of sex” includes discrimination because of pregnancy); H.R. REP. NO. 95-948, at 3-4 (stating that discrimination based on pregnancy is *per se* sex discrimination under Title VII).

193. See, e.g., *Derungs*, 141 F. Supp. 2d at 889 (stating that Wal-Mart’s breastfeeding restriction affects only women who choose to breastfeed).

194. See *Barrash*, 846 F.2d. at 931-32 (stating that breastfeeding is not an incapacitating medical condition but rather results from a mother’s wish to nurse her child).

195. See *Derungs*, 141 F. Supp. 2d at 890 (defining the groups resulting from Wal-Mart’s restriction on breastfeeding as (1) women who breastfeed and their infants, and (2) individuals who do not breastfeed or are not breastfed).

196. See *id.* at 893 (stating that Wal-Mart may discriminate against the protected subclass of women who choose to breastfeed, unless the women can prove Wal-Mart’s discrimination by comparing themselves to a comparable subclass of men).

197. See *id.* (dismissing the plaintiff’s claim that the court’s analysis should not require a plaintiff to show that the employer’s practice discriminated against all women, but rather that the employer’s practice discriminated against some women who wished to engage in breastfeeding, because such an assertion “misses the point”).

198. See 42 U.S.C. § 2000e-2(a)(1) (prohibiting employers from discriminating against employees on the basis of race, color, religion, sex or national origin).

199. See 42 U.S.C. § 2000e(k) (defining distinctions “based on sex” to include pregnancy).

200. See *Kay*, *supra* note 125, at 30 (asserting that Justice Stevens’s dissent in *Gilbert* provides a possible, although not sufficient, solution to the lack of a comparable class of men by dividing the classes resulting from distinctions based on sex as persons who face the

solid basis for claims of breastfeeding discrimination because it lays a foundation for courts to treat breastfeeding and pregnancy as a choice that a subclass of women willingly make, rather than equating pregnancy with sex.²⁰¹

However, the PDA does not require the comparability analysis, since distinctions based on pregnancy are *per se* violations of Title VII.²⁰² Instead, the PDA simply extends the definition of sex to include pregnancy.²⁰³ In this way, the PDA rejects the use of comparability analysis and provides a framework that meets the goal of ensuring protection of women in the workplace, even if pregnancy is a choice.²⁰⁴ This *per se* approach is the framework that Congress intended and that the Supreme Court supported.²⁰⁵ Considering the broad nature of the PDA, the logic behind distinguishing pregnancy *per se* violations of Title VII, despite the lack of comparability analysis, and the sex-specific nature of breastfeeding, courts have incorrectly withheld the extension of the PDA to breastfeeding discrimination claims.²⁰⁶ Finally, the courts erroneously related breastfeeding to “child-care” rather than relating breastfeeding to pregnancy, further foreclosing the possibility of including protection for breastfeeding under the PDA.²⁰⁷

3. *Treating Breastfeeding as a Medical Condition Ignores Its Sex-Specific Nature*

Courts avoided the issue of breastfeeding as sex-specific in cases like *Barrash* and *Wallace*, by confining their analyses to the “related medical condition” clause and treating breastfeeding as a trivial medical condition

risk of pregnancy and those who do not).

201. See Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act*, 38 BUS. L.J. 819, 850 (2001) (arguing that treating pregnancy as a subclass and choice, rather than equating it with sex, results in the courts giving less deference to pregnancy than to “immutable” traits like race and sex).

202. See 42 U.S.C. § 2000e(k) (defining “because of sex” and “based on sex” to include pregnancy); H.R. REP. NO. 95-948, at 3-4 (clarifying that pregnancy discrimination is a *per se* violation of Title VII, under the PDA).

203. See H.R. REP. NO. 95-948, at 3 (stating that Congress enacted the PDA “to change the definition of sex discrimination”).

204. See *id.* (noting that the PDA ensures “working women are protected against all forms of employment discrimination based on sex”).

205. See *id.* (explaining that “distinctions based on pregnancy are *per se* violations of Title VII”); *Newport News*, 462 U.S. at 684 (stating that the PDA clearly requires courts to find that discrimination based on pregnancy is “on its face” discrimination based on sex).

206. See Kovacic-Fleischer, *supra* note 148, at 392 (asserting that, like pregnancy, breastfeeding is a biological function that courts should recognize).

207. See *Wallace*, 789 F. Supp. at 869, 879 (citing to the PDA’s legislative history in examining Congress’s intent to exclude child care from the protection of the PDA, thereby relating breastfeeding to childrearing rather than relating breastfeeding to pregnancy); see also Kovacic-Fleischer, *supra* note 148, at 380 (stating that unlike childrearing, breastfeeding is not sex-neutral, and that making such comparisons ignores the biological differences between men and women).

related to pregnancy.²⁰⁸ These court decisions erroneously defined breastfeeding as a medical condition.²⁰⁹ Furthermore, in treating breastfeeding as a medical condition, the *Barrash* incapacitation requirement wrongly interpreted the PDA narrowly, ignoring the possibility that Congress intended more breadth in enacting the Act.²¹⁰ The more courts continue to follow these flawed frameworks, express legislation protecting breastfeeding is imperative.

D. Implications and Recommendations

1. The Medical and Social Benefits of Breastfeeding Augment the Importance of Legal Protection of Public Breastfeeding

The protection of public breastfeeding in Ohio and other states is critical due to the numerous benefits breastfeeding provides infants,²¹¹ mothers²¹² and society.²¹³ Breastfeeding also promotes family values.²¹⁴ In recognition of the importance of breastfeeding to families and society, the World Health Organization (“WHO”) advocates the adoption of a global public health policy recommending that mothers feed infants exclusively through breastfeeding for the first six months of infancy.²¹⁵ The legal

208. See *Barrash*, 846 F.2d at 931-32 (stating that, to justify discrimination based on sex, one would need to compare women and men; however, there is no valid comparison between men suffering an incapacitating medical condition and “young mothers wishing to nurse little babies”); *Wallace*, 789 F. Supp. at 869 (stating that the PDA protects medical conditions, but finding that breastfeeding is not the type of medical condition that the PDA covers).

209. See 42 U.S.C. § 2000e(k) (defining “sex” as including, but not limited to, pregnancy); H.R. REP. NO. 95-948, at 5 (extending the PDA’s protection to include all matters pertaining to the childbearing process). But see Isabelle Schallreuter Olson, Casenote and Comment, *Out of the Mouths of Babes: No Mother’s Milk for U.S. Children, The Law and Breastfeeding*, 19 *HAMLIN L. REV.* 269, 302 (1995) (arguing that because of the health benefits of breastfeeding and because of the courts characterization of breastfeeding as “child rearing,” it is appropriate for courts to analyze breastfeeding as a medical condition related to pregnancy under the PDA).

210. See H.R. REP. NO. 95-948, at 5 (explaining that the PDA covers a range of matters concerning pregnancy and related medical conditions, but does not require incapacitation).

211. See *BLUEPRINT*, *supra* note 19, at 10-11 (enumerating child health benefits of breastfeeding, such as resistance to infectious disease and developmental benefits).

212. See *id.* at 11 (including physical benefits of breastfeeding to the mother such as minimizing postpartum maternal blood loss, reducing the risk of menopausal breast and ovarian cancers and psychological benefits such as increased self-confidence).

213. See *id.* (noting socioeconomic benefits including a decrease in medical expenditures for families and employers and higher employee productivity due to a decrease in parental absence from the workplace). Breastfeeding decreases such parental absence from the workplace because breastfed babies generally are sick less often than non-breastfed babies. *Id.*

214. See Gordon G. Waggett & Rega Richardson Waggett, *Breast is Best: Legis. Supporting Breast-Feeding is an Absolute Bare Necessity-A Model Approach*, 6 *MD. J. CONTEMP. LEGAL ISSUES* 71, 77 (1994-1995) (suggesting that the nurturing nature of breastfeeding provides a strong foundation for a child and promotes a natural bond between mother and child).

215. See WORLD HEALTH ORG., *GLOBAL STRATEGY FOR INFANT & YOUNG CHILD FEEDING* 7 (2003) (reasoning that because breastfeeding is the best way to promote healthy

protection of public breastfeeding is important because studies show that requiring women to hide or disguise breastfeeding, discouraging women from breastfeeding at work, and placing other bans or restrictions on public breastfeeding discourages women from choosing to breastfeed their children, despite the practice's physical, psychological and socioeconomic value.²¹⁶

2. *Social Implications of Lack of Legal Protection for Public Breastfeeding*

Currently, at least thirty-six states have some legislation related to breastfeeding and at least twenty-three states expressly protect public breastfeeding.²¹⁷ The states that protect public breastfeeding are in line with federal policy promoting breastfeeding as the healthiest and most desirable form of nutrition for infants.²¹⁸ Many of these states meet the Department of Health and Human Services *Healthy People 2010* objective of a seventy-five percent rate of mothers breastfeeding their infants.²¹⁹ However, Ohio is well below the seventy-five percent objective.²²⁰ It is quite likely that Ohio's history of failing to meet the national objective, like other states failing to meet the objective, stems from the state's history of lack of legal protection for public breastfeeding.²²¹ When states do not protect public breastfeeding, women face discrimination in places of public accommodation, embarrassment, low esteem in body image and general lack of acceptance.²²² These factors weigh heavily on a woman's decision

growth and development, governments should ensure that communities and workplaces support and accommodate breastfeeding women).

216. See, e.g., IMMUNIZATION SURVEY, *supra* note 82 (reporting that only 64.5% of Ohio mothers breastfed their children at any point during infancy). But see Danielle M. Shelton, *When Private Goes Public: Legal Protection for Women who Breastfeed in Public and at Work*, 14 LAW & INEQ. 179, 183 (1995) (noting Norwegian law, which requires employers to allow breastfeeding mothers two hours a day to breastfeed, as an example of policy that positively impacts breastfeeding rates and results in ninety-nine percent of mothers breastfeeding their infants for more than six weeks of infancy).

217. See STATE LEGIS., *supra* note 99 (providing examples of state laws that relate to breastfeeding); NAT'L CONF. OF STATE LEGS., 50 STATES SUMMARY OF BREASTFEEDING LAWS (Sept. 2004) (listing the various state laws protecting or promoting breastfeeding), at <http://www.ncsl.org/programs/health/breast50.htm> (last visited July 24, 2005).

218. See, e.g., 42 U.S.C. § 1790 (2000) (recognizing breastfeeding as the best method of ensuring infant nutrition and implementing a national breastfeeding promotion program).

219. See, e.g., CAL. CIVIL CODE § 43.3 (2005) (protecting a mother's right to breastfeed in any place of public accommodation); IMMUNIZATION SURVEY, *supra* note 82 (reporting that 83.7 percent of California mothers have breastfed their infants).

220. See IMMUNIZATION SURVEY, *supra* note 82 (reporting that 64.5 percent of Ohio mothers breastfed their infants at any time during infancy).

221. See Waggett & Waggett, *supra* note 214, at 77-78, 81 (arguing that societal attitudes about breastfeeding influence a woman's decision to breastfeed her child and that legislation allowing breastfeeding in public is necessary to change society's negative attitudes and encourage mothers to breastfeed their children).

222. See, e.g., *Derungs*, 162 F. Supp. 2d at 864 (stating that Ms. Derungs was "appalled" and "embarrassed" when a Wal-Mart employee told her that she had to move to the restroom or leave the store while breastfeeding her child because she might offend other customers).

to breastfeed in public, as well as on her decision to breastfeed at all.²²³ Additionally, ignoring the sex-specific nature of breastfeeding adopts a rigid, formal vision of equality between men and women.²²⁴ A substantive approach of equality that recognizes the biological differences between men and women would promote equality between men and women in the workplace more adequately, thus fulfilling one of the primary goals of the PDA.²²⁵

3. Recommendations for Action by Other States

Because OPAS prohibits sex discrimination but does not expressly include protection for breastfeeding discrimination, Ohio's new law was a proper legislative response that will better protect women from breastfeeding discrimination in places of public accommodation.²²⁶ Over nineteen state agencies and organizations went on the record to Senator Clancy's breastfeeding bill, demonstrating the widespread support for protecting public breastfeeding.²²⁷ States that do not enact similar legislation will not protect women who breastfeed in public against discrimination. The lack of willingness of the courts to extend the protection of the PDA to breastfeeding results in the fact that states like Ohio that protect sex discrimination based on a Title VII model, whether in employment or public accommodation statutes, are not protecting against breastfeeding discrimination.²²⁸ Instead, they must adopt alternative legislation expressly protecting public breastfeeding.²²⁹ Similarly, outdated criminal statutes that criminalize exposure of the female breast provide potential barriers to public breastfeeding that states should note in

223. See Waggett & Waggett, *supra* note 214, at 81 (arguing that a woman needs to be able to breastfeed her child at any time and in any place in order to be successful at breastfeeding).

224. See Christrup, *supra* note 176, at 485-86 (stating that ignoring the sex-specific nature of an activity like giving birth or breastfeeding ignores actual differences between men and women and that ignoring these differences makes it impossible to consider men and women equally).

225. See H.R. REP. NO. 95-948, at 3 (noting the primary goal of the PDA is to ensure that women are free from sex discrimination in the workplace); see also Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1, 4-5 (1994) (noting that a substantive equality approach, which looks to the results or effects of a law or practice and accounts for biological differences, makes up for the effect of a formal equality approach that ignores these differences and results in inequality between men and women).

226. See OHIO REV. CODE ANN. § 3781.55 (West 2005) (Ohio 2005) (requiring that proprietors of places of public accommodation allow women to breastfeed).

227. See E-mail from Erika Cybulskis, Aide to Senator Patricia Clancy, Ohio Senate, to Brianne Whelan (Jan. 28, 2005, 13:37 EST) (on file with author) (listing a number of supporters of the bill, such as the Ohio Academy of Family Physicians and the Ohio Department of Health, as well as the Executive Director of the Ohio Civil Rights Commission, G. Michael Payton).

228. See, e.g., *Derungs*, 374 F.3d at 430 (holding that restrictions on breastfeeding in places of public accommodation do not constitute sex discrimination under OPAS).

229. See, e.g., OHIO REV. CODE ANN. § 3781.55 (Ohio 2005) (permitting mothers to breastfeed in public).

2005]

FOR CRYING OUT LOUD

703

considering new legislation.²³⁰

230. *See supra* notes 55-58 and accompanying text (examining several state criminal statutes involving exposure of the female breast).

In February 2003, Senator Olympia J. Snowe introduced a proposal in the United States Senate to amend the PDA to include breastfeeding under the definition of discrimination based on sex, but the bill never emerged from consideration.²³¹ Until Congress adopts legislation like this, or the Supreme Court rules on whether Congress intended the PDA to protect against discrimination based on breastfeeding, courts may continue to resurrect the logic of *Gilbert* and the PDA will not protect the act of breastfeeding.²³² Therefore, more states should follow Ohio and adopt legislation expressly protecting public breastfeeding.

CONCLUSION

Derungs exemplifies the inadequacy of protection for public breastfeeding in states lacking specific legislation protecting the practice.²³³ Courts are reluctant to rule that breastfeeding discrimination amounts to sex discrimination under an employment discrimination analysis.²³⁴ This analysis employs a rigid formal approach to sex discrimination and equality issues.²³⁵ Furthermore, the analysis is inconsistent with the PDA's goal of protecting women from discrimination in the workplace and federal policies promoting breastfeeding as the healthiest source of nutrition for infants.²³⁶ Unless courts abandon the use of the overruled *Gilbert* analysis, statutes that prohibit sex discrimination in the employment context or in places of public accommodation will not protect public breastfeeding adequately.²³⁷ While Ohio's law may not completely nullify the *Derungs* holding,²³⁸ more states should adopt similar legislation because it will

231. See Pregnancy Discrimination Act Amendments of 2001, S. 418, 108th Cong. (2003) (proposing to include the term "breastfeeding" after the term "childbirth" in the PDA). The Senate assigned the bill to the Senate Committee on Health, Education, Labor and Pensions on February 14, 2003. *Id.*

232. See, e.g., *Wallace*, 789 F. Supp. at 869 (holding that excluding breastfeeding from situations in which employers will grant employees personal leave is not sex discrimination "under the principles set forth in *Gilbert*").

233. See *Derungs*, 374 F.3d at 430 (holding that OPAS does not prohibit places of public accommodation from restricting or banning public breastfeeding).

234. See, e.g., *Martinez*, 49 F. Supp. 2d at 309-11 (holding that an employer's inability to provide privacy for, and prevent the harassment of, a female employee's breast pumping did not amount to sex discrimination under Title VII because the PDA does not cover breastfeeding as a basis, *per se*, for sex discrimination).

235. See *supra* notes 224-25 and accompanying text (describing the different effects of employing a substantive equality approach rather than a formal equality approach on breastfeeding claims).

236. See H.R. REP. NO. 95-948, at 3 (acknowledging the primary goal of the PDA as the protection of women from all forms of workplace discrimination); H.R. REP. NO. 102-645, at 4 (recognizing the importance of federal promotion of breastfeeding because of the numerous health benefits breastfeeding provides).

237. See, e.g., *Derungs*, 374 F.3d at 430 (holding that places of public accommodation may ban breastfeeding because such restrictions do not constitute sex discrimination).

238. Compare OHIO REV. CODE ANN. § 3781.55 (West 2005) (providing an affirmative right to breastfeed), with OHIO REV. CODE ANN. § 4112.05(B) (West 2005) (providing a private right of action for sex discrimination claims).

2005]

FOR CRYING OUT LOUD

705

better protect women who breastfeed and will result in consistency with the federal and state promotion of breastfeeding.²³⁹

239. See OHIO REV. CODE ANN § 3781.55 (West 2005) (proposing to amend Ohio law to require places of public accommodation to allow public breastfeeding); Waggett & Waggett, *supra* note 214, at 81-83 (arguing that legislation allowing women to breastfeed in public is necessary to overcome the pervasiveness of society's negative attitudes towards breastfeeding that create barriers to a woman's ability to breastfeed her child any time or place).