

Ninth Circuit’s Decision Holds That Salary History Is Not a Defense to Equal Pay Claims

Article By:

Susan Gross Sholinsky

The federal [Equal Pay Act](#) (“EPA”) mandates equal pay for equal work regardless of sex. Employers that pay men and women different wages for the same work are strictly liable for violations of the EPA unless they can show that one or more of four exceptions apply to explain the wage disparity. The four statutory exceptions are seniority, merit, the quantity or quality of the employee’s work, or “any other factor other than sex.” The Ninth Circuit recently took up the question of the meaning of the fourth, catchall exception – “any factor other than sex” – in order to consider whether an employer may rely, in whole or in part, on an employee’s prior salary as a basis for explaining a pay differential in *Aileen Rizo v. Jim Yovino*.

Rizo was a math consultant who worked for the Fresno County Office of Education (“County”). After learning that comparable male employees were earning more for the same work, Rizo filed suit against her employer, alleging that its practice of calculating the salaries for newly hired employees based on their salary history violated the EPA. The County did not dispute that Rizo was paid less than her male counterparts, but it argued that basing her salary on past earnings was a lawful reason for the pay differential as it constituted a “factor other than sex” under the EPA.

On April 9, 2018, the Ninth Circuit sitting *en banc* rejected the County’s argument. The Court held that “prior salary alone or in combination with other factors cannot justify a wage differential.” Writing for the majority, Judge Reinhart stated that justification of a pay disparity based on “‘any other factor other than sex’ is limited to legitimate, job-related factors such as a prospective employee’s experience, educational background, ability, or prior job performance.” The Court explained that the terms “job-related” and “business-related” are not synonymous and that an employer cannot explain a pay differential based on the benefit to the business as opposed to a legitimate work-motivated consideration. Some examples of job-related factors identified by the Court included shift differentials, job hazards, physical job requirements, and training. Unlike each of these things, past salary was not a “job-related” factor but rather, potentially, a business-related factor.

The Court further opined that permitting an employer to rely on historical pay information was inconsistent with the purpose of the EPA, which was to correct past pay discrepancies caused by sex discrimination. “It is inconceivable,” wrote Reinhart, “that Congress, in an Act the primary purpose of which was to eliminate long-existing ‘endemic’ sex-based wage disparities, would create an exception for basing new hires’ salaries on those very disparities....” Thus, the majority concluded

that relying on past salary in order to explain a wage differential was improper, even if it was only one of the factors ultimately considered. Confusingly, the Court also noted that there could be instances in which past salary might play a role in individualized negotiations and declined to resolve whether past salary could be taken into account in such circumstances. However, given the broad pronouncement against factoring past compensation into current salary considerations, it would seem unlikely that the current court would countenance such an exception.

In finding that past salary may never be considered, the *Rizo* decision overrules the Ninth Circuit's prior ruling in *Kouba v. Allstate Insurance Co.* 691 F.2d 873 (9th Cir. 1982). *Kouba* held that past salary could be one of the factors considered by employers in evaluating pay, as it was a "factor other than sex" permissible to justify pay gaps between men and women under the EPA. Notably, four of the eleven judges on the panel concurred with the decision in *Rizo*, because salary history was the sole reason for the pay disparity, but separated from the majority on the issue of excluding salary history from consideration under any circumstance. The *Rizo* decision has also exacerbated a circuit split on whether salary history may be considered, and to what extent. While certain circuits have taken an approach similar to the concurring judges in *Rizo*, permitting it as long as it is not the sole basis for a pay disparity, the Seventh Circuit has held that salary history is always a legitimate factor other than sex.

While California employers are no longer entitled to inquire about past salary as part of the job application process as of January 1, 2018, in light of the *Rizo* decision, employers with operations in California, Oregon, Washington, Idaho, Montana, Nevada, Arizona, Alaska, and Hawaii may wish to take actions to ensure that any pay disparities are not based on salary history, such as not asking about salary history during the hiring process (even in states where this practice is not prohibited by law) and conducting pay equity audits.

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