

## COMMENTS

### START A FAMILY OR BECOME A PROFESSOR?

#### PARENTAL LEAVE POLICIES FOR POSTDOCTORAL FELLOWS TRAINING FOR ACADEMIC CAREERS IN THE SCIENCES

*George E. McCue\**

INTRODUCTION.....	110
I. A FORGOTTEN CLASS OF SCIENTISTS .....	113
II. THE POSTDOC’S PLACE WITHIN THE LABORATORY .....	115
III. OPTIONS TO TAKE PARENTAL LEAVE.....	117
A. The Federal Family and Medical Leave Act and Its State Law Counterparts.....	118
B. University-Wide Policies .....	121
C. Departmental Policies .....	122
D. Funding Source Policies .....	123
1. The National Institutes of Health.....	124
2. The National Science Foundation .....	124
3. Private Funding Sources .....	125
IV. POLICIES THAT WOULD BENEFIT POSTDOCS.....	125
A. Flexible Family-Friendly Policies and Communication Improvements .....	125
1. Part-Time Opportunities .....	126
2. Clock Extensions: Pushing Back Deadlines to Alleviate Time Pressure .....	126
3. Stronger Communication and More Organizations to Support Postdocs.....	127
B. Policy Proposals to Standardize Postdoc Parental Leave .....	128
1. Clearer Parental Leave Policies Communicated by Funding Sources, Which Universities Could Follow and Use as Guidelines.....	128

---

\* B.S., Ball State University, 2002.; J.D., Univ. of Wisconsin Law School, Dec. 2010. I would like to thank Ann Miller, Ph.D., for her help in selecting this topic and keeping me apprised of literature from the scientific community. Special thanks to Yevgenya Grinblat, Ph.D., and to Bonnie Smith, Ashley Gillard, Leah Isakson, Christine Heywood and Jennifer Torbeck for their thoughtful editing. Finally, thanks to my wife, Emily Vaughan, Ph.D., for her support, guidance and inspiration.

2. A Single Employee Classification of Postdocs, Regardless of Whether the Postdoc is Individually- or University-Funded .....	128
V. LEGAL SOLUTIONS TO ENCOURAGE FAMILY-FRIENDLY POLICIES AND TO ENSURE COMPLIANCE WITH EXISTING LAW .....	130
A. Title VII: Protecting Employees from Discrimination.....	131
1. Disparate Treatment.....	132
2. Disparate Impact .....	135
B. Title IX: Protections from Discrimination Within Educational Programs .....	136
C. Other Potential Legal Claims .....	137
CONCLUSION .....	138

## INTRODUCTION

A biology research scientist could spend twenty-nine years, perhaps more, in school and training positions before being ready to search for permanent employment at a university. These twenty-nine years include thirteen years of grade school followed by four years of undergraduate education, seven years of graduate (doctoral) education<sup>1</sup> working in a laboratory as a research assistant (RA)<sup>2</sup>, and five years of postdoctoral training.<sup>3</sup> From kindergarten to completion of a postdoctoral fellowship, the researcher would look back on the better part of three decades of preparation on her<sup>4</sup> path to independent research.

1. See Donald Kennedy, Editorial, *Getting Older*, SCIENCE 323 (2002) (citing the average doctorate in the United States as lasting seven years); OFFICE OF ACADEMIC PLANNING & ANALYSIS, UNIV. OF WISCONSIN-MADISON OFFICE OF THE PROVOST, *Average Time to Graduate Degree, by Major and by Degree Level* (2009), available at [http://apa.wisc.edu/degrees/Graduate Time to Degree.pdf](http://apa.wisc.edu/degrees/Graduate%20Time%20to%20Degree.pdf). Between the 2004-05 and 2008-09 school years, the average time to complete a biological science doctorate at the University of Wisconsin-Madison ranged between 5.9 and 6.3 years.

2. Lucy M. Stark, *Exposing Hostile Environments for Female Graduate Students in Academic Science Laboratories: The McDonnell Douglas Burden-Shifting Framework as a Paradigm for Analyzing the "Women in Science" Problem*, 31 HARV. J.L. & GENDER 101, 132 (2008). Typically, an RA receives a monthly stipend and does not pay tuition. *Id.* at 133. The median age to receive a biology doctorate in the United States is 31.4 years old. NAT'L SCI. FOUND., DOCTORATE RECIPIENTS FROM U.S. UNIVERSITIES: SUMMARY REPORT 2007-08 (2009), available at <http://www.nsf.gov/statistics/nsf10309/pdf/nsf10309.pdf>.

3. Stark, *supra* note 2, at 121 (stating "[p]ostdoctoral fellowships in the biological sciences usually last around five years" and even suggesting that in the biological sciences, multiple fellowships are customary before moving on to a faculty-level position). Of course, there is one more all-important step to true job security at a university—tenure. Because this writing focuses on the postdoctoral fellowship, it will not discuss the timeline and challenges new professors face in attaining a tenured professorship.

4. For conciseness, pronouns in this writing will be attributed to the female sex (i.e., "her"). However, most parental leave policies and issues in question can affect both sexes. Therefore, unless referring specifically to pregnancy, female pronouns are interchangeable with male pronouns (i.e., "his"). This is an important point because men who take family care-taking responsibilities can be discriminated against, perhaps sometimes in violation of the Family and Medical Leave Act. See Joan C. Williams & Nancy Segal, *Beyond the*

Of course, that does not account for the number of years a new professor will struggle to achieve tenure and funding for her research.<sup>5</sup>

The average age for a researcher to receive her first major grant is now forty-two years old.<sup>6</sup> Most professors are approaching or already in middle age by the time they have reached the professional benchmark of securing tenure.<sup>7</sup> After looking at the immense amount of time and work that a research scientist faces before becoming professionally established, one might wonder—where does starting a family fit in?

Many scientists will make family-related decisions during the training stages of their careers, particularly after earning their doctorate degrees.<sup>8</sup> Postdoctoral fellows, or postdocs<sup>9</sup>, conduct research in a university research laboratory under the supervision of a professor who manages the laboratory.<sup>10</sup> The postdoctoral fellowship is a temporary position usually lasting several years. This fellowship is in many ways a segue between student and employee. A postdoc does not take classes. She typically receives a stipend, usually monthly, which seems like a normal paycheck. However, the fellowship is still a training position and not considered a job in many respects. These features can lead to problems and ambiguity regarding employment benefits.<sup>11</sup> A prime

---

*Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 92, 101-02 (2003). As will be discussed in this writing, many of the policies in question will affect more females than males.

5. According to the most recent memorandum from the University of Wisconsin-Madison, approximately 42% of female faculty are promoted to tenured positions within six years, and 64% are promoted within nine years. Memorandum from Margaret Harrigan, Office of Academic Planning & Analysis, Univ. of Wisconsin-Madison, to Steve Stern, Damon Williams, Julie Underwood, Committee on Women in the University (Mar. 12, 2009), available at [http://apa.wisc.edu/Diversity/FacStaff\\_\GenderEthnic\\_200809\\_MH.pdf](http://apa.wisc.edu/Diversity/FacStaff_\GenderEthnic_200809_MH.pdf). The corresponding percentages for men are 55% within six years, and 70% within nine. *Id.* Those figures reflect tenure clock extensions, which a significant proportion of both men and women received. *Id.*

6. NAT'L RESEARCH COUNCIL, BRIDGES TO INDEPENDENCE: FOSTERING THE INDEPENDENCE OF NEW INVESTIGATORS IN BIOMEDICAL RESEARCH I (2005).

7. The average age to reach tenure extended past thirty-nine years old as of 2003, compared to thirty-six years old in 1985. MARC GOULDEN ET AL., STAYING COMPETITIVE: PATCHING AMERICA'S LEAKY PIPELINE IN THE SCIENCES 6 (2009), available at [http://www.americanprogress.org/issues/2009/11/pdf/women\\_and\\_sciences.pdf](http://www.americanprogress.org/issues/2009/11/pdf/women_and_sciences.pdf).

8. *See id.* at 2-3.

9. "Postdoc" is common shorthand for "postdoctoral fellowship," particularly when referring to the person in the position as opposed to the position itself. For the sake of conciseness, the term "postdoc" is used from here forward when referring to people in that position, while the term "postdoctoral fellowship" is used when referring to the position itself.

10. *See* Geoff Davis, *Doctors Without Orders: Highlights of the Sigma Xi Postdoc Survey*, AM. SCIENTIST, May-June 2005 (Supp.), at 1, 1, available at <http://www.sigmaxi.org/postdoc/highlights.pdf>.

11. *See id.* at 1-2.

example of this ambiguity is the lack of clear parental leave policies when a postdoc becomes pregnant.<sup>12</sup>

This writing will explore the current state of parental leave policies for postdocs and weigh solutions to help reform the current policy. The writing uses examples from the biological sciences.<sup>13</sup> Although the discussion could apply to any program employing postdocs,<sup>14</sup> this discussion often focuses on the biological sciences because biology programs now enroll a higher number of women than other science programs.<sup>15</sup> Higher numbers of mothers and potential mothers mean that parental leave policies currently have the broadest impact in this discipline (although parental leave policies indisputably affect men as well). In addition, the biological sciences are an appropriate point of focus because it currently has one of the longest roads to professional stability out of the research sciences.<sup>16</sup> Earning a doctorate degree in most of the

---

12. "Parental leave" encompasses what has been traditionally referred to as "maternity leave," but is more expansive because it covers both parents, and in some cases more than simply pregnancy and childbirth. Many of the policies examined in this writing may apply even beyond parental leave, extending to other kinds of "family leave" (for example, the Family Medical Leave Act allows leave to care for an aging parent or disabled family member). See Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2006). Because this writing focuses on family leave associated with parenting, the term "parental leave" will be used in all instances unless specifically referring to leave due to pregnancy (in which case "maternity leave" may be used).

13. "Biological sciences" can include many different specific disciplines. For example, the University of Wisconsin-Madison's Women in Science and Engineering Leadership Institute considers the following departments to be included: Agronomy, Animal Science, Bacteriology, Biochemistry, Dairy Science, Entomology, Food Microbiology & Toxicology, Food Science, Genetics, Horticulture, Nutritional Sciences, Plant Pathology, Forest Ecology & Management, Natural Resources - Wildlife Ecology, Kinesiology, Nelson Institute for Environmental Studies, Botany, Communicative Disorders, Zoology, Anatomy, Anesthesiology, Biostatistics & Medical Informatics, Family Medicine, Medical Genetics, Obstetrics & Gynecology, Medical History & Bioethics, Human Oncology, Medicine, Dermatology, Medical Microbiology, Medical Physics, Neurology, Neurological Surgery, Oncology, Ophthalmology & Visual Sciences, Orthopedics & Rehabilitation, Pathology & Laboratory Medicine, Pediatrics, Pharmacology, Biomolecular Chemistry, Physiology, Population Health Sciences, Psychiatry, Radiology, Surgery, School of Pharmacy, Animal Health & Biomedical Sciences, Medical Sciences, Pathobiological Sciences, Comparative Biosciences, Surgical Sciences. This paper is primarily concerned with research biology programs that perform laboratory research and employ postdocs.

14. Note that this includes postdoctoral fellowships in other academic disciplines such as chemistry and physics, as well as postdoctoral fellowships provided by private employers. Also, although there is such a thing as an "industry" postdoctoral fellowship, this writing focuses on the traditional academic postdoctoral fellowship at a university. For a discussion of the differences between academic and industry postdoctoral fellowships, see Lesley McKarney, *Inside the Industrial Postdoc Experience*, SCI. CAREERS (June 20, 2003), available at [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2003\\_06\\_20/noDOI.262611639775010726](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2003_06_20/noDOI.262611639775010726).

15. See Stark, *supra* note 2, at 111 tbl.1.

16. See *id.* at 121.

biological sciences typically takes between five and seven years.<sup>17</sup> Over the past few decades, this period has steadily increased.<sup>18</sup>

This writing will progress from an introduction of the problem to an analysis of solutions through policy and law to remedy it, exploring the likelihood of success and costs involved. Part I introduces the postdoctoral fellowship, which is in many respects a forgotten class in limbo between student and employee. Part II explains the mechanics of how a postdoctoral fellowship fits within the research laboratory structure at universities with regard to funding and employment. Part III then explores existing parental leave options for postdocs, from the Family and Medical Leave Act (FMLA), to university policies. Part IV proposes family-friendly and other clarifying policies that would benefit postdocs who choose to start a family. Part V assesses legal solutions to help attain those policies, exploring pregnancy's legally-protected status and methods to enforce compliance with antidiscrimination law. Finally, the conclusion includes a conceptualization of a "model" parental leave policy, combining several successful innovations and reforms.

#### I. A FORGOTTEN CLASS OF SCIENTISTS

This writing focuses on parental leave options for what could be termed as a "forgotten class" of scientists—postdocs.<sup>19</sup> Sometimes thrown into the same group as students and other times considered employees or faculty,<sup>20</sup> today's postdocs will be tomorrow's research university faculty.<sup>21</sup>

Parental leave policies for postdocs are particularly important for several reasons. Many of these reasons pertain to both female and male postdocs, but

---

17. See Kennedy, *supra* note 1. See generally Letter to the Editor, *The Paucity of Grants Among Young Scientists*, 298 SCIENCE 2327-28 (2002) (letters commenting on Kennedy's article, contending that his figures on length of doctorates and postdoctoral fellowships were *underestimates* if anything).

18. See Kennedy, *supra* note 1.

19. Both the National Institutes of Health and the National Science Foundation define the term "postdoctoral scholar" as the following: "An individual who has received a doctoral degree (or equivalent) and is engaged in a temporary and defined period of mentored advanced training to enhance the professional skills and research independence needed to pursue his or her chosen career path." Letter from Norka Ruiz Bravo, Deputy Director for Extramural Research, National Institutes of Health and Kathie L. Olsen, Deputy Director, National Science Foundation, to Alyson Reed, Executive Director, National Postdoctoral Association (Jan. 29, 2007), available at [http://grants.nih.gov/training/Reed\\_Letter.pdf](http://grants.nih.gov/training/Reed_Letter.pdf).

20. For example, in statistics compiled by the University of Wisconsin-Madison's Office of Academic Planning and Analysis, postdocs appear to not be included in either "student" or "faculty" statistics.

21. Although academic postdoctoral fellowships can and do precede jobs outside of academia, the postdoctoral fellowship is traditionally defined as very specific training to prepare for a career in a university laboratory. See Karen Christopherson, *Postdoc Production*, SCI. CAREERS (Aug. 30, 2002), [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2002\\_08\\_30/noDOI.15442684455129763462](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2002_08_30/noDOI.15442684455129763462). Jobs outside of academia include working in areas such as the biotech industry, science writing, scientific patent law, or consulting. *Id.*

particularly pertain to females who are or may become pregnant. First and most importantly, most postdocs are at an age when people commonly have or raise children, and when pregnancy carries the fewest risk factors regarding the health of both mother and child.<sup>22</sup> A 2003 survey found that 34% of U.S. postdocs had children.<sup>23</sup> Second, postdocs are not highly paid, especially taking into consideration their level of education and training.<sup>24</sup> They are especially vulnerable to financial pressures and therefore are not well-situated to take unpaid time off to start a family.<sup>25</sup> Third, the postdoctoral fellowship's complicated and often ambiguous employee status means that many benefit policies are often poorly communicated or not in place at all.<sup>26</sup>

Finally, policies that poorly serve work-family balance can cause would-be faculty to leave science, especially academic science with its intense demands.<sup>27</sup> According to one study, only 36% of female postdocs—and 52% of male postdocs—considered the tenure-track career at a research university to be “family friendly.”<sup>28</sup> Another study found that women who had children within five years of receiving their doctorate were 24% less likely than their male counterparts to gain tenure within twelve to fourteen years of earning the doctorate.<sup>29</sup> This is a costly trend for the nation. When an individual drops out

---

22. Although postdocs' ages can vary widely, a recent study found the majority (58%) of postdocs within the age range of thirty to thirty-five years old. Davis, *supra* note 10, at 4; see Kathleen Kunkle Gilbert, *Northwestern University School of Law's Two Year Work Requirement and Its Possible Effects on Women: Another Tile in the Glass Ceiling?*, 12 AM. U. J. GENDER SOC. POL'Y & L. 69, 104-11 (asserting that Northwestern's work requirement for law school applicants inherently discriminates against women by ignoring the fact that women have a finite time period in which to have children). Scientific evidence exists of the decreasing level of fertility in women after they reach the age of thirty. See *id.* at 105 (citing American College of Obstetricians and Gynecologists, *Pregnancy After 30* (1985)). After that age, there are also higher risks for pregnancy-complicating health concerns such as high blood pressure and diabetes, and also for miscarriages. See *id.* Pregnancies later than the age of thirty-five have a higher risk for certain conditions such as preeclampsia. *Id.* at 106.

23. Davis, *supra* note 10, at 4.

24. *Id.* at 6 (comparing the median salary of the postdoc survey respondent, \$38,000, to the median salary for a worker with a bachelor's degree, cited as \$45,000).

25. Typical stipend levels for postdoctoral fellowships range from \$37,740 to \$52,068, depending on years of (postdoctoral) experience. See Ruth L. Kirschstein *National Research Service Award (NRSA) Stipend and Other Budgetary Levels Effective for Fiscal Year 2009*, NAT'L INSTS. OF HEALTH (Jan. 13, 2010), <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-09-075.html> [hereinafter *NRSA Stipend*].

26. For example, a search for benefits eligibility for postdocs at the University of Wisconsin-Madison yielded only a chart intended to be a “summary” for research assistants and postdocs. See *Eligibility of Postdoctoral Fellows/Trainees and Research Associates for Various University Benefits*, UNIV. OF WIS.-MADISON, <http://www.grad.wisc.edu/admin/hr/info/benefitschart.pdf> (last updated June 7, 2010). Most of the web addresses on the chart, including the referral to the benefits policy in its entirety, were not active.

27. See GOULDEN ET AL., *supra* note 7, at 14-15.

28. *Id.* at 17.

29. Mary Ann Mason & Marc Goulden, *Do Babies Matter? The Effect of Family Formation on the Lifelong Careers of Academic Men and Women*, ACADEME, Nov.-Dec. 2002, at 21, 24, available at <http://www.aaup.org/AAUP/pubsres/academe/2002/ND/Feat/Maso.html>.

of academic science after years of training (which is subsidized through grants by the federal government and often, state education), it results in a huge loss of investment to taxpayers.<sup>30</sup> Although this writing does not assume that “fixing” parental leave will totally reverse such trends, it does argue that the loss of talented scientists can be mitigated by well-communicated, family-friendly policies, such as equitable parental leave for postdocs.

## II. THE POSTDOC’S PLACE WITHIN THE LABORATORY

A brief description of the structure of a university research lab is necessary to understand the funding process and the relationship between postdocs and professors. Postdocs conduct research on behalf of the laboratory under the direction of a professor who guides the research, although postdocs perform more independently than RAs (doctoral students).<sup>31</sup> Unlike most RAs, postdocs often secure their own funding from outside the university to support their research, which includes paying for their salary.<sup>32</sup> The largest and most prevalent funding source for biology research is the National Institutes of Health (NIH), which provides grants for research aimed at producing medical benefit.<sup>33</sup> Other funding sources include the National Science Foundation (NSF) and private funding sources such as the American Cancer Society (ACS).<sup>34</sup>

A professor, who in this context is often referred to as a principal investigator (PI)<sup>35</sup>, runs her own laboratory.<sup>36</sup> Although the university will provide some support, a PI typically must secure funding from many of the same sources mentioned (NIH, NSF, private sources) to fund her laboratory.<sup>37</sup> That funding allows the PI to buy the materials and equipment for research and

---

30. Mary Ann Mason, Op-Ed., *A Look at the PhD Problem*, THE DAILY CALIFORNIAN (Jan. 22, 2010, 12:45 AM), <https://www.law.berkeley.edu/7438.htm>.

31. See, e.g., *Definitions for Research Associate, Postdoctoral Fellow, Postdoctoral Research Associate and Related Classifications*, UNIV. OF S. CAL., <http://www.usc.edu/dept/personnel/comp/researchassociatedefinitions.pdf> (last visited Apr. 16, 2011).

32. For a list of biology postdoctoral fellowship funding sources compiled by the University of California-Berkeley, see *Postdoctoral Fellowships in the Biological Sciences*, U.C. BERKELEY SPONSORED PROJECTS OFFICE, <http://www.spo.berkeley.edu/Fund/biopostdoc.html> (last visited Apr. 16, 2011).

33. Statutorily authorized by 42 U.S.C. § 241(a)(3) (2006).

34. *Postdoctoral Fellowships*, *supra* note 32.

35. Although this term is commonly used in the laboratory setting, it technically describes the professor’s position with regard to funding and is not a professor’s actual job title with the university. See *Glossary & Acronym List*, NAT’L INSTS. OF HEALTH, <http://grants.nih.gov/grants/glossary.htm> (last visited Apr. 16, 2011) (defining “principal investigator” as “[a]n individual designated by the grantee to direct the project or activity being supported by the grant. He or she is responsible and accountable to the grantee and NIH for the proper conduct of the project or activity.”).

36. See Stark, *supra* note 2, at 132, 147.

37. See Sarah Webb, *Business Sense: Starting an Academic Lab*, SCI. CAREERS (July 17, 2009), [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2009\\_07\\_17/credit.a0900088](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2009_07_17/credit.a0900088).

hire staff.<sup>38</sup> A laboratory's staff can include undergraduates (usually working a few hours per week), RAs,<sup>39</sup> postdocs (although many postdocs secure their own funding, it is also possible that PIs may partially or totally fund their postdocs with general laboratory funding), and technicians.<sup>40</sup> In essence, the PI manages an operation similar to a small business or franchise.<sup>41</sup>

Of course, research laboratories are a part of larger structures—departments and universities. Individual laboratories belong to academic departments, headed by departmental chairs.<sup>42</sup> For example, the University of Wisconsin-Madison's Zoology Department oversees more than twenty faculty-run research laboratories.<sup>43</sup> Academic departments are part of the larger university. These three levels—laboratory, department and university—come into play with regard to laboratory staff members' employment and benefits.

From a laboratory worker's perspective, however, the PI is the "boss" and often, in practical respects, "the human resources department."<sup>44</sup> The PI heading the laboratory hires staff, decides how work will be conducted, and usually makes determinations regarding many benefits such as time off.<sup>45</sup> This model of employment can be problematic. PIs, even if they are brilliant scientists, may not have the background and information at their disposal to address the human resources aspects of the job, such as when a staff member becomes pregnant and wants to know her options.<sup>46</sup>

---

38. *See id.*

39. In the case of RAs, the PI's laboratory budget usually pays that student's tuition to the university, and also a monthly stipend to the RA. The amount of stipend can vary greatly by area of the country, institution, department and funding source. NIH grants, such as the Kirschstein National Research Service Award, specify stipend levels that have become de facto guidelines for stipend levels. In 2009, those annual stipend levels were \$20,976 for predoctoral researchers (RAs). NAT'L INSTS. OF HEALTH, *supra* note 25; *see also* Clinton Parks, *The Wild World of Doctoral Funding*, SCI. CAREERS (Apr. 7, 2006), [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2006\\_04\\_07/noDOI.13555482768542130956](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2006_04_07/noDOI.13555482768542130956).

40. Laboratory technicians are support positions that do not necessarily require a doctorate, assisting other staff members with technical aspects of their respective research. *See Webb, supra* note 37.

41. *Id.*; *cf.* Stark, *supra* note 2, at 147 ("Each PI runs his or her lab like a private 'fiefdom,' with minimal departmental or institutional oversight of internal laboratory practices").

42. *See* Cathy Ann Trower, *Alleviating Tenure Torture*, SCI. CAREERS (Aug. 10, 2001), [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2001\\_08\\_10/noDOI.10553693740778769025](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2001_08_10/noDOI.10553693740778769025).

43. *Zoology Faculty Research Interests*, UNIV. OF WIS.-MADISON DEP'T OF ZOOLOGY, <http://www.zoology.wisc.edu/faculty/zoofaclist.html> (last visited Apr. 16, 2011).

44. *See Stark, supra* note 2, at 147-48.

45. *See id.*

46. Joan Williams, Distinguished Professor of Law, Univ. of Cal.-Hastings, Denice D. Denton Distinguished Lecture at the Univ. of Wis.-Madison (Oct. 2, 2009), *available at* <http://mediasite.engr.wisc.edu/Mediasite/Viewer/?peid=bd6dccd1d4db4719b813b6d4b5a3445b>.

## III. OPTIONS TO TAKE PARENTAL LEAVE

When seeking options to take parental leave for a pregnancy, the postdoc will likely discuss her situation with her PI. Typically, the postdoc and PI make arrangements for the postdoc to take some time off as paid parental leave, perhaps using informal policies like vacation.<sup>47</sup> However, there are potential problems with this practice. The process leaves a huge amount of discretion with the PI, which can be problematic if the PI chooses to not accommodate the postdoc.<sup>48</sup> As one attorney has noted, “[y]ou can’t solve an institutional problem with an individual accommodation.”<sup>49</sup>

In a related vein, the PI may *want* to give the postdoc time off, but her arms may be tied by the laboratory’s funding pressures.<sup>50</sup> To look at it another way, it is unfair for the PI to lose the productivity of a staff member without that productivity being compensated or accommodated for in some way.<sup>51</sup> As noted in Part II’s overview of academic laboratory operations, PIs apply for and receive laboratory funding from sources outside the university (in the same way that many postdocs secure their own individual funding).<sup>52</sup> Therefore, the PI’s future lifeline of funding is dependent upon research results that will secure future funding.<sup>53</sup> Despite where the funding comes from, research is a collaborative process. Giving the postdoc a “charitable” amount of time off means a longer absence of a key staff member of the laboratory.<sup>54</sup> The PI may feel that her laboratory cannot afford additional time without such an experienced staff member who helps mentor and collaborate with other laboratory workers.

If the postdoc is paid through the general laboratory funding, there is a direct productivity cost that must be made up elsewhere.<sup>55</sup> However, even when the postdoc receives her own individual funding from outside the university, the PI may feel compelled to provide stopgap coverage or assume other indirect costs. For example, if the postdoc’s funding source does not give parental leave but it does allow two weeks of paid vacation for the postdoc, the PI might offer additional time off paid through the general lab funding. The larger point is that unless the leave is sanctioned and supported by the larger institutions—the

---

47. See GOULDEN ET AL., *supra* note 7, at 4.

48. See *id.* at 17, 32.

49. Williams & Segal, *supra* note 4, at 82 (quoting Anne Weisberg in Joan Williams & Cynthia Thomas Calvert, *Balanced Hours: Effective Part-Time Policies for Washington Law Firms: The Project for Attorney Retention, Final Report, Third Edition*, 8 WM. & MARY J. WOMEN & L. 357, 393 (2002)).

50. See GOULDEN ET AL., *supra* note 7, at 17, 32.

51. See *id.* at 31.

52. See Webb, *supra* note 37; see also Emma Hitt, *Faculty Positions: Seeking the Skills for a Successful Career in Academia*, SCI. CAREERS (Jan. 25, 2008), [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2008\\_01\\_25/science.opms.r0800046](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2008_01_25/science.opms.r0800046).

53. *Id.*

54. See GOULDEN ET AL., *supra* note 7, at 31.

55. See *id.*

department, university, and/or funding agency—the PI and her laboratory must absorb the burden.<sup>56</sup>

Therefore, knowing if the postdoc is entitled to parental leave by law or policy, and to what extent, are important considerations for the PI in deciding to exercise any sort of discretion in a determination. There are two primary considerations. The first consideration is whether the PI is required by law to give the postdoc time off. The second consideration is whether the time off is paid, and if so, by whom. The following laws and policies may apply.

A. *The Federal Family and Medical Leave Act and Its State Law Counterparts*

The Family and Medical Leave Act (FMLA) entitles eligible employees to up to twelve weeks of unpaid leave for family-related purposes such as pregnancy with continued medical benefits such as health insurance.<sup>57</sup> The FMLA applies to employees who have worked for at least one year and have met minimum hour requirements.<sup>58</sup>

If an employer violates the FMLA by not providing the mandated leave or terminating the employee in retaliation for taking such leave, the employee may bring a private action.<sup>59</sup> The employee may sue to recover actual lost wages, salary and benefits arising from the violation, plus interest and in some cases liquidated damages equal to the amount of the aforementioned compensatory damages and interest.<sup>60</sup> Courts have determined that the FMLA does not give plaintiffs a right to collect punitive damages.<sup>61</sup>

Many states have their own laws allowing unpaid parental leave in a similar fashion to the FMLA.<sup>62</sup> Employers must allow eligible employees to

---

56. *Id.* (“[W]hen researchers paid by grants need family leave or modification of duties[,] it puts [PIs] in a very difficult position, wanting to support the individual but also knowing that their research projects will likely suffer.”)

57. 29 U.S.C. § 2612(a)(1)(A) (2006); *see also* 29 C.F.R. § 825 (2010). *See generally* Susan A. Kidwell, *Pregnancy Discrimination in Educational Institutions: A Proposal to Amend the Family Medical Leave Act of 1993*, 79 TEX. L. REV. 1287 (2001) (proposing giving special treatment to higher education employees to allow a full semester of leave, citing the difficulty in taking a twelve-week absence in a university setting).

58. 29 U.S.C. § 2611(2)(A).

59. *Id.* § 2617(a)(1).

60. *Id.* If the employer can prove that the violation is made in good faith, the trial court has the discretion to reduce the amount of or even omit any liquidated damages. *Id.* § 2617(a)(1)(A)(iii).

61. *Keene v. Rinaldi*, 127 F. Supp. 2d 770, 772 (M.D.N.C. 2000)

62. *See Federal vs. State Family and Medical Leave Laws*, U.S. DEP’T OF LABOR, <http://www.dol.gov/whd/state/fmla/index.htm> (last visited Apr. 16, 2011). Such states include California, CAL. GOV’T CODE § 12945.2 (West Supp. 2011); Connecticut, CONN. GEN. STAT. ANN. § 31-511l (West Supp. 2010); Hawaii, HAW. REV. STAT. ANN. §§ 398-1 to 398-29 (West Supp. 2010); Maine, ME. REV. STAT. ANN. tit. 26, § 843-850 (Supp. 2010) (extending leave protections to victims of domestic violence); Minnesota, MINN. STAT. ANN. § 181.941 (West 2006); New Jersey, N.J. STAT. ANN. § 34:11B-4 (West 2000); Oregon, OR. REV. STAT. §§ 659A.150-86 (2009); Rhode Island, R.I. GEN. LAWS §§ 28-48-1 to 28-48-12 (2009); Vermont, VT. STAT. ANN. tit. 21, §§ 470-74 (Supp. 2009); Washington, WASH. REV.

use the law, either the FMLA or state law, that is most favorable to employees.<sup>63</sup> For example, the California Family Rights Act allows even more time—up to three months of unpaid leave—for family care related leave.<sup>64</sup> In Wisconsin, the Wisconsin Family and Medical Leave Act<sup>65</sup> allows up to six weeks of unpaid leave with continued medical benefits.<sup>66</sup> Wisconsin's act has similar qualifications, with some variations, to the FMLA.<sup>67</sup>

There are two significant difficulties in applying federal or state family leave law to postdoc positions. First, the postdoctoral fellowship is not a permanent position, as it only lasts a few years.<sup>68</sup> Therefore, the one-year work requirement of the FMLA (or similar provision in state law) precludes a large fraction of the fellowship period from being covered.<sup>69</sup>

Second, if a postdoc is individually funded by a source outside the university, she is usually deemed by the university to not be an employee of the university and therefore ineligible for FMLA or state law family leave.<sup>70</sup> However, one might question the logic that postdocs are not university employees simply because they are funded by a source outside the university. After all, postdocs do not commonly receive a paycheck directly from their funding source.<sup>71</sup> Rather, the university (or department) typically sets the salary amount and the paycheck comes from the university.<sup>72</sup>

---

CODE ANN. §§ 49.78.220 (West 2009); Wisconsin, WIS. STAT. § 103.10 (2009-10), WIS. ADMIN. CODE DWD 225 (2010); and the District of Columbia, D.C. CODE § 32-1202 (Supp. 2007).

63. See 29 U.S.C. § 2651(b).

64. See CAL. GOV'T CODE § 12945.2.

65. See WIS. STAT. § 103.10; WIS. ADMIN. CODE DWD 225.

66. See WIS. STAT. § 103.10(3)(a)(1).

67. For example, Wisconsin allows employees to be eligible after working 1,000 in the past year of employment, while the FMLA requires 1,250 hours. See WIS. STAT. § 103.10(2)(c).

68. See Davis, *supra* note 10, at 1.

69. For example, if a postdoctoral fellowship lasts three years, then the postdoc is not FMLA-eligible for one third of the total time period.

70. The different labels for postdocs based on their employment status are confusing and inconsistent from university to university. The different classes may be called "employees," "associates," "fellows," "trainees," "researchers," "scholars," "appointees," etc. See, e.g., *Postdoc Life: Info for Parents and Expectant Parents at the University of Chicago*, UNIV. OF CHI. BIOLOGICAL SCIS. DIV. POSTDOCTORAL ASS'N, <http://www.bsdpstdoc.uchicago.edu/being-childcare.shtml> (last visited Apr. 16, 2011) (explicitly stating non-employee postdocs, or what the school terms "fellows," are not eligible for FMLA); Laure Haak, *Postdocs and the Law, Part 3: Are Postdocs Employees?*, SCI. CAREERS (Dec. 20, 2002), [http://sciencecareers.sciencemag.org/career\\_development/previous\\_issues/articles/2100/postdocs\\_and\\_the\\_law\\_part\\_3\\_are\\_postdocs\\_employees/](http://sciencecareers.sciencemag.org/career_development/previous_issues/articles/2100/postdocs_and_the_law_part_3_are_postdocs_employees/).

71. E.g., *NIH Grants Policy Statement*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Dec. 2003), [http://grants2.nih.gov/grants/policy/nihgps\\_2003/NIHGPs\\_Part10.htm](http://grants2.nih.gov/grants/policy/nihgps_2003/NIHGPs_Part10.htm) ("Non-Federal sponsoring institutions receive an award for the stipend, institutional allowance, and tuition and fees (when applicable). The institution directly pays the fellow and disburses all other awarded costs."). Postdocs that receive funding *directly* from their source suffer two disadvantages. First, they would probably not be considered employees of the funding agency, and even if they were, it would often be unlikely that the agency would have fifty such "employees" to meet FMLA eligibility. Second, direct funding to postdocs could make

Universities respond that they are simply following tax regulations with regard to employee status.<sup>73</sup> As is discussed throughout this writing, a distinction is often made between postdocs who are paid from general laboratory funding and those who are individually funded.<sup>74</sup> Universities often consider the former “employees” that earn the equivalent of wages through their stipend, and consider the latter “trainees,” or non-employees, whose stipends technically originated from the funding source outside the university.<sup>75</sup> Most postdocs, whether employee or non-employee, pay income taxes on their stipends.<sup>76</sup> The NIH’s National Research Service Award fellowship, which is discussed below, is a notable exception.<sup>77</sup> Therefore, “trainee” postdocs are shut out of FMLA and state law family leave eligibility and other benefits because they are deemed not to be employees.<sup>78</sup>

The non-employee status of many postdocs has not been challenged in court in the context of FMLA or state law family leave benefit eligibility. However, as will be discussed, postdocs can usually arrange more preferable, paid parental leave options instead of FMLA or state law family leave. Therefore, while it would be preferential to extend FMLA or state law family leave benefits to all postdocs—which would probably require an act of Congress to revisit and clarify the employee/trainee distinction in the Internal

---

the postdoc “invisible” to the university regarding other benefits such as health insurance, which usually is provided by the university. See Beryl Lief Benderly, *The California Plan*, SCI. CAREERS (Aug. 2, 2003), [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2003\\_08\\_01/noDOI.15636715966130403015](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2003_08_01/noDOI.15636715966130403015) (outlining California’s policy to give the same health insurance plan to all postdocs regardless of funding source or set-up).

72. See Haak, *supra* note 70.

73. See Laure Haak, *Postdocs and the Law, Part II: Principal Investigator Versus Individual Grants*, SCI. CAREERS (Dec. 6, 2002), [http://sciencecareers.sciencemag.org/career\\_development/previous\\_issues/articles/2100/postdocs\\_and\\_the\\_law\\_part\\_ii\\_principal\\_investigator\\_versus\\_individual\\_grants/](http://sciencecareers.sciencemag.org/career_development/previous_issues/articles/2100/postdocs_and_the_law_part_ii_principal_investigator_versus_individual_grants/).

74. Haak, *supra* note 70.

75. See *id.*

76. See I.R.C. § 117(a)(2006) (making an income exception for scholarships to individuals who are candidates for degrees). Because postdocs are not pursuing a degree, they are generally not covered by this section (although the NRSA fellowship has been held to fall under this provision). See, e.g., *Streiff v. Comm’r*, 77 T.C.M (CCH) 1565 (1999). The one general exception to this statement covers foreign postdocs covered by a tax treaty. See INTERNAL REVENUE SERV., PUBLICATION 901: U.S. TAX TREATIES 16 (2010), available at <http://www.irs.gov/pub/irs-pdf/p901.pdf>.

77. See *Rev. Rul. 83-93, 1983-1 C.B. 364 (reversing former ruling Rev. Rul. 77-319, 1977-2 C.B. 48 in which NRSA fellowships were deemed taxable income)*. For a helpful discussion of the analysis comparing NRSA-funded postdocs to non-NRSA-funded postdocs, see generally I.R.S. Chief Counsel Advice 200944027 (July 22, 2009), available at <http://www.irs.gov/pub/irs-wd/0944027.pdf>.

78. E.g., *The Postdoctoral Fellows’ Guide to Working and Conducting Research at OHSU*, OR. HEALTH & SCI. UNIV., <http://www.ohsu.edu/research/rda/postdocs/infaculty.shtml> (last visited Apr. 16, 2011) (“Post Doc Researchers, who are considered employees, are entitled to protected leave for birth or adoption or serious health conditions. Trainees (not considered employees) are not entitled to protected FMLA.”).

Revenue Code—a higher priority for reform efforts should be to secure paid parental leave benefits for postdocs.

### B. University-Wide Policies

Ideally, postdocs should receive paid parental leave from their employer, the university (regardless of whether it is covered by a funding source). After all, paid parental leave provided by the university is a common benefit expectation of professors.<sup>79</sup> Unfortunately, there is little consistency from university to university regarding parental leave for postdocs.<sup>80</sup> Those trends that are discernable provide little comfort to postdocs wanting to start a family. According to one study of the Association of American Universities member institutions, only 23% of those universities had a policy in place entitling postdocs to at least six weeks<sup>81</sup> of paid parental leave.<sup>82</sup> Another 37% of institutions offer some form of paid leave with limitations, such as only allowing it for certain groups, allowing less than six weeks, or only partially-paid leave.<sup>83</sup>

The distinction between employee and non-employee postdocs, introduced in the last subsection, may lead universities to administer two different benefit schemes, based on the postdoc's funding source.<sup>84</sup> Some universities have policies in place for postdocs, but they only apply to employee postdocs.<sup>85</sup> If the postdoc is a non-employee (individually funded), that employee is not covered under the policy. However, some schools may allow paid leave to non-employee postdocs at their discretion.<sup>86</sup> For example, the University of Minnesota gives individual departments the discretionary power to allow paid leave to individually-funded postdocs.<sup>87</sup>

---

79. According to one study of Association of American University members, 58% of professors receive at least six weeks of paid maternity leave. *See* GOULDEN ET AL., *supra* note 7, at 4 fig.2.

80. *See* Emily Klotz, *Solutions for Pregnant Postdocs*, SCI. CAREERS (Apr. 6, 2001), [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2001\\_04\\_06/noDOI.16345389045951849768](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2001_04_06/noDOI.16345389045951849768) (with a sampling of different universities' parental leave policies).

81. Six weeks is considered a minimum timeline for recovery from childbirth. GOULDEN ET AL., *supra* note 7, at 19. For more complicated childbirths such as caesarian sections, an appropriate minimum is closer to at least eight weeks. *Id.*

82. *Id.*

83. *Id.* at 19 fig.9.

84. *See supra* notes 74-78 and accompanying text.

85. *See, e.g.,* Klotz, *supra* note 80 (mentioning the University of California Los Angeles (UCLA) as an example of this policy. It should be noted that UCLA has since revised its policy to treat all postdocs equally). *See* GOULDEN ET AL., *supra* note 7, at 18-19 (as discussed in Part III.A regarding federal- and state-mandated unpaid family leave eligibility, postdocs receiving individual funding from outside the university are not considered to be employees of the university).

86. *E.g.,* *Parental Leave for Academic Employees*, UNIV. OF MINN., <http://www.policy.umn.edu/Policies/hr/Leaves/PARENTALLEAVE.html> (last updated Aug. 26, 2010).

87. *See id.*

Meanwhile, other universities, such as the University of California-Berkeley, the University of California-Los Angeles (UCLA), and Yale University specify in their policy several weeks of paid maternity leave to all postdocs, regardless of funding source.<sup>88</sup> In other words, whether the postdoc is individually funded and her funding source does not cover the allotted amount of paid time off for parental leave, the university policy mandates that the department allow the postdoc to take that time off and cover the difference. As an example, UCLA's policy combines unpaid time off, disability leave with partial pay, and accrued sick days.<sup>89</sup>

Many universities, including the University of Wisconsin-Madison, do not have a blanket policy, leaving it to the discretion of the PI or department head.<sup>90</sup> University of Wisconsin-Madison's departments may allow sick and vacation time to be used toward the leave.<sup>91</sup>

### C. Departmental Policies

Individual departments may also implement their own policies for parental leave. For example, the University of Wisconsin-Madison's Chemistry Department offers paid maternity leave to its postdocs and research assistants.<sup>92</sup> To avoid the legal and political complications of using taxpayer dollars,<sup>93</sup> this benefit is funded by private gifts to the department, as opposed to state or federal funding.<sup>94</sup>

Other levels of administration between the university as a whole and individual departments may develop their own policies.<sup>95</sup> As with university-

---

88. See UNIV. OF CAL. OFFICE OF THE PRESIDENT, ACADEMIC PERSONNEL MANUAL 390 1, 15 (2003), available at <http://www.ucop.edu/acadadv/acadpers/apm/apm-390.pdf>; *Postdoctoral Scholar Leaves and Other Benefits*, UCLA GRADUATE DIV., <http://www.gdnet.ucla.edu/gss/postdoc/pdleave.htm> (last visited Apr. 16, 2011) (explicitly specifying that all postdocs, whether "employees" or "fellows" are eligible for sick time and parental leave); YALE UNIV., POLICIES FOR POSTDOCTORAL APPOINTMENTS (2011), available at [http://www.yale.edu/postdocs/documents/PD\\_policy.pdf](http://www.yale.edu/postdocs/documents/PD_policy.pdf).

89. See SOC'Y OF POSTDOCTORAL SCHOLARS AT UNIV. OF CAL. L.A., UCLA POSTDOC MATERNITY LEAVE INFO SHEET, available at [https://www.postdoc.ucla.edu/files/UCLA%20Postdoc%20Maternity%20Leave%20Info%20Sheet\\_0.pdf](https://www.postdoc.ucla.edu/files/UCLA%20Postdoc%20Maternity%20Leave%20Info%20Sheet_0.pdf) (last visited Apr. 16, 2011) [hereinafter UCLA POSTDOC MATERNITY LEAVE INFO SHEET].

90. Interview with Yevgenya Grinblat, Associate Professor, Dep't of Zoology, Univ. of Wis.-Madison (Nov. 12, 2009); see YALE UNIV., *supra* note 88.

91. Interview with Yevgenya Grinblat, *supra* note 90.

92. Anita Weier, *New Moms Get Incentive to Stick with Chemistry*, CAP. TIMES, Nov. 2, 2007, at A3.

93. Those complications might include a possible legal challenge that the department was improperly using state dollars to give benefits beyond those given to other state employees, without approval by the larger university or the Wisconsin Legislature.

94. Weier, *supra* note 92.

95. Departments may produce their own determinations to help communicate their policies. *E.g.*, OHIO STATE UNIV. COLL. OF MED./OFFICE OF HEALTH SCIS. ET AL., POSTDOCTORAL RESEARCHER OR POSTDOCTORAL FELLOW? DECISION GUIDE, 1-2 (2010), available at [http://medicine.osu.edu/research\\_ed/postdoc/faculty\\_admin/Documents/Postdoctoral%20Researcher%20or%20Postdoctoral%20Fellow%20decision%20guide%20u](http://medicine.osu.edu/research_ed/postdoc/faculty_admin/Documents/Postdoctoral%20Researcher%20or%20Postdoctoral%20Fellow%20decision%20guide%20u)

wide policies, these policies could supplement what is given to individually-funded postdocs to give universal treatment to all postdocs, regardless of funding source. For example, Vanderbilt University Medical Center, which includes many individual research departments, has a policy in place that applies to all of its postdocs.<sup>96</sup> According to that policy, two weeks of accrued vacation or sick time can be used in addition to the NIH-allowed paid leave time for postdocs that it funds.<sup>97</sup> Therefore, a postdoc at Vanderbilt, whether funded by her own laboratory, the NIH, or another funding source, is eligible for six weeks of maternity leave provided she applies some of her own vacation or sick time toward it. Another similar example is the Bloomberg School of Public Health, which includes several academic departments but is a subdivision of Johns Hopkins University. The School of Public Health allows thirty days of paid parental leave to all postdocs who were receiving stipends from any source, whether inside or outside of the university.<sup>98</sup>

#### D. Funding Source Policies

As discussed in Part II, many postdocs secure their own individual funding through grants instead of being paid through the laboratory budget or university. Funding agencies could make accommodations for parental leave to be applied by the university and also used as general guidelines. This relationship of funding, between university and funding source, raises a particular point of contention regarding how parental leave policies can be clarified and reformed—specifically, who should do it.<sup>99</sup> On the one hand, universities look to funding sources—particularly the NIH—for provisions that universities could implement into their own policies.<sup>100</sup> On the other hand, the funding agencies consider it a matter that they are not well-suited to address, better left to individual universities.<sup>101</sup> The major funding sources are

---

pdated%202.1.2010.pdf (specifying that “Postdoctoral Researchers,” the department’s title for employee postdocs, are eligible for state or federal family leave, while “Postdoctoral Fellows,” the department’s title for non-employee postdocs, are not eligible for that unpaid type of leave; neither class is given paid parental leave).

96. See *Policy for Parental Leave for Graduate Students and Postdoctoral Research Fellows*, VAND. UNIV. SCH. OF MED. (Feb. 16, 2005), <https://medschool.vanderbilt.edu/postdoc/policies?q=node/46>. The policy also applies to RAs. *Id.*

97. See *id.* Although it appears to be the current policy, Vanderbilt’s 2005 proposal (that was formally accepted) is actually out of date with regard to the length of leave specified by the NIH, which was extended from thirty calendar days to sixty calendar days in 2008. See *infra* note 104 and accompanying text. This provides yet another example of information that is unclear at best and misleading at worst for any postdoc trying to educate herself about her options when taking pregnancy leave.

98. JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, STUDENT HANDBOOK 2007-08 73 (2005), available at [http://www.jhsph.edu/bin/e/t/2007-08\\_SPH\\_Student\\_Handbook.pdf](http://www.jhsph.edu/bin/e/t/2007-08_SPH_Student_Handbook.pdf).

99. See GOULDEN ET AL., *supra* note 7, at 23-24.

100. *Id.* at 24. The NIH’s influence as a policy-shaper is evident through examples such as the way NIH stipend levels for grants often function as de facto guidelines for salary levels for postdocs and RAs. See *id.*; *NRSA Stipend*, *supra* note 25.

101. See GOULDEN ET AL., *supra* note 7, at 40.

individually discussed below to explore their parental leave policies (or lack thereof).

### 1. The National Institutes of Health

The NIH is by far the largest funding source of biology research. It has a parental leave policy in place for the most common postdoctoral fellowship grant, the National Research Service Award (NRSA),<sup>102</sup> which is often used as a guide for other NIH grants.<sup>103</sup> The grant allows salary coverage for up to eight weeks (the equivalent of sixty calendar days, extended in 2008 from thirty days<sup>104</sup>) per year for birth or adoption of a child, subject to approval by the training program director.<sup>105</sup> In addition to a period of paid leave, an unpaid leave of absence for an “extended period” may be available, conditioned upon approval, for family leave.<sup>106</sup>

Approval of NIH leave is technically contingent upon whether similar training programs at the university receive the same amount of paid leave.<sup>107</sup> In other words, if the university does not give paid parental leave to its postdocs through its policy, then NIH-individually-funded postdocs should likewise receive no paid leave from the NIH.<sup>108</sup> Or, if the university’s policy offered six weeks, the grant would match those six weeks instead of eight weeks.

### 2. The National Science Foundation

The NSF is a distant second in research funding by federal agencies.<sup>109</sup> It funds all types of general science research, as opposed to the NIH, which only funds research providing medical benefit.<sup>110</sup> The NSF has no specific parental leave policy for grant recipients.<sup>111</sup> Although it is considering guidelines to help institutions make determinations on the possibilities of leave, none currently

---

102. Statutorily authorized by 42 U.S.C. § 241(a)(3) (2006). Also known as the Ruth Kirschstein Grant.

103. See GOULDEN ET AL., *supra* note 7, at 23.

104. *Revised NIH Parental Leave Policy for the Ruth L. Kirschstein NRSA Award*, NAT’L INSTS. OF HEALTH (April 10, 2008), <http://grants1.nih.gov/grants/guide/notice-files/NOT-OD-08-064.html>.

105. See *Ruth L. Kirschstein National Research Service Awards (NRSA) for Individual Postdoctoral Fellows—Part I Overview Information*, NAT’L INSTS. OF HEALTH, <http://grants.nih.gov/grants/guide/pa-files/PA-07-107.html> (last visited Apr. 16, 2011).

106. See *id.*

107. *Id.* (“Fellows may receive stipends [during the period of leave] . . . when those in comparable training positions at the grantee institution have access to paid leave for this purpose . . . .”)

108. Because parental leave is applied so inconsistently and PIs often make their own informal work-around solutions, it is difficult to say how often this rule is strictly applied.

109. GOULDEN ET AL., *supra* note 7, at 9 fig.3. Although other federal agencies provide funding for research (such as funding a project or laboratory), only the NIH and the NSF fund individual postdocs. See *id.* at 23.

110. Statutorily authorized by 42 U.S.C. § 1862 (2006).

111. See GOULDEN ET AL., *supra* note 7, at 23.

exist.<sup>112</sup> Instead, for the time being, the NSF handles parental leave on a “case-by-case basis.”<sup>113</sup>

### 3. Private Funding Sources

Countless private sources may also fund research at universities. Usually, such sources are non-profit organizations that fund research to combat a specific disease or explore a certain technological area.<sup>114</sup> Larger private sources in the biological sciences include the ACS, the American Heart Association, the Helen Hay Whitney Foundation, the Damon Runyon Cancer Research Foundation, and the Susan G. Komen Breast Cancer Research Foundation.<sup>115</sup> Parental leave policies from these funding sources can vary widely. For example, the Damon Runyon Cancer Research Association allows twelve weeks of paid leave for the postdocs it funds.<sup>116</sup> Other private funding organizations, such as the ACS, do not offer any kind of standard policy.<sup>117</sup>

## IV. POLICIES THAT WOULD BENEFIT POSTDOCS

A good parental leave policy needs to be complemented by other policies that in composite create a workplace environment that supports a work-family balance. The keys are flexibility and communication. Universities and departments should implement—and funding sources should allow and encourage—policies to offer more flexibility regarding work-family balance.<sup>118</sup>

### A. *Flexible Family-Friendly Policies and Communication Improvements*

In this context, “flexibility” does not mean giving a PI unbridled discretion in granting or denying parental leave.<sup>119</sup> Rather, the key to “flexible” policies is that the policies provide *options* that can universally be offered to all postdocs in an equitable manner.

---

112. *Id.*

113. *Id.*

114. See Virginia Gewin, *Funding Your Future: Publish or Perish*, SCI. CAREERS (Sept. 11, 2009), [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2009\\_09\\_11/science.opms.r0900077](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2009_09_11/science.opms.r0900077).

115. See *Postdoctoral Fellowships in the Biological Sciences*, *supra* note 32.

116. See *Fellowship Award Overview*, DAMON RUNYON CANCER RES. FOUND., [http://www.damonrunyon.org/for\\_scientists/more/fellowship\\_award\\_overview](http://www.damonrunyon.org/for_scientists/more/fellowship_award_overview) (last visited Apr. 16, 2011).

117. See AM. CANCER SOC’Y, POSTDOCTORAL FELLOWSHIP POLICIES AND INSTRUCTIONS (2011), available at <http://www.cancer.org/Research/ResearchProgramsFunding/pf-policies-and-instructions-2011-pdf>. The ACS simply notes that requests for leave are handled on a “case-by-case basis.” See *id.*

118. See generally LAUREL SMITH-DOERR, *WOMEN’S WORK: GENDER EQUALITY VS. HIERARCHY IN THE LIFE SCIENCES* (2004) (comparing academic biology research to biotech companies, and finding that universities’ highly-structured hierarchy systems were actually less friendly to female scientists than the “network-based” approach found at many biotech companies).

119. See GOULDEN ET AL., *supra* note 7, at 7.

### 1. Part-Time Opportunities

By instituting policies to allow postdocs to work part-time, even if only temporarily, universities may alleviate the work and funding pressures associated with arranging to work while starting a family.<sup>120</sup> Postdocs are not offered the opportunity to continue work on a part-time basis as often as their RA and PI counterparts, although the reason why appears to be tied more to tradition than to logic.<sup>121</sup> It is common practice to budget RA positions as part-time with regard to laboratory funding.<sup>122</sup> Similarly, funding agencies commonly allow laboratory budgets to account for part-time faculty.<sup>123</sup> Unfortunately, postdocs are rarely openly given the option to work part-time by either the institution or funding source.<sup>124</sup>

Part-time options for postdocs should be expanded in the policies of universities and funding sources.<sup>125</sup> Especially if part-time postdocs could keep some benefits such as health insurance, many postdocs may be willing to work and be paid less as a compromise allowing them to devote more time to their family.<sup>126</sup>

### 2. Clock Extensions: Pushing Back Deadlines to Alleviate Time Pressure

The career ladder to tenured research professor is one in which the scientist moves to a new position every few years.<sup>127</sup> Along with all of those steps come deadlines to proceed forward.<sup>128</sup> Allowing flexibility with those

---

120. *See id.* at 37.

121. *See id.*

122. *See id.*

123. *See id.* Though, some universities insist on “full time or no time” for faculty.

124. *See id.* *See generally* Laura S. Malisheski, *Part-Time Science in Perspective*, SCI. CAREERS (Dec. 7, 2007), [http://sciencecareers.sciencemag.org/career\\_development/previous\\_issues/articles/2007\\_12\\_07/caredit\\_a0700177](http://sciencecareers.sciencemag.org/career_development/previous_issues/articles/2007_12_07/caredit_a0700177) (“In the United States, established policies for funding part-time research aren’t quite as progressive [as in Europe]. However, even funders who aren’t used to awarding grants or fellowships to part-time researchers may be open to the prospect.”)

125. *See* GOULDEN ET AL., *supra* note 7, at 37.

126. *See* Klotz, *supra* note 80 (on strategies for postdocs to keep health insurance and its importance for beginning families). Special care should taken, however, to avoid cognitive, perhaps even unintentional, biases against postdocs who have or are currently working part-time to accommodate family needs. *See* Williams & Segal, *supra* note 4, at 97. As stressed throughout this part of the writing, a key to reform is acceptance of a work-family balance, even if it is achieved through non-traditional means. *See* GOULDEN ET AL., *supra* note 7, at 42.

127. *See supra* notes 1-5 and accompanying text.

128. For example, RAs typically face a preliminary evaluation early after approximately a year of research. *See, e.g.,* *Graduate Information*, IND. UNIV.-PURDUE UNIV. INDIANAPOLIS DEP’T OF BIOLOGY, <http://www.biology.iupui.edu/graduateinformation.html> (last visited Apr. 16, 2011). Similarly, non-tenured faculty face target dates to focus and produce their research or secure laboratory funding. *See* Cathy Ann Trower, *Alleviating Tenure Torture*, SCI. CAREERS (Aug. 10, 2001), [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2001\\_08\\_10/noDOI.10553693740778769025](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2001_08_10/noDOI.10553693740778769025). Postdocs face similar deadlines as well.

deadlines at the postdoctoral fellowship level would make parental leave and other options such as part-time work more feasible.

At the faculty level, tenure clock extension has become an effective way to allow more flexibility with work-family balance.<sup>129</sup> Tenure clock extension's premise is that any leave or loss of productivity is accounted for by pushing back subsequent deadlines in the tenure track.<sup>130</sup> This is a practical way to ensure that the researcher is not subjected to undue pressure for taking time off, and conversely, to avoid putting that person in a *better* position by awarding tenure when that researcher has completed less work than others similarly situated.<sup>131</sup>

By the same token, postdocs deserve clock extensions for completion of their benchmarks or to extend maximum time allotments if they choose to take parental leave or are having difficulty balancing work-family pressures.<sup>132</sup> Clock extensions can and should be incorporated with any leave or part-time policy.<sup>133</sup> For example, if a postdoc were to opt to take six months off or work exactly half-time for one year, a clock extension policy would direct that postdoc's supervising PI to extend benchmarks or the eventual target date for completion of the fellowship by six months.

### 3. Stronger Communication and More Organizations to Support Postdocs

Postdocs are a sizable population at any research university.<sup>134</sup> Postdocs are generally more informed about their employment rights and more satisfied with their experience when the university has an official postdoc association.<sup>135</sup> Postdoc associations can point out university and departmental policies and help postdocs to understand and interpret those policies.<sup>136</sup> Some postdoc associations are also unions, which could ensure adequate pay levels and other

---

129. See Yudhijit Bhattacharjee, *Women Say Stopping Tenure Clock Isn't Enough*, SCI. CAREERS (Dec. 17, 2004), [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2004\\_12\\_17/noDOI.9322025004052172510](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2004_12_17/noDOI.9322025004052172510) (discussing the concept of tenure clock extension and how in order to be effective, it must be accompanied by a climate that does not discourage women from requesting such extensions).

130. *See id.*

131. Joan Williams, *supra* note 46.

132. *See* GOULDEN ET AL., *supra* note 7, at 42.

133. *See id.* at 37.

134. University of Wisconsin-Madison has approximately 600 postdocs. UNIV. OF WISC.-MADISON GRAD. SCHOOL, POSTDOCTORAL SCHOLARS EXPERIENCE AT UW-MADISON 1 (2001), *available at* <http://www.grad.wisc.edu/research/postdocs/summary.pdf>. According to the University of Wisconsin-Madison, there were 911.6 "employees in training" in the Fall 2010. UNIV. OF WIS.-MADISON, DATA DIGEST 2010-11 (2011), *available at* [http://apa.wisc.edu/DataDigest/DATA\\_DIGEST\\_11.pdf](http://apa.wisc.edu/DataDigest/DATA_DIGEST_11.pdf). Presumably, this includes postdoctoral fellows.

135. *See* Melanie Sinche & Donita Robinson, *The Benefits of Collaboration to Postdoctoral Education*, ASCB NEWSL. (Am. Soc'y for Cell Biology, Bethesda, MD), Nov. 2002, *reprinted in* SCI. CAREERS (Jan. 17, 2003), [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2003\\_01\\_17/noDOI.18226396133471728217](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2003_01_17/noDOI.18226396133471728217). The University of Wisconsin-Madison has no postdoc office or active organization.

136. *See, e.g.*, UCLA POSTDOC MATERNITY LEAVE INFO SHEET, *supra* note 89.

employment concerns.<sup>137</sup> However, at the very least postdoc associations provide communication and a support network for postdocs who have a family or are considering starting a family. Currently, those attributes are lacking at many research institutions.<sup>138</sup>

*B. Policy Proposals to Standardize Postdoc Parental Leave*

As has been stressed throughout this writing, parental leave policies are far from universal or even consistent from university to university or between classes of postdocs. The following two proposals could help to standardize postdoc parental leave policies at U.S. universities.

1. Clearer Parental Leave Policies Communicated by Funding Sources, Which Universities Could Follow and Use as Guidelines

The fact that the NIH has any parental leave policy at all is a positive thing. However, this policy only actually applies to one type of NIH grant, the NRSA.<sup>139</sup> It has been applied to other NIH grants in an attempt to be fair to postdocs only because the other grants are silent on the issue of parental leave.<sup>140</sup> Specifying parental leave policy for other NIH grants, by at the very least referring to NRSA's provision, would make parental leave policies clearer.

Also, the NSF should abandon its ad hoc method of dealing with parental leave and create its own parental leave policy that matches or exceeds the NIH's policy. If the two largest governmental funding agencies were to show how they made parental leave policy a priority, it would hopefully encourage many private funding agencies to follow suit with their own standardized and well-communicated policies.

2. A Single Employee Classification of Postdocs, Regardless of Whether the Postdoc is Individually- or University-Funded

Universities should find ways to solve the inconsistent and confusing employee classification of postdocs, which currently is largely based upon

---

137. See Beryl Lief Benderly, *University of California Postdoc Union Wins Official Recognition*, SCI. CAREERS (Aug. 29, 2008), [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2008\\_08\\_29/caredit.a0800128](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2008_08_29/caredit.a0800128); see also *infra* note 168 and accompanying text. College and university faculty are more commonly unionized than other professions in the United States. See Ann Mari May et al., *Representation of Women Faculty at Public Research Universities: Do Unions Matter?*, 63 INDUS. & LAB. REL. REV. 699, 703 (2010) (finding that one-third of all college and university faculties are unionized).

138. See Sinche & Robinson, *supra* note 135.

139. See MARY ANN MASON ET AL., THE FEDERAL GRANTS AND THE ACADEMIC PIPELINE SLOAN GRANT PROPOSAL 5 (2005), available at <http://ucfamilyedge.berkeley.edu/Sloan%20Federal%20Grants%20Proposal%20Final.pdf>.

140. See *id.* at 6-7.

funding source.<sup>141</sup> It is unfair and illogical to divide postdocs who do the same kind of work, perhaps next to each other in the same laboratory, on this arbitrary basis.<sup>142</sup> Roslyn Orkin, Dean of Faculty Affairs at Harvard Medical School, explains:

Categorizing postdocs according to salary source—'employee' [paid from sponsor's grant] versus 'stipendee' [paid from an NIH fellowship/training grant or from a private foundation fellowship]—is an artificial, essentially administrative classification . . . . What was undoubtedly set out originally by the NIH as a means to protect postdocs ("trainees") from abusive practices, has paradoxically, in many cases, turned out to harm them, largely in terms of access to benefits.<sup>143</sup>

According to another administrator, Trevor Penning, Associate Dean for Postdoctoral Research Training at the University of Pennsylvania:

Whether a postdoctoral appointee is a full-time employee or a trainee is fundamental to the issue of compensation and benefits. Federal policy and/or institutions must decide on a single classification for [the] postdocs because in reality they [all] do the same work. Once this classification is made, other policies could become uniform.<sup>144</sup>

The most effective place to make this change would be with the federal government, specifically through funding agency policy and refinement of applicable tax law. Large funding agencies such as the NIH and NSF could clearly state or even require that the postdocs they fund be employees of the university. Federal tax law should acknowledge the unique employment situation of postdocs. Ideally, it should specify that postdocs be considered employees of the university. After all, the university, not the funding agency, has the most control over the postdoc's day-to-day work, and the university also benefits from the work that postdocs perform.<sup>145</sup> One important benefit that

---

141. See Laure Haak, *Strategies to Benefit Postdocs: A Guide to Best Practices*, SCI. CAREERS, (June 7, 2002), [http://sciencecareers.sciencemag.org/career\\_magazine/previous\\_issues/articles/2002\\_06\\_07/noDOI.9141840545598755171](http://sciencecareers.sciencemag.org/career_magazine/previous_issues/articles/2002_06_07/noDOI.9141840545598755171).

142. See Haak, *supra* note 70. Such actions by universities can lead into complicated tax quagmires. For example, universities that have given all postdocs employee status have been audited by the IRS. See *id.*; Haak, *supra* note 73.

143. Haak, *supra* note 70.

144. *Id.*

145. See, e.g., I.R.S. Chief Counsel Advice 200944027 (July 22, 2009), available at <http://www.irs.gov/pub/irs-wd/0944027.pdf> (with an example of the analyses that the IRS applies to determine whether an employer-employee relationship exists, applying it to postdocs).

more postdocs would enjoy if they were considered employees is FMLA (and state family leave law) eligibility.<sup>146</sup>

In the absence of federal reform, universities can play a part as well. Some universities have already begun to experiment with such policies, such as classifying postdocs as a single class (student, employee, or faculty), regardless of funding source.<sup>147</sup> This kind of innovative problem solving by universities should be encouraged and expanded.

While policy reform is the ultimate goal, litigation may be necessary to compel that reform and also to address the unfortunate event of discriminatory treatment. The next section explores how such problems can be addressed in the judicial system.

#### V. LEGAL SOLUTIONS TO ENCOURAGE FAMILY-FRIENDLY POLICIES AND TO ENSURE COMPLIANCE WITH EXISTING LAW

The previous sections explored policies associated with paid or unpaid parental leave, in most cases applying to both male and female postdocs. Regarding a postdoc who is pregnant, even if she is not afforded parental leave through a policy or family leave law, her pregnant status is legally protected from discrimination.<sup>148</sup>

As an initial matter, all supervisors—including PIs—should be familiar with the law’s protection of pregnant employees under Title VII, discussed in detail in the next subsection. Note that in this context, “employee” is broader and may encompass both employee and non-employee postdocs (as discussed as separate classifications in other sections of this writing). In other words, a court would likely not find the fact that the postdoc was individually funded and classified by the university to be a non-employee to be determinative of whether the postdoc was an “employee” for purposes of discrimination protections.<sup>149</sup> Rather, the court would look to the postdoc’s actual work environment, supervision structure, and other factors.<sup>150</sup>

---

146. Some postdocs would still not be included if they were employed less than a year or the applicable state-law minimum amount of time. *See supra* notes 58, 69 and accompanying text.

147. *See* Haak, *supra* note 70.

148. 42 U.S.C. § 2000e(k) (2006).

149. The postdoc would need to be found to be an employee for purposes of Title VII. For example, independent contractors are not considered to be employees and are not given Title VII protections. *E.g.*, *Cole v. Venture Transp., Inc.*, No. 99-3259, 2000 U.S. Dist. LEXIS 4353, at \*7 (E.D. La. Mar. 30, 2000). Because Title VII is not specific as to what constitutes an employee, case law has developed tests such as the Fifth Circuit’s “economic realities” test that looks to factors such as the level of control over the worker and who benefits from the work. *See id.*

150. *See, e.g.*, *Sizova v. Nat’l Inst. of Standards. & Tech.*, 282 F.3d 1320 (10th Cir. 2002) (determining whether a postdoc was an employee of either a university, the funding agency, or both). In this Title VII case, which was even brought by a then-pregnant postdoc, the postdoc’s employer was ruled by the Tenth Circuit to be the funding agency and *not* the partnering university. *Id.* at 1330. However, *Sizova* involved unusual circumstances; the postdoc actually performed work on the premises of the funding agency, which is not the

If a postdoc believes that she has been discriminated against, she may file a complaint with the United States Equal Employment Opportunity Commission (EEOC) to enforce federal antidiscrimination law, or take similar action to enforce applicable state antidiscrimination law.<sup>151</sup> This exhaustion of administrative remedies is generally a required step. On the federal level, if the EEOC finds “reasonable cause to believe that the charge is true,” it could bring its own action.<sup>152</sup> Alternately, once the EEOC investigation or case is completed or dismissed, the complainant can obtain her own right to sue.<sup>153</sup>

The following sections outline the applicable law regarding discrimination on the basis of pregnancy.

A. *Title VII: Protecting Employees from Discrimination*

Employees<sup>154</sup> are protected from discrimination, including discrimination of a woman’s pregnant condition, by Title VII of the Civil Rights Act of 1964.<sup>155</sup> Universities should realize that parental leave policies, or even the absence of such policies, could run afoul of Title VII.<sup>156</sup> On this point, the federal statute is clear: “A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of [T]itle VII.”<sup>157</sup>

---

case for the academic postdocs that this writing focuses upon. *See id.* The point to be emphasized here is that a court should and will explore the specific facts and circumstances of employment and not take at face-value a university determination that the postdoc is not an employee.

151. *See* Beryl Lieff Benderly, *The Curt Flood Effect*, SCI. CAREERS (Aug. 3, 2007), [http://sciencecareers.sciencemag.org/career\\_development/previous\\_issues/articles/2007\\_08\\_03/career\\_a0700109](http://sciencecareers.sciencemag.org/career_development/previous_issues/articles/2007_08_03/career_a0700109).

152. 42 U.S.C. § 2000e-5(b).

153. 29 C.F.R. § 1601.28 (2010). The filing of an administrative complaint may trigger a statute of limitations period. For example, Title VII claims must be filed within 300 days of filing the EEOC complaint. *See* 42 U.S.C. § 2000e-5(e)(1). If there is harm caused by a continuing hostile work environment, claims may not be time barred after that 300-day period. *See* Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002).

154. While postdocs would likely be considered “employees” in this context, RAs have been precluded from Title VII protections by some courts that consider them to be students, not employees. *Compare* *Ivan v. Kent State Univ.*, 863 F. Supp. 581, 585 (N.D. Ohio 1994) (classifying a graduate assistant in a Psychology M.A./Ph.D program as an employee under Title VII because even though she was a student, she also entered into contractual relationships with the university to “render service”), *with* *Washington v. Jackson State Univ.*, 532 F. Supp. 2d 804, 811 (S.D. Miss. 2006) (holding that a doctoral candidate in a psychology department as not an “employee” protected under Title VII, despite the fact that he received a stipend).

155. 20 U.S.C. § 1681.

156. *See* Williams & Segal, *supra* note 4, at 103, 106 (showing examples of successful Title VII cases and attributing cases often cited as examples of Title VII’s ineffectiveness to weak facts or poor lawyering).

157. 29 C.F.R. § 1604.10(a).

In 1978, Congress amended Title VII with the Pregnancy Discrimination Act (PDA), adding pregnancy to the list of protected statuses.<sup>158</sup> Note the PDA requires that employers treat pregnant employees the same as other employees, not that pregnant employees are to be given special treatment.<sup>159</sup> The following section outlines methods and proposals to reshape the current academic environment through the law into one more accepting of researchers starting families while pursuing a career.

If a plaintiff brings a Title VII suit against a state university, the university may include in its defenses protection by Eleventh Amendment immunity.<sup>160</sup> Courts have held that in some circumstances public institutions may not be protected by that immunity, but only when Congress “both unequivocally intends to do so and ‘act[s] pursuant to a valid grant of constitutional authority.’”<sup>161</sup> While this complicated standard is outside of the scope of this writing,<sup>162</sup> potential litigants should take note of this extra consideration for state universities.

The Title VII doctrine recognizes two types of discrimination, discussed in the following subsections.

### 1. Disparate Treatment

The first type of discrimination claimants may allege is disparate treatment. These cases require the claimant to evidence discriminatory intent, through the judicially-created *McDonnell Douglas* burden-shifting framework.<sup>163</sup> The first burden lies with the plaintiff to establish a prima facie case of disparate treatment between two different groups.<sup>164</sup> To use a hypothetical situation as an example, a pregnant woman could sue over her

---

158. See *id.* Congress passed the PDA as an implicit rejection of holdings such as *General Electric Co. v. Gilbert*, in which the United States Supreme Court had interpreted Title VII to mean discrimination based upon pregnancy was not gender discrimination. See 429 U.S. 125, 146 (1976). See generally Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act*, 38 AM. BUS. L.J. 819 (2001) (proposing that plaintiffs alleging discrimination based on pregnancy should not be confined to the *Douglas-McDonnell* framework, because the ability to become pregnant is a “biological reality” not a condition to compare with similarly-situated non-pregnant workers).

159. See 42 U.S.C. § 2000e(k).

160. See *Nanda v. Bd. of Trs. of the Univ. of Ill.*, 303 F.3d 817, 822-23 (2002).

161. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (citing *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62, 73 (2000)). The interplay of Title VII claims and Eleventh Amendment immunity requires an exploration of what powers the Fourteenth Amendment gives to Congress and the courts, respectively.

162. See *Nanda*, 303 F.3d at 823-31.

163. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). This is also known as an “indirect case.” *Maldonado v. U.S. Bank*, 186 F.3d 759, 762 (1999). See generally Jamie Darin Prekert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas’s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511 (2008) (discussing the effect of the newer “mixed-motive” theory of disparate treatment, in which if the employer relied on both discriminatory and legitimate reasons in its act, it can be found liable for discrimination).

164. See *McDonnell Douglas Corp.*, 411 U.S. at 802-03.

postdoctoral fellowship position not being renewed for an additional year, while another postdoc in the laboratory (who began his postdoctoral fellowship at the same time) was invited to continue his fellowship. If the plaintiff successfully establishes a prima facie case, the defendant has the burden of rebutting the contention by providing a legitimate, nondiscriminatory explanation for the disparate treatment.<sup>165</sup> Continuing the hypothetical, the defending university may claim that the treatment was nondiscriminatory because the PI only had enough funding to keep one of the two postdocs, and the non-pregnant postdoc had a stronger performance record than the pregnant postdoc. If the defendant provides an adequate explanation, the final burden shifts to the plaintiff to attack the defendant's explanation as pretextual or unpersuasive.<sup>166</sup> The hypothetical pregnant woman might rebut the university's explanation by producing evidence that the non-pregnant postdoc actually had a poor work record (such as work reviews or other indicators such as research results), while she had performed in a far superior manner by those benchmarks. The plaintiff has the ultimate burden to prove by a preponderance of evidence that the defendant intentionally discriminated because of the plaintiff's protected status.<sup>167</sup>

There is little case law of Title VII's disparate treatment doctrine used in a claim involving pregnant postdocs, although there is potential support for postdocs bringing such claims. In *Towers v. State University of New York*, the United States District Court for the Eastern District of New York did appear willing to hear disparate treatment claims from a former physics postdoc who became pregnant.<sup>168</sup> Although the court dismissed many of her claims, including the one alleging pregnancy discrimination,<sup>169</sup> the court appeared to have no issue with the postdoc plaintiff's claimed employee status.<sup>170</sup> Another example, *Zhang v. Massachusetts Institute of Technology*, involved a plaintiff whose temporary postdoctoral appointment in an atmospheric sciences laboratory was not renewed after her supervisor learned that she was pregnant.<sup>171</sup> Zhang alleged claims including disparate treatment on the basis of sex (specifically, her pregnancy).<sup>172</sup> The Appeals Court of Massachusetts reversed the trial court's ruling of summary judgment for the defendants and remanded the case for a determination on the factual disputes.<sup>173</sup> Cases such as *Towers* and *Zhang* do show that, at the very least, there is potential for

---

165. *See id.*

166. *See id.*

167. *See id.*

168. *See* No. 04-5243, 2007 U.S. Dist. LEXIS 37373 (E.D.N.Y. May 21, 2007).

169. *See id.* The court also dismissed the claims against one of the defendants, a state university, because they were barred by the Eleventh Amendment. *Id.* at \*14.

170. *Id.* at \*10 ("Although untimely, the ... denial of maternity leave may be considered with respect to [what were other, timely and successful claims] as background evidence of discriminatory intent.")

171. *See* 708 N.E.2d 128, 130-32 (Mass. App. Ct. 1999).

172. *Id.* at 130.

173. *Id.* at 133.

disparate treatment claims involving pregnant postdocs to survive the summary judgment phase with prima facie evidence of discrimination.

Other cases not involving universities indicate how the theory of disparate treatment may play out for pregnant postdocs. In general, the more obvious the discriminatory intent, the better the chances of a successful claim. For example, in *Maldonado v. United States Bank*, a disparate treatment claim—one in which a bank employee was promptly fired within one day of announcing that she was pregnant—survived a motion for summary judgment.<sup>174</sup>

Postdocs should be aware of what attorney and policy advocate Joan Williams terms “hostile prescriptive stereotyping”—comments such as “Oh, my God, she’s pregnant again.”<sup>175</sup> Although one would guess that few supervisors would be so foolish to say such things, Williams argues that even today the “loose lips” phenomenon is potentially “prevalent.”<sup>176</sup> Such remarks, if included in the record, could tip the evidence in a plaintiff’s favor in a disparate treatment case.<sup>177</sup>

Such clear evidence is rare in the world of academia and the complicated employment structure in academia gives defending universities an opportunity to find a non-discriminatory explanation for treatment.<sup>178</sup> In *Fisher v. Vassar College*, the United States Court of Appeals for the Second Circuit ruled against the plaintiff, a female biology professor who had been denied tenure for her university position.<sup>179</sup> The plaintiff brought a prima facie case of disparate treatment between men and women at the university regarding tenure selection.<sup>180</sup> However, the plaintiff’s anecdotal evidence of disparate treatment was no match for the defendant’s evidence—a fourteen-page recommendation by the biology department outlining the ways that the plaintiff lacked the level of scholarship, teaching ability, service and leadership required for a tenure grant.<sup>181</sup> The court ruled that the defending educational institution successfully met its burden to prove a legitimate reason for its decision to deny tenure.<sup>182</sup>

*Fisher* shows that bringing a successful disparate treatment claim is an uphill battle. The defendant can often argue that the employee was treated the way she was because of a legitimate reason, such as poor job performance, better candidates for the position, etc.<sup>183</sup> In the world of scientific research,

---

174. 186 F.3d 759 (7th Cir. 1999).

175. Williams & Segal, *supra* note 4, at 106 (using a direct quote from the case *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1042 (7th Cir. 1999)).

176. *Id.* at 107.

177. *See id.*

178. *See Stark*, *supra* note 2, at 102 (referring to the “systemic discrimination against tenured women faculty” that was successfully accomplished at the Massachusetts Institute of Technology for many years).

179. *See 70 F.3d 1420 (2d Cir. 1995)*.

180. *See id.* at 1450.

181. *See id.* at 1434, 1438, 1440.

182. *Id.* at 1434.

183. For example, in *Fisher*, Vassar College successfully persuaded the trial court that the plaintiff, Fisher, had been fairly considered for tenure and simply was not qualified for the position. *See id.* at 1426-27.

performance benchmarks are difficult to measure. Hard work may not be rewarded with the desired experimental results that the scientist is seeking. The indefinite nature of success in postdoctoral research provides universities with wide openings to find an explanation for why they treated a given postdoc the way that they did.

## 2. Disparate Impact

The second type of Title VII-protected discrimination is disparate impact, where the results of a seemingly neutral action by an employer adversely impact a protected class.<sup>184</sup> Unlike disparate treatment, it does not require discriminatory intent.<sup>185</sup> Instead, the plaintiff shows that a facially neutral policy disparately impacts a protected class, often using statistical evidence.<sup>186</sup> If the plaintiff can do that, the employer has an opportunity to explain that the disparate impact is caused by a legitimate occupational qualification or business necessity.<sup>187</sup> Then the plaintiff has the ultimate burden to show either that the employer's explanation is pretextual, or that the employer failed to pursue a less discriminatory alternative.<sup>188</sup>

In order to survive a motion for summary judgment, a disparate impact claimant must demonstrate a strong showing of that impact upon a protected class.<sup>189</sup> This can be difficult for any class, but is especially complicated for a *pregnant* female class, because pregnancy is a temporary condition that does not necessarily include all female employees.<sup>190</sup> Although similar logic in older case law was superseded by the PDA,<sup>191</sup> such reasoning still appears in recent cases. For example, *Davidson v. Franciscan Health System of the Ohio Valley, Inc.* involved an absentee policy that terminated twenty-two employees, twenty-one of them women.<sup>192</sup> Because the protected class at issue in that case was pregnant women, the court looked to whether any of the employees were terminated for any reasons relating to a pregnant condition, such as exceeding the authorized maternity leave.<sup>193</sup> None of the women had been terminated for reasons relating to pregnancy or were pregnant at the time of termination, so the court found no disparate impact.<sup>194</sup>

This case provides a lesson of how to frame the disparate impact issue. In order to survive a defendant's motion for summary judgment, the court must be persuaded not to divide a class of women who were pregnant at the time of the

---

184. See Stark, *supra* note 2, at 125.

185. See *id.* at 125-26.

186. See *id.*; e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971).

187. See Stark, *supra* note 2, at 126.

188. See *id.* at 118.

189. See Magid, *supra* note 158, at 853-54. See generally Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 615-19 (2010).

190. See Magid, *supra* note 158, at 853-54.

191. See Geduldig v. Aiello, 417 U.S. 484 (1974).

192. See 82 F. Supp. 2d 768, 772 (S.D. Ohio 2000).

193. See *id.* at 774-75.

194. See *id.*

act and those who were not.<sup>195</sup> Rather, the plaintiff should attempt to persuade the court that female employees, who should have the freedom to consider pregnancy *even if they are not pregnant at the time*, constitute one protected class.<sup>196</sup>

Although disparate treatment may be more applicable to individual postdocs, a possible disparate impact suit might be brought against a university that does not provide adequate parental leave to pregnant postdocs. For instance, if a leave policy granted varying time or options in a manner that disadvantaged pregnant women (perhaps treating other disabilities differently than pregnancy), a court could find an impermissible disparate impact.<sup>197</sup> However, there must be a policy in the first place to be attacked—the PDA does not *force* employers to carry a maternity or parental leave policy<sup>198</sup> (and some may consider that to be the job of FMLA safeguards<sup>199</sup>). Because most leave policies are careful not to explicitly disadvantage pregnant employees, disparate treatment would seem to be the more commonly-applicable and effective way for a postdoc to bring a legal claim if she has suffered adverse consequences through her pregnancy (although both types of claims can be brought concurrently).<sup>200</sup>

#### B. Title IX: Protections from Discrimination Within Educational Programs

Along with Title VII, Title IX of the Educational Amendments of 1972 would logically be applicable for pregnant postdocs who wish to legally challenge discriminatory behavior. Title IX prohibits exclusion of participation, denial of benefits, or discrimination under educational programs that receives federal funding.<sup>201</sup> Title IX impacts postdocs at public universities because it applies to any federally-funded educational program.<sup>202</sup> Doctoral students have successfully brought sex discrimination claims based on rejection from graduate schools.<sup>203</sup> However, the United States Supreme Court has limited

---

195. Magid, *supra* note 158, at 854.

196. *See id.*

197. See the Seventh Circuit's handling of disparate impact with regard to pregnant employees (here, teachers) in *Scherr v. Woodland School Community Consolidated District No. 50*, 867 F.2d 974 (7th Cir. 1988) (reversing a finding of summary judgment against two pregnant teachers bringing a disparate impact challenge) and *United States v. Board of Education of Consolidated High School District 230*, 983 F.2d 790 (7th Cir. 1993) (finding a school district policy that provided varying options to combine sick and maternity leave did not disparately impact pregnant employees impermissibly).

198. *See* Grossman, *supra* note 189, at 616.

199. *See id.* at 612.

200. For example, the plaintiffs in *Scherr* alleged both types of discrimination. *See Scherr*, 867 F.2d at 976.

201. *See* 20 U.S.C. § 1681 (2006).

202. Claims against public universities also have to contend with the Eleventh Amendment immunity issue. *See supra* notes 160-62 and accompanying text.

203. *See Cannon v. Univ. of Chi.*, 441 U.S. 678 (1979) (a prospective medical school student successfully argued that she was discriminated against when her application was rejected).

such private causes of action to intentional discrimination<sup>204</sup> and otherwise restricted the scope of Title IX.<sup>205</sup> Because postdocs are considered employees in this context,<sup>206</sup> they must make legal challenges through the remedial scheme of Title VII instead of Title IX.<sup>207</sup>

### C. Other Potential Legal Claims

In the event that a postdoc brings a claim against the university for discrimination based on her pregnant condition, Title VII would be the primary avenue for claims. However, other litigation strategies that apply broadly to most professions could be applied to pregnant postdocs, particularly if the postdoc were terminated from her position.<sup>208</sup> For example, sexual harassment or hostile work environment theories would be possible in a case with strong facts and evidence.<sup>209</sup> Some evidence might be allowed in a hostile work environment case that would not be in a disparate treatment case, such as discriminatory actions coming from fellow workers instead of the supervisor.<sup>210</sup>

It should be noted that even if a postdoc leaves her fellowship by her own accord (as opposed to being terminated), she may still be eligible for legal relief. If a postdoc was treated so severely after requesting parental leave that she felt forced to quit, a constructive discharge cause of action could be possible.<sup>211</sup> In essence, if the discriminatory treatment was substantial enough to make the postdoc feel as if she had no other option but to resign from her fellowship, a court may consider that synonymous with an actual discharge by a supervisor.

While this writing has focused on legal remedies for discrimination in federal law, those remedies are not necessary exclusive. Postdocs may also have some legal theories for causes of action under state statutes and common law actions such as the tort action for wrongful discharge.<sup>212</sup> This would be especially pertinent if a legally-injured postdoc belonged to a collective bargaining unit such as a union.<sup>213</sup> The larger point to be taken here is a postdoc

---

204. See Stark, *supra* note 2, at 126.

205. See *id.* at 124 n.95 and accompanying text (citing *Alexander v. Sandoval*, 532 U.S. 275 (2001) (limiting the scope of Title VI of the Civil Rights Act of 1964) and other case law that analogized Title XI to Title VI, effectively extending *Alexander's* holding to Title XI); see also *Towers v. State Univ. of N.Y.*, No. 04-5243, 2007 U.S. Dist. LEXIS 37373 (May 21, 2007); *supra* notes 168-70 and accompanying text.

206. See *supra* notes 149, 154 and accompanying text; see also *Towers*, 2007 U.S. Dist. LEXIS 37373, at \*13.

207. *E.g.*, *Towers*, 2007 U.S. Dist. LEXIS 37373, at \*13.

208. See generally Williams & Segal, *supra* note 4, at 90-103 (exploring the “chilly climate for family caregivers”).

209. See *id.* at 138-39.

210. See *id.* at 139.

211. See *id.*

212. See *id.* at 155-60.

213. See *id.* at 159-60. Postdocs at some universities sometimes do have organized representation, and at least one, the University of Connecticut Health Center, is represented

who has suffered discrimination may have several avenues for legal relief, looking at the circumstances of her situation.

#### CONCLUSION

Postdocs comprise a growing and aging class of scientists-in-training who typically do not have clear parental leave policies at the universities where they perform research. With clear policies in place and with fewer opportunities for discrimination, female postdocs in particular would be more encouraged to remain on the academic track even if they wanted to start a family. Given the underrepresentation of women in science, technology, engineering, and math (collectively, STEM) disciplines,<sup>214</sup> clarifying and expanding parental leave policies could help attract and retain female scientists in academic track careers.<sup>215</sup> Unclear policies regarding rights and benefits such as parental leave do not foster a family-friendly climate with these potential future scientists. As postdoctoral appointments have grown both in number and length,<sup>216</sup> universities and funding sources—particularly the NIH<sup>217</sup>—should develop more protective policies and also better communicate the content of these policies.

Reform should be aimed at a “model policy” that all universities in the United States can attempt to emulate. A model parental leave policy would incorporate many of the features discussed in this writing. Such a policy would be applied at the university level for the sake of consistency and simplicity. That way, individual departments would not have to spearhead initiatives in a piecemeal fashion across the university. It would provide coverage to all postdocs, regardless of funding source. By having a clear paid leave policy in place, postdocs would be able to take advantage of funding source policies (such as the one already in place for the NRSA) that commit to match whatever the university offers up to a given level. A model policy should also compare itself to more generous family policies in place in other countries, which U.S. universities compete with for the best and brightest scientific researchers.<sup>218</sup> For

---

by a “bona fide labor union.” Davis, *supra* note 10, at 2; *see also supra* note 137 and accompanying text.

214. *See Stark, supra* note 2, at 110-12.

215. Even though improved parental leave policies would help attract both women and men, the fact remains that women overwhelmingly assume the role of caregiver in U.S. families. In the United States in 2007, it was estimated that between approximately three and twenty percent of stay-at-home parents were fathers. *See Katherine Shaver, Stay-at-Home Dads Forge New Identities, Roles, THE WASH. POST, June 17, 2007, available at* <http://www.washingtonpost.com/wpdyn/content/article/2007/06/16/AR2007061601289.html>; *see also Thomas H. Barnard & Adrienne L. Rapp, Pregnant Employees, Working Mothers and the Workplace—Legislation, Social Change and Where We Are Today, 22 J.L. & HEALTH 197, 232-33 (2009) (discussing why women leave the workforce and the “opt-out hypothesis,” a theory that many women freely choose to care for their families at the expense of their careers).*

216. *See Kennedy, supra* note 1.

217. GOULDEN ET AL., *supra* note 7, at 9 fig.3.

218. *See id.* at 28.

example, eight weeks or more parental leave is generally standard in these other countries.<sup>219</sup> If a postdoc needed to take more time than the standard paid leave, a model policy would have provisions in place for that situation. These provisions would allow postdocs to take a longer unpaid leave, or to return to work on a part-time basis, without risking the loss of health insurance coverage or other benefits. The model policy would be accompanied by a well-communicated and assertive anti-discrimination policy that would emphasize the rights of all laboratory workers to a discrimination-free workplace. A clear grievance system would ensure that employees know where to go if they do witness or experience discrimination.

Essentially, many of the features of this “model policy” rely on common sense, equal treatment, and clear communication. Unfortunately, many postdocs currently have to rely on the good graces of their PI for equitable parental leave on an ad hoc basis, which is potentially disadvantageous to all parties involved.

The costs of many of the reforms explored in this writing would not necessarily be substantial. After all, many departments, universities, and funding agencies already do allow parental leave, but simply grant it on a case-by-case basis. Rather, the problem is one more associated with clarity and communication. Also, it should be noted that one reform, to give all postdocs employee status and thus qualifying them for FMLA and state-law family leave benefits, would give postdocs the option of *unpaid* parental leave, which would not cost the university or funding agency anything with regard to stipend coverage during the leave period.

Even if policy reforms do have costs that universities and funding agencies must assume, those costs should be weighed against the competitive advantage that U.S. research universities lose to institutions in other countries that provide far more generous parental leave benefits with no questions asked. In other words, other countries have made it possible (or at least easier) for their young scientists to choose to start a family *and* pursue a career in academic research. The United States should eliminate needless obstacles that could divert young scientists away from careers in academic science.

Academic departments, research universities, and funding providers in this country should work together to implement policies that provide parental leave to the nation’s postdocs. It is the fair thing to do, it is the practical thing to do, and further reform of parental leave policies will encourage more young scientists—women and men, mothers and fathers—to remain and prosper in academic careers.

---

219. *Id.* at 19. Of course, parental leave policies, regardless of industry, are less generous in the United States than in many other competing countries. See Rebecca Ray et al., *Who Cares? Assessing Generosity and Gender Equality in Parental Leave Policy Designs in 21 Countries*, 20 J. OF EUR. SOC. POL’Y 196 (2010) (finding the United States was far surpassed in parental leave benefits by nearly all of the other twenty surveyed countries).