

No. 12-20220

In the United States Court of Appeals for the
Fifth Circuit

Equal Employment Opportunity Commission,

Appellant-Plaintiff,

v.

Houston Funding II, Ltd., et al.,

Appellees-Defendants.

From the United States District Court
For the Southern District of Texas, Houston Division
Civil Action H-11-2442

**Brief of Amici Curiae Texas Medical Association,
and the Texas Pediatric Society**

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Certificate of Interested Persons

Pursuant to Fifth Circuit Local Rule 28.2.1, the undersigned counsel for amicus the Texas Medical Association (TMA) and amicus the Texas Pediatric Society (TPS), certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification of recusal in this appeal, 12-20220.

1. Equal Employment Opportunity Commission, Appellant-Plaintiff;
2. Houston Funding II, Ltd., Appellee-Defendant;
3. Houston Funding Corporation, Appellee-Defendant;
4. Susan L.P. Starr, Claudia Molina-Antanaitis, Attorneys for Appellant-Plaintiff;
5. Mark Joseph Oberti, Attorney for Appellee-Defendant;
6. Texas Medical Association, Amicus;
Amicus the Texas Medical Association (TMA) is a nonprofit corporation operating under the laws of the State of Texas. It has no parent corporation, and no publicly held company owns 10% or more of its stock.
7. Texas Pediatric Society, Amicus;
Amicus the Texas Pediatric Society (TPS) is a nonprofit corporation operating under the laws of the State of Texas. It has no parent corporation, and no publicly held company owns 10% or more of its stock.
8. Donald P. Wilcox, Attorney for Amici.

Respectfully submitted,

/s/ Donald P. Wilcox
Attorney of record for TMA and TPS

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INTEREST OF *AMICI CURIAE*

TMA is a private, voluntary, nonprofit association of more than 45,000 Texas physicians and medical students. TMA was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, TMA's maxim continues in the same direction: "Physicians caring for Texans." TMA's diverse physician members practice in all fields of medical specialization. TMA supports Texas physicians by providing distinctive solutions to the challenges they encounter in the care of patients.

The Texas Pediatric Society, the Texas Chapter of the American Academy of Pediatrics, is a state professional non-profit association representing 3,500 physicians and medical student members. TPS believes that the most important resource of the State of Texas is its children, and pledges its efforts to promote their health and welfare. The goal of TPS is that all children in the State attain their full potential for physical, emotional, and social health. The mission of TPS is to focus its talent and resources to ensure that the children in Texas are safe and healthy, that its members are well informed and supported, and that the practice of pediatrics in Texas is both fulfilling and economically viable.

Pursuant to Fed. R. App. P. 29(c)(4), the source of authority to file this brief is Fed. R. App. P. 29(a), as all parties to this appeal have consented to its filing.

Pursuant to Fed. R. App. P. 29(c)(5), no party's counsel has authored this brief in whole or in part, no party or party's counsel has contributed money intended to fund preparing or submitting the brief, and no person—other than the amicus curiae, its members, or its counsel—contributed money intended to fund preparing or submitting the brief.

ARGUMENT

Plaintiff Equal Employment Opportunity Commission appeals from Judge Hughes' order of February 9, 2012, which granted defendants' motion for summary judgment against plaintiff's claim that the defendants violated Venters' Title VII rights. Judge Hughes opined that the law does not punish lactation discrimination because "lactation is not pregnancy, childbirth, or a related medical condition."

This brief is submitted to dispute that reasoning. Based on Congress' repeated clarifications of the scope of protection afforded nursing mothers by Title VII, lactation is a medical condition which enjoys statutory protection. Therefore, a trial is needed to determine whether Venters was fired based on discriminatory criteria, as asserted by Plaintiff, or for abandoning her job, as asserted by Defendants.

I. Firing a Female Employee Because She is Lactating Violates Title VII’s Prohibition on Discrimination Based on “pregnancy, childbirth, or related medical conditions.

a. Title VII must be liberally construed in order to have meaning.

Subsection (k) of Title VII of the Civil Rights Act of 1964 states that “[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.” 42 U.S.C. § 2000e(k). The district court’s reading of this subsection is far too narrow. This court has previously recognized that “Title VII ‘is a remedial statute to be liberally construed in favor of victims of discrimination.” Hernandez v. Aldridge, 866 F.2d 800, 803 (5th Cir. 1989), vacated on other grounds, Hernandez v. Rice, 494 U.S. 1013 (1990).

The district court gave a list of conditions related to pregnancy, which consisted of ‘cramping, dizziness, and nausea.’ USCA5 207. Interestingly, these conditions are all gender-neutral, unlike lactation. Also, the citation used by the district court to support this opinion was from a district court case that referenced such conditions in consideration of an ADA claim, rather than a Title VII claim. See Cerrato, 941 F. Supp. at 393 (“Rather, this case concerns only whether pregnancy-related conditions including spotting, leaking, cramping, dizziness, and nausea can qualify as disabilities under the ADA”). Furthermore, the list is preceded by the term “including” which clearly indicates it is not an exhaustive list

of pregnancy-related medical conditions. The district court's conclusion that Venters' medical condition(s) were not related to her pregnancy because the plaintiff in another case did not complain about the same condition(s) is unsupportable.

b. Lactation is a physiological response most often caused by pregnancy and childbirth.

Since Title VII does not provide an exhaustive list of medical conditions related to pregnancy (or 'because of sex'), it is up to the courts to determine such things. Principles of statutory construction provide guidance. "When a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117, 129 (1991). Medical is defined as "[o]f or relating to the study or practice of medicine."

<http://www.thefreedictionary.com/medical>. "Lactation is the medical term for yielding of milk by the mammary glands which leads to breastfeeding."

<http://medical-dictionary.thefreedictionary.com/lactation>. Therefore, "related medical conditions" includes all pregnancy and childbirth associated conditions relating to the study or practice of medicine. Since the yielding of milk by mammary glands is a medical condition caused by pregnancy and childbirth, lactation is a "related medical condition" as contemplated by Title VII.

c. The district court decision renders part of the statute meaningless.

Courts should avoid a construction that renders any provision meaningless or inoperative and must lean in favor of a construction that will render every word operative, rather than one that may render a phrase meaningless or inoperative. See Hanson v. Jordan, 145 Tex. 320, 323, 198 S.W.2d 262, 263 (1946). In stating that “[s]he gave birth on December 11, 2008” and then opining that “[a]fter that day, she was no longer pregnant, and her pregnancy-related conditions had ended,” the district court improperly ignored all “related medical conditions” occurring after birth but related to pregnancy and childbirth. There are several examples of medical conditions indisputably related to pregnancy that are present and require care after childbirth including caesarean sections, episiotomies and even postpartum depression. Indeed, according to her testimony, the primary reason Venters’ doctor delayed her return to work was so that she could recover from an infection at the site of her caesarean section incision.

II. Public Policy Demands Protection for Lactating Mothers in the Workplace.

a. PPACA is the latest example.

Many court cases have interpreted the protections afforded pregnant women and mothers by Title VII and other laws. There have been additions to the text of these laws. The trend that continues each time these laws are amended is that the

amendment clarifies that pregnant women and mothers have more protection than a court interpreting Title VII found.

For example, in 1976, the Supreme Court in interpreting Title VII ruled that an employer's refusal to provide pregnancy-related benefits was not discrimination on the basis of sex. General Electric Co. v. Gilbert, 429 U.S. 125, 136. Congress responded in 1978 by enacting the Pregnancy Discrimination Act ("PDA"), which amended Title VII to clarify that "the terms "because of sex" or "on the basis of sex" include, but are not limited to, because of . . . pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k).

The Patient Protection and Affordable Care Act (PPACA) is the latest example of Congress clarifying what protections and rights pregnant women and mothers have. PPACA amended Section 7 of the Fair Labor Standards Act (FLSA) (Public Law 111-148) to clarify that employers are required 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." 29 U.S.C. § 207(r). Employers are also required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."

According to the Department of Labor, the FLSA requirement of break time for nursing mothers to express breast milk does not preempt State laws that provide

greater protections to employees (for example, providing compensated break time, providing break time for exempt employees, or providing break time beyond 1 year after the child's birth). <http://www.dol.gov/whd/regs/compliance/whdfs73.htm>

b. Texas law similarly demonstrates a commitment to protecting the rights of women who lactate.

Texas provides even greater protection for mothers who breast-feed. In Texas, a mother is entitled to breast-feed her baby in any location in which the mother is authorized to be. Tex. Health Code Ann. § 165.002 (1995). Tex. Health Code Ann. § 165.003 et seq. even provides for the use of a "mother-friendly" designation by businesses who have policies supporting worksite breastfeeding.

The Texas legislature found that breastfeeding a baby is an important and basic act of nurture that must be encouraged in the interests of maternal and child health and family values. In compliance with the breastfeeding promotion program established under the federal Child Nutrition Act of 1966 (42 U.S.C. Section 1771 et seq.), the legislature recognizes breastfeeding as the best method of infant nutrition. Tex. Health Code Ann. § 165.001 (1995). Tex. Health Code Ann. § 165.004 states that any state agency that administers a program providing maternal or child health services shall provide information that encourages breastfeeding to program participants who are pregnant women or mothers with infants.

The Texas legislature recognizes a mother's responsibility to both her job and her child when she returns to work and acknowledges that a woman's choice to breast-feed benefits the family, the employer, and society. Tex. Health Code Ann. § 165.031 (1995). Tex. Health Code Ann. § 165.033 requires the Texas Department of State Health Services to develop recommendations supporting the practice of worksite breastfeeding that address the following: work schedule flexibility, including scheduling breaks and work patterns to provide time for expression of milk; the provision of accessible locations allowing privacy; access nearby to a clean, safe water source and a sink for washing hands and rinsing out any needed breast-pumping equipment; and access to hygienic storage alternatives in the workplace for the mother's breast milk.

c. TMA policy supports breastfeeding.

Physicians see firsthand the benefits of breastfeeding to both children and mothers, which is why TMA has adopted many policies which support breastfeeding. TMA recognizes that exclusive breastfeeding for the first six months and continued breastfeeding for at least one year is important for the optimal health and development of infants and children and encourages all physicians to promote and support breastfeeding as the gold standard of infant nutrition and TMA endorses the Texas Department of State Health Services breastfeeding training programs and educational materials for physicians and their patients. 140.008

(Amended Council on Public Health, p 150, A-96; amended CM-MPH Rep. 1-A-06).

TMA endorses the Texas Ten Step Facility Program established by the Texas Hospital Association and the Texas Department of State Health Services, which encourages hospitals to adopt practices that promote and support breastfeeding for mothers who deliver at their facility. 130.018 (CM-MPH Rep. 1-A-09). TMA supports incorporating clinically based breastfeeding training into residency programs and continuing education workshops to better prepare physicians for their role in breastfeeding advocacy. 140.005 (Committee on Maternal and Child Health, p 95, A-95; reaffirmed CM-MPH Rep. 1-A-05). The TMA supports efforts to improve access to preconception health and care, including the important elements of breastfeeding education. 330.009 (Amended CM-MPH Rep. 1-A-08).

d. There are several reasons why breastfeeding mothers are protected under the law.

There are several reasons why Title VII was passed, why Title VII was clarified, why Texas' statutes on breastfeeding were passed and why TMA (and similar organizations) have adopted policies to protect and promote breastfeeding. The United States Department of Health and Human Services¹, United States

¹ <http://eclkc.ohs.acf.hhs.gov/hslc/tta-system/family/For%20Parents/Expectant%20Mothers/Breastfeeding/TheComprehensive.htm>

Surgeon General² and World Health Organization³ recognize the many important benefits of breastfeeding.

The benefits for children include: increased resistance to disease and infection, reduced risk of Sudden Infant Death Syndrome, less frequent occurrence of gastrointestinal infections, lower incidence of lower respiratory tract disease, reduced risk of obesity in adulthood, increased cognitive development and academic achievement. The benefits for mothers include: reduced risk of breast cancer and reduced risk of developing type II diabetes. Stanley Ip, M.D., et al., *Breastfeeding and Maternal and Infant Health Outcomes in Developed Countries*, AHRQ Publication No. 07-E007 (April 2007).⁴

Many other benefits are believed to come from breastfeeding, but there is currently insufficient scientific data to back up those assertions.

CONCLUSION

Venters was fired from her job at Houston Funding II. She was a new mother, recovering from an infection at the site of her caesarean section incision, who wished to express breast-milk in a back-room at the office. She may have subjected herself to termination due to job abandonment; or she may have been fired because she wished to express breast-milk.

² <http://www.surgeongeneral.gov/videos/2012/02/breastfeeding-benefits.html>

³ <http://www.who.int/topics/breastfeeding/en/>

⁴ The benefits were compiled from multiple studies by the United States Department of Health and Human Services' Agency for Healthcare Research and Quality.

Title VII protects employees from being fired “because of sex” or “on the basis” of sex. Congress amended Title VII, in response to a Supreme Court case, to clarify that those terms “include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.” It is clear that Congress intends to protect women, such as Venters, from being fired based on medical conditions relating to their pregnancy and/or childbirth.

Judge Hughes’ Summary Judgment of February 9, 2012 should be vacated and the case remanded to determine whether Venters was fired because she wanted to express breast-milk or for abandoning her job.

Respectfully submitted,

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Date: May 29, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief was produced in Times New Roman 14 point typeface using Microsoft Word 2003 and contains 2,960 words. I further certify that all required Privacy redactions have been made as required by 5th Cir. R. 25.2.13; that the electronic submission is an exact copy of the paper document as required by 5th Cir. R. 25.2.1; and the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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PROOF OF SERVICE

I, Donald P. Wilcox, certify that on this 29th day of May, 2012, a copy of the foregoing Brief of *Amici Curiae* the Texas Medical Association, and the Texas Pediatric Society in Support of Appellant-Plaintiffs was served on all counsel of record according to their preference, either by mail or electronically filing it with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the Appellate ECM/ECF system, which automatically provides electronic notification to the following persons:

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