When Less is More

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Kate Webber, [Families are More Popular Than Feminism: Exploring the Greater Judicial Success of Family and Medical Leave Laws](#), 32 **Colum. J. Gender & Law** 145 (2016).

Why are employees who sue to obtain workplace leave under the Family Medical Leave Act of 1993 (FMLA) almost twice as likely to win their cases as those who bring discrimination cases under Title VII of the Civil Rights Act of 1964 (Title VII)? The title of [Kate Webber's](#) intriguing article reflects an intuition many feminists and family law scholars already bring to the table: courts find women more sympathetic when they make claims that conform to their appropriate gender roles (as they do when they ask for family leaves) than when they challenge those norms in the workplace (as they do when they make a claim that the workplace is discriminatory). Webber unpacks this intuition, first by identifying differences in the statutory schemes that might help to explain the gap in success rates between the two statutes, and then by examining the ways in which the content of the legal protections each statute provides might understandably trigger different ideological and cognitive responses by judges. The analysis is both cautious and compelling. It is also surprisingly optimistic, concluding that family leave laws provide a legislative model that may actually be more effective than Title VII in reducing institutional workplace inequality.

Other scholars have noted the differences between Title VII and the FMLA.[1] The most important of these differences for Webber's purposes is that the FMLA, though motivated by the desire to relieve work-family conflicts especially among women, is a gender-neutral employee benefit, much like minimum wage laws and OSHA regulation. To win an FMLA claim, a claimant need only show that she was entitled to the benefit and did not get it. In contrast, Title VII creates a civil right available on the basis of membership in a protected class. A Title VII claimant must show both that she experienced an adverse employment action and that this action was caused or motivated by the claimant's sex, race, religion, or other protected characteristic. The difference is structural: the former defines the status quo; the latter challenges it.

Webber explores various attitudinal and strategic models of judicial behavior as well as theories of cultural cognition, suggesting that while these theories do not conclusively prove judicial bias, they help to explain the different win rates under the two statutes. Building on the insights of Katie Eyer, Joan Williams, and others, Webber explains that the FMLA does not threaten existing meritocratic norms and employer prerogatives in the workplace and instead appeals to a broader range of family values. As a result, she argues, the FMLA is less challenging to judicial worldviews than Title VII and thus generates less ideological and psychological resistance. Deciding in favor of an FMLA claimant, Webber explains, requires only that one believe that the employer denied a benefit defined by that statute. Deciding in favor of a Title VII claimant requires acceptance of an altogether more contentious narrative, built on suppositions that certain groups are especially vulnerable in the workplace; that protecting those vulnerable people does not constitute favoritism; and that discrimination by people and institutions is not rare and is not always conscious or rooted in animus. Tellingly, Webber points out, in those FMLA cases based on discriminatory retaliation for filing a claim—cases more like Title VII claims than FMLA interference claims in what it asks decisionmakers to believe—the win rate goes down.

From a Title VII standpoint, Webber's analysis of the ideological and psychological barriers to

determinations of discrimination is discouraging, for these barriers are not easily overcome. Drawing on the work of Catherine Albiston, however, Webber finds a silver lining: the greater potential of the FMLA "direct benefit" model to weaken aspects of institutional workplace inequality. FMLA claims are not only more winnable, Webber argues, but the FMLA more radically abandons the norm of full-time work availability, which Title VII leaves intact, and substitutes a norm that requires workplace adaptation to some family circumstances. For Webber, the relative success of FMLA cases should encourage legislators to press for more family-friendly, gender-neutral statutory benefits as an alternative to anti-discrimination laws based on "comparative status based equity" (p. 180). She favors, in particular, the Pregnant Workers' Fairness Act, which would require employers to provide reasonable accommodations to pregnant workers as long as these accommodations do not impose an undue hardship on the employer.

Families are More Popular Than Feminism has the quality of a picture that conveys two alternative images—like the famous Rubin vase/profile illusion.[2] For dominance feminists, perhaps enticed to read the article by its title, the piece confirms the shortcomings of a judicial system that cannot reliably recognize the workplace discrimination that women face unless they present themselves as caretakers. For those with fewer preconceptions, the article is a hopeful account of a gender-neutral wedge that might have the leverage to change workplace institutions. Both seem plausible to me—different sides of the same coin, as it were. Webber acknowledges, correctly, that a benefits approach will fall short of the fuller range of civil rights protections that Title VII promises, and she does not ask us to abandon these protections. But in explaining what works about family leave laws, Webber reminds us that sometimes less is more.

1. *See, e.g.*, Katharine B. Silbaugh, Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts, 15 **Wash. U. J.L. & Pol'y** 193 (2004); Katie R. Eyer, That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law, 96 **Minn. L. Rev.** 1275 (2012).
2. *See* http://psylux.psych.tu-dresden.de/i1/kaw/diverses%20Material/www.illusionworks.com/html/figure_ground.html.

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