



October 7, 2015

Via U.S. Mail and E-Mail

Dr. David J. Skorton, Secretary
Smithsonian Institution
Smithsonian Institution Building (The Castle)
P.O. Box 37012
Washington, DC 20013-7012

Dear Dr. Skorton,

The American Civil Liberties Union of the Nation's Capital and the First Shift Justice Project have received complaints from Smithsonian Institution employees regarding the Smithsonian Institution's failure to provide basic and essential accommodations to nursing mothers. We have heard a persistent theme of management indifference and lack of knowledge about lactation accommodation requirements under federal law. As a result, employees who need to express breast milk at work have been forced to improvise haphazard solutions, which has led to women pumping in bathrooms, having their breasts inadvertently exposed to coworkers who walk in to the rooms in which they are pumping, and pumping in spaces with no basic amenities (such as a table on which to place their equipment or an electrical outlet). We detail in this letter the situations at two Smithsonian units, which we believe are representative of circumstances found across the agency.

We know that as a physician you understand the health benefits, both for mothers and babies, of breastfeeding, especially during the first year of a baby's life. Further, as a large government agency employing more than 6,000 people, the Smithsonian has the resources to comply with federal law and create a hospitable workplace for its female employees. We therefore call on the Smithsonian Institution to draft and implement an agency-wide policy on workplace accommodations for employees who are nursing, to train all human resources and management level employees in that policy, and to provide notice to all Smithsonian employees about the institution's policy and their rights under the law.

I. Federal Law Requires the Smithsonian Institution to Provide Accommodations for Nursing Employees

To ensure full equality for women, workplace policies and procedures must reflect the role of pregnancy, breastfeeding and childcare in the lives of many female employees. Inadequate accommodations for breastfeeding mothers who have returned to the workplace act as a barrier to women's continued workforce participation and advancement. These concerns motivated the 2010 amendment of the Fair Labor Standards Act (FLSA) to require employers to provide a "reasonable break time for an employee to express breast milk" each time an employee

needs to express the milk, and “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public” to be used by female employees to express breast milk.¹

As an employer with non-exempt employees under the FLSA, the Smithsonian is subject to the requirements of this provision and is required to provide the specified accommodations to covered employees. As a policy matter, the Smithsonian should follow the lead of the Executive Branch and the recommendations of the Department of Labor and ensure that appropriate lactation space is available for all Smithsonian employees.²

II. Appropriate Space to Express Breast Milk is Needed in All Smithsonian Units

It is our understanding, based on the information currently available to us, that throughout the Smithsonian Institution, there are only two dedicated lactation rooms — one in the Harvard-Smithsonian Center for Astrophysics and one in the Smithsonian Institution Building (the Castle). We recognize that the Smithsonian is a sprawling institution with a variety of workplace environments. However, regardless of the specifics of the physical workplace, the Smithsonian is legally required to provide to all breastfeeding non-exempt employees a location to express breast milk that complies with the requirements of the FLSA.

In one small museum,³ which currently has two nursing employees, one employee raised the issue of appropriate lactation space prior to her maternity leave, just before returning from leave, and multiple times after she was back at work. Despite her attempts to work out an acceptable solution with management, she was told to “figure it out” on her own. Similarly, a Human Resources representative told the employee to “pump wherever you can” and to “let me know when you have worked it out.” As a result, the employee for a time attempted to use a dressing room in the museum’s theater area to express breast milk, as previous employees had done. However, the room was located far from her office space and was accessible to other employees. On two occasions while she was attempting to pump, male facility workers walked through the room.

This employee later sought to use an empty office that was being used as storage space, and announced her intention to coworkers. She was initially told the room was not available for her to use to pump breast milk because it was being reserved for an incoming employee. However, when she informed colleagues she would use it until the employee moved in, she was not prevented from doing so. The room did not lock from the inside, and despite the knowledge that the employee was using it as a lactation space, and despite posted signs, on two occasions

¹ 29 U.S.C. § 207(r)(1).

² See Memorandum from John Berry, Director, U.S. Office of Personnel Management, to Heads of Executive Departments and Agencies (Dec. 22, 2010) (“in order to ensure consistent treatment of nursing mothers within the Federal workforce, agencies should also apply the requirements of subsection 7(r) of the FLSA to Executive branch civilian employees who are exempt from section 7 of the FLSA.”); U.S. Dep’t of Labor, Wage and Hour Division, *Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073, 800074 (Dec. 21, 2010) (“The Department encourages employers to provide break time for all nursing mothers including those who may not be covered under the FLSA or who are exempt from section 7.”).

³ We are not printing the names of the specific locations in this public letter due to the privacy concerns of the employees who spoke with us, who wish at this time to remain anonymous.

the employee's colleagues — including her supervisor — entered the room while she was pumping.

Expressing breast milk frequently requires a woman to lift or unbutton her shirt and expose her breasts. This type of exposure to any coworker, but in particular male coworkers or supervisors, can be a humiliating and degrading experience, and may discourage some mothers from continuing to breastfeed.

It is our understanding that another employee at this museum has used a file closet to express breast milk, however the closet does not have a table on which she can put her pumping equipment. Further, it is our understanding that the closet doesn't have an electrical outlet, so she has been forced to acquire a battery pack in order to use her electric pump. The Department of Labor instructs that a "functional" lactation space "at a minimum, . . . must contain a place for the nursing mother to sit, and a flat surface, other than the floor, on which to place the pump," ideally with access to electricity.⁴

Another small museum currently has three nursing employees. After one employee had her first child three years ago, she pulled a chair into the bathroom, as that was the only space available for her to express breast milk. Neither that employee nor her immediate supervisor were made aware of the requirements for lactation space under federal law. The FLSA explicitly prohibits the designation of a bathroom as a lactation room because of health and sanitation concerns related to expressing breast milk in a bathroom.⁵ Further, requiring women to express breast milk in spaces that are otherwise considered unsuitable for employees' work or leisure activities poses harm to women's basic human dignity.

Due to the lack of any involvement by management, this employee and others who are currently pumping have worked together to improvise a more workable solution. Another colleague told them where to find the key to a locked conference room. And after incidents of colleagues disregarding signs on the door and entering the conference room while a woman was pumping, the colleague put in a maintenance request for an inner lock be installed on the door. Because it took many weeks for the lock to be installed, one woman began seeking out offices whose occupants were out for the day and used those spaces to pump. Stopgap solutions such as this require nursing mothers to find a new space each day and include inherent uncertainty as to whether a space will be available.

The lock on the conference room has since been installed, and another woman is now able to use that room regularly to pump. However, that solution still has its limitations and there

⁴ U.S. Dep't of Labor, Wage and Hour Division, *Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073, 800076 (Dec. 21, 2010).

⁵ See 29 U.S.C. § 207(r) (employers covered by Fair Labor Standards Act are to provide nursing employees "a place other than a bathroom" for expression of breast milk that is "free from intrusion"); U.S. Dep't of Health and Human Servs., *Breastfeeding*, <http://www.womenshealth.gov/breastfeeding/going-back-to-work> (last visited Jun. 9, 2015) ("Restrooms are unsanitary and there are usually no electrical outlets. It can also be difficult to manage a pump in a toilet stall."); U.S. Dep't of Labor, Wage and Hour Division, *Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073, 80076 (Dec. 21, 2010) (discussing "health and sanitation concerns" raised by locations such as bathrooms and locker rooms); *Currier v. Nat'l Bd. of Med. Examiners*, 462 Mass. 1, 9, 965 N.E.2d 829, 836 (2012) ("It is not recommended that a restroom be used for expressing milk due to the risk of infection.").

is still no dedicated lactation space in this museum, despite the number of employees who would benefit from a dedicated space.

The plain language of the Break Time for Nursing Mothers provision requires that employers take an active role in providing accommodations for employees, rather than passively sitting back and forcing employees to “figure it out.”⁶ Even if some employees are able to cobble together a workable solution, the Smithsonian is not fulfilling its own obligations as an employer when it does no more than respond to employee complaints after problems have arisen.

While federal law does not require employers to designate a space to be used exclusively as a lactation room, in units with significant numbers of female employees, arranging for a permanent room may be the most efficient solution. Regardless of whether a space is permanent or temporary, the space must be secure (usually meaning it must lock from the inside), must include a table and a chair, must be clean and must be available whenever needed by breastfeeding employees. Ideally, the space will include an electrical outlet, be close to a sink and be in close proximity to the employee’s work space. A bathroom is never an acceptable space to express breast milk.⁷ Providing an appropriate space for employees to express breast milk is beneficial not only for the employee, but also for the employer, as spaces that are comfortable, secure and easily accessible will enable employees to pump in an efficient manner.

When determining where and how many spaces are necessary, it is important to recognize that frequently there may be two or more nursing employees in the same unit. Employers should consider the number of nursing mothers and their work schedules to determine the appropriate number of spaces necessary to accommodate them.⁸ Importantly:

[W]here the number of nursing employees needing to use the space either prevents an employee from taking breaks to express milk or necessitates prolonged waiting time, the Department [of Labor] will not consider the employer to be in compliance with the requirement to provide reasonable break time.⁹

III. Training and Notice of the Policy Requirements is Necessary to Ensure Compliance

We were concerned to hear of the frequent intrusions on female employees who were attempting to express breast milk at work. These intrusions occurred despite employees informing coworkers they would be using certain spaces to pump and despite the posting of signs while the room was in use.

⁶ See 29 U.S.C. § 207(r)(1) (“An employer *shall 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.”)(emphasis added).

⁷ See U.S. Dep’t of Labor, Wage and Hour Division, *Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073, 800076 (Dec. 21, 2010); U.S. Dep’t of Labor, Wage and Hour Division, *Frequently Asked Questions – Break Time for Nursing Mothers*, <http://www.dol.gov/whd/nursingmothers/faqBTNM.htm> (“If the only space available at a work site is a bathroom, can employers require employees to express breast milk there? ANSWER: No. The statute specifically states that the space provided for employees to express breast milk cannot be a bathroom.”).

⁸ U.S. Dep’t of Labor, Wage and Hour Division, *Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073, 800076.

⁹ *Id.*

We also received reports of colleagues failing to accommodate the schedules of nursing mothers, who may need to express breast milk every two to four hours. While in the workplace, breastfeeding women need to express milk on roughly the same schedule as the child's feeding schedule so that there is a supply of milk on hand for the baby. Pumping is also required in order for a mother to maintain her supply and production of breast milk, and to relieve the sometimes painful physical pressure as her breasts produce milk throughout the day. If a woman does not breastfeed or pump on this schedule, it will cause discomfort, pain, engorgement, and a risk of developing blocked milk ducts and infection. As the Department of Labor's interpretation of the federal law indicates, interruptions in the schedule of expression of milk can lead to decreased milk supply; this in turn, is associated with the discontinuation of breastfeeding.¹⁰

Accordingly, the Break Time for Nursing Mothers provision requires that a woman be provided breaks "each time" she has a need to pump; 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.'"¹¹

Disregard for the privacy and scheduling requirements of nursing employees reflects a culture of dismissiveness and disregard for the rights of nursing mothers. A clear policy is the first step toward addressing this issue. However, appropriate training of all relevant management and human resources personnel is essential to ensuring that the new policy is carried out consistently and in a respectful manner.

Further, providing notice to employees of their rights is crucial as well. Employees who are already aware of their rights and responsibilities pursuant to a breastfeeding policy are more likely to communicate their needs to the employer in a timely fashion. In addition, all employees would benefit from education about the need to respect the privacy of colleagues who are expressing milk.

Conclusion

The accounts detailed in this letter illustrate that the Smithsonian Institution is failing to provide its employees the basic accommodations required by federal law. We therefore call on the Smithsonian to 1) promulgate a breastfeeding policy that complies with federal law and

¹⁰ See United States Department of Health and Human Services, Office of the Surgeon General, The Surgeon General's Call to Action to Support Breastfeeding at 13 (2011), available at <http://www.surgeongeneral.gov/library/calls/breastfeeding/calltoactiontosupportbreastfeeding.pdf>.

¹¹ See U.S. Dep't of Labor, Wage and Hour Division, *Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073, 80075 (emphasis added). As the Department of Labor has explained:

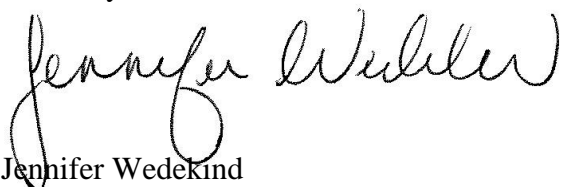
The frequency of breaks needed to express breast milk varies depending on factors such as the age of the baby, the number of breast feedings in the baby's normal daily schedule, whether the baby is eating solid food, and other factors. In the early months of life a baby may need as many as 8 to 12 feedings per day... 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.

Id.

meets or exceeds employer best practices; 2) provide training in the policy and other workplace considerations around breastfeeding employees to relevant management and human resources personnel; 3) provide notice to all Smithsonian employees of the new policy and of their rights under federal law.

As a nationwide organization, the ACLU has unique insight and information about best practices in this and other areas, which may help as you formulate and implement a new policy. Further, the First Shift Justice Project specializes in working with pregnant and parenting employees to ensure that their rights are respected in the workplace. We would welcome the opportunity to work collaboratively with the Smithsonian on a policy that would bring the Institution into compliance with the law and ensure that the agency is not discriminating against its female employees in policy or in practice. We are happy to discuss this issue further or review any draft language and provide feedback. We encourage you to contact us to continue this conversation.

Sincerely,



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