



April 24, 2015

Kentucky Board of Bar Examiners
c/o Elizabeth S. Feamster
Director and General Counsel
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Via first class and electronic mail

RE: Denial of Request for Non Standard Test Accommodations
In re: Jacquelyn Bryant-Hayes

Dear Director Feamster:

On behalf of our client, Jacquelyn Bryant-Hayes, we submit this appeal from the Committee's April 14th denial of her request for non-standard test accommodations for the July 28 & 29 Kentucky Bar examination. For the reasons that follow, we believe the Committee erred in denying Ms. Bryant-Hayes' request for reasonable accommodations related to her expressing breast milk during the examination. Thus, we ask the Board to overturn that decision and grant the requested accommodation.

BACKGROUND

Ms. Bryant-Hayes is nearing completion of her third (and final) year of law school at the University of Louisville's Brandeis School of Law. She is also pregnant, and her baby is due on June 21, 2015. Because Ms. Bryant-Hayes intends to breastfeed her baby (who will be just over *four weeks old* when the July Bar examination will be administered),¹ she requested two additional 30 minute stop-

¹ The medical benefits of breastfeeding are well established. For example, the American Academy of Pediatrics' most recently issued guidelines recommend "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." Am. Academy of Pediatrics, *Breastfeeding and the Use of Human Milk*, 129 Pediatrics e827 (2012), available at <http://pediatrics.aappublications.org/content/129/3/e827.full.pdf+html>. See also Alison Steube, *The Risks of Not Breastfeeding for Mothers and Infants*, 2 Rev. Obstetrics & Gynecology 222 (2009), available at

the-clock breaks during the 8 hour examination, as well as a private location other than a restroom, to allow her an opportunity to express breast milk during the exam. In support of her request, Ms. Bryant-Hayes submitted a Physical Disability Verification Form, as required. Ms. Bryant-Hayes' then-treating physician, Dr. Heath Brown, completed the form and in doing so indicated that Ms. Bryant-Hayes will, one month after delivering her baby, require breaks to express milk every 90 minutes.

In a letter dated April 14, 2015, you informed Ms. Bryant-Hayes that although she may utilize a private location to express milk during the examination, the Accommodations Committee denied her request for additional break time. Ms. Bryant-Hayes, of course, appreciates the Committee's agreement to allow her to utilize a private location to express milk during the examination. However, the denial of her request for additional break time leaves her in an untenable position and compels her to seek this appeal. Specifically, without the additional break time, Ms. Bryant-Hayes will be forced to take the test under conditions that will likely cause her significant pain, potentially place her health at risk, and put her at a significant disadvantage compared to other test takers.² Because her request for

<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."). Accordingly, there is a strong public policy at both the state and federal level in favor of accommodating the needs of nursing mothers. *See, e.g.,* United States Dep't of Health and Human Servs., Office of the Surgeon Gen., *The Surgeon General's Call to Action to Support Breastfeeding*, v (2011). Child Nutrition Amendments of 1992, Pub. L. No. 102-342, 106 Stat. 911 (1992) (requiring Secretary of Agriculture to establish a national breastfeeding promotion program to promote breastfeeding as "the best method of infant nutrition"); Dep't of Health and Human Servs., Office of Women's Health, *HHS Blueprint for Action on Breastfeeding* (2000).

² Women who are breastfeeding and away from their children need to empty their breasts using a breast pump on approximately the same schedule as their babies' feeding schedule. Failure to pump on this regular schedule can lead to health problems including engorgement (pain and swelling of the breasts due to build-up of pressure from unremoved milk), as well as the risk of developing serious medical problems such as mastitis (an inflammation of the breast tissue caused by an infection that can lead to pain, swelling, redness, fevers, chills, and flu-like aching) and blocked ducts (which can be painful, sometimes cause fevers, and can lead to the more serious condition of mastitis). It can also lead to a reduction in milk supply and a lack of sufficient stored milk to feed the baby. *See generally* Department of Labor, Wage and Hour Division, Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80075 (Dec. 21, 2010).

additional break time is reasonable in scope, does not impose an undue burden on the Ky. Board of Bar Examiners ("Board"), and is based upon a documented medical need, **we believe that there exists a legal obligation to accommodate her request.**

ARGUMENT

I. Petitioner's Request Is Reasonable and Adequately Supported.

Although it is not possible to know with certainty the frequency with which Ms. Bryant-Hayes will need to express breast milk until her baby is born and its nursing schedule established, her treating physician estimated in the documentation attached to her original application that as a mother of a newborn, she would need breaks every 1.5 hours during the course of the eight-hour test day. In response to the Committee's denial stating that her medical documentation was insufficient, Ms. Bryant-Hayes is hereby submitting additional documentation of her medical need to express milk. Her revised Physical Disability Verification Form states that:

[Ms. Bryant-Hayes] will require roughly 20 minute breaks every 2 hours for pumping. Without being able to pump, she can develop breast engorgement, causing pain or infection in the breasts. Her baby could also suffer from decreased milk supply.

And in the "accommodations recommended" section, the doctor reiterates that:

[T]he patient would require 1 20-minute break in each am + pm session for pumping breast milk. Generally require 20 minutes for adequate milk expression. Should not go longer than 2-3 hours without pumping...[Patient] would need either extra breaks or extra time. Basically needs to have 1 20 minute window within each testing block to be able to pump.

This explicit explanation of her functional limitations, the medical basis for the request, and the specific accommodations requested are sufficient to establish both the reasonableness of her request as well as basis for it. Moreover, both the original and the amended form support Ms. Bryant-Hayes' request for two additional stop-the-clock breaks of 30 minutes each during the two test sessions. And although her revised form has modified slightly the frequency with which breaks will be required, the documented need for a break every 2 hours still requires at least one additional break be provided within each 3 hour session. This is especially true in light of the time it takes on either side of the test session for test administration. Finally, the request for 30 minute breaks is reasonable in light of the time it typically takes to express milk and set up and clean equipment, as

well as any time necessary to get to and from the location designated for pumping. See U.S. Dep't of Labor ("DOL"), Wage and Hour Division, *Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073, 80075 (Dec. 21, 2010) [hereinafter "Break Time for Nursing Mothers"].

Both her initial request for breaks every 1.5 hours and her renewed request for breaks every 2 hours are also well-supported by medical standards as reflected in federal policy. As the U.S. Department of Health and Human Services has advised, "[t]o 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.*" U.S. Dep't Health & H. S'vcs, *Breastfeeding* (<http://www.womenshealth.gov/breastfeeding/going-back-to-work/>) (emphasis added); DOL, *Break Time for Nursing Mothers*, *supra* (same).

The conclusion stated in your April 14th letter — that the existing lunch break between the two three-hour testing sessions during the 8 hour test day provides "ample" time for Ms. Bryant-Hayes to express milk — is factually as well as mathematically incorrect. First, the *one* existing break over the course of a test day is not equivalent to the EEOC's recommended guideline of "*two-to three*" breaks "over the duration of an eight-hour" period. You state that the one existing break "provides ample opportunity for [our client] to pump before the exam begins, during your lunch break, and after the exam has been completed." This treats the time period *before and after* the eight hour period of the test day as if it is included *within* the eight hour period. But the "two to three breaks" mentioned in the guideline take place "*over the duration of*" the eight-hour period—not on either side of it. Thus, compliance with the guideline would lead to the necessity for breaks roughly every 2-2.6 hours. The single, existing break would require our client to go at least three hours (and quite possibly longer, depending on the time it takes to begin and recommence test administration) before a break—which is at least 1-1.4 hours *longer* than the guidelines you cite in your letter.

Second, statements by EEOC and the Department of Labor indicating that the recommended frequency of breaks is what "a nursing mother will *typically* need" during an eight-hour period highlight that the guideline is based upon the *average* frequency necessary. Such an average is not determinative of the physiological needs of an individual woman, nor should it be construed as providing an upper limit on the number of breaks an individual might reasonably require in any given period. On the contrary, the Department of Labor has clarified that the frequency of need to express milk varies, emphasizing that employers should "bear[] in mind" that the Fair Labor Standards Act requires them to "provide the break time and lactation space *each time* such employee has need to express the milk." See FLSA Nursing Mothers Provision at 80075 (emphasis added). As the Department explains:

The frequency of breaks needed to express breast milk varies depending on factors such as the age of the baby, the number of breast feedings in the baby's normal daily schedule, whether the baby is eating solid food, and other factors. In the early months of life a baby may need as many as 8 to 12 feedings per day. This means that a nursing baby needs food every two to three hours. A nursing mother produces milk on a constant basis. If the baby does not take the milk directly from the mother, it must be removed by a pump about as frequently as the baby usually nurses. . . . Depending on the nursing mother's work schedule, it may be that the frequency of breaks needed tracks regular breaks and lunch periods, but this will not always be the case. As the child grows and begins to consume solid foods, typically around six months of age, the frequency of nursing often decreases, and the need for a nursing mother to take breaks to express breast milk may also gradually diminish.

Id.

Thus, the single existing break available during the bar examination, which occurs at least *three hours* after the test commences, is not sufficient to address either Ms. Bryant-Hayes' *particular* anticipated medical need to express breast milk every 1.5 hours, which was the necessary frequency estimated by her doctor in her initial application, or her revised estimated need to express milk at least once every two hours. Both support the requested accommodation of one additional thirty-minute stop-the-clock break during each test segment.

Finally, your statement that the single, existing break should provide "ample" time to express milk ignores the fact that requiring our client to dedicate that break to the expression of breast milk will deprive her of equal time to conduct any of the other activities to which the break period is typically dedicated—such as eating, going to the restroom, resting, walking, or stretching. The necessity to pump will reduce by approximately 30 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 in part so that she will be able to enjoy the same benefits of the existing break as other applicants who do not have medical or physiological needs to address.

II. Kentucky Law Supports Petitioner's Request For A Reasonable Accommodation.

Kentucky law explicitly provides that “[n]otwithstanding any other provision of the law, a mother may breast-feed her baby or express breast milk in any location, public or private, where the mother is otherwise authorized to be,” and further specifies that “[n]o person shall interfere with a mother breast-feeding her child in any location, public or private, where the mother is otherwise authorized to be.” Ky. Rev. Stat. Ann. § 211.755. This provision is broad by design, and on its face applies to the current situation. The Board’s refusal to honor Ms. Bryant-Hayes’ medically documented need to express breast milk on the schedule dictated by her physician constitutes a denial of her right to express milk at the location of the examination, where she is clearly authorized to be, and an interference with her right to breastfeed.

Moreover, Kentucky’s public accommodations law provides in relevant part: “It is an unlawful practice for a licensing agency to refuse to license, or to bar or terminate from licensing an individual because of race, color, religion, national origin, sex, or age forty (40) and over, or because the person is a qualified individual with a disability.” Ky. Rev. Stat. Ann. § 344.050(2). *See also* Ky. Rev. Stat. Ann. § 344.010(11) (defining “licensing agency” as including any “public ... organization which has as one (1) of its duties the issuing of licenses or the setting of standards which an individual must hold or must meet as a condition to practicing a particular trade or profession or to obtaining certain employment within the state or as a condition to competing effectively with an individual who does hold a license or meet the standards.”); 104 Ky. Admin. Reg. 1:100 (Nondiscrimination on the basis of disability by a place of public accommodations, licensing agencies and trade organizations).

We do not assert that breastfeeding or the need to express breast milk is itself a disability. However, offering accommodations to individuals with disabilities under the ADA but not to lactating women constitutes sex discrimination under applicable public accommodation law, as the court held in *Currier v. National Bd. Of Med. Examiners*, 965 N.E. 2d 829 (MA 2012). There, the Massachusetts Supreme Judicial Court ruled that National Board of Medical Examiners (“NBME”) violated a nursing mother’s right to express milk under a similar 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.”

Cf. also EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 428–30 (5th Cir. 2013) (holding that discrimination on the basis of lactation is prohibited sex discrimination under Title VII because it is a sex-linked condition and is related to pregnancy and childbirth); *Martin v. Cannon Bus. Solutions, Inc.*, No 11-cv-02565, 2013 WL 4838913, at *8, n.4 (D. Colo. Sept. 10, 2013) (same). Because NBME made testing accommodations available to individuals for reasons other than breastfeeding, the court held that its denial of those accommodations to Ms. Currier was discriminatory under applicable state laws prohibiting sex discrimination.

As was true for NBME in *Currier*, the Board here is obliged to provide testing accommodations similar or identical to those requested by our client under other existing law for reasons *other* than breastfeeding. For example, the Board’s obligation to provide accommodations to ADA-qualified individuals is clearly established, and it is apparent from the Board’s website that its current policy permits applicants with disabilities to request testing accommodations. *See* 42 U.S.C.A. § 12189; 34 C.F.R. § 36.309(b)(3). Federal guidelines also make clear that such accommodations may include additional break time and a separate room for testing, and that the Board would be legally required to honor any such request that was properly documented. *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.* Thus, offering such accommodations to individuals with disabilities under the ADA but not to lactating women constitutes sex discrimination under applicable public accommodation law. *Currier*, 965 N.E. 2d at 840, 842; *also cf. Young v. U.P.S.*, 135 S. Ct. 1338 (2015) (denial of accommodations to women for pregnancy and related medical conditions that are given to employees for other reasons supports prima face case of sex discrimination under Title VII and can support a finding that non-discriminatory reasons for denial are pretext).³

³ To the extent that the Board receives federal funds, either directly or indirectly, it is subject to Title IX of the Education Amendments of 1972. *See* 29 U.S.C. § 794; 34 C.F.R. § 106.2 (defining “financial assistance as including “[s]cholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity”); *cf. Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321, 330 (2d Cir. 1998), *vacated on other grounds by* 527 U.S. 1031 (1999) (state board of law examiners liable as recipient of federal funds for purposes of § 504 of the Rehabilitation Act by virtue of receipt of vouchers provided to handicapped applicants to assist in payment of bar exam application fees). Title

Conclusion

Ms. Bryant-Hayes' request for two additional stop-the-clock breaks, one during each session of the bar examination, is reasonable and well-supported by medical documentation, and it imposes no undue burden upon the Board's administration of the Kentucky Bar exam. By contrast, refusing to grant the requested accommodation ignores Ms. Bryant-Hayes' documented medical needs, misconstrues relevant federal guidance, and violates her rights under state and federal law. The refusal to acknowledge that a woman who is nursing has additional physical demands that require additional break time flies in the face of the medical facts of lactation and puts her at a significant disadvantage compared to other examinees. Should she be forced to take the test without the additional break time she has requested, her chances of success will be hindered by pain and distraction, and her health potentially placed at risk. Should she decide she cannot risk enduring the test under these circumstances, she will have no choice but to put off taking the test until she is no longer nursing, thus forcing her to choose between the pursuit of her career goals and her and her baby's health needs. We trust that this is not a result the Board wishes to endorse. Accordingly, we respectfully request that the Accommodations Committee's ruling be reversed. Moreover, we urge the Board to also establish a policy that gives meaning to the weight of medical authority supporting breast feeding and fulfills the Board's obligation to administer the test in a non-discriminatory manner.

IX regulations make clear that recipients may not discriminate based on sex or pregnancy, including related conditions. *See* 34 C.F.R. § 106.40 (b)(1); *see also* 34 C.F.R. § 106.34 (b)(4) (providing that women affected by pregnancy-related conditions must be treated the same as other individuals affected by temporary disabilities); 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).

Moreover, should Ms. Bryant-Hayes' claim be denied, she might also have an actionable claim against the Board under the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.*, which prohibits discrimination in employment, including entities "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). *See also* *Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 877 (6th Cir. 1991) ("[A] plaintiff is protected [under Title VII] if the defendant is one who significantly affects access of any individual to employment opportunities."); *Doe on Behalf of Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986); *Burns v. Terre Haute Reg'l Hosp.*, 581 F. Supp. 1301, 1303 (S.D. Ind. 1983); *Morrison v. Am. Bd. of Psychiatry & Neurology, Inc.*, 908 F. Supp. 582, 587 (N.D. Ill. 1996). *But see* *Darks v. City of Cincinnati*, 745 F.2d 1040, 1042 n.3 (6th Cir. 1984) (citing cases in other circuits finding licensing decisions not covered under this theory).

Thank you in advance for your consideration of this appeal, and we look forward to your decision.

Sincerely,



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