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EMPLOYMENT DISCRIMINATION, BREASTFEEDING, AND HEALTH JUSTICE

RUQAIJAH YEARBY*

ABSTRACT

*Breastfeeding has been shown to lead to healthier mothers and infants. In fact, one study found that for every 1000 infants not breastfed there were 2,033 extra doctor visits, 212 hospitalization days and 609 prescriptions, costing an additional \$331–475 per infant during the first year of life.¹ Research has also shown that a breastfeeding mother recovers faster from childbirth and reports lower stress levels compared to mothers that do not breastfeed.² However, as Professor Andrea Freeman's book, *Skimmed: Breastfeeding, Race, and Injustice*, details, marketing and governmental programs have undermined breastfeeding in the Black*

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1. Thomas M. Ball & Anne L. Wright, *Health Care Costs of Formula-Feeding in the First Year of Life*. 103 PEDIATRICS 870, 870 (1999).

2. STANLEY IP ET AL. & TUFTS-NEW ENG. MED. CTR. EVIDENCE-BASED PRAC. CTR., BREASTFEEDING AND MATERNAL AND INFANT HEALTH OUTCOMES IN DEVELOPED COUNTRIES 6-7 (Evidence Reps. Tech. Assessments No. 153, Apr. 2007).

community((pp. 59–85). These actions are further exacerbated by the failure of the government (federal and state) to provide protection from employment discrimination for breastfeeding women after pregnancy (pp. 130–32). Although employment discrimination impacts women of all races and ethnicities, like Freeman’s book, this essay focuses exclusively on the experiences of Black women, as an illustrative example of the barriers all women experience when trying to breastfeed their children after returning to work. This essay broadly reviews employment discrimination laws pertaining to pregnancy, gaps in the scope and application of these laws, and the influence of these laws on Black women’s ability to breastfeed. The essay concludes with law and policy solutions, based on the health justice framework, to address these problems.

INTRODUCTION

Historically, Black women have been relegated to working in fields, cleaning houses, and watching children, which enabled White men and women to earn income and build wealth.³ Because of state-sanctioned racial discrimination that prevented Black women from obtaining jobs outside of domestic service, “white, working-class women increasingly found jobs in the expanding industrial sector, [while] domestic service became synonymous with Black women.”⁴ As a result, “[b]etween 1930 and 1940, the percentage of White women employed as domestics declined from thirty-seven to eleven percent, while the percentage of employed Black women in domestic service roughly remained constant, at slightly more than fifty percent,” allowing White men and women to work outside the home

3. Nina Banks, *Black Women’s Labor Market History Reveals Deep-Seated Race and Gender Discrimination*, *Working Economics Blog*, ECON. POL’Y INST. (Feb. 19, 2019), <https://www.epi.org/blog/black-womens-labor-market-history-reveals-deep-seated-race-and-gender-discrimination/> (citing TERESA AMOTT AND JULIE MATTHAEL, *RACE, GENDER, AND WORK: A MULTICULTURAL ECONOMIC HISTORY OF WOMEN IN THE U.S.* (1996) and JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* (1985)).

4. Peggie R. Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 IOWA L. REV. 1835, 1857 (2007).

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in higher paying jobs.⁵ Stuck in domestic service jobs, many Black women did not have the opportunity to breastfeed.

As Professor Freeman states, this made the racially-targeted formula marketing in the 1940s and 1950s even more effective.⁶ Thus, the false marketing campaigns that formula has a high nutritional value, not only relieved Black mothers' guilt, but also allowed them to work to support their families (p. 65). Today, these structural inequities in employment persist, as Black women remain disproportionately employed in low-wage occupations, such as childcare, nursing, cleaning, waitressing, and teaching.⁷

Based on a 2007 Center for American Progress report, “nearly half—43 percent—of the 29.6 million employed women in the United States were clustered in just 20 occupational categories, of which the average annual median earnings were \$27,383.”⁸ Specifically, 26% of Latino women, 35% of Black women, and 43% of White women are employed in higher-wage management, professional, and related jobs compared to 62% of Latino women, 57% of Black women, and 53% of White women clustered in low-wage service and sales and office occupations.⁹ Furthermore, in 2019, “84.4 percent of Black mothers [were] breadwinners, which represents a larger share than for any other racial or ethnic group,” and many of these workers were employed in low paying jobs.¹⁰ In fact, a recent *New York Times*

5. *Id.*

6. “Employers underpaid Black women compared to White men and women, making it necessary for them to work harder to achieve the same income levels. Black women also faced the challenge of financial instability caused by the absence of Black wealth” (p. 65).

7. Banks, *supra* note 3.

8. Alexandra Cawthorne Gaines, *The Straight Facts on Women in Poverty*, CTR. AM. PROGRESS (October 8, 2008), <https://www.americanprogress.org/issues/women/reports/2008/10/08/5103/the-straight-facts-on-women-in-poverty/>; *Labor Force Statistics from the Current Population Survey*, U. S. DEP'T OF LABOR (Nov. 22, 2019), <https://www.bls.gov/cps/earnings.htm>.

9. Milia Fisher, *Women of Color and the Gender Wage Gap*; CTR. AM. PROGRESS (Apr. 14, 2015), <https://www.americanprogress.org/issues/women/reports/2015/04/14/110962/women-of-color-and-the-gender-wage-gap/>.

10. ; Christian Weller, *African Americans Face Systematic Obstacles to Getting Good Jobs*, CTR. AM. PROGRESS (Dec. 5, 2019),

analysis of census data crossed with the federal government's essential workers guidelines found that "one in three jobs held by women has been designated as essential during this pandemic . . . [and] nonwhite women are more likely to be doing essential jobs than anyone else."¹¹

Relegated to low-paying jobs deemed essential, many Black women, who are breadwinners for their entire family, cannot afford to miss work, even to breastfeed their infant. In fact, the Centers for Disease Control and Prevention (CDC) reports that low-income women, who are predominately Black and Latina women, are "more likely than their higher-income counterparts to return to work earlier and to be engaged in jobs that make it challenging for them to continue breastfeeding."¹² Thus, employment protections that allow these women the opportunity to pump (i.e., express) and store their milk at work are essential to supporting Black women's efforts to breastfeed their children.

Section I of this essay briefly reviews employment discrimination laws pertaining to pregnancy, gaps in the scope and application of these laws, and the influence of these laws on Black women's ability to breastfeed. Section II of the essay provides law and policy solutions based on the health justice framework to address these problems.

I. EMPLOYMENT LAWS: BACKGROUND, GAPS, AND INFLUENCE ON BLACK WOMEN'S BREASTFEEDING

Generally, federal and state breastfeeding protection laws exempt public breastfeeding from public decency laws¹³ or provide for a place

<https://www.americanprogress.org/issues/economy/reports/2019/12/05/478150/african-americans-face-systematic-obstacles-getting-good-jobs/>.

11. Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html>.

12. KATHERINE R. SHEALY ET. AL, U.S. DEP'T OF HEALTH & HUM. SERVS., THE CDC GUIDE TO BREASTFEEDING INTERVENTIONS 7 (2005), https://www.cdc.gov/breastfeeding/pdf/breastfeeding_interventions.pdf.

13. *Breastfeeding State Laws*, NAT'L CONF. STATE LEGIS. (July 7, 2020), <https://www.ncsl.org/research/health/breastfeeding-state-laws.aspx#:~:text=All%20fifty%20states%2C%20the%20District,breastfeeding%20>

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to breastfeed, so women are shielded from view.¹⁴ For example, the Fairness for Breastfeeding Mothers Act of 2019 requires “certain public buildings” that are open to the public and contain a public restroom provide a lactation room, other than a bathroom, that is hygienic and available for use by members of the public to express milk.¹⁵ However, a public building is not required to provide a lactation room to the public if it does not have a lactation room available for employees who work in the building and does not have a room that could be repurposed as a lactation room at a reasonable cost.¹⁶

In terms of employment protections, Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race or sex.¹⁷ However, it was not until the Pregnancy Discrimination Act passed in 1978 that pregnancy was explicitly protected under federal employment law.¹⁸ Nevertheless, women still face barriers in continuing to breastfeed their children once they return to work because of gaps in the scope and application of these laws. More specifically, research shows that women need space, time, and protection at work to express their milk (p. 65);¹⁹ yet federal and state laws do not provide women with these things.

from%20public%20indecency%20laws (States include: Alaska, Arizona, Arkansas, Florida, Idaho, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, Washington, Wisconsin, and Wyoming); *see, e.g.*, MISS. CODE ANN. § 97-29-31 (2012); WIS. STAT. § 944.20 (1995); S.C. CODE ANN. § 16-15-130 (2006); MONT. CODE ANN. § 50-19-501 (2007).

14. Fairness for Breastfeeding Mothers Act of 2019, Pub. L. No. 116-30, 133 Stat. 1032 (codified as amended at 40 U.S.C. 3318).

15. *Id.*

16. *Id.*

17. It also prohibits employment discrimination based on “color, religion, . . . and national origin.” 42 U.S.C. § 2000e-2(a)(1).

18. *Pregnancy Discrimination*, U.S. EQUAL EMPL. OPPORTUNITY COMM’N, <https://www.eeoc.gov/pregnancy-discrimination> (last visited May 2, 2021).

19. Naomi Bromberg Bar-Yam, *Nursing Mothers at Work: Corporate and Maternal Strategies to Support Lactation in the Workplace*, 6 J. ASS’N RSCH. MOTHERING 127, 129–131 (2004).

For example, the Patient Protection and Affordable Care Act, which amended the Fair Labor Standards Act (FLSA), requires employers to provide “reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk.”²⁰ However, the law only applies to employers with more than fifty employees and does not require employers to pay for this time or provide for a place to store the milk.²¹ Furthermore, Black women are often employed in domestic, agricultural, and service occupations that classify them as independent contractors.²² This is significant because the FLSA does not apply to independent contractors.²³ Consequently,

20. Patient Protection & Affordable Care Act, Pub. L. No. 111-148, § 4207, 124 Stat. 119 (2010) (codified as amended at 29 U.S.C. § 207(r)(1)(A)).

21. *Id.* (codified as amended at 26 U.S.C. § 4980H). The law includes small businesses; however, they may be exempt if the business has fewer than 50 employees and can demonstrate that compliance would impose an un-due hardship. *Fact Sheet #73: Break Time for Nursing Mothers Under the FLSA, Wage and Hour Division*, U.S. DEP’T OF LABOR, <https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers> (last updated April 2018).

22. See Ruqaiyah Yearby, *Structural Racism and Health Disparities: Reconfiguring the Social Determinants of Health to Achieve Racial Equity*, 48 J. LAW MED. ETHICS 518 (2020); Banks, *supra* note 3.

23. Fair Labor Standards Act of 1938, 29 U.S.C. § 203(r)(1). The Fair Labor Standards Act of 1938 (FLSA) limited the work week to 40 hours and established federal minimum wage and overtime requirements. 29 U.S.C. §§ 206, 207. The FLSA exempted from these protections domestic, agricultural, and service occupations, which were predominately filled by racial and ethnic minorities. In 1974, the FLSA was amended to cover domestic workers, but those providing companionship services were exempted from these protections. Smith, *supra* note 4. Even though the Department of Labor (DOL) issued regulations in 2015 that for the first time made the FLSA apply to *most* home health care workers, many workers still remain unprotected. Application of the Fair Labor Standards Act to Domestic Service; Announcement of 30-Day Period of Enforcement 80 Fed. Reg. 55029-30 (Sept. 14, 2015) (to be codified at 29 CFR 552). The DOL under the Trump administration expanded the definition of who constitutes an independent contractor, making many domestic workers independent contractors. U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FIELD ASST. BULL. NO. 2018-4, DETERMINING WHETHER NURSE OR CAREGIVER REGISTRIES ARE EMPLOYERS OF CAREGIVER 8 (2018), https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/fab2018_4.pdf; *Labor Classification in the Home Health Care Industry: A Sign of What’s to Come?*, BALLARD SPAHR (July 15, 2018), <https://www.ballardspahr.com/insights/alerts-and-articles/2018/07/labor-classification-in-the-home-health-care-industry-a-sign-of->

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the breastfeeding protections provided by the FLSA do not apply to many Black women.

Some outlier states do provide for time, space, and protection for employees.²⁴ For example, twenty-one states and the District of Columbia require employers to provide a private, secure, and sanitary room for lactation space (other than a restroom).²⁵ Twenty-eight states and the District of Columbia mandate employers to allow workers time to express milk.²⁶ Finally, nineteen states and the District of Columbia prohibit discriminatory practices against women for breastfeeding.²⁷ Although these laws begin to address the issues, it is still not enough.

For instance, Massachusetts prohibits employers from denying an employee reasonable accommodations to express breastmilk or nurse a child. However, an employer may deny such accommodations if the employer can demonstrate the accommodations impose an undue hardship.²⁸ Montana law also provides for similar breastfeeding protections for mothers, but these protections *only* cover public entities, such as all state and county governments, municipalities, school districts, and the university system.²⁹

whats-to-come.; This is significant because the FLSA does not apply to independent contractors. 29 U.S.C. . § 203(r)(1).

24. Candice Thomas, Lauren Murphy, Drake Van Egdome, and Haley Cobb, *Supporting Employee Lactation: Do U.S. Workplace Lactation Benefit Mandates Align With Evidence-Based Practice?*, ST. LOUIS U. J. HEALTH L. & POLICY (forthcoming 2021) (manuscript at 6–9), <https://www.researchgate.net/publication/346039146>.

25. *Id.* (manuscript at 26–28 tbl. 2b) (states include Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Minnesota, Montana, New Jersey, New Mexico, New York, North Dakota, Tennessee, Utah, Vermont, Virginia, and Washington).

26. *Id.* (The states include Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Montana, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, and Washington).

27. *Id.* (The states include California, Hawaii, Illinois, Indiana, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Jersey, New York, Oregon, South Carolina, Utah, Vermont, Virginia, and Washington).

28. MASS. GENERAL LAWS CHAP. 151B § 4 (1E)(a) (2018).

29. MONT. CODE ANN. § 39-2-215(1) (2007).

Some states provide additional requirements for time, space, and protections beyond the FLSA, such as Oregon, New Mexico, Indiana, and Connecticut. In 2005, Oregon enacted a law that requires employers to provide a sanitary space for breastfeeding or expressing milk and prevents employers from counting the breaks for breastfeeding or expressing milk against the employee's benefits accrual.³⁰ Hence, an employer cannot use these breaks to reduce the number of hours an employee works per week. This is an additional protection compared to the FLSA, which protects an employee's pay and benefits. Yet, the breaks for breastfeeding or expressing milk are *unpaid*.

New Mexico also provides additional breastfeeding protections compared to the FLSA. The New Mexico Breast Pumping in the Workplace Act mandates employers to provide a clean, private space *near* an employee's workstation for breastfeeding or expressing milk.³¹ Although the statute does not require an employer to provide a place to store breastmilk or payment for overtime and breaks, it applies to employers with four or more employees and does not limit the accommodation to one year.³² These are all improvements from the FLSA, which only applies to employers with fifty or more employees, limits the accommodation to a year, and does not provide guidance about the location of the space for breastfeeding.³³

Indiana is the only state that requires employers to provide or allow employees to provide cold storage space for expressed milk pumped during work hours.³⁴ However, it does not require employers to provide break time for employees to breastfeed or express their milk.³⁵ Connecticut law applies to employers with one or more employees. It requires employers to allow their employees to express breast milk as frequently as needed, typically three times in an eight-

30. OR. REV. STAT. § 653.077 (2019).

31. N.M. STAT. ANN. § 28-20-2 (2007).

32. *Id.*

33. 29 U.S.C. § 207(r).

34. IND. CODE § 22-2-14-2 (2008).

35. *Id.*

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hour workday, and provides pay for breastfeeding breaks *if* breaks are typically compensated.³⁶

Although these state laws provide some protection for breastfeeding, they do not fully meet the needs of women of color, particularly Black women. For example, none of the aforementioned state laws provide paid time to express their milk. As Professor Freeman details in her book, Black women are at a disadvantage because they work in low-wage jobs that pay hourly wages and cannot afford to lose any paid time to express their milk (p. 131). Thus, these laws and policies must be reformed.

II. SOLUTIONS

As Freeman notes, there is a need for systemic, structural reform in the laws, policies, and practices to support Black women's ability to breastfeed (p. 136). Yet, without engaging Black women in the process, changes to employment laws and policies will continue to lack the necessary protections and will continue to replicate systemic injustices. Thus, to address these problems, policymakers should adopt a health justice framework. This framework highlights the need to engage and empower marginalized populations in developing and implementing solutions. Further, it calls for policymakers to provide access to basic health-related rights, protections, and supports that eliminate health disparities.³⁷

The health justice framework includes three overarching principles that provide a mechanism for the systems-level transformation of governmental responses to health disparities to achieve health equity.³⁸ First, law and policy responses must address the structural health determinants—including discrimination and poverty, the root causes of inequity—and immediate needs. Second,

36. CONN. GEN. STAT. ANN. §31-40w (West 2018); CONN. COMM'M HUM. RTS. & OPPORTUNITIES, LEGAL ENFORCEMENT GUIDANCE: PREGNANCY, CHILDBIRTH, OR RELATED CONDITIONS AT WORK 4 (2019), <https://portal.ct.gov/-/media/CHRO/20190412RevisedProposedPregnancyGuidancepdf.pdf>; CONN. GEN. STAT. §46a-60(b)(7)(F) (West 2018).

37. Emily A. Benfer, Seema Mohapatra, Lindsay Wiley & Ruqaiyah Yearby, *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Inequities During and After COVID-19*, 19 YALE J. HEALTH POL'Y L. & ETHICS 122, 129 (2020).

38. *Id.*

laws and policies must provide material support and legal protections to enable healthy behaviors.³⁹ Third, historically marginalized communities must be engaged and empowered as leaders in the development and implementation of laws and policies to attain health justice.⁴⁰

When applied to breastfeeding, the health justice framework requires the government (federal and state) do three things. First, the government must enact and enforce laws and policies that provide accommodations for breastfeeding in a way that addresses structural inequities in employment. To address structural inequities, the FLSA and state laws providing breastfeeding accommodations must apply to all workers, even if they are deemed independent contractors. Black women are often relegated to low-wage jobs and jobs that classify them as independent contractors. A more robust application of FLSA and state laws will address structural inequities in employment, particularly for Black women.

Second, to facilitate breastfeeding, these accommodations must also include financial support and protection that address structural inequities. Specifically, women returning to work after having a child should be provided a guaranteed basic income.⁴¹ The use of a guaranteed basic minimum income to support workers is not novel. Alaska implemented a guaranteed basic income called the Alaska Permanent Fund in 1976 and has been sending dividends to every

39. Lindsay Wiley, *Health Law as Social Justice*, 24 CORNELL J.L. & PUB. POL'Y 47, 95–96 (2014) (“interventions [grounded in health justice] reflect collective responsibility for health rather than individualistic interventions aimed at urging people to change their behaviors without necessarily making it easier for them to do so”).

40. Angela Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 765 (2020) (describing “the emergent health justice movement [as] a framework that places the empowerment of vulnerable populations at the center of action”); Wiley, *supra* note 39, at 101 (“the health justice framework [should] root ongoing efforts to ensure access to health care and healthy living conditions more firmly in community engagement and participatory parity”).

41. See Kimberly Amadeo, *What Is Universal Basic Income?*, THE BALANCE (Dec. 13, 2019), <https://www.thebalance.com/universal-basic-income-4160668> (illustrating the freedom people would have to return to school or stay home to care for a family member).

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Alaskan resident since 1982.⁴² Thus, for almost twenty years Alaska has provided guaranteed support for residents and helped to address poverty, without altering full-time employment. Providing women with a guaranteed basic minimum income would not only address structural inequities in employment, but also provide financial supports that allow Black women working in low-wage jobs the freedom to take unpaid breaks to express their milk or breastfeed their children.

Third, the government must engage and partner with Black women in the development and implementation of law and policy interventions that provide breastfeeding accommodations. The government (federal and state) should form employee boards that have the power to develop such interventions that include specific details regarding the time, space, and support employees need to breastfeed their child or express their milk. These interventions should be used to draft federal and state laws, policies, and practices governing breastfeeding accommodations. The board should also have the power to evaluate the effects of these laws and develop changes for federal and state laws, policies, and practices governing breastfeeding accommodations as needed.

CONCLUSION

Breastfeeding provides health benefits for both mothers and infants. Still, the government has not provided breastfeeding women the space, time, and protection at work to continue to breastfeed their children once they return to work. Coupled with false marketing campaigns and governmental programs that promote formula use, as noted in Professor Freeman's book, *Skimmed: Breastfeeding, Race, and Injustice*, Black women's abilities to breastfeed their children have been disproportionately restricted. Adopting the solutions discussed in this essay would begin to remove employment restrictions on Black women's abilities to breastfeed their children. It would also begin to redress the historical and current harms of structural inequities in employment that leave Black women without the necessary financial security to breastfeed their children.

42. Michael Coren, *When You Give Alaskans a Universal Basic Income, They Still Keep Working*, QUARTZ (Feb. 13, 2018), <https://qz.com/1205591/a-universal-basic-income-experiment-in-alaska-shows-employment-didnt-drop/>.