

## Ohio Supreme Court Divided on Whether State's Gender Discrimination Law Applies to Women Who Are Lactating

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Does Ohio law prohibit an employer from discriminating against a female employee on the basis of lactation? According to the Supreme Court of Ohio in a recent decision, the answer is “possibly.” In *Allen v. Totes/Isotoner Corp.*, a divided Court sidestepped the issue, ruling for the employer without addressing whether Ohio law prohibits discrimination against women because they are lactating. However, three of the Court’s seven justices concluded that a female employee could sue for sex discrimination in these circumstances.

In *Allen*, the employer discovered that Allen had taken several unauthorized breaks. Allen admitted to taking these unauthorized breaks because she was lactating and needed to pump milk. Subsequently, the employer terminated Allen’s employment for failing to follow directions (in the form of the unauthorized breaks). Allen filed suit claiming that her termination was a result of sex discrimination on the basis of pregnancy, specifically because of lactation.

The *Allen* Court majority chose not to address whether alleged discrimination due to lactation is a form of sex discrimination prohibited by Ohio law. Instead, it ruled simply that Allen’s insubordination was a legitimate, nondiscriminatory reason for the employer terminating her, and that she failed to present evidence showing that her sex had anything to do with her termination.

While the *Allen* Court majority ultimately chose not to address whether Ohio law prohibits employers from discriminating on the basis of lactation, this issue is far from resolved. That three justices found Ohio’s law extends protection to lactating employees suggests that the case was a close one. Indeed, over a dozen states already require employers to “allow,” and provide a space for, mothers to express breast milk at work.

Consequently, this recent decision serves as a reminder to employers of an issue that should be considered when drafting and implementing workplace policies. While the Court’s decision did not impose any affirmative requirements on employers in connection with breast feeding, it also didn’t prohibit employers from voluntarily accommodating employees in these situations. Accordingly, proactive employers will want to review their existing policies on employee break times to ensure that they are uniform and non-discriminatory, and they may also want to determine how their break policies should address this issue.

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