

NORFOLK, SS

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT
NO. 07-01515

SOPHIE C. CURRIER, ET AL., PLAINTIFFS

v.

NATIONAL BOARD OF MEDICAL EXAMINERS, DEFENDANT

**MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

After hearing and review of the parties' submissions and case law, I will deny plaintiff's motion for a preliminary injunction for the following reasons.

First, it appears to me unlikely that the plaintiffs will prevail on the merits of their claims. The cases cited by the parties indicate that the defendant, the entity which administers the medical licensing examination, is not a "state actor". The states, not the defendant, determine who will be licensed as a physician. Determining who will be licensed as a physician is a state function; the testing performed by the defendant is not.

The claim under the Massachusetts Civil Rights Act will likely fail because the plaintiff cannot establish the necessary "threats, intimidation, or coercion" necessary for that cause of action. Establishing the conditions under which the test will be given, including the time available, does not constitute "threats, intimidation or coercion", economic or otherwise, within the meaning of G.L.c. 12, §11H.

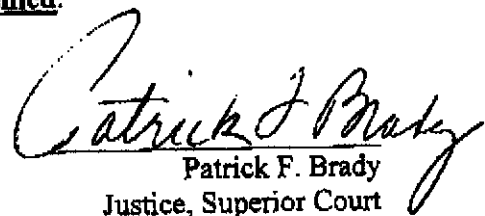
Furthermore, the crux of plaintiff's complaint is that the time allotted by the defendant for those taking the test to attend to personal needs such as food, drink and use of the restroom does not allow her sufficient time to express milk. I do not agree, however, that the defendant's refusal to permit the plaintiff additional time to take the test burdens plaintiff's alleged constitutional right to breast-feed. The cases cited by the plaintiff allegedly establishing a constitutional right to breast-feed involved situations where the state actor refused to permit the plaintiff to breast-feed. That is not the case here. The defendant has offered a number of so-called "personal items exceptions" which would make it more convenient for the plaintiff to attend to her needs including permission to express milk in a separate, private room with an electrical outlet, permission to bring in and use multiple breast pumps to express milk while in her separate testing room during the test and/or break time, providing her privacy to pump in her separate testing room during the test and/or break time, permission to bring food and drink into the exam, which she may consume at any time, and the option to leave the test center to breast-feed during the allotted break time. Even assuming the constitutional right which the plaintiff is asserting, it is unlikely that she will prevail on the argument that the conditions under which she is required to take the test unfairly burdens her right.

Finally, the plaintiff has not demonstrated that irreparable harm would likely result from a failure to grant a preliminary injunction, or that the public interest requires the granting of a preliminary injunction. The plaintiff may take the test and pass, notwithstanding what she considers to be unfavorable conditions. The plaintiff may delay the test, which is offered numerous times during the year, until she has finished her breast-feeding and the need to express milk. If, as the plaintiff asserts, her career will be

delayed as a result of the testing conditions, there is no reason to believe that she cannot be adequately compensated by an award of money damages.

ORDER

Plaintiffs' motion for a preliminary injunction is **denied**.


Patrick F. Brady
Justice, Superior Court

18 Sept 07

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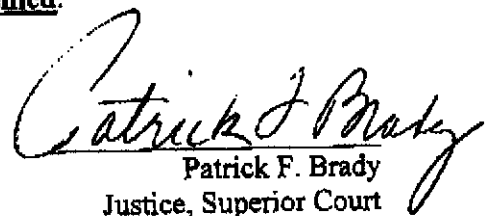
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