

# Employment Law Notes

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## DISCRIMINATION

### Disparate Treatment Can Lead to Liability Even After Employee Obtains Remedies by Filing Grievances

*The Ninth Circuit Court of Appeals (which covers Washington) recently ruled that disparate treatment of an employee in a protected class can give rise to a discrimination claim, even after the employee has successfully filed grievances to right the wrongs committed against him.*

#### Legal Background

In order to establish a disparate-treatment discrimination claim, a plaintiff must establish that (1) he is a member of a protected class, (2) he was qualified for his position, (3) he experienced an adverse employment action, and (4) similarly situated people outside of the protected class were treated more favorably.

#### The Case

Sergio Fonseca was a warehouse worker for Sysco Food Services in Arizona beginning in 1995. His troubles began in 1999 when he was assigned to a new supervisor, Don Peterson. Among other things, Mr. Peterson repeatedly failed to offer Mr. Fonseca overtime work to which he was entitled under a collective bargaining agreement because of his seniority, and instead offered it to less senior whites. In about half of the instances, Fonseca filed grievances and won the overtime pay he claimed, and in the other instances he did not make any demands or file a grievance.

Proceeding without an attorney, Fonseca sued for race discrimination under Title VII of the Civil Rights

Act and 42 U.S.C. §1981. The trial court dismissed the case, partly because it accepted Sysco's argument that Fonseca had not suffered any adverse employment action, because by filing grievances he had eventually received all the overtime pay he asked for.

The Ninth Circuit Court of Appeals reversed. The court noted that the evidence in the case showed that when whites were improperly passed over for overtime, they were able to get payment without filing a grievance, and also that whites received their pay immediately while Fonseca waited months for his payments. The court held that requiring only employees of a certain race to file grievances to obtain their rights constitutes race discrimination, so it is no defense that employees can use the grievance process to vindicate their rights.

The case is *Fonseca v. Sysco Food Services of Arizona, Inc.*, decided by the 9th Circuit Court of Appeals on July 6, 2004. Read it on [www.dehnlaw.com](http://www.dehnlaw.com).

#### What the Case Illustrates

The saying "no harm, no foul" does not apply to race discrimination. Also, when employees in a protected class are assigned to a new supervisor, employers should pay attention to what happens. In this case, Fonseca began filing grievances almost immediately after Peterson became his supervisor, and it appears Peterson's supervisors and the folks in the HR department were oblivious to the fact that Peterson was repeatedly found to be at fault in grievance after grievance. The numerous grievances should have been a red flag. ✍

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