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A Mother's Right to Breast-Feed Her Child in Public—A New Personal Right in California

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Code Sections Affected

Civil Code § 43.3 (new).

AB 157 (Villaraigosa); 1997 STAT. Ch. 59

I. INTRODUCTION

A mother recognizes the different cries of her baby, especially the cry alerting her that it is time for a feeding. For some mothers this presents a problem because they have chosen to breast-feed their child. If the baby gets hungry and needs feeding while the mother is out shopping or eating, the mother may breast-feed the child in the store or restaurant, but, this is where the trouble begins. Although most mothers who breast-feed their babies in public do so discreetly, some observers complain it is disgusting and mothers should not breast-feed in public.¹

However, that is just the beginning of the typical scenario. A security guard asked Amy Rooker, a Sacramento mother, to breast-feed her son in the bathroom after the security guard saw her breast-feeding in a store.² There are many other stories of women who have been asked to either stop breast-feeding, go to the bathroom to breast-feed, or to leave the premises if they continue breast-feeding their child.³ In fact, some women have even been threatened with legal action.⁴

1. See Isabelle Schallreuter Olson, Comment, *Out of the Mouths of Babes: No Mother's Milk for U.S. Children. The Law and Breastfeeding*, 19 HAMLIN L. REV. 269, 269 (1995) (highlighting a Dear Abby column where a woman who was discreetly breast-feeding her baby in a beauty parlor was asked to hurry up and finish breast-feeding because she was offending other customers); *id.* (documenting the responses of other women to the Dear Abby column about breast-feeding in public, saying they felt that breasts "should not be flaunted in public" and that it was "gross").

2. See Dan Bernstein, *Assembly OKs Breast-Feeding Bill*, SACRAMENTO BEE, Apr. 4, 1997, at A1 (noting the incident that happened to Amy Rooker in 1995 and quoting her response to the security guard: "Would you like to eat your lunch there?").

3. See Arthur Caplan, *Right to Breast-Feed Needs Protection*, TIMES UNION (Albany, NY), Dec. 10, 1996, at A14 (reporting that a woman was "thrown out of a toy store" for breast-feeding her baby in the aisle); B.G. Gregg, *Breast-Feeding Moms Rebel at Restrictions. Two Local Women Say State Law is Needed*, CINCINNATI ENQUIRER, Apr. 14, 1997, at B1 (reporting that a mother was kicked off a bus for breast-feeding her baby and noting that another mother, who was breast-feeding her baby in her car in the parking lot, was asked to leave the premises); Margaret Krome, *This Act is Shrewd, Not Lewd*, CAPITAL TIMES (Madison, Wis.), Feb. 20, 1997, at A12 (noting that a woman was asked to stop breast-feeding her child at the daycare).

4. See Caplan, *supra* note 3, at A14 (citing an incident where a woman was charged with disorderly conduct for breast-feeding her child at the mall); see also SENATE FLOOR, ANALYSIS OF AB 157, at 2 (June 26, 1997) (stating that these women are sometimes threatened with charges of violating either a state or local law).

To avoid incidents like these, the California Legislature enacted Chapter 59 to protect a woman's right to breast-feed her child in public and protect the mother from being harassed or threatened with legal action.⁵ California is one of a growing number of states to address this problem.⁶

II. CALIFORNIA'S BREAST-FEEDING LAW

Even before the enactment of Chapter 59, breast-feeding in public was not illegal or punishable under California law.⁷ However, the Legislature points out that mothers breast-feeding their children need a law to let the public know mothers have a right to breast-feed their children in public.⁸ Chapter 59 allows a mother to breast-feed her child in any public or private place where she has a right to be.⁹ The only exception is that a mother is not free to breast-feed her child in a person's private home or residence unless permitted to do so.¹⁰ Moreover, the Legislature reasoned that since in one jurisdiction mothers were granted a constitutional right to breast-feed in public, Chapter 59 should be enacted to protect that right in California.¹¹

III. WHAT IS THIS CONSTITUTIONAL RIGHT?

The Fifth Circuit Court of Appeals in *Dike v. School Board of Orange County*,¹² held that a mother has a constitutional right to breast-feed her child in public.¹³ In

5. See SENATE FLOOR, ANALYSIS OF AB 157, at 2-3 (June 26, 1997) (stating that Chapter 59 will help mothers so that they do not have to feel embarrassed or ostracized if they choose to breast-feed their children in public); Jenifer Warren, *Wilson Signs Bill on Right to Breast-Feed*, L.A. TIMES, July 15, 1997, at A3 (noting a function of the breast-feeding in public law is to make everyone feel more comfortable about women breast-feeding their babies in public).

6. New York has gone the farthest, giving women a civil right protecting their right to breast-feed their child in public. See N.Y. CIV. RIGHTS LAW § 79-e (McKinney Supp. 1997). Other states have created a protected right to breast-feed in a public or private place where the woman has a right to be. See, e.g., FLA. STAT. ANN. § 383.015 (West Supp. 1997); NEV. REV. STAT. § 201.232 (1995); TEX. HEALTH & SAFETY CODE ANN. § 165.002 (West Supp. 1997). Still other states have chosen to state that breast-feeding is not a violation of public indecency laws. See, e.g., 720 ILL. COMP. STAT. 5/11-9 (West 1993 & Supp. 1997); MICH. COMP. LAWS ANN. § 117.5h (West Supp. 1997); VA. CODE ANN. § 18.2-387 (Michie 1996).

7. See ASSEMBLY FLOOR, CONCURRENCE IN SENATE AMENDMENTS OF AB 157, at 1 (June 30, 1997) (noting that breast-feeding in public is not prohibited in California); Max Vanzi, *Assembly OKs Right to Breast-Feed in Public*, L. A. TIMES, July 1, 1997, at A3 (emphasizing that no California law prohibits breast-feeding in public).

8. See Vanzi, *supra* note 7, at A3 (reporting that Chapter 59 will give women a "clear, legal right to breast-feed in public").

9. CAL. CIV. CODE § 43.3 (enacted by Chapter 59).

10. *Id.*

11. See *infra* Part III (discussing the constitutional right to breast-feed in public).

12. 650 F.2d 783 (5th Cir. Unit B July 1981).

13. *Dike v. School Bd. of Orange County*, 650 F.2d 783, 787 (5th Cir. Unit B July 1981); cf. Olson, *supra* note 1, at 290 (explaining that on remand, the district court found that a compelling state interest outweighed the mother's right to breast-feed her child at the school). Note also that the 11th Circuit, which was part of the 5th Circuit at the time of the *Dike* decision, has chosen not to follow *Dike* in the new Circuit and has since overruled

this case a teacher wanted to breast-feed her child during her lunch break. However, because of school policies prohibiting faculty from bringing their children to work, the school asked her to stop having her child brought to her for breast-feeding.¹⁴

The court based its holding on established jurisprudence of protecting rights of personal privacy under various provisions of the United States Constitution.¹⁵ In reaching its conclusion, the court listed several rights given constitutional protection, noting that the U.S. Constitution protects parents' interest in the "nurturing and rearing" of their children.¹⁶ Moreover, the court pointed out that the relationship between the mother and child is an intimate one and that breast-feeding is a key element of parental care.¹⁷ Therefore, a mother's right to breast-feed her child is constitutionally protected and the state must show a compelling reason why the woman should not be allowed to breast-feed her child in a public place.¹⁸ However, a constitutional right would only apply to state actors and not reach private businesses.

IV. POLICY REASONS FOR PROTECTING A MOTHER'S RIGHT TO BREAST-FEED

Chapter 59 has significant public policy implications. It is well documented that breastmilk is the best nutrition for an infant.¹⁹ In fact, breast-feeding provides numerous benefits for both the mother and the child. Breast-feeding helps prevent various diseases in both the mother and child.²⁰ It also helps promote the psychological well being of both the mother and child.²¹ Additionally, Governor

it in the 11th Circuit. See *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).

14. *Dike*, 650 F.2d at 784-85.

15. See *id.* at 785-86 (citing various cases that state the right to privacy has been found in the First, Ninth and Fourteenth Amendments); *id.* (citing various cases that have held particular activities to be protected by the United States Constitution, and that some of the protected activities deal with child rearing and education).

16. See *id.* at 786 (listing certain protected personal rights such as decisions respecting marriage, procreation, contraception, abortion, and family relationships).

17. *Id.* at 787.

18. See *id.* (pointing out that merely declaring a woman has a constitutionally protected right to breast-feed is only part of the analysis and that a state may regulate breast-feeding in public if there are "sufficiently important state interests").

19. See Emmanuel Cheraskin, *Breastfeeding Versus Animal Milk*, NUTRITION HEALTH REV., Mar. 22, 1995, at 8 (stating that breast feeding "is the best way of nourishing the infant").

20. See Olson, *supra* note 1, at 271-72 (noting that breast-fed infants are less likely to suffer from diarrhea, ear infections, and various other childhood diseases including some cancers, allergies, and respiratory infections); *id.* at 271-73 nn.19-38 (citing numerous medical studies done on the effects of breast-feeding, including a study finding that breast-fed children perform better on developmental and IQ tests); *id.* at 274 nn.43-45 (noting that women who breast-feed their children reduce their risk of developing both ovarian and breast cancer); *id.* (noting that "prolonged lactation helps a woman lose weight after pregnancy").

21. See Nicole Bondi, *Infant Care: Mom Sings Praises of Mother's Milk*, DETROIT NEWS, Jan. 9, 1997, at F5 (reporting that not only does breast-feeding have physical benefits but it also "creates a bond between mother and child").

Pete Wilson, who at first thought the bill was unnecessary,²² now states that women need the legislation to remove “barriers of embarrassment, harassment, and charges of indecent exposure when a mother breast-feeds her child in public.”²³ In fact, he designated August as breast-feeding awareness month.²⁴

However, opponents of Chapter 59 argue that some things, including breast-feeding, should not be done in public.²⁵ Another concern is that mothers will take babies to places where it may not be appropriate or safe to bring a small baby.²⁶

V. WAS THE LEGISLATION NECESSARY OR COULD A WOMAN HAVE BEEN PROTECTED UNDER THE UNRUH CIVIL RIGHTS ACT ?

Under common law, an owner of a place of public accommodation had a right to choose whom (s)he would serve.²⁷ However, the law subjected innkeepers to a stricter standard, prohibiting them from discriminating against a person capable of paying for his or her room and meal.²⁸ In 1897, California enacted anti-discrimination legislation carving out exceptions to the common law rule that only innkeepers could not discriminate.²⁹ Again in 1959, the Legislature revised the statute mandating that business establishments cannot discriminate against a person based on their sex, race, color, religion, ancestry, national origin or disability.³⁰

Today in California, businesses cannot discriminate against potential customers.³¹ Moreover, the California Supreme Court found the particular protected classes listed in the Unruh Civil Rights Act to be “illustrative, rather than

22. See Bernstein, *supra* note 2, at A1 (noting that the Governor thought that the bill was unnecessary and did not think that breast-feeding in public was a major crisis).

23. See Dan Smith, *Wilson Signs Public Breast-Feeding Bill*, SACRAMENTO BEE, July 15, 1997, at A1 (quoting Governor Wilson on the effects of Chapter 59).

24. *Id.*

25. See Bernstein, *supra* note 2, at A1 (reporting that some legislators opposed the bill because they felt that breast-feeding in public was inappropriate).

26. See *id.* (noting that opponents believe a mother may take her baby to unsafe places such as a baseball game where there is a lot of dirt and dust); see also *id.* (stating that opponents believe that breast-feeding in a public place where other children are present is inappropriate).

27. See *State v. Brown*, 195 A.2d 379, 382-83 (Del. 1963) (noting that a specific Delaware statute codified part of the common law that gave owners of places of public accommodation a right to choose whom they would serve).

28. See *id.* at 381-82 (stating the common law rule for innkeepers required them to provide services to all travelers who could pay).

29. See Steven Wyllie, Comment, *The Unruh Civil Rights Act: A Weapon to Combat Homophobia in Military On-Campus Recruiting*, 24 LOY. L.A. L. REV. 1333, 1335 (1991) (explaining that the 1897 law listed certain types of establishments that could not discriminate).

30. See CAL. CIV. CODE § 51 (West 1982 & Supp. 1997) (stating that everyone is entitled to “full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever”); Wyllie, *supra* note 29, at 1334 (noting that the statute is known as the Unruh Civil Rights Act and it applies to all business establishments).

31. CAL. CIV. CODE § 51 (West 1982 & West Supp. 1997).

restrictive"³² and that the statute is to be read broadly to avoid arbitrary discrimination.³³ Could a woman who has been asked to leave a store or restaurant because she is breast-feeding her child be protected by the Unruh Civil Rights Act?

In *In re Cox*,³⁴ the California Supreme Court held that a shopping mall could not discriminate against a person because of his "unconventional appearance."³⁵ Furthermore, in *Marina Point, Ltd. v. Wolfson*,³⁶ the California Supreme Court held that a policy discriminating against families with children who were trying to rent an apartment was arbitrary and violated the Unruh Civil Rights Act.³⁷

However, business owners still can ask prospective customers to leave if there is the potential for property damage, injury to others, or disruption of business.³⁸ It would seem unlikely, however, that businesses could fit breast-feeding mothers into any of those situations, including disruption of business because the stores are not prevented from providing their services. Thus, the mothers may qualify to be a protected class under the Unruh Civil Rights Act.

Therefore, even though the Unruh Civil Rights Act could have protected mothers who breast-feed their babies in public, under Chapter 59 businesses must allow mothers to breast-feed their children in public. The legislature created a new personal right allowing women to breast-feed their children wherever they have a right to be.³⁹

VI. CONCLUSION

Although the reasons for the enactment of Chapter 59 are based on the best of intentions, the Legislature cannot change the attitudes of individual citizens who may continue to make mothers, who breast-feed their children in public, feel uncomfortable.⁴⁰ However, Chapter 59 might well be the beginning of public

32. *In re Cox*, 3 Cal. 3d 205, 212, 474 P.2d 992, 997, 90 Cal. Rptr. 24, 27 (1970).

33. *In re Cox*, 3 Cal. 3d at 216, 474 P.2d at 999, 90 Cal. Rptr. at 31.

34. 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970).

35. *See In re Cox*, 3 Cal. 3d at 216-18, 474 P.2d at 999-1000, 90 Cal. Rptr. at 31-32 (holding that a shopping center guard who asked a man to leave because he had long hair and was wearing biker clothes, violated the Unruh Civil Rights Act by arbitrarily discriminating against the man).

36. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982).

37. *See Marina Point, Ltd.*, 30 Cal. 3d at 744, 640 P.2d at 129, 180 Cal. Rptr. at 511 (holding that children, as a class, cannot be arbitrarily discriminated against by a landlord). *But see King v. Hofer*, 42 Cal. App. 4th 678, 684, 49 Cal. Rptr. 2d 719, 722 (1996) (holding that the Unruh Civil Rights Act does include nonsmokers as a protected class).

38. *See In re Cox*, 3 Cal. 3d at 217, 474 P.2d at 999, 90 Cal. Rptr. at 31 (declaring that a business may establish regulations so long as the regulations are reasonable and "rationally related to services performed and the facilities provided"); *see also King*, 42 Cal. App. 4th at 682, 49 Cal. Rptr. 2d at 720 (noting that the Unruh Civil Rights Act relates to personal characteristics or physical attributes and not to economic situations).

39. CAL. CIV. CODE § 43.3 (enacted by Chapter 59).

40. *But see Jean Hoelscher, Breastfeeding in Public*, MOTHERING, Sept. 1990, at 82 (suggesting turn around in attitudes toward breast-feeding in public as being acceptable may be possible as illustrated by the recent attitude changes against smoking in public places).

acceptance of this natural infant feeding.⁴¹ At the very least, those mothers who do choose to breast-feed their children will not have to worry about hiding in back corners or bathrooms when their child needs to be fed.

41. See *Vanzi*, *supra* note 7, at A3 (noting that when other states enacted legislation protecting a woman's right to breast-feed her child in public, incidents of harassment stopped).