

A cashier/teller for the City's treasurer's office worked part-time. Her supervisor required her to be available to come in when needed. Plaintiff had absenteeism issues. She asked to work as a coin collector, but the supervisor asked her how she would handle it if she had her period. When she didn't get the job, she made a discrimination complaint and was subjected to unreasonable work hours and other harassment. She was terminated when, for childcare reasons, she could not work a full day when she was scheduled to work a half day. The court denied the employer's motion for summary judgment and found that there was a genuine issue of material fact as to whether the employer's stated reason for its decision to deny plaintiff the position and terminate her – her frequent absences – was a pretext for discrimination. *Snodgrass v. Brown*, No. 80-1171-K, 1990 WL 198431 (D. Kan. Nov. 26, 1990).

B. Disparate Impact

Another theory used under Title VII to protect family caregivers in the workplace is disparate impact. Under the disparate impact theory, practices or policies that appear to be neutral on their face may be found to violate Title VII if they have a significantly negative impact on workers of only one sex.¹ Disparate impact suits have been used in family responsibilities cases to challenge work policies by showing that the policies have a negative and statistically significant impact on women, or women with children. One example is strict attendance policies that do not permit time off for any reason; such policies disproportionately impact pregnant women.² Another example is leave policies that do not permit employees to take sick time to care for sick family members.³

*Practice Tip: Whenever possible in a disparate impact case, also plead disparate treatment. In several cases, plaintiffs have not prevailed on their disparate impact claims, but have won or would have won disparate treatment claims.*⁴

A disparate impact suit has three steps. First, the plaintiff has the initial burden of establishing a prima facie case that a “specific identifiable employment practice or policy caused

¹ The disparate impact theory had its origins in the case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Title VII does not permit barriers to employment that operate to discriminate based on race; if an employment practice is not related to job performance, it is prohibited).

² See *Abraham v. Graphic Arts International*, 660 F.2d 811 (D.C. Cir. 1981). But see *Stout v. Baxter Health Care*, 282 F.3d 856 (5th Cir. 2002) (attendance policy that prohibited probationary employees from taking leave disproportionately impacted pregnant women, but no violation of Title VII was found because otherwise pregnant women would be treated more favorably than non-pregnant women).

³ *Roberts v. United States Postmaster General*, 947 F. Supp. 282, 284 (E.D. Tex. 1996).

⁴ E.g., *Fannon v. AAP St. Mary's Corp.*, 1997 U.S. App. LEXIS 23776 (6th Cir. 1997) (disparate impact claim failed; court suggests that disparate treatment claim may have been viable, but plaintiff did not make the claim); *Kelber v. Forest Electric Corp.*, 799 F. Supp. 326 (S.D.N.Y. 1992) (employer's motion for summary judgment granted on disparate impact claim, but denied on disparate treatment claim).