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Pioneering the Right to Breastfeed at 35,000 Feet: Workplace Accommodations for Lactating Employees in the Airline Industry

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**PIONEERING THE RIGHT TO BREASTFEED AT 35,000
FEET: WORKPLACE ACCOMMODATIONS
FOR LACTATING EMPLOYEES IN
THE AIRLINE INDUSTRY**

BROOKE L. HAUGLID*

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I. INTRODUCTION

AIRLINE COMPANIES have a clouded history when it comes to sex discrimination.¹ Open any textbook on gender and law and you are sure to find cases like *Wilson v. Southwest Airlines*,² *Burwell v. E. Air Lines, Inc.*,³ or numerous others featuring airline companies at the heart of gendered legal issues.⁴ The gender composition of airline companies could be a contributing factor to the industry's contentious relationship with sex. Only 34% of the airline industry workforce in the United States is female.⁵ Looking at the specific occupational breakdown

¹ See Denis Binder, *Sex Discrimination in the Airline Industry: Title VII Flying High*, 59 Cal. L. Rev. 5 (1971).

² See 517 F. Supp. 292 (N.D. Tex. 1981) (overruling Southwest's policy of only hiring female flight attendants and rejecting the airline's bona fide occupational qualification defense that femininity or female sex appeal was required for the position).

³ See 633 F.2d 361 (4th Cir. 1980) (per curiam) (ruling airlines may have mandatory maternity leave policies for flight attendants once they reach a certain point in their pregnancies or demonstrate inability to perform job duties. Notably, however, the rulings on mandatory leave for pregnant flight attendants remain varied among courts).

⁴ See also *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387 (7th Cir. 1975) (invalidating policy requiring that female stewardesses be unmarried when no such marriage policy applied to male stewards); *Laffey v. Nw. Airlines*, 567 F.2d 429 (D.C. Cir. 1976) (ruling airline violated Title VII by paying female flight attendants lower salaries than male flight attendants for substantially equal work); *Gerdorn v. Cont'l Airlines*, 692 F.2d 602 (9th Cir. 1982) (holding airline violated Title VII by enforcing height and weight requirements for female, but not male, flight attendants).

⁵ Dan Peltier, *Government Report Highlights U.S. Airlines' Lack of Racial and Gender Diversity*, SKIFT (Aug. 25, 2015), <https://skift.com/2015/08/25/government-report-highlights-u-s-airlines-lack-of-racial-and-gender-diversity/> [https://perma.cc/VD65-2PDN].

within these companies, the gendered power structure of the industry becomes even more apparent: while 79% of all flight attendants are female, women make up only 4% of all pilots for airlines in America.⁶

The higher you go (literally and figuratively), the fewer women you see in power. Women comprise only about 6% of all the executive positions at airline companies.⁷ As an industry predominantly made up of and controlled by males, issues generally thought of as “primarily female concerns”—like maternity leave, pregnancy-related accommodations, family leave, breastfeeding accommodations, etc.—can be forgotten or given lower priority. Further, the way airline employment policies are created may contribute to the problem.

This Comment explores workplace breastfeeding accommodations in the airline industry. Specifically, it addresses in-flight employees (e.g., pilots and flight attendants) rather than ground employees (e.g., ticketing agents, luggage handlers, etc.), considering the unique concerns that arise when the workplace in question is an airplane, flying 35,000 feet in the sky. By analyzing airline accommodation policies and relevant discrimination law, this Comment argues that, even in light of the airline industry’s unique nature, failure to provide adequate breastfeeding accommodations for lactating pilots and flight attendants is an actionable form of indirect sex discrimination. Part II provides a brief introduction to airline employment practices and gender. Part III gives context regarding breastfeeding and general breastfeeding-related laws, identifying the legal remedies currently available. Part IV examines how the airline industry and breastfeeding accommodation law currently intersect and common concerns that arise. Part V delves into some of the recent litigation related to breastfeeding within aviation and other comparable industries. And finally, Part VI of this Comment considers the future of the industry and its lactating employees and makes suggestions for going forward by drawing comparisons to similar industries. The final conclusion drawn is

⁶ FED. ADMIN. AERONAUTICAL CTR., 2016 AIRMEN STATISTICS REPORT (2016), available at https://www.faa.gov/data_research/aviation_data_statistics/civil_airmen_statistics/media/2016-civil-airmen-stats.xlsx [<https://perma.cc/V6CL-XXC6>].

⁷ *Why Don't Women Run Airlines? Part 1: 94% of Airlines Are Led by Men*, CAPA CTR. FOR AVIATION (Apr. 9, 2015, 11:00 PM), <https://centreforaviation.com/insights/analysis/why-dont-women-run-airlines-part-1-94-of-airlines-are-led-by-men-217930>.

that unpaid leave should not be the only option for breastfeeding employees. At a minimum, airlines must provide some accommodation to allow flight attendants and pilots to return to work while continuing to breastfeed.

II. BACKGROUND ON GENDER, UNIONS, AND COLLECTIVE BARGAINING FOR EMPLOYMENT POLICIES IN THE COMMERCIAL AIRLINE INDUSTRY

Unlike most industries,⁸ contract negotiations between airline companies and employees are governed by the Railway Labor Act (RLA) because airlines are carriers in the transportation industry.⁹ The RLA, in effect, created a compulsory process of collective bargaining.¹⁰ Under this system, flight attendants and pilots do not independently negotiate their own employment contracts but instead sign on to a Collective Bargaining Agreement (CBA) agreed upon by the airline and union representatives.¹¹

The RLA also dictates the handling of employment disputes in the airline industry. Conflicts between employers and employees over terms of a CBA or its interpretation are subject to either negotiation and mediation overseen by the National Mediation Board or to arbitration by an Adjustment Board.¹² The purpose of the RLA is to keep transportation industry labor disputes out of court, thus Adjustment Boards have exclusive authority, and courts have no jurisdiction to interpret CBAs.¹³ However, even under this system, employees may seek remedy from the courts if their claim rests on some independent statutory basis, including anti-discrimination laws.¹⁴

To work within the RLA structure, the airline industry is largely unionized.¹⁵ Pilots and flight attendants each formed respective union organizations to negotiate with airline companies on their behalf. For pilots, the Air Line Pilots Association

⁸ Most other industries are controlled by the National Labor Relations Act (NLRA). See 29 U.S.C. §§ 151–169 (2018).

⁹ Railway Labor Act, 45 U.S.C. § 151 (2018).

¹⁰ *Id.* §§ 151–159.

¹¹ Franklin A. Nachman, *Hiring, Firing, and Retiring: Recent Developments in Airline Labor and Employment Law*, 53 J. AIR L. & COM. 31, 62–64 (1987).

¹² 45 U.S.C. §§ 153–155.

¹³ Nachman, *supra* note 11, at 64–66.

¹⁴ *Id.* at 84.

¹⁵ *Id.* at 32.

(ALPA) claims to be the largest union representing pilots in the commercial airline industry, listing its membership as of 2017 at around 60,000 pilots from over forty major airlines, including Delta, JetBlue, Frontier, United Air Lines, Virgin America, and Alaska Airlines.¹⁶ Other airlines have their own unions aligned only with the pilots from that airline.¹⁷ For flight attendants, the Association of Flight Attendants (AFA) is the largest union organization, having a current membership of over 50,000 flight attendants from more than twenty different airline companies, including large carriers such as United, Spirit, Frontier, Hawaiian, and Alaska Airlines.¹⁸ Again, some carriers opt for independent flight attendant unions.¹⁹

Once an airline and union finalize a CBA, those terms apply to any unionized employee of that specific company.²⁰ Accordingly, airlines can have divergent policies on various matters based on the different CBAs agreed upon. Because the unions dictate which issues are brought up in negotiations with airline employers, the disproportionate gender composition of the industry can be problematic. For instance, when only 4% of pilots are female,²¹ the unions that represent all pilots and negotiate employment policies for the airline tend to lean away from issues such as maternity leave or pumping milk in the cockpit, instead investing their time and money in policy issues that affect the majority of union constituents, men.²²

It is clear that airline companies have made strides since the days of some of their more overt sex discrimination cases.²³ However, the industry is still ripe with issues of gender and employment law. How to handle breastfeeding accommodations for lactating, in-flight employees is one such issue. Due to the CBA negotiation model, airline companies come out a number

¹⁶ See Air Line Pilots Ass'n, www.alpa.org [<https://perma.cc/X7VF-6463>].

¹⁷ See, e.g., ALLIED PILOTS ASS'N, <https://www.alliedpilots.org/> [<https://perma.cc/TFG3-GKK2>]; SOUTHWEST AIRLINES PILOT ASS'N, <https://www.swapa.org/> [<https://perma.cc/2HXR-EJ5L>].

¹⁸ See ASS'N FLIGHT ATTENDANTS, <http://www.afacwa.org/> [<https://perma.cc/HH94-7G8B>].

¹⁹ See, e.g., ASS'N PROF. FLIGHT ATTENDANTS, <https://www.apfa.org/> [<https://perma.cc/5YX9-RZT6>]; TWU LOCAL 556, <https://twu556.org/> [<https://perma.cc/KW7E-YLXE>].

²⁰ Nachman, *supra* note 11, at 32.

²¹ 2016 AIRMEN STATISTICS REPORT, *supra* note 6.

²² *Id.*

²³ See generally *Sprogis v. United Airlines, Inc.*, 517 F.2d 387 (7th Cir. 1975); *Burwell v. E. Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980); *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

of different ways on the question of whether to accommodate breastfeeding employees, and if so, how. While, per Federal Aviation Administration (FAA) instruction,²⁴ every CBA contains a painstakingly delineated policy on exactly how many consecutive hours an employee can be “on-duty,” what “on-duty” means, and how domestic flight on-duty differs from international flight on-duty, there are no standards for breastfeeding accommodation policies.²⁵ The result is that some CBAs address the subject of accommodations for breastfeeding employees while others leave it out entirely.²⁶

This lack of consensus highlights how the airline industry as a whole fails to seriously consider the concerns of its female employees. Female pilots and flight attendants are left in a lurch: the unions that are supposed to advocate on their behalf often overlook many of their needs as females in the industry, and the structure set up by the RLA gives them little or no further assistance. When the union system does not fit the needs of all its constituents, namely its pregnant or breastfeeding members, those employees have to look for outside, independent statutory bases for relief.²⁷ Recently, unaccommodated breastfeeding pilots and flight attendants who have not been heard by their employers or unions have instead turned to general theories of accommodation law and discrimination protections for help.

²⁴ 14 C.F.R. § 121.467(b)(i) (2018) (stating flight attendants cannot be scheduled for more than fourteen hours on duty for regularly scheduled flying).

²⁵ The 2011–2016 Frontier Airlines Flight Attendant Contract has seven pages dedicated to “on-duty” limitations while only about a half page discusses maternity leave policies. Lactation and breastfeeding accommodations are not mentioned and presumably fall under the brief maternity leave section. See Frontier Airlines Flight Attendant Agreement 2011–2016, arts. 4, 12(F), available at https://cdn.afacwa.org/airlines/frontier/AFA_FINAL_CBA__10_11_11__1_.pdf [<https://perma.cc/846K-GG8N>].

²⁶ See Alaska Airlines 2014–2019 Flight Attendant Agreement § 24(H), available at <http://cdn.afacwa.org/docs/cba/alaska/alaska-airlines-contract-2014-2019.pdf> [<https://perma.cc/4P4D-NBHL>] (providing specifically for lactating accommodations for flight attendants so long as it does not interfere with duties). But see Frontier Airlines Flight Attendant Contract 2011–2016, *supra* note 25, art. 12(F)–(G) (stating that any leave related to pregnancy will use the flight attendant’s accrued sick leave or vacation days and, if applicable, Family Medical Leave Act leave).

²⁷ Nachman, *supra* note 11, at 84.

III. BREASTFEEDING AND BREASTFEEDING ACCOMMODATION LAW

A. BACKGROUND ON BREASTFEEDING²⁸

Breastfeeding is presently a hot topic across all industries.²⁹ Breastfeeding is recommended by the American Academy of Pediatrics³⁰ and requires that the mother express (release) milk at least once every three to four hours.³¹ Beyond the demonstrated health benefits of choosing to breastfeed, lactation is a naturally-occurring biological phenomenon that happens automatically when a woman has recently given birth, whether or not she ultimately chooses to breastfeed her child.³²

A woman who does not express the milk accumulating in her breasts faces health risks such as leaking or engorgement of breasts, blocked milk ducts, and mastitis, which is an infection of breast tissue causing swelling, redness, pain, and burning sensations in the breasts.³³ If left untreated, medical conditions like blocked ducts or mastitis can worsen and even require surgical drainage.³⁴ Further, if a mother is choosing to breastfeed her child but fails to express milk consistently, over time her supply

²⁸ Though the term “breastfeeding” technically refers to directly feeding a child from a woman’s breast while “lactating” technically refers to releasing breastmilk by way of mechanical pump, this Comment uses both terms to refer to the process of releasing breastmilk in general.

²⁹ See Epstein Becker Green, *Is Breastfeeding Bias the EEOC’s Next Battleground?*, LEXOLOGY (June 25, 2012), <https://www.lexology.com/library/detail.aspx?g=e004e602-2bbf-4c60-8bec-fa8652343948> [<https://perma.cc/R8P3-57TX>]; see also Tara Haelle, *Employers Routinely Break the Law When it Comes to Breastfeeding Moms*, FORBES (Oct. 20, 2015), <https://www.forbes.com/sites/tarahaelle/2015/10/20/less-than-half-of-breastfeeding-mothers-have-legally-required-pumping-accommodations-at-work/#4f1865c83943> [<https://perma.cc/J4XX-RW5Y>].

³⁰ Health benefits of breastfeeding for both the mother and the child are well documented. Current guidelines released by the American Academy of Pediatrics recommend breastfeeding at least for the first six months of a child’s life. Am. Academy of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, 129 PEDIATRICS 827, 828–32 (2012).

³¹ A.I. Eidelman et al., *Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496, 499 (2015).

³² Diana Kasden, Note, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. REV. 309, 313 (2001) (citing Chapman et al., *Identification of Risk Factors for Delayed Onset of Lactation*, 99 J. AM. DIETETIC ASS’N 450 (1999)).

³³ *Mastitis*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/mastitis/symptoms-causes/syc-20374829> [<https://perma.cc/X88T-8FKB>] (last updated June 12, 2015).

³⁴ *Id.*

of breastmilk will reduce, and she may lose her ability to produce milk altogether.³⁵

The process of expressing milk takes approximately fifteen to twenty minutes and requires the woman to set up the breastfeeding pump and connect it to an electrical outlet, partially undress, and sit while the milk is pumped, thus rendering her unable to work during the process.³⁶ Women often want privacy while expressing milk, so it also necessitates a private space for her to do so.³⁷ Hence, breastfeeding poses some special hurdles for working women and their employers.

B. CURRENT LAWS RELATING TO BREASTFEEDING AND THE WORKPLACE

Litigation over breastfeeding and the workplace often appears in two ways: (1) an employee alleges her employer discriminated against her because she was breastfeeding, usually pointing to some adverse action as evidence; or (2) an employee claims she had a right to breastfeeding accommodations in the workplace, and her employer denied her this right. These two scenarios regularly overlap. The employee could assert claims of both discrimination and failure to accommodate, or she could argue that the denial of breastfeeding accommodations *was* the source of discrimination.

While there is no single comprehensive legal scheme for workplace breastfeeding suits, there are several different legal theories commonly asserted in these types of cases. The patchwork of different legal frameworks employed includes: Title VII³⁸ and the Pregnancy Discrimination Act,³⁹ the Family and Medical Leave Act,⁴⁰ the Americans with Disabilities Act,⁴¹ and the Amended Fair Labor Standards Act,⁴² as well as various state laws and local regulations. This section briefly analyzes each of

³⁵ Henry Wyatt Christrup, *Litigating a Breastfeeding and Employment Case in the New Millennium*, 12 YALE J. L. & FEMINISM 263, 266 (2000).

³⁶ HEALTH RES. & SERVS. ADMIN., DEP'T HEALTH & HUM. SERVS., EMPLOYEES' GUIDE TO BREASTFEEDING AND WORKING: BOTTOM LINE BENEFITS 3 (2008), available at https://uhs.berkeley.edu/sites/default/files/wellness-womenshealth_breastfeedingandworking.pdf [<https://perma.cc/Z97X-E382>].

³⁷ *Id.*

³⁸ 42 U.S.C. § 2000e-2(a)(1) (2018).

³⁹ Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

⁴⁰ 29 U.S.C. §§ 2601-2654 (2018).

⁴¹ 42 U.S.C. § 12102.

⁴² 29 U.S.C. § 207(r).

these legal models in relation to the contested right to breastfeed in the workplace.

1. *Title VII and the Pregnancy Discrimination Act*

The leading causes of action currently available for employees who clash with their employers over breastfeeding are sex and pregnancy discrimination suits through the Equal Employment Opportunity Commission (EEOC). Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of sex.⁴³ The enactment of the Pregnancy Discrimination Act (PDA) in 1978 incorporated discrimination on the basis of pregnancy or “pregnancy-related conditions” into the existing Title VII framework.⁴⁴

In *California Federal Savings and Loan Association v. Guerra*, the Supreme Court asserted that the PDA, in conjunction with Title VII, was intended to “guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”⁴⁵ The Court’s interpretation of the PDA as legislation intended to provide women the protections necessary to both return to work and to continue to fully participate in family life, combined with the PDA’s protection of “pregnancy-related conditions,”⁴⁶ provided advocates for workplace breastfeeding accommodations with a jumping-off point for their claims.

This argument found some footing with the 2013 case *EEOC v. Houston Funding II, Ltd.*⁴⁷ The court in *Houston Funding II* did two important things: (1) it held that, legally, lactation is a “pregnancy-related condition”;⁴⁸ and (2) it found that Congress intended the PDA to cover lactating or breastfeeding employees as a protected group.⁴⁹

⁴³ 42 U.S.C. § 2000e-2(a)(1).

⁴⁴ Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (“An Act [t]o amend title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy.”).

⁴⁵ *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987).

⁴⁶ 42 U.S.C. § 2000e(k).

⁴⁷ 717 F.3d 425 (5th Cir. 2013).

⁴⁸ *Id.* at 428 (stating “lactation is the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth.”).

⁴⁹ *Id.* (declaring that analysis of Congressional intent behind the PDA demonstrated that the Act was intended to protect not only pregnancy but also the physiological conditions that occur naturally post-pregnancy).

Though the Houston Funding II decision was not universally binding and other courts have come out differently on the issue,⁵⁰ the decision proved a huge victory for those advocating on behalf of breastfeeding working mothers.⁵¹ It allows them to argue that because lactation is a physiological process related to pregnancy, breastfeeding is a “pregnancy-related condition” for the purposes of the PDA. Because the PDA specifically protects “pregnancy-related conditions,” advocates can then assert that breastfeeding employees are a federally protected class under Title VII and the PDA. Thus, breastfeeding discrimination claims can be tried under the established Title VII/PDA frameworks.

Title VII/PDA discrimination suits are brought as either claims of disparate impact or claims of disparate treatment. Disparate impact alleges that an employer’s policy, which appears neutral on its face, in application has a much greater negative impact on an identifiable protected class.⁵² Claims of disparate treatment involve identifying direct actions taken or not taken by an employer against an employee allegedly *because of* the employee’s status as a member of a protected class, such as sex, pregnancy, or pregnancy-related conditions.⁵³ Breastfeeding accommodation cases have traditionally been asserted as claims of disparate treatment.⁵⁴

For disparate treatment discrimination suits, the claimant must follow the framework set out in *McDonnell Douglas Corp. v. Green*, first making out a prima facie case by showing: (1) she is a member of a protected class; (2) she sought accommodation by her employer; (3) the employer denied the request; and (4) the employer did accommodate some other employee “similar in their ability or inability to work.”⁵⁵ After the claimant has proven the prima facie case, the employer has an opportunity to justify

⁵⁰ See *Derungs v. Wal-Mart Stores Inc.*, 374 F.3d 428, 439 (6th Cir. 2003); *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 308–09 (S.D.N.Y. 1999); *Fejes v. Gilpin Ventures, Inc.*, 990 F. Supp. 1487, 1492 (D. Colo. 1997); *Wallace v. Pyro Mining Co.*, No. 90-6259, 1991 WL 270823, at *1 (6th Cir. Dec. 19, 1991).

⁵¹ See Lauren A. Shurman, *Fifth Circuit Sides with EEOC in Finding Lactation Discrimination Constitutes Title VII Violation*, LEXOLOGY (May 31, 2013), <https://www.lexology.com/library/detail.aspx?g=d1504020-16ba-46af-a8b5-ae55a4ac1ca9> [<https://perma.cc/2JJ2-A8VU>].

⁵² See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–32 (1971).

⁵³ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁵⁴ Nicole Kennedy Orozco, Note, *Pumping at Work: Protection from Lactation Discrimination in the Workplace*, 71 OHIO ST. L.J. 1281, 1298 (2010).

⁵⁵ *McDonald Douglas*, 411 U.S. at 802.

their denial of the accommodation by claiming some “legitimate, nondiscriminatory reason.”⁵⁶ If the employer does so properly, the burden shifts back to the claimant, who could still succeed in the claim if she is able to show that the employer’s reasons for not accommodating “give rise to an inference of intentional discrimination.”⁵⁷ In other words, the woman must then show that the legitimate, nondiscriminatory reason was just pretextual, and the employer was actually intending to discriminate based on her sex, pregnancy, or pregnancy-related condition.

In the past few years, courts have seen a flood of hugely impactful cases relating to discrimination, disparate treatment, workplace accommodations, and pregnancy or pregnancy-related conditions, demonstrating that the issue has the courts’ attention. In the 2015 case *Young v. United Parcel Service*, the Supreme Court held that the failure of an employer to make appropriate accommodations for pregnancy or “pregnancy-related conditions” could be a violation of Title VII.⁵⁸ In *Young*, a pregnant employee was denied her request for “light-duty” assignments to accommodate her inability to lift heavy objects while pregnant.⁵⁹ UPS did, however, accommodate with light-duty assignments other temporarily disabled employees who were injured and unable to lift.⁶⁰ The plaintiff in *Young* alleged her denial was because she was pregnant, thus making it discriminatory, and the Court agreed.⁶¹

The *Young* ruling was a landmark decision for breastfeeding-related litigation in that the Supreme Court held an employee claiming discrimination based on the failure to accommodate pregnancy could follow an adapted *McDonnell Douglas* framework to succeed in a Title VII suit against their employer.⁶² To do so, the Court ruled the claimant would need to demonstrate the following: (1) that she was pregnant, or had a pregnancy-related condition; (2) that she requested a reasonable accommodation; (3) that she was denied accommodation; and lastly, (4) that the employer accommodated other employees “similar

⁵⁶ *Id.*

⁵⁷ *Id.* at 134–35.

⁵⁸ *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

⁵⁹ *Id.* at 1341.

⁶⁰ *Id.*

⁶¹ *Id.* 1341–43.

⁶² *Id.*

in their ability or inability to work.”⁶³ *Young* strays from *McDonnell Douglas* in that the Court says a claimant may satisfy the fourth element of her case by simply showing other non-pregnant yet similarly disabled employees were offered accommodations.⁶⁴ After *Young*, it is enough now to establish pretext through statistics without proving intentional discrimination. In other words, a pregnant (or breastfeeding) employee who is denied an accommodation may only have to point to a non-pregnant (or non-breastfeeding) temporarily disabled employee who was granted that accommodation.

As in *McDonnell Douglas*, once the claimant has met her burden to demonstrate this, the employer must prove a legitimate, nondiscriminatory reason for its denial of the claimant’s request for the pregnancy or pregnancy-related condition accommodation.⁶⁵ Notably, the cost or financial implications of employing a member of the protected group is not a valid defense to a Title VII discrimination suit. Finally, the *Young* decision states that if an employer can articulate a legitimate, nondiscriminatory reason for not accommodating the pregnant employee, the burden will shift back to the claimant to prove that the employer’s policy “imposes a significant burden on the employee” that outweighs the employer’s reason for denying the accommodation.⁶⁶

Putting together the *Young* holding with the *Houston Funding II* decision, a legitimate argument is made for breastfeeding employees seeking accommodations. Under the Title VII/PDA framework, a breastfeeding employee can articulate that her status as a lactating employee is protected under the PDA (*Houston Funding II*), and her employer must accommodate her breastfeeding needs as it would the needs of any other temporarily disabled employee (*Young*). More and more litigation is being brought against employers now that *Houston Funding II* and *Young* have set the stage, though the legal framework is anything but settled. For instance, the question of who may be the “similarly situated” counterpart is further complicated when the plaintiff is a breastfeeding woman as lactating is a uniquely female and pregnancy-related condition.⁶⁷ It is also unclear which

⁶³ *Id.* at 1354–55.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 1355.

⁶⁷ See Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 34 (2009).

justifications by employers encompass a “legitimate, nondiscriminatory reason” for denying an accommodation to a breastfeeding employee.

Finally, Title VII and the PDA, even when coupled with the recent judicial interpretations like *Young* or *Houston Funding II*, still only provide comparative remedies. This means the employee seeking breastfeeding accommodations at work must be able to point to another “similarly situated” worker who is actually receiving accommodations before she is entitled to any remedy under the law.⁶⁸ Nothing under Title VII or the PDA entitles these employees to any accommodations if the employer is not offering such assistance to other employees; the protections are against discrimination only, not against an employer’s failure to accommodate.⁶⁹ Courts have been careful to point out that neither of these laws do anything to require an employer to accommodate pregnant or breastfeeding workers but simply require companies to accommodate these women in the same way they would other similarly situated employees.⁷⁰ In attempting to secure an affirmative right to accommodations, employees must look elsewhere.

2. *The Family and Medical Leave Act*

Another law breastfeeding employees call upon is the Family Medical Leave Act (FMLA). The FMLA is a federal law granting employees protected unpaid leaves of absence in situations such as illness or taking on caregiving responsibilities.⁷¹ Some have considered the FMLA to be a “viable option for a woman if she wishes to breastfeed and is unable or unwilling to do so at work.”⁷² However, the Act has limited utility for employees who desire to breastfeed *and* return to work.⁷³ The FMLA also affects

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Equal Emp’t Opportunity Comm’n v. Hous. Funding II, Ltd.*, 717 F.3d 425, 430, n.6 (5th Cir. 2013); *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 207 (5th Cir. 1998); *Maldonado v. U.S. Bank*, 186 F.3d 759, 762 (7th Cir. 1999) (all noting Title VII and the PDA do not require employers to provide special accommodations but only prohibit an employer from taking an adverse employment action against the protected class).

⁷¹ 29 U.S.C. §§ 2601–2654 (2018).

⁷² See Marian Kousaie, Comment, *From Nipples to Powder*, 49 AKRON L. REV. 207, 227 (2015). *But see also* Saru M. Matambanadzo, *The Fourth Trimester*, 48 U. MICH. J.L. REFORM 117, 151–54 (2014).

⁷³ *Id.*

only companies with fifty or more employees and only those employees who have worked for at least twelve months.⁷⁴ Further, just twelve weeks of protected unpaid leave are allotted by the FMLA while the recommended period for breastfeeding is six months, thus this is not an adequate period of protection for employees who use the FMLA to take unpaid leave while breastfeeding (either by choice or because their employer will not accommodate them).⁷⁵ Therefore, not everyone is covered (or adequately covered) by the FMLA.⁷⁶

3. *The Americans with Disabilities Act*

Breastfeeding working mothers can also bring claims under the Americans with Disabilities Act (ADA). The ADA was enacted to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁷⁷ The ADA clarifies that the term “discriminate against a qualified individual on the basis of disability” includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”⁷⁸ While the ADA does not explicitly define “reasonable accommodations,” it is interpreted to require an employer to make reasonable changes such as modifying the nature of a job, providing devices to disabled workers, improving accessibility of facilities, restructuring essential job functions, adjusting work hours, and as a last resort, reassigning an employee to a different position.⁷⁹ As such, some women seek accommodations for breastfeeding under the ADA. Historically, however, these suits rarely succeed because most courts do not find that pregnancy or pregnancy-related conditions such as lactation qualify as “disabilities” without some extenuating circumstance.

In 2008, the ADA’s scope was somewhat expanded by the ADA Amendments Act, which provides that “pregnancy-related impairments may be defined as disabilities.”⁸⁰ The EEOC, which interprets the ADA, has construed this amendment to mean em-

⁷⁴ 29 U.S.C. § 2611(2)(b)(ii).

⁷⁵ Kousaie, *supra* note 72, at 228.

⁷⁶ *The 2000 Survey Report: Impact of Family and Medical Leave on Non-Covered Establishments*, U.S. DEP’T LABOR, available at <http://www.dol.gov/whd/fmla/chapter7.htm> [<https://perma.cc/VU2N-GE6Y>].

⁷⁷ 42 U.S.C. § 12101(b)(1) (2018).

⁷⁸ *Id.* § 12112(b)(5)(a).

⁷⁹ *See id.*

⁸⁰ Matambanadzo, *supra* note 72, at 159 (citing 29 C.F.R. § 1630.2(h) (2014)).

ployees who are “temporarily disabled” by pregnancy or a pregnancy-related condition must be treated by employers like other employees who are temporarily disabled for reasons other than pregnancy or pregnancy-related conditions.⁸¹ With the amendment, the ADA potentially became a more powerful protection for working breastfeeding mothers, but the protection remains constricted by interpretations of exactly which pregnancy-related conditions qualify as “impairments” worthy of protection.⁸²

4. *The Amended Fair Labor Standards Act*

In 2010, Congress passed the Patient Protection and Affordable Care Act (PPACA),⁸³ which contained an addition to the Federal Labor Standards Act (FLSA).⁸⁴ This small amendment provided groundbreaking federal protections for workers who wish to continue breastfeeding.⁸⁵ The law requires those employers covered by the FLSA to provide employees with reasonable break time to express milk and a private space other than a bathroom to do so.⁸⁶

Though the PPACA’s amendment to the FLSA marked the first time federal legislation comprehensively addressed affirmative protections for breastfeeding in the workplace, the protection has some serious limitations. First, the provision only applies to employers with fifty or more employees.⁸⁷ Application is further limited to “non-exempt employees,” meaning the section would only cover employees who are not exempt from the FLSA’s overtime protections, a very small portion of the overall workforce.⁸⁸ Thus, the FLSA provision is arguably a “step in the right direction” for legal breastfeeding accommodation protec-

⁸¹ *Id.*

⁸² See Kousaie, *supra* note 72, at 226. *But see also* Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation after the ADA Amendments Act*, 32 *YALE L. & POL’Y REV.* 97 (2013).

⁸³ Patient Protection and Affordable Care Act § 4207, Pub. L. No. 111-148, 124 Stat. 119 (2010), (codified at 29 U.S.C. § 207(r) (2018)).

⁸⁴ 29 U.S.C. § 207(r).

⁸⁵ See Katy Kozhimannil et al., *Access to Workplace Accommodations to Support Breastfeeding After Passage of the Affordable Care Act*, 26 *WOMEN’S HEALTH ISSUES* 6 (2016).

⁸⁶ 29 U.S.C. § 207(r).

⁸⁷ *Id.*

⁸⁸ Marcy Karin & Robin Runge, *Breastfeeding and a New Type of Employment Law*, 63 *CATH. U. L. REV.* 329, 348 (2014); Kousaie, *supra* note 72, at 245 (“This means that almost 12 million otherwise eligible salaried women do not qualify for protection under the PPACA’s breastfeeding accommodations provisions.”).

tions; however, the severe eligibility restrictions significantly limit the protection's scope and effectiveness.

5. *State Laws and Local Regulations*

Finally, in addition to the federal legislative actions already discussed, twenty-nine states, the District of Columbia, and Puerto Rico have all passed legislation directly addressing breastfeeding in the workplace—all applicable to airline companies.⁸⁹ Many of these state laws somewhat mirror the PPACA/FLSA provision but apply more broadly to employees within the respective states and provide strong protections to women who want to return to work and continue to breastfeed.

IV. PUTTING IT TOGETHER: THE INTERSECTION OF THE AIRLINE INDUSTRY AND BREASTFEEDING ACCOMMODATION LAW

A. WHICH LAWS APPLY

Commercial airline companies in the United States are responsible for complying with federal anti-discrimination laws such as Title VII⁹⁰ and the PDA.⁹¹ Courts have held that the protections provided by Title VII and the PDA are “not rights which can be bargained away either by a union, by an employer, or by both acting in concert.”⁹² Thus, even in the heavily unionized commercial airline industry, these rights apply, and judicial remedies are available to employees should those rights be violated.⁹³ So long as the airline employee can prove she is “an aggrieved person under the Act” and belongs to a group that the Act intends to protect, she may proceed against the airline employer under a Title VII/PDA claim.⁹⁴

The airline industry may also be liable according to the federally mandated rules contained in the FMLA and the ADA. Because most airline carriers fall well over the FMLA's eligibility

⁸⁹ *Breastfeeding State Laws*, NAT'L CONF. ST. LEGISLATURES (June 5, 2017), <http://www.ncsl.org/research/health/breastfeeding-state-laws.aspx> [https://perma.cc/F96K-TXFS].

⁹⁰ 42 U.S.C. §§ 2000e (2018).

⁹¹ Pub. L. No. 95-555, 92 Stat. 2076 (1978).

⁹² *Laffey v. Nw. Airlines*, 567 F.2d 429, 447 (D.C. Cir. 1976).

⁹³ Tammy Julian, *How Title VII Has Affected the Airline Industry*, 11 ST. LOUIS U. PUB. L. REV. 281, 283 (1992).

⁹⁴ *Id.* (citing *In re Nat'l Airlines, Inc.*, 434 F. Supp. 266 (S.D. Fla.1977); *Hailes v. United Air Lines*, 464 F.2d 1006, 1008 (5th Cir.1972)).

qualification of employing at least fifty employees,⁹⁵ airline companies are consequently liable for claims under the Act so long as the employee claiming the violation has worked at that airline company for more than twelve months.⁹⁶ The ADA likewise comprehensively covers the airline industry as virtually every commercial airline company meets the fifteen employee eligibility requirement.⁹⁷

Notably, however, private airline companies are not responsible for complying with the 2010 PPACA revision to the FLSA, which contains the nursing mothers lactation break provision. FLSA § 213(b)(3) exempts from its breastfeeding accommodation requirements “any employee of a carrier by air subject to the provisions of Title II of the Railway Labor Act,”⁹⁸ which, as discussed in the beginning of this Comment, includes all commercial airline companies.⁹⁹ Thus, flight attendants and pilots are not guaranteed any of the PPACA/FLSA workplace breastfeeding accommodation protections.

Outside the federal legislative structures, airline companies may be liable under relevant state laws or local regulations, depending on where the potential claim arose.¹⁰⁰ State and local regulations, however, present a noteworthy concern in the context of the airline industry: as planes fly from city to city, which regional laws and regulations apply becomes a particularly important question since states have enacted differing laws regarding breastfeeding accommodations.¹⁰¹

Ultimately, as with most industries, workplace breastfeeding claims against airline companies have materialized primarily in the form of sex or pregnancy discrimination suits under Title VII/PDA and through the EEOC. Additionally, employees of commercial airline companies have found some success by raising claims of state or local law violations where there is a relevant workplace breastfeeding provision.

⁹⁵ 29 U.S.C. §§ 2611–2654 (2018); BUREAU OF TRANSP. STATISTICS, BTS 26-17, MARCH 2017 PASSENGER AIRLINE EMPLOYMENT DATA (2017), *available at* <https://www.bts.gov/newsroom/march-2017-passenger-airline-employment-data> [<https://perma.cc/2Y3Q-YZWT>].

⁹⁶ 29 U.S.C. § 2611(2)(A)(i).

⁹⁷ 42 U.S.C. § 12111(5)(A) (2018).

⁹⁸ 29 U.S.C. § 213(a).

⁹⁹ 45 U.S.C. § 181.

¹⁰⁰ *State Level Workplace Breastfeeding Rights*, U.S. DEP'T LAB., <https://www.dol.gov/wb/maps/4.htm> [<https://perma.cc/V3V5-KF4K>].

¹⁰¹ *See Breastfeeding State Laws*, *supra* note 89.

B. UNIQUE NATURE OF THE INDUSTRY, RELEVANT SAFETY CONCERNS, AND AIRLINE COMPANIES' DEFENSE ARGUMENTS

A major factor in the discussion of breastfeeding accommodation law and the airline industry is the nature of the industry itself. Since employment duties of flight attendants and pilots occur in-flight and their job responsibilities put these employees directly in charge of passenger safety while in the air, the nature of the airline industry poses some specific and unique issues that most other industries do not deal with.¹⁰²

The interconnection of safety and the airline industry is readily apparent. Flight attendants are responsible for evacuating the plane in case of emergency, operating emergency equipment, administering basic emergency medical assistance or first aid, and facilitating communication between passengers and pilots. With pilots, the safety aspect of the position is even more obvious—the pilot is navigating a massive airplane carrying passengers and crew at 35,000 feet in the air. As it is clear that these employees must be able to perform their jobs effectively to ensure safety of everyone on board the plane, the FAA requires that both flight attendants and pilots receive extensive safety training and emergency protocol preparation.¹⁰³

Due to inherent safety concerns in the industry, airlines have been able to rely heavily on passenger safety as the basis of a “business necessity” defense in claims of discrimination. The business necessity defense allows an employer to defend an admittedly discriminatory policy on the basis that the policy is necessary for some “legitimate business purpose” and the “safe and efficient operation of [that] business.”¹⁰⁴ Plainly stated, when an employee’s ability to perform a certain job duty is critical to the “essence” of the business for which she works, then the employer may have a valid defense for related discriminatory actions. Courts have long recognized the validity of the business

¹⁰² See generally Jennifer Staton, Comment, *What’s Wrong with Pregnancy in the Airline Industry and What to Do About It*, 77 J. AIR L. & COM. 403 (2012).

¹⁰³ The FAA is empowered to prescribe regulations and minimum safety standards, including training for commercial aircraft pilots and flight attendants. See 49 U.S.C. § 44516(a)(2) (2018); see also 14 C.F.R. §§ 121.419 (defining pilot training requirements), 121.421 (defining requirements for flight attendant training), 121.427 (outlining recurrent training requirements for both pilots and flight attendants) (2018).

¹⁰⁴ Julian, *supra* note 93, at 285 (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971)).

necessity defense but have cautioned that it should be “interpreted narrowly.”¹⁰⁵ The airline industry is famously one of the few remaining contexts in which arguments of safety as a business necessity defense are consistently accepted by the courts.¹⁰⁶

Airline companies often contend (and courts agree) that passenger safety is, first, the “essence” of the airline business, and second, a necessity that can justify discrimination.¹⁰⁷ One of the most common examples of this successful argument comes from airlines’ mandatory maternity leave policies.¹⁰⁸ A policy discriminating against pregnant employees by forcing them to take mandatory leave on the basis of their pregnancy would ordinarily be a clear violation of Title VII and the PDA, but airlines often successfully assert the practice is justified by the industry’s business necessity of guaranteeing passenger safety.¹⁰⁹

Breastfeeding accommodation claims by pilots and flight attendants are vulnerable to a similar line of defense from airline employers. For example, although an airline could be liable under Title VII and the PDA for denying accommodations to breastfeeding flight attendants or pilots, when faced with claims of discrimination, the airline could argue providing its flight attendants or pilots with suitable breastfeeding accommodations while in-flight compromises passenger safety. The passenger safety argument thus provides airline companies with a powerful defense to employment practices that otherwise would be considered blatant sex and pregnancy discrimination.¹¹⁰ In light of

¹⁰⁵ *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971) (quoting 29 C.F.R. 1604.1(a)).

¹⁰⁶ See Katie Manley, *The BFOQ Defense: Title VII’s Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL’Y 169, 176–82 (2009).

¹⁰⁷ *Levin v. Delta Air Lines*, 730 F.2d 994, 996 (5th Cir. 1984) (upholding a policy requiring flight attendants to either resign or involuntarily be moved to ground duties upon discovery of pregnancy, reasoning that “[passenger] safety is of the essence of an airline’s function” and that pregnant flight attendants may not be able to provide safe flights).

¹⁰⁸ See *id.*; *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 676 (9th Cir. 1980); *Burwell v. E. Air Lines, Inc.*, 633 F.2d 361, 362 (4th Cir. 1980); *Condit v. United Air Lines*, 558 F.2d 1176, 1177 (4th Cir. 1977).

¹⁰⁹ *Levin*, 730 F.2d at 996.

¹¹⁰ See *Condit v. United Air Lines*, No. 74-250-A, 1976 WL 615, at *7 (E.D. Va. Sept. 3, 1976) (stating “[t]he safety of the passengers must come first—in case of doubt, that doubt must be resolved in favor of the passengers—airlines must take no chances when it comes to safety[,]” and upholding a mandatory maternity leave policy). Compare *Int’l Union v. Johnson Controls*, 499 U.S. 187, 203 (1991) (business of manufacturing batteries has no safety component, and thus employer defense failed), with *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647–48 (1974) (teaching at an elementary school did not invoke any job require-

courts' continuing acceptance of passenger safety as an airline business necessity defense, airlines will likely continue to assert passenger safety to justify outwardly discriminatory policies in breastfeeding accommodation cases, just as they do for mandatory maternity leave policies.¹¹¹

V. CURRENT AND PENDING BREASTFEEDING ACCOMMODATION LITIGATION IN THE AIRLINE INDUSTRY

As breastfeeding continues to capture public attention and draw societal support, more and more working women are refusing to choose between their jobs and breastfeeding their children, instead calling for accommodations in the workplace that allow for both. As previously discussed, courts are hearing an increasing number of "lactation discrimination" cases.¹¹² Recently, several of these lactation-related suits have been brought against airline companies.¹¹³

In 2015, a Delta flight attendant filed a pregnancy discrimination claim alleging the airline discriminated against her because she was breastfeeding.¹¹⁴ The flight attendant claimed Delta violated a local New York Human Rights Law¹¹⁵ guaranteeing the right to be provided an appropriate space to pump breastmilk at work. The suit quietly settled (flying under the radar as many

ments relating to safety which a pregnant woman could not perform, thus the discriminatory universal mandatory maternity leave policies were not justified).

¹¹¹ See Jo Linda Roby, *Charge of Discrimination*, AM. CIVIL LIBERTIES UNION (May 15, 2017), available at <https://www.aclu.org/legal-document/complaint-jo-roby> [<https://perma.cc/3PX2-X2RF>] (alleging that Frontier Airlines supervisors denied a flight attendant's request to pump, stating she was forbidden to pump "on duty, on the ground or in-flight, for her own safety and the safety of others").

¹¹² In the last decade, there has been an 800% increase in lawsuits filed for "lactation discrimination." Cynthia Thomas Calvert, *Caregivers in the Workplace: Family Responsibilities Discrimination Litigation Update 2016*, WORKLIFE LAW, <https://worklifelaw.org/publications/Caregivers-in-the-Workplace-FRD-update-2016.pdf> [<https://perma.cc/8YY2-PT5X>].

¹¹³ *Lara-Woodcock v. United Air Lines, Inc.*, 999 F. Supp. 2d 1027 (N.D. Ill. 2013); *McFarlane v. EasyJet Airline Co. Ltd.*, Employment Tribunal, Case No. 1401496 (2016); *Frontier Airlines EEOC Complaint*, AM. CIVIL LIBERTIES UNION (May 16, 2017), <https://www.aclu.org/cases/frontier-airlines-eoc-complaint> [<https://perma.cc/ADS3-FJPX>]; Annalyn Kurtz, *Delta Settles with Flight Attendant Who Says She Had Nowhere to Pump Breast Milk*, FORTUNE (Apr. 13, 2017), <http://fortune.com/2017/04/13/delta-flight-attendant-breastfeeding-settlement> [<https://perma.cc/2XMM-47A4>].

¹¹⁴ Kurtz, *supra* note 113.

¹¹⁵ N.Y. Exec. Law §§ 292(21-e), 296(3) (McKinney 2018); see N.Y.C. ADMIN. CODE § 8-107(22) (2016).

claims against huge airline corporations do) and, because it was never brought before a court, set no legal precedent.¹¹⁶ However, as a result of the suit, Delta as a company did change its training and policies regarding accommodating breastfeeding flight attendants, and the flight attendant received a \$30,000 settlement for her emotional distress and attorney's fees.¹¹⁷ While the settlement did not set a legal precedent for the industry at large, it does represent a shift in the way breastfeeding accommodation cases with airlines play out.

One year after the Delta settlement, Frontier Airlines found itself in a similar legal predicament when four of its female pilots filed suit against the airline for sex and pregnancy discrimination.¹¹⁸ The American Civil Liberties Union (ACLU) took up the fight on behalf of the pilots and brought the case to the EEOC.¹¹⁹ The pilots asserted that Frontier's policies treat pregnant and breastfeeding pilots less favorably than pilots with other medical conditions or temporary disabilities, thus violating Title VII and the PDA as well as applicable state sex discrimination laws.¹²⁰ In their complaints, the pilots relay stories of having to delay expressing breastmilk for hours due to lengthy flight schedules, causing them severe pain and resulting in three of the women developing serious infections.¹²¹ One of the pilots, who had worked for Frontier for more than fourteen years, was even disciplined when Frontier was informed she had pumped on the aircraft.¹²² Importantly, the pilots alleged that

¹¹⁶ Kurtz, *supra* note 113.

¹¹⁷ *Id.*

¹¹⁸ Vin Gurrieri, *Breast-Feeding Frontier Airline Pilots Claim Discrimination*, LAW360 (May 10, 2016), <https://www.law360.com/articles/794441/breast-feeding-frontier-airline-pilots-claim-discrimination> (last visited Sept. 4, 2018).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See Brandy Beck, *Charge of Discrimination*, AM. CIVIL LIBERTIES UNION, available at <https://www.aclu.org/legal-document/final-eeoc-charge-brandy-beck> [<https://perma.cc/3CQX-BQSB>]; Shannon Kiedrowski, *Charge of Discrimination*, AM. CIVIL LIBERTIES UNION, available at <https://www.aclu.org/legal-document/final-eeoc-charge-shannon-kiedrowski> [<https://perma.cc/PAB3-PPWK>]; Erin Zielinski, *Charge of Discrimination*, AM. CIVIL LIBERTIES UNION, available at <https://www.aclu.org/legal-document/final-eeoc-charge-erin-zielinski> [<https://perma.cc/4Y3F-DECC>]; Randi Freyer, *Charge of Discrimination*, AM. CIVIL LIBERTIES UNION, available at <https://www.aclu.org/legal-document/final-eeoc-charge-randi-freyer> [<https://perma.cc/T6FY-97AW>].

¹²² Shannon Kiedrowski, *Airline Pilots Should Not Have to Choose Between Their Jobs and Breastfeeding Their Babies*, AM. CIVIL LIBERTIES UNION BLOG (May 10, 2016, 10:00 AM), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/airline-pilots-should-not-have-choose-between-their-jobs?redirect=blog/>

other Frontier employees were allowed alternative work assignments that enabled them to keep working through their medical conditions, potentially creating a *Young* basis for pretext if the accommodated group includes non-breastfeeding, temporarily disabled pilots.

One policy the pilots specifically point to as discriminatory is Frontier's restriction that forces female employees to stop flying after thirty-two weeks of pregnancy but does not allow them to seek an alternative job assignment in return.¹²³ This, the pilots allege, forces Frontier's pregnant employees to use up their FMLA unpaid leave before their child is even born, leaving these women with little time left for purposes of post-birth child care, including breastfeeding. Combined with Frontier's lack of breastfeeding accommodations for the pilots once they return to work, the policy in effect forces the pilots to "choose between [their] jobs and breastfeeding [their] children."¹²⁴ Temporary reassignments for Frontier employees are governed by the CBA, which is negotiated by the pilots' or flight attendants' union. For pilots, the CBA provides that any pilot temporarily disabled by an on-the-job injury may receive a ground duty reassignment.¹²⁵ The option of temporary ground duty reassignment is reserved only for pilots injured on the job and is not available to breastfeeding pilots, even if requested.¹²⁶

In the 2016 complaints, the ACLU and pilots asked Frontier to allow temporary alternative assignments for breastfeeding pilots (comparable to "light-duty"); to allow additional unpaid leave for breastfeeding moms; to identify proper places for breastfeeding pilots to pump at the airports used by Frontier; and to allow breastfeeding pilots the option to pump in-flight if necessary.¹²⁷ Notably, these pilots did not seek any financial re-

speak-freely/airline-pilots-should-not-have-choose-between-their-jobs-and-breast-feeding-their [https://perma.cc/X58Y-T2WN].

¹²³ Gurrieri, *supra* note 118.

¹²⁴ Kiedrowski, *supra* note 122.

¹²⁵ Tara Haelle, *Pilots and ACLU Sue Airline Over Breast Milk Pumping at Work*, NAT'L PUB. RADIO (May 13, 2016, 4:03 PM), <https://www.npr.org/sections/health-shots/2016/05/13/477945231/pilots-and-aclu-sue-airline-over-breast-milk-pumping-at-work> (last visited Sept. 4, 2018).

¹²⁶ *Id.*

¹²⁷ *ACLU Files Discrimination Charges Against Frontier Airlines on Behalf of Breast-Feeding Pilots*, AM. CIVIL LIBERTIES UNION (May 10, 2016), <https://www.aclu.org/news/aclu-files-discrimination-charges-against-frontier-airlines-behalf-breast-feeding-pilots> [https://perma.cc/GZH7-A8ZR].

covery or other relief from their suit, only requesting that Frontier Airlines change its policies.

In 2017, one year after the first suit against Frontier by the four pilots, a second suit was filed against the airline company by two of its lactating flight attendants.¹²⁸ Again, the ACLU took on the case, filing once more with the EEOC against Frontier on the basis of sex and pregnancy discrimination.¹²⁹ Like the pilots, the flight attendants allege that Frontier's policies are discriminatory. Like the pilots, these flight attendants describe being denied accommodations to express breastmilk; having to work lengthy, back-to-back shifts without breaks to pump; and even facing disciplinary actions as a result of policies penalizing pregnancy-related absences.¹³⁰ The flight attendants claim they requested accommodations that would have allowed them to pump, such as shorter flight plans or non-flight work duties, but were told that no such accommodations were possible for them and were even forbidden from pumping while in-flight.¹³¹ The flight attendants also stated that Frontier failed to provide accommodations on ground as well, as the airports the women flew between often had inadequate or nonexistent facilities for expressing breastmilk.¹³²

A pilot who filed one of the 2016 complaints, Randi Freyer, also filed an affidavit to accompany the new round of complaints by the flight attendants.¹³³ In her 2017 charge, Freyer

¹²⁸ Braden Campbell, *Frontier Flight Attendants Allege Pregnancy Bias*, LAW360 (May 16, 2017), <https://www.law360.com/employment/articles/924543> (last visited Sept. 4, 2018).

¹²⁹ *Frontier Airlines Flight Attendants File Discrimination Charges with EEOC*, AM. CIVIL LIBERTIES UNION (May 16, 2017), <https://www.aclu.org/news/frontier-air-lines-flight-attendants-file-discrimination-charges-eeoc> [<https://perma.cc/4XT5-QG3E>].

¹³⁰ Roby, *supra* note 111; Stacy Rewitzer, *Charge of Discrimination*, AM. CIVIL LIBERTIES UNION (May 15, 2017), <https://www.aclu.org/legal-document/complaint-stacy-schiller> [<https://perma.cc/5H2H-NU6U>].

¹³¹ Campbell, *supra* note 128.

¹³² Inadequate breastfeeding accommodations at airports only exasperate the difficulties lactating pilots and flight attendants face and is an issue in itself. See Michael Haight & Joan Ortiz, *Airports in the United States: Are They Really Breastfeeding Friendly?*, 9 BREASTFEEDING MED. 515, 517–18 (2014); see also *Friendly Airports for Mothers (FAM) Act*, H.R. 2375, 115th Cong. (2017), available at <https://www.congress.gov/115/bills/hr2375/BILLS-115hr2375ih.pdf> [<https://perma.cc/9NPW-9UMP>] (proposing all large and medium airports to require private, non-bathroom spaces with a table, seat, and electrical outlet in each terminal for women to express breastmilk).

¹³³ AFFADAVIT OF RANDI FREYER IN FURTHER SUPPORT OF CHARGES FILED BY BRANDY BECK, SHANNON KIEDROWSKI, ERIN ZIELINKSI, AND RANDI FREYER, AM. CIVIL

alleged that Frontier continued to engage in discriminatory actions and ignore her lactation-related needs by refusing to assign her shorter flights and failing to provide adequate lactation facilities.¹³⁴ Freyer reiterated the complaints lodged by herself and the other pilots in 2016 and voiced her support for the flight attendants now filing for the first time.¹³⁵

All six Frontier employees assert that the airline's policies treat pregnancy and breastfeeding less favorably than other medical conditions or temporary disabilities and have a harsher effect on female employees, thus violating multiple state and federal sex discrimination laws.¹³⁶ In a statement to the media, a representative for Frontier maintained that Frontier's "policies and practices comply with all federal and state laws and a collective bargaining agreement between the company and its flight attendant group" and that "the company has 'made good-faith efforts' to find private rooms for breast-feeding flight attendants when they travel for work."¹³⁷

However, to the breastfeeding flight attendants and pilots working for Frontier, those good-faith efforts are not enough. In January 2018, Galen Sherwin, a senior staff attorney with the ACLU Women's Rights Project, stated that a class-action lawsuit against Frontier was currently before the EEOC and would soon be filed in federal court.¹³⁸ Sherwin further stated, "I think people are looking at it closely. Certainly, I think it would be the largest case that has been filed related to accommodations for women who are breastfeeding on the job."¹³⁹

LIBERTIES UNION (May 15, 2017), <https://www.aclu.org/legal-document/complaint-randi-freyer> [<https://perma.cc/T3EQ-E2RS>].

¹³⁴ *Id.*

¹³⁵ See Randi Freyer, *As an Airline Pilot, I Struggle Every Day to Find a Clean, Sanitary Place to Pump Breast Milk for My Baby*, AM. CIVIL LIBERTIES UNION BLOG (Aug. 7, 2017), <https://www.aclu.org/blog/womens-rights/pregnancy-and-parenting-discrimination/airline-pilot-i-struggle-everyday-find> [<https://perma.cc/AMS9-R38Z>].

¹³⁶ *Id.*

¹³⁷ See Campbell, *supra* note 128.

¹³⁸ Catherine Pearson, *For Breastfeeding Moms, A Difficult Choice: Work or Pump?*, HUFFINGTON POST (Jan. 31, 2018), https://www.huffingtonpost.com/entry/america-fails-breastfeeding-moms_us_5a69fbbde4b0dc592a0ff06d [<https://perma.cc/395T-7PN7>].

¹³⁹ *Id.*

VI. THE FUTURE OF BREASTFEEDING FOR AIRLINE
EMPLOYEES AND POTENTIAL SOLUTIONS
GOING FORWARD

As society's cries for breastfeeding accommodations in the workplace grow louder, airline companies will be forced to respond or risk breastfeeding simply becoming the next point on the industry's long history of archaic policies that fail its female employees. There are many actions that the industry as a whole could take or that individual airlines could adopt to address the needs of breastfeeding pilots and flight attendants, and there are several considerations airlines should be aware of going forward.

A. SUGGESTIONS FOR THE FUTURE

1. *Industry Standardization*

Overarching standards for the entire airline industry may be the most effective possible solution to the issue of pilot and flight attendant breastfeeding accommodations. An industry consensus has the potential to settle the debate over whether employees have a right to accommodations and what those accommodations should be. Currently, the assortment of different airline breastfeeding policies results in an industry where accommodations are haphazardly offered and denied, sometimes in violation of employees' rights and other times in full compliance with the law. For example, while several airlines already explicitly provide accommodation policies for breastfeeding flight attendants and pilots,¹⁴⁰ others will deny that same accommodation and claim passenger safety demands such. Or a CBA will offer an accommodation to employees injured on-the-job but provide unpaid leave as the only option for employees with pregnancy-related disabilities.¹⁴¹ The contradictions are rampant.

Adding to this inconsistency, airline employment policy issues are largely kept out of the courts because employees often opt to proceed with arbitration and negotiations through their unions to avoid the conflict and hassle of litigation. Additionally, when faced with lawsuits, airlines usually choose to settle rather

¹⁴⁰ See Alaska Airlines 2014–2019 Flight Attendant Agreement, *supra* note 26, § 24(H).

¹⁴¹ See United Airlines 2016–2021 Flight Attendant Agreement § 13(D)(10), available at <http://unitedafa.org/docs/contract/jcba-final.pdf> [<https://perma.cc/G2GJ-8K3M>].

than litigate.¹⁴² The absence of litigation results in a lack of judicially binding decisions on policy issues like breastfeeding accommodations.¹⁴³ With no industry consensus and no binding case law, airline employees are virtually at the mercy of the policies established by their employers and unions through CBAs. If accommodation policies are addressed in the CBA, the flight attendant or pilot might have a basis to request accommodation. If not, she may be out of luck. Industry unanimity on the issue of breastfeeding accommodations would guarantee employees are treated equally and in accordance with their rights and would ensure companies maintained fair, standard policies, cutting down on the potential for discrimination.

2. *Stricter Scrutiny of Airlines' Safety Defenses*

If standardization of industry policy is not possible, at a minimum it is time for the airline industry to quit hiding behind its passenger safety defense. Few would disagree that airline companies face extremely unique safety concerns—the business of safely transporting people across the sky is highly technical and rife with potential for tragedy.¹⁴⁴ As a result, courts tend to operate on a “better safe than sorry” mentality when allowing airlines to discriminate in the name of safety. However, the passenger safety defense cannot be treated as a “get out of jail free card.” Of course passenger safety must remain the ultimate concern, but it should not enable these companies to retain discriminatory policies if safe, non-discriminatory alternatives are available. Sometimes when an airline’s asserted safety defense is actually scrutinized, the underlying reasoning falls apart. This is particularly true in the arena of airlines’ pregnancy-related accommodations.

Perhaps the most compelling and sensible evidence that passenger safety is not a defense to a lack of accommodations for breastfeeding employees is the fact that some airlines already make breastfeeding accommodations for their flight attendants

¹⁴² Staton, *supra* note 102, at 422 (stating that “when discrimination claims are litigated, they often result in large, class action suits which can take years to resolve. These cases regularly result in employees being pitted against their unions, and unions aligning themselves with airline management.”).

¹⁴³ *Id.*

¹⁴⁴ See 14 C.F.R. § 117.5 (2018) (aircraft carriers and operators have a duty to operate with the highest degree of safety); see also John E. Stephen, *Carrier Legal Responsibility for Commercial Safety*, 34 J. AIR L. & COM. 473 (1968).

and pilots.¹⁴⁵ For example, Alaska Airlines provides accommodations for lactating flight attendants so long as it does not interfere with duties.¹⁴⁶ In addition, following its 2015 settlement, Delta Airlines changed its policies to allow breastfeeding employees up to six weeks of paid maternity leave and an additional month of unpaid leave beyond that.¹⁴⁷ International airlines are already making breastfeeding accommodations as well. For example, in *EasyJet v. McFarlane*,¹⁴⁸ two breastfeeding flight attendants employed by the European airline EasyJet filed an indirect discrimination suit under the Employment Rights Act. The tribunal ruled that the flight attendants had the right to take temporary special work duties, such as ground shifts or shorter flight plans, to enable them to return to pump milk at work.¹⁴⁹ The tribunal further ordered the airline to make better accommodations for its lactating in-flight employees.¹⁵⁰ The safety argument weakens when airline Y claims it is unable to accommodate breastfeeding flight attendants due to passenger safety, yet airline Z offers that exact accommodation and safely transports passengers every day. As it is evident that other airlines have successfully managed to accommodate breastfeeding and maintain safe operations, it is unclear how any airline can reasonably argue that passenger safety is an appropriate defense to a lack of accommodations for breastfeeding employees.

The safety defense also loses credibility if accommodations are made for certain employees or in certain instances but are seemingly arbitrarily denied on the basis of safety in other cases. For example, an airline might argue it cannot accommodate a breastfeeding flight attendant's need for twenty-minute, in-flight lactation breaks because doing so would render her unable to evacuate a plane in an emergency.¹⁵¹ On its face, the assertion of

¹⁴⁵ See Alaska Airlines 2014–2019 Flight Attendant Agreement, *supra* note 26, § 24(H); see also *McFarlane v. EasyJet Airline Co. Ltd.*, Employment Tribunal, Case No. 1401496 (2016).

¹⁴⁶ Alaska Airlines 2014–2019 Flight Attendant Agreement, *supra* note 26, § 24(H).

¹⁴⁷ Kurtz, *supra* note 113.

¹⁴⁸ *McFarlane*, Employment Tribunal, Case No. 1401496.

¹⁴⁹ *Id.* at ¶¶ 61–66.

¹⁵⁰ Joe Cortez, *Flight Attendant Mothers Win Case Against EasyJet*, FLYERTALK (Sept. 30, 2016), <https://www.flyertalk.com/articles/flight-attendant-mothers-win-case-against-easyjet.html> [<https://perma.cc/2HLT-QTN7>].

¹⁵¹ Notably, the counterargument to this is that *not* allowing the lactating flight attendant or pilot to take the break to express breastmilk could compromise safety—that these employees must be allowed breaks to express milk, or else severe symptoms and pain when a lactating woman is unable to express milk will

passenger safety seems reasonable. However, to comply with FAA flight attendant duty period limitations,¹⁵² airlines have the ability to increase the number of flight attendants on a crew and allow flight attendants to take in-flight breaks.¹⁵³ If a company had true, serious concerns about a flight attendant taking a twenty-minute break affecting passenger safety, that airline would be able to simply add an additional flight attendant to the flight so as to accommodate short lactation breaks, just like airlines already do for the purpose of FAA duty time limitations. The airline might claim they cannot do this because of the cost of paying for an additional flight attendant that would not otherwise be necessary. However, courts have unanimously rejected financial costs as a defense to not accommodating protected groups.¹⁵⁴

While airlines rightfully point out that safety is a serious concern in the industry, the argument that accommodating pilots or flight attendants inherently jeopardizes passenger safety is simply unfounded. The fact that the FAA has remained silent on the subject supports the notion that accommodating breastfeeding flight attendants and pilots while in flight does not necessarily need to implicate safety concerns.¹⁵⁵ The regulatory agency ensuring aviation safety has not promulgated any rules on in-flight accommodations as it does with concerns such as maximum duty periods or the minimum number of crew members necessary for flights.¹⁵⁶ The absence of even a single rule related to in-flight accommodations indicates there is no absolute threat to safety. Evidently there are available alternatives that would allow for accommodations and safe flight operations to coincide. The airline industry cannot assert safety as a blanket excuse when there are options to safely accommodate breastfeeding.

render them unable to effectively assume their responsibilities, thus compromising safety. Tara Haelle, *Women Who Have to Delay Pumping Risk Painful Breast Engorgement*, NAT'L PUB. RADIO (May 26, 2016), <https://www.npr.org/sections/health-shots/2016/05/26/479288270/women-who-have-to-delay-pumping-risk-painful-breast-engorgement> (last visited Sept. 4, 2018).

¹⁵² 14 C.F.R. § 121.467(b)(1) (2018) (a flight attendant will not be scheduled for more than fourteen hours on duty for regularly scheduled flying).

¹⁵³ *Id.* § 121.467(c)(1)(iii); see also Frontier Airlines Flight Attendant Agreement 2011–2016, *supra* note 25, art. 4(B).

¹⁵⁴ *Young v. United Parcel Service*, 135 S. Ct. 1338, 1354–55 (2015).

¹⁵⁵ Despite the particularity of questions arising in the airline industry with regards to breastfeeding employees and safety concerns, the FAA has issued no authoritative regulations on the matter.

¹⁵⁶ 14 C.F.R. §§ 121.391(a), 121.467(a).

Legally, the safety defense begins to break down even further if an airline denies an accommodation to one employee but has previously accommodated other employees in similar standing (in the case of breastfeeding accommodations, presumably a non-breastfeeding, temporarily injured flight attendant or pilot). Following *Young*, if a plaintiff can show other similarly situated employees are receiving the accommodation she was denied, an inference of discrimination and pretext may arise.¹⁵⁷ Claimants against airlines could point out that pilots and flight attendants are allowed bathroom breaks while in flight,¹⁵⁸ or that most airlines offer accommodations or light duty to pilots or flight attendants for injuries or temporary disabilities unrelated to pregnancy.¹⁵⁹ Parallels can be drawn between lactating pilots who may need more breaks to express milk and older pilots who require more breaks or shorter flight plans on account of their age.¹⁶⁰

By this reasoning, breastfeeding employees could argue that although the airline's safety justification may be valid, in reality, denying accommodations to lactating employees has nothing to do with the safety excuse. If accommodations are possible for non-breastfeeding employees, then the law demands those accommodations be made available to breastfeeding employees as well.¹⁶¹ The *McDonnell Douglas* framework, as interpreted by the *Young* decision and in combination with *Houston Funding II*, demonstrates how employees can successfully sue their employers for failing to accommodate their breastfeeding needs as a pregnancy-related condition by pointing to another similarly situated employee receiving accommodations.¹⁶²

To ensure statutory compliance going forward, airlines should evaluate their current policies and ask whether they make ac-

¹⁵⁷ *Young*, 135 S. Ct. at 1354–55.

¹⁵⁸ See *Falk v. City of Glendale*, No. 12-CV-00925-JLK, 2012 WL 2390556, at *4 (D. Colo. June 25, 2012) (stating that Title VII could support lactation-related claims “if other coworkers were allowed to take breaks to use the restroom while lactating mothers were banned from pumping”).

¹⁵⁹ See, e.g., *Urbano v. Cont'l Airlines*, 138 F.3d 204, 205 (5th Cir. 1998).

¹⁶⁰ John A. Conway, *The Americans with Disabilities Act: New Challenges in Airline Hiring Practices*, 59 J. AIR & COM. 945, 975–76 (1994).

¹⁶¹ See Reasonable Break Time for Nursing Mother, 75 Fed. Reg. 80073, 80078 (Dec. 21, 2010) (“If an employer treats employees who take breaks to express breast milk differently than employees who take breaks for other personal reasons, the nursing employee may have a claim for disparate treatment under Title VII[.]”).

¹⁶² *Young*, 135 S. Ct. at 1355; *Equal Emp't Opportunity Comm'n v. Hous. Funding II, Ltd.*, 717 F.3d 425, 430 (5th Cir. 2013).

commodations for any of their employees. If so, they must ensure that those accommodations are offered to breastfeeding employees as well. Even taking the passenger safety defense into consideration, according to EEOC-issued workplace guidelines, “an employee must have the same freedom to address such lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions.”¹⁶³

3. Utilizing Other Industries as Examples

Beyond the contradictions of the safety defense, as more and more industries demonstrate that employers can both accommodate breastfeeding employees and maintain safe operations, the airlines’ “unique nature of the industry” argument begins to weaken as well. Nearly all industries face lawsuits alleging failure to accommodate employee breastfeeding needs, including some that involve equally unique concerns.¹⁶⁴ The duties of police officers, surgeons and nurses, and ambulance drivers all raise similar questions regarding whether an employer can accommodate a breastfeeding employee while maintaining the same level of safety for its employees and for the third parties they serve.

The law enforcement industry, like the airline industry, arguably has a third-party safety component to its “business”: when an officer is on duty, they are responsible for the safety of the community. Like the airline industry, law enforcement has struggled with how to accommodate breastfeeding employees while maintaining the same level of operation. For example, in the 2017 case *Hicks v. City of Tuscaloosa*,¹⁶⁵ a breastfeeding officer was unable to wear her bulletproof vest due to her condition, raising questions of safety and an employee’s right to breastfeeding accommodations. Following the reasoning set out in *Young*, the Eleventh Circuit held that by denying light-duty accommodations that would have allowed her to return to work and continue breastfeeding, the police department had violated the

¹⁶³ U.S. EQUAL EMP’T OPPORTUNITY COMM’N, NO. 915.003, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES 16 (2015), available at https://www.eeoc.gov/laws/guidance/upload/pregnancy_guidance.pdf [<https://perma.cc/XM9G-WQ6H>].

¹⁶⁴ See *Hicks v. City of Tuscaloosa*, 870 F.3d 1253 (11th Cir. 2017); *Legg v. Ulster Cty.*, 820 F.3d 67 (2d Cir. 2016); *Allen-Brown v. D.C.*, 174 F. Supp. 3d 463 (D.D.C. 2016); *Mayer v. Professional Ambulance, LLC*, 211 F. Supp. 3d 408 (D.R.I. 2016); *Fillman v. Valley Pain Specialists, P.C.*, No. 13-CV-01609, 2016 WL 192656 (E.D. Pa. 2016).

¹⁶⁵ *Hicks*, 870 F.3d at 1253.

PDA because the police department offered this accommodation to other temporarily disabled employees.¹⁶⁶ The appellate court stated that this was prima facie evidence of discrimination.¹⁶⁷ The *Hicks* court further noted that “[t]he PDA would be rendered a nullity if women were protected during a pregnancy but then could be readily terminated for breastfeeding—an important pregnancy-related ‘physiological process.’”¹⁶⁸ Though safety clearly plays a role in a police officer’s duties, the police department could not rely on safety as a defense to not providing light-duty accommodations.¹⁶⁹

The *Hicks* case is not a one-off holding either, as the law enforcement field has recently seen multiple lactation discrimination cases and courts are routinely rejecting the employer’s safety defense arguments because of the suitable, light-duty option. For example, the D.C. Circuit Court decision in *Allen-Brown v. District of Columbia* closely paralleled the Eleventh Circuit’s decision in *Hicks*.¹⁷⁰ In that case, again, a police officer returned to work after recently giving birth and was denied proper breastfeeding accommodations.¹⁷¹ The court cited *Houston Funding II*, *Young*, and *Hicks* in support of its findings that lactation is a function of pregnancy, that discrimination because of breastfeeding is actionable under the PDA, and that denying accommodations, such as light-duty, can constitute discrimination.¹⁷² Courts are clearly showing that workplace discrimination based on breastfeeding will not be accepted, even in fields like law enforcement where the nature of the job poses special concerns.

A police officer’s request for light-duty desk work assignments to accommodate her inability to work in the field is arguably quite similar to a pilot requesting ground-duty assignments

¹⁶⁶ *Id.* at 1261.

¹⁶⁷ Joanna L. Grossman, *Got Milk? Eleventh Circuit Holds Discrimination Because of Employee’s Breastfeeding is Unlawful Discrimination*, VERDICT: JUSTIA (Sept. 12, 2017), <https://verdict.justia.com/2017/09/12/got-milk-eleventh-circuit-holds-discrimination-employees-breastfeeding-unlawful-discrimination> [<https://perma.cc/MC7D-XFYQ>].

¹⁶⁸ *Hicks*, 870 F.3d at 1257.

¹⁶⁹ Andrew M. McKinley, *Eleventh Circuit: Pregnancy Discrimination Act Prohibits Discrimination Related to Breastfeeding*, NAT’L LAW REV. (Oct. 27, 2017), <https://www.natlawreview.com/article/eleventh-circuit-pregnancy-discrimination-act-prohibits-discrimination-related-to> [<https://perma.cc/TQ6V-WA6U>].

¹⁷⁰ *Allen-Brown v. District of Columbia*, 174 F. Supp. 3d 463 (D.D.C. 2016).

¹⁷¹ *Id.* at 465–66.

¹⁷² *Id.* at 478.

when she cannot fly long flight plans. If courts order police departments to grant light duty to lactating law enforcement officers, there is no excuse for an airline not to do the same for its pilots and flight attendants. Although passenger safety is a specialized and legitimate concern, the idea of safety as a general public interest consideration is not limited to the airline industry.

Hicks and *Allen-Brown* demonstrate the courts' growing receptiveness to *Young-Houston Funding II* hybrid arguments for breastfeeding accommodations, even in safety-sensitive industries. Airlines unquestionably face distinct industry related concerns, but if other industries can work around their respective unique challenges, the airline industry should be treated no differently. Airline companies who do not yet offer accommodations have a variety of solutions that have been proven workable by other airlines and other industries. Instead of trying to hold themselves out as exceptional, airline companies should consider some of the solutions already successfully enacted in comparable industries. When so many alternatives exist, there is simply no excuse for forcing lactating pilots and flight attendants to take an unpaid leave of absence if they wish to continue breastfeeding.

For instance, airlines can offer breastfeeding employees schedules with shorter flight plans so they can pump between shifts. They can offer breastfeeding pilots or flight attendants ground duties while lactating so that pump breaks could be taken as needed without implicating passenger safety. If airlines allow flight attendants and pilots in-flight bathroom breaks or breaks for other non-pregnancy related medical conditions (i.e., insulin breaks for diabetics, fatigue rest breaks for older pilots), then that airline must be prepared to offer similar accommodations to lactating employees or risk liability for discrimination. At a minimum, there must be some option available to flight attendants and pilots allowing them to return to work and to continue to breastfeed. Unpaid leave should not be their only choice.

B. FUTURE CONSIDERATIONS

In addition to taking steps to address breastfeeding employees' needs as discussed above, going forward, airline companies will also need to stay on top of developing legislation relating to breastfeeding and the workplace. The government has long encouraged breastfeeding generally, but the legislature in recent

years has begun to back this up with actual support for working mothers, such as the PPACA's amendment to the FLSA and federally mandated guidance for breastfeeding-friendly workplaces.¹⁷³ Lobbying efforts have been strong the past few years, particularly for the proposed Pregnant Workers Fairness Act (PWFA), a bill seeking to “ensure reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.”¹⁷⁴ While no affirmative federal laws currently dictate airline industry requirements for breastfeeding employees, the environment is constantly shifting, and airlines will need to pay attention.

With the list of state statutes protecting breastfeeding working mothers continuing to grow,¹⁷⁵ airlines will also need to be aware of which local statutes and rules apply to their employees, particularly since these laws can vary greatly.¹⁷⁶ Airline companies must ensure that their policies are compliant, not only with federal laws but also with any relevant state or local regulations that could apply—a collection of rules that is constantly changing.

Airlines will also need to be conscious of the space employees need to express milk. This means airlines must ensure employees have access to, knowledge of, and adequate time to get to lactation rooms with seating, electrical outlets, and privacy at each airport they may be stationed at. Offering space for lactation while in flight could also be necessary to fully accommodate

¹⁷³ U.S. OFFICE OF PERS. MGMT., GUIDE FOR ESTABLISHING A FEDERAL NURSING MOTHER'S PROGRAM (2013), available at <https://www.opm.gov/policy-data-oversight/worklife/reference-materials/nursing-mother-guide.pdf> [https://perma.cc/RG3M-PQLK].

¹⁷⁴ Pregnant Workers Fairness Act, H.R. 2417, 115th Cong. (2017). Similar to the ADA, the PWFA encompasses reasonable accommodations for the physical effects which accompany pregnancy, regardless of whether that accommodation is already made available to other employees and, like the ADA, would retain an “undue hardship” limitation.

¹⁷⁵ At the time of writing, just one month into 2018, two new states have added new protections for working, breastfeeding women. See *Massachusetts Pregnant Workers Fairness Act Takes Effect April 1, 2018*, LEXOLOGY (Jan. 23, 2018), <https://www.lexology.com/library/detail.aspx?g=e39d3efa-3c15-4899-bec2-25c7c0a2b3a1> [https://perma.cc/2YWU-ZNK4]; Nicole Leonard, *New Year Brings New Breastfeeding Civil Rights Protections to New Jersey Working Women*, PRESS OF ATLANTIC CITY (Jan. 13, 2018), http://www.pressofatlanticcity.com/news/new-year-brings-new-breastfeeding-civil-rights-protections-to-new/article_7ea7f325-e0eb-5d2fb2fa-8343fd256068.html [https://perma.cc/2UHF-3J38].

¹⁷⁶ *State Level Workplace Breastfeeding Rights*, *supra* note 100.

breastfeeding pilots and flight attendants because at times flights are delayed or schedules tightened, and this may prevent employees from accessing the airport lactation spaces. At a minimum, airlines should not punish employees for expressing milk on the plane when they need to.

Going forward, airlines also should take note of the host of data and literature available to assist employers seeking to accommodate their breastfeeding employees.¹⁷⁷ Even small changes to policies could make a world of difference to these women who currently face serious pain and discomfort from delaying pumping or are forced to pump their child's next meal in dirty airplane bathrooms between flights.

VII. CONCLUSION

Breastfeeding is a hot-button issue right now. Women have decided they want the option to both return to work and continue to breastfeed. A rush of legal developments have recently made it clear that the issue has not been adequately addressed yet and will not go away until it is. The ultimate goal for breastfeeding employees would be federal legislation securing an absolute right to breastfeeding accommodations in every workplace. Women should not have to choose between working and breastfeeding and should not be forced to work through the pain that comes with not being able to express milk. In order to fully protect working new mothers, there must be both protections against discrimination related to lactating in the workplace as well as affirmative requirements for accommodations for these breastfeeding mothers.

However, until the legislature addresses these problems by enacting universal federal protections, the airline industry should follow the example set by other industries and internally tackle this legal shortcoming. Either by way of reforms within the unions and CBA system or through universal regulation via the FAA, the airline industry should move to standardize accommodations for lactating pilots and flight attendants. Breastfeeding airline employees are beginning to demand their concerns be addressed, and airlines that fail to adequately provide accommodations to breastfeeding employees should be prepared for a potential increase in lawsuits as pregnant or breastfeeding pilots and flight attendants continue to feel alienated by their male-

¹⁷⁷ Susanha Yimyam & Wasana Hanpa, *Developing a Workplace Breastfeeding Support Model for Employed Lactating Mothers*, 30 MIDWIFERY 720 (2014).

dominated unions and as the legal recourse available to breastfeeding employees is refined and strengthened.

Airlines have shown they have the ability to do better, so now they must follow through—whether that entails accommodating breastfeeding employees in-flight or simply making alternative assignments, like shorter flight plans or ground duties, available to these women. There must be an option to enable flight attendants and pilots to return to work and breastfeed simultaneously. If not, breastfeeding will become just another chapter in gender and law textbooks' discussions of the airline industry's systemic failure to support its female employees.