

Questionable accommodations allow nursing mother's claims to advance

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Although Arizona isn't one of the many states with its own laws about lactation breaks, the Fair Labor Standards Act (FLSA) is a federal law that requires Arizona employers to abide by certain requirements if one of their nonexempt employees is lactating. For up to one year after an employee gives birth, her employer is required to provide her with reasonable break time and a suitable space any time she needs to express milk.

Although employers don't have to create a permanent lactation space, they must "provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public." Employers should be careful about how they apply the FLSA's open-ended requirements, especially in light of its sparse interpretation by courts, to avoid being held liable for lost wages, damages, and claims of retaliation.

A prelude to litigation

Carrie Clark worked as a "swing shift" paramedic for the Tucson Fire Department (TFD), meaning she wasn't assigned to a single station. Following the birth of her first child, she returned from maternity leave as a swing shift paramedic and sought a place to express milk at each of her several assigned stations. She felt that some of TFD's fire stations didn't have sufficiently private and germ-free spaces for her to express milk. In fact, she believed that the available spaces didn't comply with the FLSA's requirements for lactation spaces. Even though TFD's policies compensated nursing mothers for the break time they used to express milk, Clark felt forced to use her sick leave to avoid working at those stations she believed not to be sufficiently private enough to express milk.

In early 2013, Clark met with the Equal Opportunity Programs Division (EOPD) at TFD to discuss filing a discrimination complaint regarding the TFD's failure to provide her with an appropriate lactation space. Although she ultimately chose not to file a complaint

and took the "wait and see" approach about whether the matter would resolve itself, the EOPD investigated her concerns and determined that only nine of TFD's 21 stations were FLSA-compliant. This determination was based on the fact that the designated private spaces didn't have locks on the doors.

After the EOPD meeting, Clark was assigned to Station 6, one of TFD's slower stations, which had a recently installed lock on a private area that could serve as her lactation space. She then requested an assignment to Station 12, but her request was denied. That position had already been put up for bid and was given to someone else. When Clark asked why her request had been denied, the assistant chief told her, "Well, that's what happens when you file a complaint."

Clark ultimately sued TFD in Arizona federal court for, among other things, sex discrimination in violation of the FLSA and related retaliation for her complaints. Both TFD and Clark asked the court to enter judgment against the other.

Sex discrimination: two-star lactation accommodations?

To prevail on her FLSA-based sex discrimination claim, Clark needed to show that TFD's lactation room accommodations weren't appropriately shielded from view of, or free from intrusion by, others. To support her claim, she presented evidence of the EOPD's determination that only nine of TFD's 21 stations were FLSA-compliant, as well as her forced use of sick leave when TFD assigned her to what she believed were noncompliant stations. Additionally, she presented a series of e-mails documenting the need for, and subsequent installation of, a lock at Station 6 (where she was later assigned), and other work orders for similar changes to the remaining noncompliant stations. She was also concerned about exposure to dangerous germs in TFD's lactation accommodations.

In response, TFD argued that the EOPD's determinations of its noncompliance were not legally binding and

inappropriately focused on the lack of locks on its accommodations' doors. In fact, TFD claimed that its accommodations complied with the FLSA because it taped paper over any windows to shield the room from view and provided perfunctory handwritten signs on the door to indicate its use to avoid intrusions.

The court found the facts to be sufficiently in dispute and declined to enter judgment in either Clark's or TFD's favor. Should the case proceed to trial, both will get to present their evidence to a jury to determine if TFD's accommodations complied with the FLSA's requirements. The court noted that although Clark's concerns about germ exposure could be a factor in TFD's compliance with the FLSA, the Act doesn't entitle her to a permanent space that she previously sanitized or to an unshared private space.

Furthermore, if Clark prevails on her claims of sex discrimination under the FLSA, TFD's voluntary policy compensating nursing mothers during their break time could allow her to recover lost wages from the sick leave she used to avoid working at noncompliant stations. This type of compensation policy isn't required by the Act. Nevertheless, the court noted that TFD's choice to implement such a policy could make her sick leave recoverable as work time.

Retaliation: 'That's what happens when you file a complaint'

For Clark to prevail on her claim of retaliation under the FLSA, she must show that:

- She was engaged in a protected activity;
- Her employer subjected her to an adverse employment action; and
- There was a causal link between the two.

TFD could avoid liability by showing that it would have reached the same conclusion even if discrimination had not played a factor in its decision. Clark would then need to show that TFD's reason was merely a pretext (cover-up) for its discriminatory motive.

Despite placing another nursing mother at Station 12, TFD defended its decision to deny Clark's requested assignment to Station 12 because it didn't have a lockable space where she could express milk, as recommended by the EOPD's findings. Additionally, it was concerned that her frequent need to express milk would interfere with her ability to respond to emergencies. With this concern in mind, it placed her at Station 6, which was slower and would allow her to express milk more frequently, with another medic

available to provide additional coverage should she need to express milk during an emergency call.

The court again refused to enter judgment for either side, noting that the facts were in dispute. The assistant chief's statement alone indicates that Clark's assignment at Station 6 was more likely than not in retaliation for her meeting with the EOPD. However, TFD defended its assignment by arguing that the EOPD meeting may not have been a protected action but simply an attempt to get a more convenient assignment—Station 12 was closer to Clark's mother's house, and her mother picked up her expressed milk.

Nevertheless, Clark adequately showed that this reason could be pretextual. Her status as a nursing mother was a substantial factor in TFD's decision to maintain her assignment to Station 6, especially when TFD could have simply installed a lock at Station 12 instead, where another nursing mother was already assigned.

Practical tips

For all of Clark's claims, the court refused to enter a judgment in either side's favor. Barring settlement, the case will be decided by a jury. Nevertheless, Arizona employers can still learn some important lessons from the issues in her case.

You should take care when changing an employee's assignment, hours, or other terms or conditions of employment after she engages in protected activity. TFD admitted that it placed Clark at a slower station because she was expressing milk. When actions such as this are taken, an employee could seek additional recovery for lost opportunities due to a potential for less experience gained or reduced subsequent employment education or promotion, although the court did not consider this particular issue in Clark's case.

The U.S. Department of Labor (DOL) has supplied some additional guidance concerning the bare minimum requirements of a lactation space for covered employers (i.e., over 50 employees) that do not create a permanent, separate, lockable lactation space. This space can be temporary, shared with other smaller businesses, or multi-purpose (so long as it is available whenever a nursing mother needs to express milk and satisfies the aforementioned requirements). Despite the privacy that bathrooms and locker rooms can provide, they cannot serve as lactation spaces because of health and sanitation concerns unless they have a separate space that satisfies the privacy requirements. Each space must have enough room for the nursing mother to sit and a flat surface to place the pump on other than the floor.

You should take heed of the DOL's guidance and create a policy for expressing milk and requesting an accommodation. Prior to a request, it's advisable that you have in place a procedure for designating a compliant space. You should at least create a space with partitions or curtains that is shielded from view, covering any windows. The space must protect the employee's privacy from intrusions, either by using signs that designate when it is in use or with a lock on the door. Speaking from personal experience, a lock is advisable (if possible) as colleagues don't always take heed of a posted "do not disturb" sign.

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