

# Management Alert



## Fifth Circuit Holds That Discharging A Female Employee Because She Is Lactating Or Expressing Breast Milk Constitutes Sex Discrimination

### OVERVIEW

On May 30, 2013, the Fifth Circuit Court of Appeals issued its opinion in the case of *Equal Employment Opportunity Commission v. Houston Funding II, Limited et al.*, No. 12-20220. In this matter, the EEOC brought suit on behalf of an employee who alleged that she was terminated because she was lactating and wanted to express breast milk at work. The District Court dismissed the lawsuit, holding that such a termination would not constitute sex discrimination. The Fifth Circuit vacated and remanded the grant of summary judgment, holding that the EEOC had presented facts that, if true, constituted a cognizable claim under Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act.

### BACKGROUND

The facts presented to oppose summary judgment were as follows: Donnicia Venters (“Venters”) worked as an account representative/collector for Houston Funding II, Limited and Houston Funding Corporation (“Houston Funding”) from March 2006 until her termination in February 2009. Venters took a leave of absence beginning in December 2008 to have a baby. Before she returned to work, Venters asked her supervisor to explore whether she would be able to use a breast pump once she returned. The employer’s limited partner responded with a strong “no” and commented that perhaps Venters needed to stay home longer. Venters contacted the company prior to her return from leave and again mentioned that she was lactating. Venters asked whether she could use a back room to pump milk at work. After a pause, the limited partner informed Venters that her position had been filled. Venters received a termination letter a few days later indicating that she had been terminated for job abandonment.

After Venters filed a charge of discrimination, the EEOC filed suit on her behalf in the Southern District of Texas, alleging discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”) based on sex, including pregnancy, childbirth, or related medical conditions. Houston Funding moved for summary judgment, arguing to the District Court that Title VII does not cover “breast pump discrimination.” The District Court granted summary judgment in favor of Houston Funding, holding that “Lactation is not pregnancy, childbirth, or a related medical condition,” and that therefore, “[f]iring someone because of lactation or breast-pumping is not sex discrimination.”

The District Court’s grant of summary judgment in this matter received significant media coverage because of its holding, and the District Court judge also received numerous email complaints from lactating mothers and others who disagreed with the decision. The EEOC appealed the summary judgment grant to the Fifth Circuit Court of Appeals.

## FIFTH CIRCUIT OPINION

On appeal, the Fifth Circuit noted that ever since Title VII was amended to include the Pregnancy Discrimination Act (“PDA”), courts have interpreted Title VII to cover a far wider range of employment decisions involving female physiology. The Fifth Circuit held that terminating an employee because she was lactating or expressing milk creates a cognizable Title VII sex discrimination claim. It also held that the PDA, which prohibits discrimination “on the basis of pregnancy, childbirth, or related medical conditions,” prohibits discrimination based on lactation. Unlike the District Court, the Fifth Circuit was not persuaded that PDA protection could not exist post-pregnancy. It had little difficulty determining that lactation is an aspect of female physiology that is affected by pregnancy, and that it therefore falls within the definition of “pregnancy, childbirth, or related medical condition.”

## TAKEAWAY

Interestingly, other district courts have previously held that employment decisions based on lactation or expressing milk cannot support a claim of sex discrimination. In this case, however, the Fifth Circuit has clearly staked out its position that employment decisions based on lactation and expressing milk can provide a basis for discrimination claims under Title VII and the PDA.

Employers should be reminded that the Patient Protection and Affordable Care Act, which was signed into law in March 2010, amended Section 7 of the Fair Labor Standards Act to require employers to provide reasonable break time and facilities for nursing mothers to express breast milk during the work day, for one year after the child’s birth. This requirement applies to companies with 50 or more employees. Note that this amendment does not prohibit discrimination based on lactation or expressing milk, however.

By: *Kate L. Birenbaum*

*Kate L. Birenbaum* is a partner in Seyfarth Shaw’s Houston office. If you would like further information, please contact your Seyfarth attorney or Kate Birenbaum at [kbirenbaum@seyfarth.com](mailto:kbirenbaum@seyfarth.com).