

BALANCING COMPETING RIGHTS EXERCISE INSTRUCTIONS

GIVEN THE DIFFICULTIES ASSOCIATED WITH THE BALANCING PROCESS IN COMPLEX MULTICULTURAL SOCIETY, IT IS IMPERATIVE THAT ONLY *ACTUAL* CONFLICTS OF RIGHTS ARE APPROACHED AS BALANCING TASKS. IN PARTICULAR, BEFORE PROCEEDING TO THE TASK OF BALANCING, CAREFUL CONSIDERATION MUST BE GIVEN TO FACTORS FOR ASSESSING THE EXTENT TO WHICH COMPETING RIGHTS ARE THE REAL ISSUE AT STAKE.

THERE ARE THREE KEY QUESTIONS:

1. ARE THE RIGHTS CLAIMS CHARACTERIZED APPROPRIATELY?
2. ARE VALID, LEGALLY RECOGNIZED RIGHTS AT STAKE?
3. ARE THE NEEDS OF BOTH PARTIES TRULY IN CONFLICT? [IF 1 & 2 THEN EXPLORE SOLUTIONS FOR ACCOMMODATING BOTH AS FOLLOWS:]
4. WHAT ARE THE CONFLICTING RIGHTS IN THE SENERIO?
5. WHAT SOLUTIONS COULD BE DETERMINED BY SOCIETY TO RESOLVE THIS CONFLICT?

BALANCINIG PRINCIPLES:

HOW DO YOU SATISFY THE COMPELLING INTEREST OF EQUALITY AND DIVERSITY IN A WAY THAT IS

- 1) LEAST INTRUSIVE MEANS OF ACHIEVING GOALS
- 2) GIVES GENEROUS EXPRESSION TO ALL RIGHTS AND INTERESTS

EX: BREASTFEEDING IN PUBLIC

IS THIS A CONFLICT BETWEEN FREEDOM OF EXPRESSION AND FREEDOM FROM DISCRIMINATION BASED ON SEX?

At first glance, then, there appears to be a conflict between freedom of expression and freedom from discrimination based on sex. But a careful consideration of whether or not the rights claims are appropriately characterized tells a different story. Court and Tribunal decisions have clearly established a woman's right to breastfeed in public. Importantly, these decisions have concluded that actions which prevent a woman from breastfeeding in public are discriminatory. These precedents mean that in the absence of a compelling, equally valid discrimination claim, a woman has an unqualified right to breastfeed in public. The freedom of expression claim is not a valid counter-claim because there is no established positive legal right to individual preference. That is, you may air your personal preferences about a woman breastfeeding in public, but you may not use those preferences to compel a woman to stop an activity that is already recognized as an established equality right. In this instance, *what amounts to a community standards test for discrimination masquerades as freedom of expression claim*. Once this guise is exposed and the actual driving force of the complaint is revealed, there is no need to engage in the task of balancing.