

January 15, 2013

Unlawful Retaliation Against Nursing Mothers?

Effective March 23, 2010, the Patient Protection and Affordable Care Act, a/k/a Obamacare, amended the Fair Labor Standards Act for a salutary purpose: to provide nursing mothers with break time and a private location to express breast milk in the workplace. The amended FLSA section requires employers to provide non-exempt employees with the following:

- A “reasonable,” uncompensated “break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time” when the employee needs to “express the milk”; and
- A place, “other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public,” which may be used by an employee to express breast milk.

An employer with fewer than 50 employees is not subject to these requirements, if the requirements would “impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.” 29 USC 207(r).

Another FLSA section prohibits an employer from retaliating against an employee by discharging or “in any other manner” discriminating against an employee who has “filed any complaint or instituted” any “proceeding under or related to” the FLSA. 29 USC 215(a)(3). This non-retaliation section is similar to non-retaliation sections in other federal labor and employment statutes.

Retaliation claims, under various labor and employment statutes, are in vogue. Many employees perceive that whenever anything bad happens to them at work after they have mentioned any legal right or law, unlawful retaliation has occurred. That is not, however, the legal standard for unlawful retaliation, but that employee perception, in part, accounts for the increasing number of retaliation claims.

Courts have now started to issue decisions regarding a predictable consequence of the amendment of Section 207(r): employee claims that employers have unlawfully retaliated against them because of their assertion of their rights under Section 207(r).

A federal district court in Iowa, for example, ruled that an employee had a legal cause of action for “constructive discharge and retaliation in relation to her complaints” about the employer’s “express breast feeding policy.” The employee, who worked in a convenience store, complained about the presence of a video camera in the office that the employer permitted her to use while expressing her breast milk. In response to her “discomfort with the presence of the camera,” the employer only told her to “place a plastic bag over the camera.” The employee, who was “unable to relax” and experienced a “noticeable reduction in her milk production,” then complained to the employer. After her complaint, “she was reprimanded for allegedly failing to fill an ice machine, failing to put hot dogs on a grill, and leaving dirty dishes.” She later quit her position and filed a lawsuit alleging, in part, “constructive discharge and retaliation.”

In denying the employer's motion to dismiss that legal claim, the court stated: "...once an employer discriminates (against) or discharges an employee in relation to an employee's complaint about the employer's express breast feeding policy," the employer has violated both Section 207(r) and Section 215(a)(3). It also noted that a "complaint need not be formal" to "fall under the purview of Section 215(a)(3). *Salz v. Casey's Marketing Co.*, 19 WH Cases 2d 717 (N.D. Iowa, 2012).

In contrast, a federal court of appeals recently affirmed an order granting a motion for judgment as a matter of law regarding an employee's claim under Section 215(a)(3). The employee claimed that the employer unlawfully discharged her for allegedly requesting a time and place to express breast milk at a facility where she did not usually work. She based that claim on an email to a co-worker, which she did not show to the employer. The email stated: "...I need to know where I can use my breast pump at (the office) and who will cover the office while I'm doing it. I'll need to be able to do it at least twice while there."

The court, however, concluded that the "circumstances surrounding the email would not have informed a reasonable employer that Miller was filing a complaint." Before sending the email, the employee, who decided, on her own, to express breast milk in her office, "had never asked for, or been denied a time or place to express breast milk. She was given breaks at her leisure without question or criticism." By sending the email, the employee did not file a complaint because the email neither notified the employer that "a grievance had been lodged" nor alleged or "even" intimated that the employer "violated the law." *Miller v. Roche Surety and Casualty Co.*, 2012 U.S. App. LEXIS 26364 (11th Cir. 2012) (unpublished opinion).

For an employer to avoid retaliation claims under the FLSA by nursing mothers, it should take the following actions:

- Comply with its obligations, under Section 207(r), to nursing mothers;
- Train supervisors and managers about the employer's obligations under Section 207(r);
- Promptly investigate and address any complaints by nursing mothers about whether the employer has provided the appropriate breaks and place for expressing milk; and
- Properly investigate and document any disciplinary actions for unrelated reasons involving nursing mothers who have exercised their rights under Section 207(r).

If you have any questions about the rights of nursing mothers and the obligations of employers under Section 207(r), please contact the author of this Client Alert, your Butzel Long attorney, or any member of the Labor and Employment Law Group.

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