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# Verdict

March 20, 2012

[Joanna L. Grossman](#)

## The Controversy Over Public Breastfeeding: Breast May Be Best, but Objectors Say Not in My Backyard (or Airplane)



Mothers today are reminded again and again that “breast is best.” Indeed, they are encouraged, cajoled, and even shamed into moving heaven and earth to make sure that they are able to nurse their babies for at least the first few months of life, if not for a full year. But the practicalities of such a commitment to breastfeeding do not always mesh with the other demands on women’s lives.

For many women, the logistics of nursing after returning to work can be quite challenging. As I explained in [a recent column \(http://verdict.justia.com/2012/02/21/a-federal-judge-thwarts-title-vii-and-the-pregnancy-discrimination-act-by-ruling-bizarrely-that-lactation-is-not-related-to-pregnancy\)](http://verdict.justia.com/2012/02/21/a-federal-judge-thwarts-title-vii-and-the-pregnancy-discrimination-act-by-ruling-bizarrely-that-lactation-is-not-related-to-pregnancy), a federal district court in Texas upheld the right of an employer to fire a woman because she planned to continue breastfeeding after returning to work. The court ruled that this was neither sex discrimination, nor pregnancy discrimination. Federal law is quite weak when it comes to protection against lactation discrimination, and even weaker when it comes to requiring employers to accommodate nursing mothers who need space and/or regularly scheduled breaks in order to pump breast milk.

Moreover, working women are not the only victims of a society that claims to promote breastfeeding, but nonetheless inhibits it in many ways. Exclusive breastfeeding can also be challenging for women who simply seek to leave the privacy of their own homes on occasion. Women who breastfeed in public routinely confront disapproving stares and are sometimes chided by strangers. Even worse, they may be kicked out of stores, restaurants, airplanes, and even courtrooms if they try to breastfeed in those places.

In 2006, for example, a woman from New Mexico was ejected from a Delta Connections flight (not, fortunately, while it was in midair) after she refused the request of an offended flight attendant to cover her nursing baby with an airplane blanket. She filed a lawsuit against Delta and two other carriers who were together responsible for the flight. As part of a confidential settlement reached this month, each carrier agreed to pay damages; two of them agreed also to pay \$20,000 to the state agency that brought the original claim.

In this column, I’ll discuss the woman’s claim, as well as the patchwork of state laws that are designed to protect a woman’s right to breastfeed in public and the grassroots movement to protect the right to breastfeed in public.

## The Law of Public Breastfeeding: Indecent Exposure?

Who decides whether a woman can breastfeed her child in “public”? Depending on the location she chooses, there are two kinds of laws that may come into play: indecent exposure laws and public accommodations laws. Let’s consider indecent exposure laws first.

In parks, beaches, and public squares and streets, a woman’s right to nurse a child may be limited by a public nudity or indecent exposure law that may prohibit exposure of a woman’s breast.

Every state has some kind of restriction on public nudity, but many of these statutes are not as broad as one might think. The emphasis in these statutes, generally speaking, is not nudity per se, but lewdness—that is, an exposure of the naked body designed to exhibit or provoke a sexual response, or to sexually intimidate onlookers.

Is the exposure of the female breast lewd? In many states, the indecent exposure laws do not apply to the female breast at all, although municipalities within a state may have their own restrictions.

In other states, however, the indecent exposure laws explicitly include the female breast in their definition of those “private parts” that cannot be exposed in public. New York is one such state, prohibiting exposure in public of “that portion of the breast which is below the top of the areola.” Although the New York law quite explicitly makes it a crime to expose a female breast in public, the state’s highest court ruled, somewhat curiously, that the law does not ban all female toplessness in public.

In the New York decision, *People v. Santorelli* ([http://scholar.google.com/scholar\\_case?case=7027949864924075479](http://scholar.google.com/scholar_case?case=7027949864924075479)) (1992), four women went topless in a public park in Rochester in order to protest what they perceived as a discriminatory law—one that allowed men, but not women, to go topless in public. When their case was decided, the New York court dodged the constitutional question as to whether such a sex-based classification could survive heightened scrutiny under either the state or federal constitutional guarantees of equal protection. Instead, the New York court ruled that the indecent exposure law should not be applied when the women’s toplessness was neither commercial, nor lewd.

Women thus have the right in New York to be shirt-free, although, despite the holding, female toplessness does not seem to have taken off here in New York or anywhere else in the United States, outside of adult entertainment establishments. Even topless sunbathing is quite unusual outside of a few designated nude beaches that are scattered around the country.

What if the four women, instead of staging a protest for women’s rights, had been exposing their breasts while breastfeeding in that Rochester public park? The New York law would clearly protect their right to do so, even if the law were applied as written to generally prohibit female toplessness. Under the statute, the prohibition does not apply if the female breast is exposed for purposes of breastfeeding infants or “entertaining or performing in a play, exhibition, show or entertainment.” This law exempts women from criminal prosecution for any exposure of the breast that may result from breastfeeding.

Many other states have similar breastfeeding exceptions to their indecent exposure laws. Washington State, for example, provides that neither breastfeeding nor pumping milk constitutes “indecent exposure.” Illinois law states that breastfeeding an infant is not an act of “public indecency.” Louisiana makes clear that breastfeeding is not “obscene.” Montana adds that breastfeeding is neither “sexual conduct,” nor a “nuisance.” Rhode Island says it is not “disorderly conduct.”

### Breastfeeding in Stores, in Restaurants, and on Airplanes

Many of the breastfeeding confrontations that have made the news involve private establishments like stores and restaurants, rather than public parks or beaches (or post offices, for that matter). What rights, if any, do women have to breastfeed in these places?

As a general matter, proprietors of private businesses have the right to set their own rules for customer behavior, as well as the right to exclude customers for noncompliance with the rules they choose to set. The primary limit

on this right comes from public accommodations laws, which prevent businesses from exercising this right to control or exclude would-be patrons in a discriminatory fashion.

The federal public accommodations law addresses only race discrimination and prevents restaurants, for example, from maintaining a “whites only” policy or from segregating customers by race. Many states, however, have enacted their own public accommodations laws that address not only race discrimination, but also, depending on the state, a host of other forms of discrimination. Many such laws ban sex discrimination; some ban sexual orientation and/or gender identity discrimination.

Most states now also have a provision in their public accommodations law or elsewhere that explicitly allows women to breastfeed in public or private places. (The National Conference of State Legislatures provides a handy state-by-state rundown of laws relevant to breastfeeding [here \(http://www.ncsl.org/issues-research/health/breastfeeding-state-laws.aspx\)](http://www.ncsl.org/issues-research/health/breastfeeding-state-laws.aspx).) The vast majority of these provisions were adopted in the last ten to fifteen years.

The public breastfeeding laws have minor variations. Some are tied explicitly to the public accommodations law, and thus may vary in scope based on different definitions of a “public accommodation.”

Others are independent provisions that apply only to breastfeeding. California’s law, for example, protects a woman’s right to breastfeed in any location other than someone else’s house. Illinois provides an unfettered right to breastfeed in public unless the mother is in a “house of worship,” where she is expected to “follow the appropriate norms within that place of worship.” Virginia only protects breastfeeding on property owned by the state.

Most public breastfeeding statutes, however, simply grant a mother the right to breastfeed in any location in which she is authorized to be. A few states allow breastfeeding anywhere, but require that it be done discreetly, which seems to be understood as requiring that something be used to cover the baby and breast. Mothers in Missouri must exercise “as much discretion as possible,” when nursing in public or private locations. The Minnesota provision, in contrast, states that a mother may breastfeed in a place of public accommodation “irrespective of whether the nipple of the mother’s breast is uncovered during or incidental to breastfeeding.”

Although there is no federal law protecting against sex discrimination in public accommodations, Congress has addressed the issue of public breastfeeding. A 1999 amendment to a postal appropriations bill provides that “a woman may breastfeed her child at any location in a Federal building or on Federal property, if the woman and her child are otherwise authorized to be present at the location.” This makes courthouses, government buildings, and national parks and forests all safe places for public breastfeeding.

In states with no public breastfeeding law, nursing mothers are generally subject to the whims of private business owners. In one case, *DeRungs v. Wal-Mart* (<http://law.justia.com/cases/federal/appellate-courts/F3/374/428/505902/>) (2004), a federal appellate court ruled that Ohio’s public accommodations law does not prohibit pregnancy discrimination, and that breastfeeding discrimination is not a form of unlawful sex discrimination—leaving the plaintiff with no recourse.

In that case, a woman shopping at Wal-Mart attempted to nurse her son while sitting on a bench outside a dressing room. She was told by an employee that she could either feed him inside the bathroom or leave the store. Other plaintiffs in the case had had similar experiences at Wal-Mart stores. But Wal-Mart won—at least temporarily. The Ohio legislature amended its code the following year to provide, in section 3781.55, that “a mother is entitled to breast-feed her baby in any location of a place of public accommodation wherein the mother is otherwise permitted.”

### ***Gillette v. Delta Air Lines: Legal Protection for Breastfeeding Mothers***

When Emily Gillette was forced off one of Delta’s airplanes for refusing to cover her baby’s head with a blanket while she was breastfeeding, the plane was at the gate in Burlington, Vermont. Gillette was sitting near the rear of the plane with her family. The nursing infant’s head was facing the aisle, leaving little or none of her breast

exposed to any passers-by. But a flight attendant who claimed to be offended gave Gillette a blanket and insisted that she use it to cover the baby's head. When Gillette refused, she was forced off the plane.

The surprising part of this incident is that Vermont very clearly protects a woman's right to breast feed in public. Vermont's Fair Housing and Public Accommodations Act (9 V.S.A. sec. 4502j) provides: "Notwithstanding any other provision of law, a mother may breastfeed her child in any place of public accommodation in which the mother and child would otherwise have a legal right to be."

This provision was added to the public accommodations law in 2001, pursuant to the state legislature's findings that "breastfeeding a child is an important, basic and natural act of nurture that should be encouraged in the interest of enhancing maternal, child and family health." Another case before the Vermont HRC made clear that this provision does not require that breastfeeding mothers cover themselves or their babies when nursing in a place of public accommodation.

After the incident, Gillette filed a complaint with the Vermont Human Rights Commission, the state agency charged with implementing the state's civil rights laws. The **agency found** ([http://hrc.vermont.gov/sites/hrc/files/pdfs/rg%20cases/Gillette v Delta Airlines Freedom Airlines.pdf](http://hrc.vermont.gov/sites/hrc/files/pdfs/rg%20cases/Gillette_v_Delta_Airlines_Freedom_Airlines.pdf)) "reasonable grounds" to believe that two smaller airlines (Freedom and Mesa Air) that had operated the Delta Connections flight had discriminated against Gillette under the provision quoted above.

It also noted that none of the airlines handled the problem well afterwards. In the commissioners' view, the "matter might have been easily been resolved with clear and responsive communication with Ms. Gillette, public apologies, additional compensation for the embarrassment and inconvenience to the Gillettes, and conciliatory discussions about the possibility of establishing written policies and training for [employees] regarding breastfeeding on [future] flights." But none of this was done.

As to Delta, the commissioners ruled 3-2 that Delta was not responsible for the smaller airlines' actions because they were independent contractors. There were thus no reasonable grounds for believing that Delta violated Vermont's breastfeeding discrimination law.

Gillette then filed a lawsuit in federal court (the natural next step for a plaintiff to take, after exhausting administrative-agency remedies in a civil rights case). The suit was delayed several times, as the smaller airlines filed for bankruptcy. Meanwhile, Gillette gave birth to two more children (and breastfed them both). The settlement announced last week marks the resolution of the federal court lawsuit.

### **Challenging Conventional Norms about Public Breastfeeding**

Despite the widespread adoption of laws to protect public breastfeeding, there continue to be a surprising number of incidents in which breastfeeding mothers are asked to cover up, or even to leave public places or private business establishments.

In one recent situation, a Michigan mother was loudly chided for discreetly nursing her five-month-old baby in the back of a courtroom, where she was waiting to make an appearance regarding a ticket she had received for allegedly operating a boat without first completing a water safety class. The Michigan mother had brought her son with her because he was sick and, right before she began nursing, he had become hungry. The bailiff slipped the judge a note to the effect that "there is a woman breastfeeding in court." The judge then called the woman up to the front of the courtroom and asked her if she thought it was "appropriate" to breastfeed in court. Her response, according to her blog post about the incident, was that "Considering the fact that my son is hungry, and he's sick, and the fact that it's not illegal, I don't find it inappropriate." The judge, however, disagreed. She recalls that he said "something to the effect of 'It's my court, it's my decision, and I do find it inappropriate.'" Michigan is one of the few states with no law protecting public breastfeeding beyond an exemption from the criminal public nudity law.

Although this exchange involved only a few sentences, it became a national news story. So did the stories involving several women who were asked by different stores or government officials to breastfeed while sitting

on a toilet in a public restroom, rather than where they could be seen by other customers or patrons.

These incidents are often greeted with shock and outrage. As breastfeeding has become more popular in recent decades, a sort of grassroots movement has grown up around a woman's right to breastfeed. It is this movement that drove the adoption of 40-plus state public breastfeeding laws in just over a decade. But the legal protections are insufficient if people are unaware of the law and routinely violate it. Thus, the public and social responses to public breastfeeding confrontations can be important for raising awareness of the law and changing attitudes about public breastfeeding.

Emily Gillette's incident with Delta Air Lines, for example, provoked not only litigation in federal court, but also, and perhaps more powerfully, a national "nurse-in"—a form of protest that is now a common response by lactation activists when women are ejected from public places due simply to breastfeeding. In a "nurse-in," breastfeeding mothers converge en masse at a particular business or location to protest the lack of support for public breastfeeding. The nurse-in that followed Gillette's exclusion was staged at Delta ticket counters at 30 airports across the country. Similar nurse-ins have been staged at Starbucks (the site of more than one contested breastfeeding incident), at Wal-Mart, at Facebook headquarters (after the company was accused of removing photos that showed breastfeeding), and at Whole Foods,

According to an [article on Time.com \(http://healthland.time.com/2011/12/29/target-nurse-in-did-it-change-perceptions-of-public-breast-feeding/\)](http://healthland.time.com/2011/12/29/target-nurse-in-did-it-change-perceptions-of-public-breast-feeding/), a nurse-in was held in December 2011 at 250 Target stores, to protest an incident in which a woman who was nursing her baby while sitting on the floor of the women's clothing department was asked repeatedly to move to a fitting room. Target issued a statement that female guests are welcome to "breastfeed in public areas," as well as to breastfeed in a fitting room "even if others are waiting to use the fitting rooms."

An event to raise awareness about public breastfeeding rights is planned for this summer on the National Mall in Washington, D.C. The event—to be called either the "Great Nurse-In" or the "Million Boob March"—will take place in August during World Breastfeeding Week. (Details are available [here \(http://www.huffingtonpost.com/2012/01/26/great-nurse-in\\_n\\_1229137.html\)](http://www.huffingtonpost.com/2012/01/26/great-nurse-in_n_1229137.html).)

Social media sites like Facebook and Twitter have made it vastly easier to share news of an incident in which public breastfeeding was interrupted, criticized, or penalized, and to organize a widespread, grassroots response. Thanks to such sites, protesters now have a greater potential than in the past to bring attention to the issue, as well as to change public perceptions and store policies. But part of the attention should also be on the laws that are already in place to protect a woman's right to breastfeed in public. If those laws were respected and enforced, many if not all of these incidents could be avoided.



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