12-1-2005

Derungs v. Wal-Mart Stores: Another Door Shut - A Federal Interpretation Excluding Breastfeeding from the Scope of a State's Sex Discrimination Protection

Katherine A. Macfarlane

DERUNGS V. WAL-MART STORES: ANOTHER DOOR SHUT—A FEDERAL INTERPRETATION EXCLUDING BREASTFEEDING FROM THE SCOPE OF A STATE'S SEX DISCRIMINATION PROTECTION

I. INTRODUCTION

What is a mother to do when her infant cries for breast milk as she pushes a cart of merchandise through Wal-Mart? After all, the American Academy of Pediatrics recommends that breastfeeding commence as soon as babies show signs of hunger.[1] Indeed, breastfed babies need to be fed eight to ten times daily.[2] To complicate matters, breastfeeding should be free of interruptions and distractions.[3] Inevitably, breastfed babies will demand feeding at inopportune moments.

If privacy is a concern, a mother may search for a secluded place to breastfeed. However, if she heeds the advice of the American Academy of Pediatrics, she will look for a convenient place to breastfeed as soon as possible. Any interruption, including a request to move the breast-feeding session, may affect the infant's ability to retain the milk.[4] Such a request is an unwarranted intrusion upon an intimate moment.[5]

---

1. Am. Academy of Pediatrics, Health Topic: Breastfeeding, *at* http://www.aap.org/healthtopics/breastfeeding.cfm (last visited Mar. 9, 2005).

2. *Id.*, *at* http://www.aap.org/healthtopics/breastfeeding.cfm (last visited Mar. 9, 2005).

3. *See id.*, *at* http://www.aap.org/healthtopics/breastfeeding.cfm (last visited Mar. 9, 2005).

4. Interruptions and other distractions increase the likelihood that an infant will spit up or hiccup during breast-feeding. *See id.*, *at* http://www.aap.org/healthtopics/breastfeeding.cfm (last visited Mar. 9, 2005).

5. Breast-feeding fosters a special bond between mother and child. *Id.*, *at* http://www.aap.org/healthtopics/breastfeeding.cfm (last visited Mar. 9, 2005).

Federal courts sitting in diversity need not worry about interrupting intimate moments when they decide matters of state law. However, if they impose uniquely federal perspectives on state law issues they may also be labeled unwelcome intruders.[6] For that reason, proper diversity practice requires federal courts to apply state law "in the same manner as would a court of the state whose law applies."[7] When state law is "unclear or unsettled," certification to the state's highest court "enables a federal court sitting in diversity definitively to obtain and properly to apply state law."[8] But what approach is a federal court to take when certification is not mandated, and federal precedent appears to supply the answer to a question of state law?

Derungs v. Wal-Mart Stores forced the Sixth Circuit Court of Appeals to resolve that dilemma.[9] Three breast-feeding women brought the case in 1999 after Ohio Wal-Mart employees restricted their breastfeeding to Wal-Mart restrooms at three distinct stores on separate occasions.[10] The court decided the case on June 30, 2004,[11] and held that breast-feeding restrictions in Ohio's places of public accommodation do not "amount" to sex discrimination.[12]

In so holding, the Sixth Circuit interpreted the text and history of Ohio Revised Code Section 4112.02(G) ("Ohio's public accommodation statute").[13] The court concluded that the statute (1) does not protect pregnancy-related activities such as breastfeeding and (2) should be analyzed according to Title VII's comparability test.[14]

---

6. *See* Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 168–69 (2003).

7. Peter Jeremy Smith, *The Anticommandeering Principle and Congress's Power to Direct State Judicial Action: Congress's Power to Compel State Courts to Answer Certified Questions of State Law*, 31 CONN. L. REV. 649, 654–55 (1999).

8. *Id.* at 654–56.

9. Derungs v. Wal-Mart Stores, 374 F.3d 428 (6th Cir. 2004).

10. *Id.* at 430

11. *Id.* at 428.

12. *Id.* at 430.

13. OHIO REV. CODE ANN. § 4112.02(G) (Anderson 2004).

14. *See Derungs*, 374 F.3d at 436–37. Under Title VII of the 1964 Civil Rights Act, it is unlawful for an employer to fail or refuse to hire, discharge or otherwise discriminate against any individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such

According to the court, a Title VII analysis also fails to protect breastfeeding because restrictions aimed at the activity do not treat one sex differently than another.[15] As a result, when Ohio Wal-Marts inform their breast-feeding female customers that they may only breastfeed in the stores' restrooms, they do not engage in sex discrimination.[16] Further, even though breast-feeding women engage in an activity in which only women may participate,[17] places of public accommodation that restrict it do not treat women differently than men.[18]

Yet in *Derungs v. Wal-Mart Stores*, the Sixth Circuit did much more than hold that a place of public accommodation may proscribe what is appropriate conduct for breast-feeding women.[19] The court also concluded that it sat at a legal crossroads where state discrimination statutes and federal breast-feeding precedent meet.[20] In interpreting Section 4112 of Ohio's Revised Code, also known as Ohio's Civil Rights statute,[21] it found that the statute did not sufficiently define the scope of sex discrimination in places of public accommodation.[22] As a result, the court turned to federal law for guidance.[23]

In the context of federal employment law under Title VII, pregnancy discrimination constitutes sex discrimination.[24] Breast-feeding restrictions, however, do not amount to discrimination on the basis of pregnancy for federal purposes.[25] This limited definition of sex discrimination guided the court's assessment of Ohio's public accommodations statute.[26]

This Comment first provides a background of the facts and procedural history of *Derungs v. Wal-Mart Stores*. Second, it

---

individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000-2(a)(1) (2000).

15. *See Derungs*, 374 F.3d at 437.

16. *See id.*

17. Of course, men may administer breastmilk through bottles, but only women's bodies can produce breastmilk and *directly* breast-feed a child.

18. *See Derungs*, 374 F.3d. at 437.

19. *See id.*

20. *See id.* at 434.

21. *Id.* at 436 n.7.

22. *See id.* at 436–37.

23. *Id.*

24. *Id.*

25. *Id.* at 439.

26. *See id.* at 435–39.

summarizes the Sixth Circuit's decision and reasoning. Third, it argues that the court's unwarranted extension of federal analysis into Ohio's public accommodation statute renders its statutory construction unpersuasive. It concedes that the Sixth Circuit's analysis aligns with federal employment law interpreting breast-feeding restrictions. It proposes, however, that the Ohio Supreme Court should have decided whether the federal analysis extends to Ohio's public accommodations statute. Finally, the Comment concludes that the Sixth Circuit's analysis intrudes upon state prerogative and stymies the natural expansion of sex discrimination protection.

II. FACTS AND PROCEDURAL HISTORY OF *DERUNGS V. WAL-MART STORES*

A. Breastfeeding in Public: Wal-Mart's Restrictions

Breastfeeding is controversial. To begin with, there is the baby formula versus breast milk dilemma.[27] Even after that conundrum is resolved, controversy persists. Mothers who choose to breastfeed must also confront a portion of American society uneasy at the sight of women breastfeeding in public.[28] In fact, American women have been asked to stop breastfeeding in malls, casino restaurants, zoos, public pools, and the children's section of a Borders bookstore.[29] In certain settings, the request may include an option: you may either breastfeed in our restroom, or leave.[30]

In April of 1997, 28-year-old Dana Derungs brought her six-week-old son Devin along when she went to an Ohio Wal-Mart in search of diapers.[31] The Wal-Mart journey was Devin's first trip

27. While most experts support the choice of breastmilk over formula, "scare stories" about breastmilk contaminated with environmental pollutants may cause new mothers to reconsider breast-feeding. Christine Gross-Loh, *Don't Trash Our Bodies! Researching Breastmilk Toxins*, MOTHERING, Jan. 1, 2004, at 54.

28. *See* Jennifer Joseph, *Let Them Eat . . . Publicly: Women Sue Wal-Mart Over Breastfeeding* (Apr. 9, 1999), http://www.snellen.iweb.nl/f4f/000409.htm (last visited Mar. 12, 2005).

29. Nancy M. Solomon, *Women-Health: Breastfeeding in Public Is a Basic Civil Right* (Aug. 9, 2002), http://www.womensenews.org/article.cfm/dyn/aid/997. The Borders bookstore incident is discussed below. *See* discussion *infra* Part V.

30. *See* Joseph, *supra* note 29.

31. *Id.*

outside the home.[32] As Derungs shopped and pushed her cart through Wal-Mart, Devin started to cry.[33] She located a bench near the women's dressing room, deciding it was an acceptable place to sit and breastfeed her child.[34] Before she could begin, a Wal-Mart employee informed Derungs that she could only breastfeed in the store's restroom,[35] or outside.[36] Derungs disagreed, and asked the employee if she would find it acceptable to eat lunch in a restroom.[37] Derungs did not persuade the employee to allow her to breastfeed somewhere other than a restroom.[38] As a result, she left the store in tears.[39]

Six months later, Jennifer Gore had a similar experience while waiting in a lay-away line at a Wal-Mart in Trotwood, Ohio.[40] While in line, Gore's son Austin began to cry.[41] She silenced his cries by breastfeeding him.[42] Her breastfeeding was so discreet that a Wal-Mart clerk asked Gore how she was able to make her son stop crying.[43] After Gore truthfully explained her technique, the clerk informed her that she could breastfeed in the restroom or leave the store.[44]

Two weeks after her incident, Derungs and eighty others picketed the Wal-Mart that would not let her breastfeed outside of the women's dressing room.[45] For two years Derungs tried to elicit an apology from Wal-Mart.[46] She also encouraged the company to adopt a breast-feeding-friendly policy.[47] Wal-Mart did not apologize and never adopted a suitable policy.[48]

---

32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. Derungs v. Wal-Mart Stores, 374 F.3d 428, 430 (6th Cir. 2004).
37. *See* Joseph, *supra* note 29.
38. *Id.*
39. *Id.*
40. *Derungs*, 374 F.3d at 430.
41. *See* Mary McCarthy, *Moms Need Law Making it Legal to Breast-Feed in Public*, DAYTON DAILY NEWS, Apr. 7, 1999, at 1B.
42. *Id.*
43. *Id.*
44. *Derungs*, 374 F.3d at 430.
45. *See* McCarthy, *supra* note 42.
46. *See id.*
47. *See id.*
48. *See id.* Derungs claimed in one media source that Wal-Mart's failure to

In 1999, Derungs and Gore filed suit in Ohio state court.[49] They claimed Wal-Mart discriminated against them on the basis of their sex.[50] Specifically, they alleged that Wal-Mart violated Ohio's public accommodation statute when it refused to allow them to breastfeed wherever they pleased.[51] On May 3, 1999, Wal-Mart removed the action to the District Court for the Southern District of Ohio on diversity of citizenship grounds.[52]

B. The District Court Dismisses Plaintiffs' Statutory Claims

In district court, Wal-Mart moved for partial summary judgment on plaintiffs' sex and age discrimination claims that alleged violation of Ohio's public accommodation statute.[53] On September 26, 2000, the district court granted Wal-Mart's Motion for Partial Summary Judgment, dismissing plaintiffs' statutory claims.[54] The court held that plaintiffs failed to demonstrate that Wal-Mart's breast-feeding restrictions constituted sex or age discrimination under the statute.[55]

1. The District Court Held that the Application of Ohio's Public Accommodation Statute was one of First Impression

In its analysis of Ohio's public accommodation statute, the court first framed the issue as whether breast-feeding prohibitions in a place of public accommodation constituted sex or age discrimi-

---

apologize or adopt a breast-friendly policy motivated her decision to sue, because, in her words, "I don't want to see any other mother go through what we went through." *Id.*

49. The complaint was amended on April 19, 1999, to add Angie Baird and her daughter as party-plaintiffs. *Derungs*, 374 F.3d at 430. Baird was prohibited from breast-feeding her daughter on a bench near the Trotwood Wal-Mart's portrait studio. *Id.* Like Derungs and Gore, Baird was given the choice of either breast-feeding in the restroom or outside of the store. *Id.*

50. *Id.* Gore and Derungs' infant sons, Austin Gore and Devin Derungs, are also named plaintiffs, and the complaint filed in Ohio State Court included a claim of age discrimination under the same Ohio statute. *Id.* The complaint additionally alleged common law claims of emotional distress, tortious interference with parental rights and loss of consortium. *Id.*

51. *Id.*

52. Derungs v. Wal-Mart Stores, 141 F. Supp. 2d 884, 884 (S.D. Ohio 2000), *aff'd*, 374 F.3d 428 (6th Cir. 2004).

53. *Id.* at 888.

54. *Id.* at 884.

55. *Id.* at 894.

nation.[56] It then labeled that issue a matter of first impression undecided by any federal or state court.[57] Both parties acknowledged that no Ohio law was on point.[58] The court therefore found it to be "both appropriate and necessary to venture beyond state law to resolve the parties' dispute."[59]

2. The Court Held that Breast-Feeding Discrimination is not Sex Discrimination under Title VII or the Ohio Statute

With no state law to aid its interpretation, the court turned to federal case law interpreting Title VII.[60] Like the Ohio statute, Title VII prohibits sex discrimination.[61] The court held that although Title VII prohibits pregnancy discrimination as a form of sex discrimination, it does not similarly forbid breast-feeding discrimination.[62]

First, the court relied on the Southern District of New York's *Martinez v. N.B.C., Inc.*'s [63] Title VII analysis.[64] *Martinez* explains that sex discrimination is limited to conduct "'favoring men while disadvantaging women or *vice versa*.'"[65] According to the *Martinez* court, Title VII sex discrimination requires the favoring of one sex, and does not cover distinctions drawn using criteria immaterial to one sex.[66] In applying this logic to the present facts, the court held that breast-feeding prohibitions do indeed differentiate between groups.[67] The prohibitions, however, merely separate breast-feeding women from those who do not breastfeed and infants who are breastfed from those who are not.[68] The court found that this sort of differentiation does not amount to sex or age discrimination because

56. *Id.* at 889.
57. *Id.*
58. *Id.* at 891.
59. *Id.*
60. *Id.*
61. *Id.* The court also held that although Title VII does not mention age discrimination, age discrimination under the Ohio Statute would likewise be analyzed using Title VII case law. *Id.* at 891–92, 892 n.9.
62. *Id.* at 899 n.7.
63. *See* 49 F. Supp. 2d 305 (S.D.N.Y. 1998) (holding that a private employer does not engage in sex discrimination by failing to accommodate a breast-feeding employee).
64. *Derungs*, 141 F. Supp. 2d at 890.
65. *Id.* (quoting *Martinez*, 49 F. Supp. 2d at 309).
66. *Id.*
67. *Id.* at 889–90.
68. *Id.*

it does not distinguish between men and women, or infants and non-infants.[69] Simply put, the court found the distinguishing characteristic of breastfeeding immaterial to men and noninfants.[70]

Second, again relying on *Martinez*, the court held that plaintiffs also failed to establish a theory of "sex-plus" discrimination, which requires disparate treatment based on sex, coupled with a second trait.[71] The plaintiff in *Martinez* could not establish that discrimination against pumping breast milk was sex-plus discrimination.[72] That is, she could not show she was "treated less favorably than similarly situated men," because men cannot pump breast milk.[73] In relying on this part of *Martinez*, the court concluded that breast-feeding discrimination will never be sex-plus discrimination because breast-feeding women have no male sub class with which to compare themselves.[74]

Finally, the court looked to the language of the Ohio statute, and found no reason to distinguish sex and age discrimination under the statute from an analysis of sex discrimination under Title VII.[75] The court, therefore, found that no claim of sex or age discrimination existed under Ohio law.[76]

---

69. *Id.* at 890. The court explained that a breast-feeding prohibition divides people into two groups: one group contains women who breast-feed and their breastfed children, and the second is comprised of people who do not breast-feed and children who are not breastfed. *Id.* at 893. Such classification is breast-feeding discrimination, but not sex or age discrimination, as both groups contain women and children. *Id.*

70. In 1978, Congress passed the Pregnancy Discrimination Act (PDA), amending Title VII's definition of sex discrimination to include discrimination "'because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions.'" *Id.* at 890 n.7. However, even under this expanded definition, breast-feeding discrimination is not pregnancy discrimination for purposes of Title VII. *Id.*; *see also* Susan Huhta et al., *Looking Forward and Back: Using the Pregnancy Discrimination Act and Discriminatory Gender/Pregnancy Stereotyping to Challenge Discrimination Against New Mothers*, 7 EMP. RTS. & EMP. POL'Y J. 303, 306 (2003) (explaining that courts have rejected claims of discrimination based on a mother's breastfeeding responsibilities despite the PDA).

71. *Derungs*, 141 F. Supp. 2d at 891–92.

72. *Id.* at 890–91.

73. *Id.*

74. *Id.* at 891 n.8.

75. *Id.* at 893.

76. *Id.* Although plaintiffs framed the issue as one of disparate treatment,

C. Dismissal of the Remaining Claims and Plaintiffs' Appeal

On March 15, 2001, the District Court granted Wal-Mart's Motion for Summary Judgment on plaintiffs' remaining common law claims.[77] On April 11, 2001, the court entered a final judgment for Wal-Mart, which plaintiffs appealed to the Sixth Circuit.[78]

III. THE SIXTH CIRCUIT'S ANALYSIS AND DECISION

The Sixth Circuit endorsed the lower court's Title VII comparability analysis when it concluded that plaintiffs failed to make out any legally cognizable sex discrimination claim.[79] The court also added an analysis of legislative intent and Ohio court decisions to further justify the lower court's reliance on Title VII.[80]

A. The Court Surveyed Ohio Decisions to Determine the Pertinent Standards for Discrimination Under the Ohio Statute

The court addressed the question of whether breast-feeding prohibitions in Ohio public accommodations constitute unlawful discrimination.[81] It stated that this was a matter of first impression under the Ohio public accommodations statute.[82] The court recognized that because it had to construe a state statute, it would need to apply the substantive law of the state in which the district court sits.[83] The court noted in such a situation, the decisions of the

---

the court also rejected any disparate impact theory of sex discrimination. *Id.* at 892 n.10. In so holding, the court found the statute's "[except] for reasons 'applicable alike' to all individuals" language *permits* discrimination in public accommodation for "reasons applicable alike to all persons." *Id.* That is, the statute does not prohibit facially neutral policies that may unintentionally discriminate. *Id.* Therefore, the court reasoned, the statute does not provide for claims which involve "the application of a facially neutral policy or practice that has a discriminatory effect on a protected class" and does not require proof of intent to discriminate, such as those alleging disparate impact. *Id.*

77. Derungs v. Wal-Mart Stores, 374 F.3d 428, 431 (6th Cir. 2004).

78. The plaintiffs only appealed their claims of sex discrimination, having voluntarily withdrawn their age discrimination claims; additionally, they did not brief their common law claims, which were considered waived. *Id.* at 431 n.1.

79. *Id.* at 437.

80. *Id.* at 437–40.

81. *Id.* at 432.

82. *Id.*

83. *Id.* at 433 (citations omitted).

state's highest court are the ideal precedent.[84] If, however, the applicable precedent is that of an intermediate court, that precedent should control unless the state supreme court would definitely take different action.[85] With these guidelines in mind, the court turned to Ohio decisions interpreting the statute.[86]

First, the court found that both the Ohio State Legislature and the Ohio Supreme Court have stated that the public accommodation statute should be construed liberally.[87] The court, however, found only one Ohio Supreme Court case, *Ohio Civil Rights Commission v. Lysyj*,[88] that directly interpreted it.[89] The court described *Lysyj* as a case in which a landlord discriminated against a white resident of a trailer park on account of her race.[90] The resident was free to entertain white guests without reprisal but was ordered to leave the park after entertaining a black guest.[91] Further, the court repeated *Lysyj*'s test for unlawful discrimination under the statute, which simply asks "whether . . . a place of public accommodation has denied to any person the full enjoyment of such place for reasons not applicable alike to all persons irrespective of race, color, religion, national origin or ancestry."[92] The court also noted that although the legislature later amended the statute to include sex and age discrimination, the *Lysyj* discrimination test is still applicable,[93] and the court employed it in a recent Ohio appellate decision.[94]

Next, the court looked to lower Ohio court interpretations of the statute. The court observed that in these decisions, the plaintiffs could be compared to a comparable class of people.[95] Hence, a comparability analysis was appropriate to determine whether discrimination had occurred.[96] For example, in *Gegner v. Graham*,[97]

84. *Id.*
85. *Id.*
86. *Id.* at 433–34.
87. *See id.* at 433.
88. 313 N.E.2d 3 (Ohio 1974).
89. *Derungs*, 374 F.3d at 433.
90. *Id.*
91. *Id.*
92. *Id.* (quoting *Lysyj*, 313 N.E.2d at 3).
93. *Id.* at 433 n.2.
94. *Id.* at 433 (citing Meyers v. Hot Bagels Factory, 721 N.E.2d 1068 (Ohio 1999)).
95. *Id.* at 434.
96. *Id.*

an appellate court held that when a barbershop refused the black plaintiff service, it plainly violated the public accommodation statute.[98] The court noted that the *Gegner* plaintiff could be compared to a comparable class of people—whites.[99]

B. The Court Compared the History of Sex Discrimination Expansion Under Federal and Ohio Law to Hold that the Ohio Public Accommodation Statute Does Not Protect Against Pregnancy Discrimination

The court stated that in the context of employment discrimination, Ohio courts have definitively adopted the federal courts' Title VII analysis.[100] In the context of public accommodation discrimination, however, the application of federal law is less settled.[101] The differing language used in constructing the various subdivisions of Ohio's Civil Rights statute further complicated the court's task.[102] Although subdivisions pertaining to employment discrimination mimic the language of Title VII, as they prohibit discrimination "'on the basis of'" a certain trait,[103] its public accommodation section is distinguishable.[104] That section prohibits discrimination "except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, disability, age or ancestry."[105] The court explained that Ohio courts have applied a Title VII analysis to Ohio's employment discrimination statutes.[106] The court, however, reasoned that the history and language of the public accommodation statute suggests that its definition of sex discrimination is less

97. 205 N.E.2d 69 (Ohio Ct. App. 1964).

98. *Derungs*, 374 F.3d at 433 (citing *Gegner*, 205 N.E.2d at 69).

99. *Id.* The court also cited *Meyers*, in which the female plaintiff alleging sex discrimination could be compared to a comparable class of males. *Id.* at 434 (citing *Meyers*, 721 N.E.2d at 1083). The court also recited the *Meyers'* interpretation of the statute's "full enjoyment" language. *Id.* The *Meyers* court held full enjoyment to mean "the right to purchase all services or products of a place of public accommodation, the right to be admitted to any place of public accommodation, and the right to have access to the services and products of such a place in the same manner as all other customers." *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 434–37.

expansive than Title VII's.[107]

First, the court described milestones in federal sex discrimination analysis. Congress passed the Civil Rights Act, including Title VII, in 1964.[108] In 1976, the Supreme Court decided *General Electric Co. v. Gilbert*[109] and employed a comparability analysis to exclude pregnancy from Title VII's sex discrimination protection.[110] In 1978, Congress passed the Pregnancy Discrimination Act ("PDA"), which provides that Title VII's employment sex discrimination protection includes discrimination based on "pregnancy, childbirth and related medical conditions."[111] In 1983, the Supreme Court held that the PDA expressly overruled *Gilbert*.[112]

The court then compared the fate of sex discrimination protection under Ohio law. Ohio adopted the public accommodation amendment to Chapter 4112 of its Revised Code before the federal Civil Rights Act passed in 1964.[113] In 1980, before the Supreme Court held that the PDA overruled *Gilbert*, Ohio incorporated the PDA's definition of sex discrimination into its employment discrimination code.[114]

The court found that the Ohio legislature was aware of both *Gilbert* and the PDA, and made a "conscious choice" to expand its definition of sex discrimination in the context of employment.[115] Further, in the public accommodations context, the court deduced that the Ohio legislature had the opportunity to expand the scope of its protection, but chose not to.[116] The court, therefore, was unwilling to extend protection to an activity the Ohio legislature purposefully excluded from the scope of public accommodation

107. *Id.*
108. *Id.* at 446.
109. 429 U.S. 125 (1976).
110. *Derungs*, 374 F.3d at 434–35.
111. *Id.* at 435. The PDA states that women affected by pregnancy, childbirth, or related medical conditions must be treated the same as other applicants and employees on the basis of their ability to work. *See* 42 U.S.C. § 2000e(k) (2000).
112. *Derings*, 473 F.3d at 436 (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983)).
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 436–37.

protection.[117] In so holding, the court suggested that *Gilbert* still governs sex discrimination under the Ohio public accommodation statute.[118]

C. The Court Affirmed the District Court's Use of a Title VII Comparability Analysis

In affirming the district court's Title VII comparability analysis, the court emphasized that the text Ohio's statute does not prohibit discrimination "applicable alike to all persons." [119] Rather, it prohibits discrimination in which a comparable class of people is treated differently.[120] Further, the court stated that a comparison analysis is supported by the few Ohio cases interpreting the public accommodation statute in the context of race and sex discrimination.[121] Applying this standard, the court concluded that Wal-Mart's breast-feeding prohibitions merely regulate the place and manner of its business invitees' feeding.[122] That is, they apply a prohibition that is applicable alike to all persons.[123]

D. The Court Held that No Judicial Body has Included Breastfeeding Within the Scope of Sex Discrimination

The court repeated its conclusion that the PDA and Title VII's pregnancy-related sex discrimination protection are more expansive than that afforded by the Ohio public accommodation statute.[124] Despite a more expansive definition, federal employment cases have held that breastfeeding falls outside the scope of sex discrimination because it does not create a comparable subclass within the opposite sex.[125] In other words, the court held that even though a more inclusive approach to sex discrimination is available, no judicial

---

117. *Id.* at 437.
118. *See id.* at 439.
119. *Id.* at 437.
120. *Id.*
121. *Id.* at 437–38.
122. *Id.*
123. *Id.*
124. *Id.* at 439.
125. *Id.* at 438–39. The court emphasized that this conclusion was not limited to federal cases decided within the Sixth Circuit, such as *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867 (W.D. Ky. 1990), but included cases in other circuits, such as *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 305 (S.D.N.Y. 1999).

body has found breast-feeding prohibitions to be sex discrimination.[126]

IV. ANALYSIS OF THE COURT'S DECISION

In its decision in *Derungs v. Wal-Mart Stores*, the Sixth Circuit declined to take the "expansive interpretive leap," that "no judicial body" had been willing to take of including breast-feeding discrimination in the scope of sex discrimination.[127] As such, the court's holding preoccupies itself with boundaries other courts have drawn. It abandons, however, the search for the true scope of Ohio's public accommodation statute and ignores the plight of breast-feeding mothers and hungry infants in places of public accommodation. In fact, Derungs did not ask the court the abstract question of whether any *other* court had taken the leap of protecting breast-feeding. Rather, Derungs asked whether the courts of Ohio would interpret the statute to allow women like Dana Derungs to breastfeed in a place other than a restroom.

The Sixth Circuit's narrow interpretation of Ohio's public accommodation statute is itself an unpersuasive approach to that question. It relies on inapplicable precedent and misconstrues Ohio law. The Ohio Supreme Court could have provided a more accurate assessment of Dana Derungs' plight. The issue at hand was an open question of state law; therefore, certification to the Supreme Court of Ohio was the most appropriate response under the circumstances.[128]

A. The Court's Narrow Construction of the Public Accommodation Statute is Unpersuasive

In holding that the Ohio legislature did not intend to protect against breast-feeding discrimination in places of public accommodation, the court relies on inapplicable federal law[129] and misconstrues Ohio's test for public accommodations discrimination. Both approaches unnecessarily narrow the scope of Ohio's sex discrimination protection.

---

126. *Derungs*, 374 F.3d at 439.

127. *Id.*

128. *See* OHIO SUP. CT. PRAC. R. 18 (2004) (describing when a state law question may be certified to the Ohio Supreme Court).

129. *See supra* Part IV.A.1.

1. Federal Employment Law Should Not Control the Scope of Ohio's Public Accommodation Statute

The Sixth Circuit's narrow construction of the public accommodation statute begins with a discussion of Ohio's employment discrimination statute. [130] That statute expanded the definition of sex discrimination to provide for protection against pregnancy discrimination.[131] The court describes the Ohio legislature's decision to expand the definition of discrimination in employment as a "conscious choice,"[132] that signals an awareness of the 1978 PDA, in which Congress similarly expanded Title VII's sex discrimination definition.[133] The language used to expand the definition in the employment context is identical to that of the PDA and came a mere two years after the PDA.[134] Therefore, the court reasoned, the Ohio legislature had the opportunity to similarly expand its definition of sex discrimination in the public accommodation context, but declined the chance.[135] Again, the court characterized this perceived legislative decision as a purposeful choice.[136]

The court is justified in comparing Ohio's employment protection with federal Title VII employment protection.[137] Yet, its negative inference of legislative intent in the context of Ohio's public accommodation statute lacks any mention of legislative history.[138] Indeed, the differences between the employment and public accommodation sections are more informative than their purported similarities. The Ohio legislature used different language in constructing the two.[139] If the word choice differs, the intent behind

130. *Derungs*, 374 F.3d at 436–37.
131. *Id.*
132. *Id.* at 436.
133. *Id.*
134. *Id.*
135. *Id.* at 437.
136. *Id.* at 436.
137. Ohio's Supreme Court "adopted the federal courts' Title VII analysis when deciding employment discrimination claims under the Ohio Civil Rights statute." *Id.* at 434.
138. *See id.* at 436–37. In fact, the court may have had no legislative history to which to turn. *See* Max Kravitz, *Ohio's Administrative License Suspension: A Double Jeopardy and Due Process Analysis*, 29 AKRON L. REV. 123, 154 (1996) (stating that Ohio "does not record its legislative history").
139. *Derungs*, 374 F.3d at 434.

the two sections may differ as well. Therefore, although the employment section reflects an awareness of federal law, the public accommodation section might not.[140]

In fact, the public accommodation section may protect against a greater range of discrimination than the employment section does.[141] For example, protection against breast-feeding discrimination may be implied by the public accommodation statute. Perhaps the Ohio Legislature declined to apply the expanded definition of sex discrimination to that context because it had no need to state the obvious. Although the actual intent of the Ohio Legislature cannot be pinpointed,[142] Ohio's definition of sex discrimination is at least potentially broader than the federal one.

Notions of state sovereignty buttress the idea that discrimination protection is plausibly broader at the state level.[143] Under a theory that supports state independence, states serve as "laboratories for the development of new social, economic, and political ideas."[144] In fact, state courts have found state constitutional rights beyond those protected by the federal government.[145] In that context, federal legislation that preempts state law limits state experimentation in regards to individual liberties.[146] Federal courts that limit the scope of states' discrimination protection similarly limit state experimentation. Further, they preempt state protection that goes beyond federal protection.

Indeed, public accommodation law may be the better context in which to expand sex discrimination protection beyond that afforded

---

140. On at least one occasion, the Ohio Legislature's civil rights protection preceded any similar move by Congress. *See id.* at 437 (noting that the Ohio Legislature adopted its Civil Rights statute before Congress passed the Civil Rights Act in 1964).

141. The plaintiffs argued that the public accommodation statute did not require a comparability analysis. *Id.* Rather, they asserted it was unique and *more* expansive than Ohio's employment discrimination protection because the public accommodation statute "precludes discrimination 'except for reasons alike to all persons.'" *Id.*

142. *See* Kravitz, *supra* note 139.

143. *See generally* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995) (proposing that federalism be viewed as empowering rather than limiting various levels of government).

144. *Id.* at 529 (citing Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 787–88 (1982) (O'Connor, J., dissenting in part)).

145. *Id.* at 538.

146. *See id.*

by federal law. Basic differences between the workplace and a place of public accommodation support varying the discrimination protection afforded to each. For example, a place of public accommodation may face fewer challenges than a workplace in accommodating breast-feeding needs. A lactating employee may require daily accommodations that range from breast-feeding rooms to breast-feeding breaks.[147] Those accommodations will be necessary until she weans her infant. Absent legislation, individual employers have little short-term economic incentive to accommodate breast-feeding employees.[148]

In contrast, a visitor to a place of public accommodation requires relatively less adjustment. For example, Jennifer Gore wanted to breastfeed in a lay-away line. Gore's accommodation requires no adjustment at all; her breastfeeding went unnoticed until Gore herself mentioned it to an inquisitive Wal-Mart clerk.[149] Similarly undemanding, Dana Derungs merely needed to sit on a bench outside of a dressing room for one breast-feeding session.[150] A discrete instance of accommodation would have sufficed to placate her. That accommodation would have permitted Derungs to quickly feed her son and return to shopping. Wal-Mart would have been rewarded with a satisfied customer likely to return.

Several state statutes may reflect the inherent differences between accommodating breast-feeding women at work and accommodating them in places of public accommodation. For example, a Connecticut statute considers breast-feeding restrictions in public accommodation to be discrimination.[151] In New York, interference with breast-feeding is a civil rights violation.[152] However, although both Connecticut and New York afford breast-

147. *See* Hilary Von Rohr, Recent Development, *Lactation Litigation and The ADA Solution: A Response to* Martinez v. NBC, 4 WASH. U. J.L. & POL'Y 341, 343–44 (2000) (describing Minnesota's breast-feeding protections, which require private employers to "set aside a private spot" for nursing mothers "who want to pump milk during unpaid breaks").

148. *See* Elissa A. Goodman, Note, *Breastfeeding or Bust: The Need for Legislation to Protect a Mother's Right to Express Breast Milk at Work*, 10 CARDOZO WOMEN'S L.J. 146, 149 (2003).

149. *See supra* notes 41–45.

150. *See* Joseph, *supra* note 29.

151. Von Rohr, *supra* note 148, at 343 n.13 (citing 1997 Conn. Acts 97-210 (Reg. Sess.).

152. *Id.* at 343.

feeding some protection, neither extend this protection to the workplace.[153] Therefore, the Sixth Circuit's assumption that Ohio's public accommodation statute offers no more protection than does its employment counterpart is at least questionable, and renders its statutory analysis unpersuasive.

2. A Comparability Analysis is not the Definitive Test for Public Accommodations Discrimination in Ohio.

The court relies on the comparability analysis used in federal employment law to conclude that because no comparable class of men is favored over breast-feeding women, breast-feeding restrictions are not sex discrimination.[154] Relying on the Ohio Supreme Court's *Lysyj* decision, however, the court also finds that Ohio's public accommodation statute mandates the same sort of analysis.[155] This conclusion misconstrues the only case directly interpreting Ohio's public accommodation statute.[156]

The court repeats *Lysyj*'s discrimination test.[157] The court, however, manipulates *Lysyj* to resemble other Ohio cases in which the court compared plaintiffs to a comparable class of people who were not discriminated against.[158] The court describes *Lysyj* as a case in which "the discrimination at issue . . . was based on the fact that a white resident was free to entertain white guests without reprisal, but when the guest was black, the resident was ordered to leave the trailer park."[159] That description suggests that the black guest can be compared to a class comprised of white guests who did not face discrimination.

The language of *Lysyj* itself does not suggest such an obvious resort to a comparability analysis. The defendant denied the *Lysyj* plaintiff the full enjoyment of the public accommodation at issue

153. *Id.* at 344.

154. *See supra* Part III.C. The problems associated with a federal analysis in the context of Ohio's public accommodation statute are discussed above. *See supra* Part IV.A; *see also* Part IV.B.1.

155. *See supra* Part III.A.

156. *See* Derungs v. Wal-Mart Stores, 374 F.3d 428, 433 (6th Cir. 2004).

157. *See supra* text accompanying note 91.

158. *See Derungs*, 374 F.3d at 433–34. The court lumps *Lysyj* with *Meyers* and *Gegner*, two Ohio appellate decisions that employed a comparability analysis. *Id.*

159. *Id.* at 433.

because "she was white and was entertaining someone who was black."[160] The comparable class consists of white people that do not entertain black guests. Yet a restriction that divides white people into two categories is not per se racial discrimination. Still, *Lysyj* held that the restriction was unlawful discrimination that violated Ohio's public accommodation statute.[161]

This alternative reading of *Lysyj* does not suggest that Ohio's public accommodation statute precludes a comparability analysis. Rather, it proposes that *Lysyj* does not require that plaintiffs have a class with which to compare themselves to successfully allege unlawful discrimination. *Lysyj* endorses a flexible approach, liberally construing Ohio's public accommodation amendments to "effectuate the legislative purpose and fundamental policy implicit in their enactment, and to assure that the rights granted by the statutes are not defeated by overly restrictive interpretation."[162] With this mandate in mind and in the context of race discrimination, *Lysyj* held that the public accommodation statute applies to "indirect discrimination against a person on the basis of the race or color of his associates."[163]

For sex discrimination claims, a less restrictive reading of the statute supports applying it to discrimination against a person on the basis of sex associated with the activity in which he or she is engaged. Although breast-feeding restrictions do not affect all women, it is an activity associated with women. When Wal-Mart employees targeted Derungs and Gore, they attacked two women who wanted to engage in an activity only women can undertake. The spirit and language of *Lysyj* suggest that breastfeeding should not be unnecessarily excluded from the statute's scope and, more importantly, that the rights of breast-feeding women should not be so easily defeated.

B. The Ohio Supreme Court was the Proper Authority to Construe the Ohio Public Accommodation Statute

In *Derungs*, the Sixth Circuit decided an issue of first impression complicated by a lack of applicable Ohio Supreme Court

160. Ohio Civil Rights Comm'n v. Lysyj, 313 N.E.2d 3, 6 (Ohio 1974).
161. *Id.*
162. *Id.*
163. *Id.* at 7–8.

precedent and the questionable application of federal law in the context of public accommodation discrimination.[164] The court unearthed the "likely legislative intent" of the public accommodation statute from shallow ground.[165] The court worried about unnecessarily expanding the legislature's definition of sex discrimination. If the court were truly concerned, however, it should also have worried about unnecessarily *narrowing* the definition. Instead of divining the intent of Ohio's legislature, the court should have looked to the Ohio Supreme Court for an authoritative response to the precise question presented.

1. Ohio Supreme Court Practice Rule 18 Allows for Federal Courts to Certify a Question of Ohio law to the Ohio Supreme Court

Pursuant to Ohio Supreme Court Practice Rule 18,[166] a federal court may certify a question of Ohio law to the Ohio Supreme Court when: (1) a question of Ohio law may be determinative of the proceeding, and (2) there is no controlling Ohio Supreme Court precedent on the question.[167] In *Cheek v. Industrial Power Coatings, Inc.*,[168] a federal district court certified a question pertaining to individual liability under the Ohio Civil Rights statute's employment discrimination provisions to Ohio's Supreme Court.[169] The district court's certification was appropriate because its question met the criteria of the certification rule.[170] In addition, five District Courts had addressed the issue of individual liability under the Act and reached different conclusions.[171]

In *Derungs*, the construction of the Ohio public accommodation statute was the only question before the court.[172] Further, the court

164. *Derungs*, 374 F.3d at 434.
165. *Id.* at 436–37.
166. OHIO SUP. CT. PRAC. R. 18.
167. OHIO SUP. CT. PRAC. R. 18(1). Federal courts may take such action sua sponte. *See* Cochran, *supra* note 6, at 195–96.
168. 1997 U.S. Dist. LEXIS 23340, at *1 (W.D. Ohio Sept. 9, 1997).
169. *See id.* The *Cheek* court certified the question of whether Ohio Revised Code sections 4112.01(A)(2), 4112.02(A) and 4112.99 make an individual employee personally liable for employment discrimination when that employee is not otherwise deemed an employee under the statute. *Id.*
170. *See id.* at *3.
171. *Id.*
172. Derungs v. Wal-Mart Stores, 374 F.3d 428, 432 (6th Cir. 2004).

acknowledged that although one Ohio Supreme Court case directly interpreted the statute,[173] that decision preceded the statute's inclusion of sex discrimination protection.[174] The court also conceded that Ohio courts had not considered whether to apply Title VII to Ohio's public accommodation statute.[175] The question facing the Sixth Circuit satisfied the two-prong requirement of Ohio's certification rule and therefore should have taken advantage of it. Instead, the court relied on federal employment precedent to evaluate a controversy involving a breast-feeding mother's shopping trip to an Ohio place of public accommodation. As a result, the law used was both practically and philosophically distinct from the context at hand.

Although district courts have yet to reach different conclusions on the question of whether breastfeeding is a protected activity under Ohio's public accommodation statute, certification is no less appropriate than it was in *Cheek*. Ohio's certification rule does not require that district courts differ before invoking certification.[176] In fact, in the absence of federal decisions, certification is even more suitable so that a federal court is not left to guess at the correct interpretation of a rarely construed state statute.

2. Certification of the Question Would Avoid a Misinterpretation of the Statute

The advantages of certification as opposed to federal speculation on state law issues are many. The Supreme Court has explained that allowing a federal court faced with a novel state-law question to put the question before the state's highest court increases the assurance "of gaining an authoritative response."[177] Other advocates have argued that:

> Certification places state law issues before state court judges with greater competence in state law . . . . When state courts decide these issues, that process avoids the dual

---

173. *Id.* at 433.
174. *Id.* at 433 n.2.
175. *Id.* at 435.
176. *See* OHIO SUP. CT. PRAC. R. 18. Despite the clarity of the certification rule, districts have elaborated on other factors to justify sending an issue to the Ohio Supreme Court. *See* Cochran, *supra* note 6, at 201–02 (describing additional factors developed by federal courts that influence the decision to certify to the Ohio Supreme Court).
177. Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997).

> dangers of federal court speculation and federal court imposition of uniquely federal perspectives that lead to misinterpretation of state law issues. Having state judges act as the state law decisionmakers promotes federalism because it serves to allocate and share judicial power between the state and federal court systems.[178]

All of the preceding arguments suggest that certification would have better resolved the court's question.

First, the Ohio Supreme Court is more familiar with, and therefore more competent in Ohio law. If a court analogizes breastfeeding under the public accommodation statute to breastfeeding under federal employment law, the Ohio Supreme Court is in the best position to so hold. The Sixth Circuit relied heavily on the fact that Ohio courts use Title VII analyses in employment discrimination cases.[179] The decision, however, to use federal law as a model for employment discrimination cases is not a necessary one, but rather the result of thoughtful analysis by the Ohio Supreme Court.[180] A federal court cannot know what the Ohio Supreme Court would do in the very different context of sex discrimination in public accommodation.[181] It should not guess.

Second, the court risks misinterpreting the Ohio statute because it imposes a federal perspective on a state law issue. The court narrowly construed the scope of Ohio's public accommodation statute by comparing its history and language to that of federal sex discrimination protection.[182] This is appropriate in the employment

178. Cochran, *supra* note 6, at 168 (footnotes omitted). Certification advocates also argue that the process promotes judicial efficiency by avoiding the delays of abstention. *Id.* at 168–69.

179. *See supra* note 100 and accompanying text.

180. *See, e.g.*, In State *ex rel.* Republic Steel Corp. v. Ohio Civil Rights Comm'n, 339 N.E.2d 658 (Ohio 1975) (explaining that because Title VII and Ohio Revised Code section 4112.05(B) emanated from similar statutory frameworks and were phrased in analogous language, applying a Title VII rationale to the code section was appropriate).

181. *But cf.* Richard B. Saphire, *The Ohio Constitution—Then and Now: An Examination of the Law and History of the Ohio Constitution on the Occasion of its Bicentennial, Ohio Constitutional Interpretation*, 51 CLEV. ST. L. REV. 437 (2004) (recognizing that despite federal shortcomings in regards to individual rights, the promise of the Ohio Constitution, as articulated by the *Republic Steel Corp.* court, has not been fully realized).

182. *See supra* Part III.A–C.

context because Ohio courts have already taken that same step. In public accommodation sex discrimination law, Ohio courts have not adopted a federal analysis. The court imposed a federal perspective into an area of state law in which Ohio courts may choose to take a different approach.

In fact, when issues arise within a context in which federal courts have already spoken, Ohio courts will not necessarily answer a question of state law in the same manner. In *Direct Plumbing Supply Co. v. City of Dayton*,[183] the Ohio Supreme Court recognized that Ohio law often parallels its federal counterpart.[184] The same court, however, also stated that if federal law threatens to limit individual rights, Ohio state courts will resort to the guarantees of the Ohio Constitution to protect them.[185] In the face of a federal "narrowing" of individual rights, the court emphasized that Ohio is a "sovereign state" whose Bill of Rights and its correspondent fundamental guaranties "have undiminished vitality."[186] Certification would allow the Ohio Supreme court to decide whether Ohio will assert its sovereignty in the context of sex discrimination.

Finally, the court's actions do not support comity between federal and state courts. The court decides an issue of Ohio law on its own, leaving the Ohio courts merely to observe a novel construction of their state's statute. This move runs the risk of implanting federal policy into state law.

V. IMPACT OF THE COURT'S DECISION

In *Derungs v. Wal-Mart Stores*, the Sixth Circuit was unwilling to take what it considered the "expansive interpretive leap" of including breast-feeding restrictions within the scope of sex discrimination.[187] The court justified its restrictive reading as one consistent with other courts' holdings. The negative impact of its holding, however, far outweighs the benefit of consistency. First, the court's failure to consider the progress made by those legislatures that have expanded sex discrimination protection eviscerates such legislative action. Second, the holding encourages other federal

183. 38 N.E.2d 70 (Ohio 1941).
184. *Id.*
185. *Id.* at 73.
186. *Id.*
187. Derungs v. Wal-Mart Stores, 374 F.3d 428, 439 (6th Cir. 2004).

courts to guess at a state legislature's intent rather than certify the issue to the appropriate authority—a state's highest court. Finally, the court's holding perpetuates illogical restrictions on the scope of sex discrimination.

A. The Court's Holding Eviscerates State Legislative Action

The court misinterprets the importance of the fact that *courts* have not expanded the scope of sex discrimination. Legislatures are not necessarily as restrictive. For example, since 1997, a mother in California may breastfeed in any public location "where the mother and child are authorized to be present."[188] Nevertheless, on March 6, 1999, a clerk at Glendale's Borders bookstore told Kerry Madden-Lunsford that she could not breastfeed her daughter under her sweater in the Borders children's section.[189] The store's manager informed Madden-Lunsford that she could either nurse in the bathroom or leave.[190] Madden-Lunsford held a press conference to announce that she would sue.[191] At that conference, the store's general manager apologized and explained that the employees who addressed Madden-Lunsford were unaware that their actions violated California law.[192] The case settled by July 29, 1999.[193] Madden-Lunsford herself was "heartened" that Borders recognized its mistake and rectified the situation.[194]

The settlement of that case suggests that in jurisdictions that protect breastfeeding, the absence of judicial decisions repeating as much should not be held to mean that no such protection exists. In states such as California, the protection may be so obvious that a violating store has no choice but to apologize for its conduct, acknowledge the law protecting breastfeeding, and quickly settle any suit. Therefore, when the Sixth Circuit mentions that no other court has protected breastfeeding, it forgets that court intervention may be preempted. The lack of judicial decisions protecting breastfeeding in

188. *See* CAL. CIV. CODE § 43.3 (Deering 2004).
189. *See Woman Sues Over Breast-Feeding Incident*, L.A. TIMES, Apr. 29, 1999, at 4B.
190. *See id.*
191. *Id.*
192. *See id.*
193. *See Woman Settles Rights Suit Over Breast-Feeding*, L.A. TIMES, July 29, 1999, at 4B.
194. *See id.*

fact may not reflect a legislative failure to protect the activity. When the court ignores this sort of legislative action it weakens the impact of legislative progress.

Further, the court's decision sends a strange message to state legislatures. The court's retelling of Ohio's legislative history suggests the following scenario: a legislature that expands the scope of sex discrimination, and happens to do so after a similar federal expansion, will have its intent interpreted as a conscious adoption of the federal expansion. Next, its intent will be imputed to other contexts. If the language it used in one expanded area is not mimicked in another, the absence of similar language will be held to indicate a lack of similar intent.

Therefore, although a legislature may have contemplated a more expansive understanding of sex discrimination that includes breast-feeding discrimination in one context, if it failed to mimic the language of the PDA, the Sixth Circuit will find the legislature did not intend such expansion. Consequently, although state legislatures may have intended to create claims for breast-feeding women under statutes such as those prohibiting discrimination in public accommodation, such claims will be extinguished absent a showing of a very specific sort of legislative intent.

By informing legislatures that their actual intent may be ignored if it is not explicit, the Sixth Circuit interferes with the legislative process. State legislatures should not be forced to model their statutes after a federal counterpart to ensure accurate interpretations by federal courts. Legislative attempts at an expansion of sex discrimination protection should not be hindered by federal courts unfamiliar with a state legislature's intent.

B. The Court's Holding Encourages Other Federal Courts to Guess at a State Legislature's Intent

The court's unnecessary and restrictive construction of Ohio's statute encourages lower federal courts to engage in similar guesswork rather than take advantage of certification to a state's highest court. By robbing state supreme courts of their proper role, the Sixth Circuit emboldens federal courts to construe all ambiguous state statutes using loosely similar federal precedent. As a result, federal courts may impose federal standards into inappropriate state-law contexts.

In fact, a district court recently cited *Derungs*.[195] The court in that case does little more than quote *Derungs* recitation of *Erie*'s mandate, that is, "when a federal court interprets state law, the substantive law of the state in which the district court sits must be applied."[196] The concern, however, is that district courts may venture deeper into *Derungs*' reasoning and inappropriately substitute certification with federal interpretation. Consequently, the federal guesswork this Comment fears most may become increasingly common.

C. The Court's Holding Illogically Halts the Expansion of Sex Discrimination Protection

The court's logic is consistent with that of most courts, which generally concede that the scope of the PDA protects pregnancy-related medical conditions, but insist that breastfeeding is not such a condition.[197] Its holding creates additional precedent to justify an illogical restriction. After all, if the PDA provides broad protection to pregnant women, and discrimination based on pregnancy is sex discrimination, why are courts reluctant to find that breastfeeding, a condition resulting from pregnancy, is pregnancy discrimination?[198]

In fact, the court discourages what is the natural expansion of sex discrimination protection. In certain contexts, the concept that pregnancy discrimination is sex discrimination may be naturally extended to find that breast-feeding discrimination is also sex discrimination.[199] Both pregnancy and breastfeeding are "quasi-voluntary conditions . . . exclusively linked to women's bodies," and the "burden and benefit" of women alone.[200]

Indeed, when Congress passed the PDA and overruled *Gilbert*, it acknowledged that discrimination is often indirect.[201] The PDA's

---

195. *See* Allison v. Pepsi Bottling Group, No. 5:03-CV-244, 2004 U.S. Dist. LEXIS 26249, at *6–*7 (W.D. Mich. Dec. 17, 2004).

196. *Id.* at *6 n.6.

197. Von Rohr, *supra* note 148, at 345.

198. *See* Goodman, *supra* note 149, at 158–59.

199. Danielle M. Shelton, *When Private Goes Public: Legal Protection for Women Who Breastfeed in Public and at Work*, 14 LAW & INEQUALITY 179, 199 (1995).

200. *Id.*

201. For example, although restrictions aimed at breast-feeding are not necessarily aimed at women, they do indirectly affect women. *See* Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy*

legislative background relied on Justice Brennan's *Gilbert* dissent.[202] There, Justice Brennan chastised the majority for forgetting that "'discrimination is a social phenomenon encased in a social context.'"[203] Further, Justice Brennan accused the court of losing sight of Title VII's purpose when it held that discrimination based on pregnancy is not sex discrimination.[204] Justice Brennan might similarly criticize the use of comparability analyses to exclude protection for activities exclusively linked to women's bodies. A comparability approach forgets the social context in which breastfeeding occurs.

The PDA should be used to eliminate discriminatory practices and devices which foster "[sexually] stratified job environments to the disadvantage of [women]."[205] Breast-feeding restrictions in employment disadvantage working women, making full integration into the working world difficult. Courts that reject adverse employment claims based on situations related to childhood, such as breastfeeding, strip the PDA of its purpose.[206] To rely on such myopic precedent extends *Gilbert*'s influence at the expense of the PDA's vision.

VI. CONCLUSION

In holding that Wal-Mart's breast-feeding restrictions do not constitute sex discrimination under Ohio's public accommodation statute, the Sixth Circuit applied a federal analysis to a state statute. A contrary holding would have expanded sex discrimination protection in an unprecedented manner: but it would have also extended protection to an activity unnaturally excluded in the first place, one which certain legislatures have already protected.

Rather than simply retracing the footsteps of federal employment law, the court should have certified to the Ohio Supreme Court the question of whether the Ohio public accommodation statute protects breastfeeding. The Sixth Circuit was in no

---

Discrimination Act, 38 Am. Bus. L.J. 819, 819–20 (2001).

202. *Id.*

203. *Id.* at 819 (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 159 (1976)).

204. *Id.* at 820.

205. *Id.* at 820–21 (quoting *Gilbert*, 429 U.S. at 160 (Stevens, J., dissenting)) (alteration in original).

206. *Id.* at 831–33.

position to guess at the intent motivating the Ohio legislature's public accommodation amendments. Ohio's Supreme Court would have provided a more authoritative interpretation of an Ohio statute instead of risking the imposition of a purely federal perspective.

Finally, the court's decision hinders the natural expansion of sex discrimination protection. Its holding alerts state legislatures that no matter how progressive their intent, it may be misconstrued by a federal court that declines to certify the question to a state court. This decision stymies state creativity in favor of a static vision of federal law.

In this case, a federal court told the plaintiffs that their state legislature did not want to include breast-feeding protection within the scope of sex discrimination. The Sixth Circuit robbed those plaintiffs of protection that the Ohio legislature may have intended for them to have. Future plaintiffs may be similarly swindled by federal courts disinclined to search beyond restrictive federal precedent for the answer to a question of state law.

Standing alone, the conclusion that breast-feeding discrimination is not sex discrimination is at least surprising. When coupled with statutory interpretation that relies on inapplicable federal precedent, however, the Sixth Circuit's decision becomes implausible. Yet without knowing the Ohio's legislature's actual intent, this Comment cannot conclude that it definitely meant to expand the scope of sex discrimination protection. Arguably, the legislature opened the door to such a possibility. With its *Derungs v. Wal-Mart Stores* decision, the Sixth Circuit slams that door shut.

*Katherine A. Macfarlane**

* J.D. candidate, May 2006, Loyola Law School, Los Angeles; B.A. Spanish and Gender Studies, Northwestern University, June 2002. Thanks to Professor Allan Ides for his guidance and to Professor Scott Wood for his encouragement. Thanks also to my parents, who nurtured my feminism from the beginning.