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Via Electronic Mail

GALEN SHERWIN
Senior Staff Attorney
T/212.519.7819
F/212.549.2580
gsherwin@aclu.org

Brian D. Pedrow, Esq.
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Pedrow@ballardspahr.com

**AMERICAN CIVIL LIBERTIES
UNION FOUNDATION**
WOMEN'S RIGHTS PROJECT
NATIONAL OFFICE
125 BROAD STREET, 18th FL.
NEW YORK, NY 10004-2400
T/212.549.2644
F/212.549.2580
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Dear Mr. Pedrow:

I write to follow up on our conversation and to communicate a formal demand on behalf of our client, Dr. Meghan McInerney, on your client, the American Board of Internal Medicine ("ABIM").

As you know, Dr. McInerney originally requested an additional 30 minutes of break time to allow her an opportunity to express breast milk during the course of her upcoming Internal Medicine Board Certification exam this November. The request is reasonable and is based on sound medical evidence that demonstrates the benefit of breast feeding not only for her baby, but for her. We believe ABIM has a legal obligation to accommodate the request. While this letter is not intended to be an exhaustive recitation of either the facts or the law, we have attempted to include enough information to allow ABIM to assess the merits of Dr. McInerney's claims.

Given the timing of the upcoming examination, we would request that ABIM respond to this request within seven days of the date of this letter. We hope that ABIM uses this opportunity not only to address Dr. McInerney's request, but to establish a policy that gives meaning to the weight of medical authority supporting breast feeding. However, if we are unable to obtain ABIM's commitment to an appropriate accommodation, we are prepared to pursue all available remedies.

I. Factual Background

Dr. McInerney is currently in her third year of a fellowship at Indiana University in the pulmonary, allergy, critical care and occupational medicine department. She has an eight-month-old baby boy.

As a pulmonary and critical care specialist, Dr. McInerney is registered to take the first of two required medical licensing boards administered by ABIM in pulmonary and critical care medicine this November in Indianapolis. The examination is offered only once a year, and all pulmonary and critical care fellows in the country take it on the same date. It costs \$2,200. The examinations

for her specialty are administered sequentially; the pulmonology board examination is a prerequisite for being able to sit for the second test in critical care the following year, and passing both tests is effectively a prerequisite for being hired in her chosen field.

The medical boards are well-known as long and grueling, and preparation for them is time-consuming and expensive. Dr. McInerney recently attended a four-and-a-half day prep session in Florida that cost \$750 (plus flights and room and board) that included 10-11 hours of instruction per day. This November's examination consists of a 30-minute introductory session, followed by four two-hour sections, administered online at a testing facility. Examinees are granted a total of 100 minutes of break time, which can be allocated between the test sections in a manner selected by the examinee. During breaks, examinees sign out and leave the testing room and go to a room with chairs and lockers where they have stored their personal belongings.

After Dr. McInerney registered for the test, she contacted ABIM on July 21 through the accommodations form on the organization's website. She explained that she was nursing and requested information on what type of accommodations might be available for her. ABIM's first response was that "[t]here is no accommodation available [to] breast feed or to pump breast milk during the exam." ABIM's response also suggested that she "divide the 100 allotted minutes in any manner you wish over the course of your three scheduled breaks. . . ." She was further advised that "[t]est centers are not usually equipped with a lactation room or anything similar," and advised to contact the test center directly to find out where she could pump.

Following Dr. McInerney's response, her request was escalated to Dwan King Bovell, ABIM's director of testing. In her email to Dr. McInerney, Ms. Bovell explained that ABIM's policy only granted accommodations to ADA-eligible disabilities, and further explained that "[w]hile a request for additional break time during an initial certification examination may seem like a minor change, please note that it would extend the required test center time beyond what can be accommodated in a single day. Adding just 15 minutes extra break time to each test session requires a customized two day testing schedule." Ms. Bovell further recommended a proposed schedule for pumping that had been used by "other women in your situation."

Dr. McInerney estimates that she will need to pump twice during the course of the eight-hour test; she is currently pumping at work, and that approximates her current schedule. Her baby is still nursing approximately every three to four hours, and she anticipates that he will continue doing so at least through the end of this year, when he turns one. Because Dr. McInerney has had difficulties maintaining her milk supply, she tries to maintain as regular a schedule as she is able to given her demanding schedule. It takes her 20-25 minutes to pump an amount sufficient to meet the baby's needs.

Dr. McInerney does not seek additional time for the examination; rather, she seeks the additional break time in between the testing periods to enable her to express breast milk, which is a medical necessity for her. During the time she is expressing milk, she will be unable to conduct any of the other activities to which the break period is typically dedicated, such as eating, resting, stretching, and conducting additional studying. Without the additional requested time, her medical necessity of expressing breast milk will reduce by 30-50 minutes the time she has available for these activities, putting her at a significant disadvantage compared to other test-takers. She therefore seeks the additional break time so that she will be able to enjoy the same benefits of the break period as other applicants who do not have medical or physiological needs to attend to. Furthermore, her request for 30 additional minutes of break time is a conservative estimate of the amount of time she

requires to get to and from wherever she will be pumping and to set up, pump, and break down and clean her equipment one time, and she is prepared to forego one of her regularly scheduled pumping sessions in order to have sufficient remaining break time available to her for other activities.

There is a strong public policy in favor of accommodating the needs of nursing mothers – much of which is founded on the recommendations advanced by the medical community and based on scientific evidence demonstrating the benefits of nursing. The American Academy of Pediatrics’ most recently issued guidelines state, “The AAP recommends exclusive breastfeeding for about 6 months, with continuation of breastfeeding for 1 year or longer as mutually desired by mother and infant, a recommendation concurred to by the WHO and the Institute of Medicine.”¹ There is no shortage of additional medical literature supporting Dr. McInerney’s position that breastfeeding is beneficial to her baby, or to her. *See, e.g.,* Alison Steube, *The Risks of Not Breastfeeding for Mothers and Infants*, 2 Rev. Obstetrics & Gynecology 222 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2812877/> (“For mothers, failure to breastfeed is associated with an increased incidence of premenopausal breast cancer, ovarian cancer, retained gestational weight gain, type 2 diabetes, myocardial infarction, and the metabolic syndrome.”)

The consequences of prolonged delay in expressing breast milk are also well established and not reasonably disputed. In addition to more serious problems such as mastitis, plugged mammary ducts, and infection, engorgement is painful and distracting. “To continue producing an adequate milk supply and to avoid painful complications associated with delays in expressing milk, a nursing mother will typically need to breastfeed or express breast milk using a pump two or three times over the duration of an eight-hour workday.” *See* U.S. Dep’t of Health & Hum. Services, *Breastfeeding* (available at <http://www.womenshealth.gov/breastfeeding/going-back-to-work/>); U.S. Dep’t of Labor, Wage and Hour Division, *Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073, 80075 (Dec. 21, 2010) (“The Department expects that nursing mothers typically will need breaks to express milk two to three times during an eight hour shift.”).

Finally, our initial investigation indicates that other medical board certifying organizations make the accommodations sought here. We have been told by the American Board of Pediatrics, for example, that it grants examinees additional break time for nursing upon request.

II. Legal Analysis

Dr. McInerney’s request is supported by settled legal authority, as well as recent case law expanding the rights of nursing mothers.

Dr. McInerney’s right to breastfeed and to express milk during the period covered by the examination is protected by State² and federal civil rights law, including Indiana’s public accommodations law. The Indiana Civil Rights Act provides in relevant part:

It is the public policy of the state to provide all of its citizens equal opportunity for education, employment, access to public conveniences and accommodations, and acquisition through purchase or rental of real property, including but not limited to

¹ *See* Am. Academy of Pediatrics, Section on Breastfeeding, *Breastfeeding and the Use of Human Milk*, 129 Pediatrics e827 (2012), available at <http://pediatrics.aappublications.org/content/129/3/e827.full.pdf+html>.

² *See* Ind. Code Ann. § 16-35-6-1 (“Right to breastfeed. Notwithstanding any other law, a woman may breastfeed her child anywhere the woman has a right to be.”)

housing, and to eliminate segregation or separation based solely on race, religion, color, **sex**, disability, national origin, or ancestry, since such segregation is an impediment to equal opportunity. Equal education and employment opportunities and equal access to and use of public accommodations and equal opportunity for acquisition of real property are hereby declared to be civil rights [and] [t]he practice of denying these rights to properly qualified persons by reason of the race, religion, color, **sex**, disability, national origin, or ancestry of such person is contrary to the principles of freedom and equality of opportunity and is a burden to the objectives of the public policy of this state and shall be considered as discriminatory practices.

Ind. Code Ann. § 22-9-1-2.

Public accommodation is defined simply and broadly as “any establishment that caters or offers its services or facilities or goods to the general public.” Ind. Code Ann. § 22-9-1-2(m). Indiana law has been broadly interpreted to include a variety of settings, and no case has excluded the type of testing facilities at issue here.

Dr. McInerney’s position is supported by a recent case analogous to the facts here. In *Currier v. National Bd. Of Med. Examiners*, 965 N.E. 2d 829 (MA 2012), the Massachusetts Supreme Judicial Court ruled that National Board of Medical Examiners (“NBME”) violated a nursing mother’s right to express milk under an analogous public accommodations law. The plaintiff in that case, Dr. Sophie Currier, requested an additional 60 minutes of break time during her examination. In upholding Dr. Currier’s claim, the court held, “Our decision in the context of the equal rights act and public accommodation statute counts, that lactation is a sex-linked classification, recognizes that there remain barriers that prevent new mothers from being able to breastfeed or express breast milk. We take this opportunity to extend protection to lactating mothers in the context of lengthy testing required for medical licensure.”

During our telephone call, you acknowledged that ABIM’s current policy³ would permit ADA-qualified individuals to request accommodations related to the examination – including, in certain circumstances, providing additional break time that may require the extension of the overall test time, including a two-day test format. Indeed, ABIM would be legally required to honor any such request that was properly documented.⁴ As the court held in *Currier*, offering accommodations to individuals with disabilities under the ADA but not to lactating women constitutes sex discrimination under applicable public accommodation law. *See id.* at 840, 842. The Equal Employment Opportunity Commission (“EEOC”) recently issued new guidance on Pregnancy Discrimination adopting this analysis in the employment context. *See EEOC, Enforcement Guidance, Pregnancy Discrimination and Related Issues* (Jul. 14, 2014),

³ ABIM is subject to a provision of the ADA requiring it to offer necessary accommodations to ADA eligible individuals during certification for the professions. *See* 42 U.S.C.A. § 12189; 34 C.F.R. § 36.309(b)(3).

⁴ *See* 24 C.F.R. pt. 36, App. A (explicating regulations published under ADAAA on Sept. 15, 2010). The United States Department of Justice, which has authority to issue regulations specifically pertaining to examinations and courses used in admissions, has specified, for example, that when a student with a learning disability documented through an Individualized Education Plan seeks “extra time and a quiet room for testing,” “a testing entity receiving such documentation should clearly grant the request for accommodations.” *Id.* The Department has specified that requests for accommodation upon appropriate documentation of need from a “qualified professional who has made an individualized assessment of the applicant” should be granted “without further inquiry.” *Id.*

http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#person and
http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#lact.⁵

Dr. McInerney may also advance claims under the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.*, which prohibits discrimination in employment. As we discussed during our call, Dr. McInerney does not contend that ABIM is her direct employer. However, individuals do not need to be employees of a direct employer to benefit from the broad antidiscrimination protections of Title VII. It is well-settled that Title VII covers organizations “interfering with an individual’s employment opportunities with another employer.” *Sibley Mem’l Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973). The *Sibley* court recognized that to give effect to the purposes of Title VII, Congress intended the Act to apply not only in a direct employment relationship, but in cases involving “interference with the direct employment relationship by labor unions and employment agencies-institutions which have not a remote but a highly visible nexus with the creation and continuance of direct employment relationships between third parties.” *Id.* at 1342.

The reasoning of *Sibley* has been adopted by District and Circuit courts around the country. *See, e.g., Burns v. Terre Haute Reg’l Hosp.*, 581 F. Supp. 1301, 1303 (S.D. Ind. 1983). It was first adopted by the Seventh Circuit nearly 30 years ago in *Doe on Behalf of Doe v. St. Joseph’s Hosp. of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986). Notably, one district court in the Seventh Circuit has already held that a medical licensing board could be held liable under Title VII under this theory. *See Morrison v. Am. Bd. of Psychiatry & Neurology, Inc.*, 908 F. Supp. 582, 587 (N.D. Ill. 1996).⁶

The EEOC has recently increased its enforcement of discriminatory practices affecting nursing mothers. In July, it issued new regulations protecting lactating women, and has actively pursued cases on the subject. *See EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 428–30 (5th Cir. 2013). Moreover, courts have recognized that discrimination on the basis of lactation is prohibited under Title VII. *See id.*; *see also Martin v. Cannon Bus. Solutions, Inc.*, No 11-cv-02565, 2013 WL 4838913, at *8, n.4 (D. Colo. Sept. 10, 2013) (holding that discrimination on the basis of lactation is prohibited under Title VII); *E.E.O.C. v. Vamco Sheet Metals, Inc.*, 2014 WL 2619812 (S.D.N.Y. June 5, 2014) (*citing Houston Funding II* and noting “[w]here a plaintiff’s claim focuses on adverse

⁵ Women affected by pregnancy-related conditions including lactation must be treated the same as other individuals affected by temporary disabilities in the education context as well. *See* 34 C.F.R. § 106.21(c)(3) (requiring that “[i]n determining whether a person satisfies any policy or criterion for admission... [recipients] shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition”). *Cf. also* 34 C.F.R. § 106.21(b)(2) (prohibiting the use of admissions tests or criteria that have “a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable”).

⁶ The Seventh Circuit has subsequently held that this theory is not available to Title VII plaintiffs seeking to hold independent contractors liable. *See Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487 (7th Cir. 1996). However, the *Alexander* court made clear that its holding was limited to that set of facts, and expressly reserved the question of “whether an employee of employer X may bring a Title VII action against employer Y when Y is not his employer, but merely someone whose discriminatory conduct interferes with his employment with employer X.” *Id.* at 493 n.2.

employment actions or conditions relating to her lactation breaks, as opposed to an alleged failure to accommodate a disability, an employer may be liable under Title VII.”).

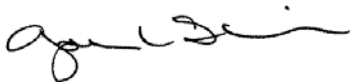
III. Conclusion

As we discussed, ABIM’s position appears to be that the time Dr. McInerney spends expressing breast milk is the functional equivalent of the time other examinees spend at their leisure – whether eating or using the time to unwind or gear up, physically and mentally, for the exam. That is not the case. Similarly, ABIM’s position that “other women have managed” under the current time restraints is a familiar trope that seeks to justify an outmoded perspective with the “authority” of its own history of inequality. That ABIM has refused thus far to accommodate Dr. McInerney’s request is especially troubling in light of the fact that it is part of the very community of medical practitioners encouraging new mothers to breastfeed their babies.

ABIM’s refusal to acknowledge that a woman who is nursing has additional physical demands that require additional break time puts her at a significant disadvantage compared to other examinees. These are genuine obstacles to employment in a traditionally male-dominated field, and one the ACLU takes seriously.

If I can be of further assistance in explaining this demand, or our position, please do not hesitate to call me at your earliest convenience. We look forward to your response by September 23, 2014.

Sincerely,



Galen L. Sherwin
Senior Staff Attorney, ACLU Women’s Rights Project



Christian Schreiber
CHAVEZ & GERTLER LLP