

ORIGINAL

IN THE OHIO SUPREME COURT  
COLUMBUS, OHIO

<b>LaNISA ALLEN,</b>	:	Case No. 08-0845
	:	
Plaintiff-Appellant,	:	
	:	
vs.	:	
	:	
<b>TOTES/ISOTONER CORP.,</b>	:	
	:	
Defendant-Appellee.	:	

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**MOTION FOR RECONSIDERATION**

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 SUPREME COURT OF OHIO

**IN THE SUPREME COURT OF OHIO**

**LaNISA ALLEN,**

Appellant-Plaintiff,

vs.

**TOTES/ISOTONER CORP.,**

Appellee-Defendant.

\* Appeal No.: 2008-0845  
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**MOTION FOR RECONSIDERATION**

NOW COMES plaintiff-appellant LaNisa Allen, by and through counsel, and hereby moves this Court to reconsider the decision entered in this matter on August 28, 2009, being Allen v. Totes/Isotoner Corp., 2009-Ohio-4321. Appellant asserts that the lead opinion has misapplied the standard for reviewing a grant of summary judgment by improperly weighing evidence to conclude that appellee had articulated a legitimate, *nondiscriminatory* reason for terminating her. Appellant therefore asks that the Court reconsider her appeal, and in particular the evidence relating to the workrule under which she was terminated, applying the correct standard.

**I. Statement of the Case**

This case concerns the circumstances surrounding the termination of appellant LaNisa Allen's ("Allen") employment with appellee Totes/Isotoner Corp. ("Totes/Isotoner"). Allen asserted that she was terminated because she was lactating, and March 16, 2006, filed suit under the Ohio Fair

Employment Practices Act (“FEPA”), R.C. §§4112.02 and 4112.99. (See Complaint, Tad. 2.) The trial court, in granting a summary judgment in favor of Totes/Isotoner, equated lactation with breastfeeding, and held that Ohio law did not prohibit discrimination against breastfeeding women. (Decision and Entry at 10, Tad. 35.)

On appeal, the 12<sup>th</sup> District Court of Appeals did not reach this legal issue, holding instead, that the company properly terminated Allen for taking an “unauthorized break,” without ever analyzing just how her work break was “unauthorized”. Allen v. Totes/Isotoner (Butler Co. 04/07/08), CA07-08-0196 at ¶3.

On further appeal, this Court, in a *per curium* decision, followed the reasoning of the 12<sup>th</sup> District Court of Appeals:

In this case, the evidence in the record demonstrates that Allen took unauthorized breaks from her workstation, and Isotoner discharged her for doing so. Thus, the record as it was developed in the trial court fails to provide a basis from which a jury could conclude that Isotone’s articulated legitimate, nondiscriminatory reason for Allen’s termination — failure to follow directions — was a pretest for discrimination based on Allen’s pregnancy or a condition related to her pregnancy. This determination defeats Allen’s sex-discrimination claim ...

Allen v. Totes/Isotoner (2009), 2009-Ohio-4231 at ¶6. Accordingly, this Court affirmed the judgment of the trial court and appellate court below. *Id.* at ¶7.

## **II. Standard of Review**

### ***A. Standard for Summary Judgment***

This case arises from the grant of a summary judgment in favor of Totes/Isotoner. This Court reviews the grant of a summary judgment *de novo*. At all times, the moving party bears the burden of demonstrating the absence of a material fact supporting an element essential to the non-moving

party's claim. Dresher v. Burt (1996), 75 Ohio St.3d 280, 292, 662 N.E.2d 264, 269. In response, the non-moving party must "set forth specific facts showing there is a genuine issue for trial." *Id.* at 293, 662 N.E.2d at 269.

This Court, in reviewing that motion, cannot analyze the facts put forth by each party to determine the truth of the matter, but only to determine whether there exists an issue of fact for trial. Inland Refuse Trans. Co. v. Browning-Ferris Ind. of Ohio, Inc. (1984), 15 Ohio St.3d 321, 323-24, 474 N.E.2d 271, 273. Accordingly, all evidence submitted in support of such a motion must be construed most strongly in favor of the non-moving party. Morris v. First National Bank (1970), 21 Ohio St.2d 25, 28, 254 N.E.2d 683, 685.

*B. Standard for Disparate Treatment Claim*

A plaintiff may establish a *prima facie* case of discrimination by introducing facts establishing: (i) that she is a member of a protected class; (ii) that she was qualified for her position; (iii) that she suffered an adverse employment decision; and (iv) that persons outside the protected class were treated more favorably. Hollingsworth v. Time-Warner Cable (Hamilton 2004), 157 Ohio App.3d 539, 812 N.E.2d 976, 2004-Ohio-3130. The establishment of a *prima facie* case creates an inference of employment discrimination.

An employer may rebut that inference by articulating a legitimate, non-discriminatory reason for the employment action at issue. The plaintiff bears the ultimate burden of establishing that the proffered reason is a pretext for unlawful discrimination. Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission (1981), 66 Ohio St.2d 192, 197-97, 421 N.E.2d 128, 132.

### **III. Analysis and Argument**

#### **A. The Lead Opinion of this Court Fails to Consider the Entire Factual Record Developed in the Proceedings Below.**

This Court, in its lead opinion, characterized the factual record relating to the justification for terminating Allen as follows:

The record in this case demonstrates that Allen admitted in her deposition that for approximately two weeks, she had taken breaks without her employer's knowledge or authorization to do so and that her supervisor had told her that she was being terminated for her failure to do so ...

Allen v. Totes/Isotoner (2009), 2009-Ohio-4231 at ¶3. That recitation is incomplete. The following facts are also included in the evidentiary record:

1. Totes/Isotoner hired Allen through an employment agency, Star Personnel Services. Angel Gravett ("Gravett"), an employee of Star Personnel, conducted the initial orientation of prospective employees. At the end of that orientation, Allen told Gravett that she was using a breast pump. Gravett subsequently told Allen she could use her breast pump during her breaks, which occurred at 8:00 and 11:00 am. (T.d. 31 at Tab 3, Memorandum from Angel Gravett at 1, lines 1-12, Defendant's Responses to Plaintiff's First Set of Requests for Production of Documents at doc. 0032.) Totes/Isotoner has specifically denied that Gravett acted as an agent of Totes/Isotoner when she told Allen this. (T.d. 31 at Tab 2, Defendant's Response to Plaintiff's request for Admission No. 13.) Moreover, Totes/Isotoner admits that neither Karen Kidder ("Kidder"), Allen's supervisor, nor Fred James ("James"), the Plant Manager — the two managers involved in firing Allen — never spoke with Allen directly before her hire regarding her use of a breast pump at work. (T.d. 31 at Tab 2, Defendant's Response to Plaintiff's request for Admission Nos. 14, 15 & 21.)

2. The record also establishes that Company employees could take a break to use the restroom for any purpose, at any time, without seeking prior approval:

Q: Did you know or anybody else, any other employees, that were taking breaks at different times than the specified breaks?

A: You know, they could walk off and go to the bathroom at any time; you didn't have to ask.

Q: To go in and use the restroom?

A: No ...

(T.d. 21, Deposition of LaNisa Allen at 55, lines 5-9.) Menstruating employees were also allowed to use the restroom whenever they became uncomfortable. (T.d. 31 at Tab 1, Affidavit of LaNisa Allen at ¶8.)

3. Totes/Isotoner has admitted that James instructed Kidder to terminate Allen because she pumped her breast milk at 10:00 am, rather than at 11:00 am. (T.d. 31 at Tab 2, Defendant's Response to Request for Admissions No. 30.) The Company has further admitted that Kidder, at the meeting when she terminated Allen, told Allen that the reason for her termination was that the company "no longer needed her services." (T.d. 31 at Tab 2, Defendant's Response to Request for Admissions No. 30.)

*B. Construing the Evidence Most Strongly in Favor of Allen, the non-Moving Party, Creates a Genuine Issue of Fact as to Whether Totes/Isotoner Terminated Allen for a Non-Discriminatory Reason.*

This Court must consider these additional facts contained in the record of the proceedings below, and, under the standard for reviewing a grant of summary judgment, must construe those

additional facts construed most strongly in favor of Allen, the non-moving party. Morris v. First National Bank, *supra*, 21 Ohio St.2d at 28, 254 N.E.2d at 685. Such an examination leads to the following conclusions:

1. In her deposition, Allen speculates that the “directions” referenced by this Court in the lead opinion are the instructions from Gravett that she should use her breast pump on her lunch break. (T.d. 21, Deposition of LaNisa Allen at 55, lines 16-22.) Yet Totes/Isotoner has specifically denied that Gravett was acting as its agent during this conversation, (T.d. 31 at Tab 2, Defendant’s Response to Plaintiff’s request for Admission No. 13.) , and asserts that no employee of Totes/Isotoner ever spoke with Allen before her hire about using her breast pump. (T.d. 31 at Tab 2, Defendant’s Response to Plaintiff’s request for Admission Nos. 14, 15 & 21.) This creates a genuine issue as to whether the Company ever did direct Allen only to use her breast pump on her lunch break. A jury could just as easily conclude that Gravett had acted on her own.

2. Other employees, both male and female, were free use the restroom for any purpose during work hours. (T.d. 21, Deposition of LaNisa Allen at 55, lines 5-9.) Assuming, *arguendo*, that Gravett’s instruction that Allen could not go to the restroom to use her breast pump during work hours was effective, then that instruction, on its face, discriminated against lactating women. There is no explanation for this differentiation, other than the Company’s assertion that, because lactating women are not a protected class, it could lawfully discriminate against employees who were lactating. (T.d. 22, Defendant’s Motion for Summary Judgment at 9, lines 1-2.)

3. Further, Totes/Isotoner admits that, when Kidder terminated Allen, she gave no reason, stating only that the Company “no longer needed her services.” (T.d. 31 at Tab 2, Defendant’s Response to Request for Admissions No. 30.) Only later, in these proceedings, did Totes/Isotoner

assert that the Company terminated Allen for violating the instructions given her by Gravett. Given that the Company has specifically denied that Gravett acted as its agent in giving Allen such instructions, and that the workrule in effect at the time was that an employee could use the restroom for any purpose during work hours — and construing this evidence most strongly in favor of Allen — there exists a genuine issue as to whether taking “unauthorized breaks” was the true reason for terminating Allen, or just a pretext for unlawful discrimination against lactating women.

C. *This Court Wrongly Held that Totes/Isotoner Properly Terminated Allen for Taking “Unauthorized Breaks” when the Workrule that Made Such a Break “Unauthorized” Itself Discriminated Against Lactating Employees.*

More to the point, even if the nuances outlined above are insufficient, the workrule that Allen allegedly violated was discriminatory on its face. This Court, in its lead opinion, failed to address this issue. If Allen was guilty of taking an “unauthorized break,” the question remains, what made that break “unauthorized”? This leads directly to the ultimate issue of whether lactating is an aspect of pregnancy protected under R.C. §4112.02, as amended by the Pregnancy Discrimination Act, 138 Ohio Laws, Part I, 1430, 1431-32. This Court, in failing to reach this question, has also eschewed investigation as to whether the proffered reason for terminating Allen was itself discriminatory.

For example, in her concurring opinion, Justices O’Connor writes:

Allen argues that the break policy discriminates against lactating women because other employees are able to use the bathroom freely to attend to bodily functions like menstruation and urination. But Allen was not forbidden to take similar breaks ...

Allen v. Totes/Isotoner (2009), 2009-Ohio-4231 at ¶45. That conclusion is in error. Lactation is a bodily function, and Totes/Isotoner placed a restriction on the time and place Allen could attend to

that function. Tote/Isotoner has created a separate rule applicable only to Allen because she was lactating.

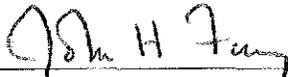
Consider the following analogy: a diabetic employee needs to administer an insulin shot at a certain time each day, and wishes to do so in the relative privacy of the restroom. The employer, however, instructs the employee to take his shot only during scheduled breaktimes, but allows employees to use the restroom freely for other activities. Those breaktimes do not accord with the employee's physical needs, and the employee leaves his workstation to take his insulin shot. The employer then terminates the employee for taking "unauthorized breaks." Under the analysis applied by this Court, the employer acted properly because the employee did not follow a workrule. However, the prohibition against a handicapped employee is well-established, and a reviewing court would more likely find that the workrule limiting the time that the diabetic employee could take insulin was itself discriminatory. The question is one of focus.

Such is the case here. The lead opinion herein declines any consideration of whether lactation is protected under R.C. §4112.02. Yet the three Justices who did consider that question, Justices O'Connor, Moyer and Pfeiffer, each concluded that lactation was an aspect of pregnancy and therefore was protected under §4112.02. Had the complete Court considered that issue, it would likely have reached the same conclusion. Therefore, any workrule that restricted the time and place that lactating employees could use a breast pump, while allowing other employees to attend to bodily functions at any time, would itself be discriminatory. Priest v. TFI-EB, Inc. (Franklin 1998), 127 Ohio App.3d 159, 165, 711 N.E.2d 1070, 1075 [an employer must extend the same accommodations made to nonpregnant employee to pregnant employees]. This Court cannot uphold a workrule as legitimate and nondiscriminatory that singles out lactating employees.

## VI. CONCLUSION

For all the reasons set forth more completely above, appellant LaNisa Allen asserts that this Court must reconsider the issue of whether lactation is an aspect of pregnancy protected under R.C. §4112.02, and whether the workrule that Allen allegedly violated — that lactating women could only pump their milk during the 11:00 am lunch break — was itself discriminatory, and therefore cannot provide a “legitimate, nondiscriminatory” reason for terminating Allen.

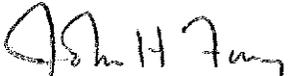
Respectfully submitted,

  
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## CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellant was served upon Timothy P. Reilly, Taft, Stettinius & Hollister, 425 Walnut Street, Suite 1800, Cincinnati, Ohio 45202, attorney for appellee, by regular U.S. Mail, on this 4th day of September 2008.

  
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