



# **Pay Equity Co-Chairs Discuss Supreme Court's Pay Bias Ruling**

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The U.S. Supreme Court took an unusual step in vacating a 2018 decision from the U.S. Court of Appeals for the Ninth Circuit because the judge who authored the opinion, and was part of the majority in the precedent-setting ruling, died before the decision was published. The high court reversed a landmark pay equity ruling that held employers could not justify wage differentials between men and women by relying on previous salary information.

In *Yovino v. Rizo*, the justices did not examine the merits of the Ninth Circuit's ruling in the unsigned opinion, but their decision returns employers to a state of uncertainty regarding an increasingly controversial pay practice.

## **Salary History Leads to Disparity in Pay for Employee**

The Fresno County Office of Education hired Aileen Rizo as a math consultant in 2009. The standard operating procedure used by the county for determining salary directed that new employees would receive a 5 percent raise over their previous salaries and the employees would then be placed into a structured salary schedule. Rizo earned a little more than \$50,000 annually at her previous job in Arizona before accepting the new math consultant position. Fresno County placed her into the appropriate step as dictated by her previous salary. The county did not use prior experience or any other factors when determining Rizo's new salary.

Rizo found out years later that male colleagues hired after her in similar roles had been placed into higher salary steps. It is likely this happened because their previous salaries had been higher than her prior pay. She filed an internal complaint. That complaint was not resolved to Rizo's satisfaction, so she filed an Equal Pay Act claim against the county in 2014.

## **Employee Eventually Wins in Court**

Rizo received a favorable ruling from a lower federal court that would have allowed her case to proceed to trial; however, a three-judge panel of the Ninth Circuit reversed that decision in 2017, ruling in the county's favor. The court considered the matter sufficiently significant to hear the matter en banc — the full complement of 11 judges ruled on the matter. This ruling set controlling law for all employers in the court's Western jurisdiction (California, Washington, Nevada, Arizona, Oregon, Alaska, Hawaii, Idaho and Montana).

The Ninth Circuit's en banc panel made history on April 9, 2018, when it became the first federal appeals court to so explicitly reject an employer's contention that salary history could serve as a

legitimate justification for a pay disparity under the EPA. Other circuit courts had reached similar conclusions, but none had laid out their ruling so explicitly. Fresno County had relied on this catchall provision of the statute:

No employer ... shall discriminate ... between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

The employer argued that because salary history is a factor “other than sex,” it should be permitted to use it to justify any pay disparity. The en banc panel rejected that argument. The judges ruled that “prior salary alone or in combination with other factors cannot justify a wage differential. To hold otherwise — to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum — would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands.”

### **Judge’s Death Taints Ruling**

The county petitioned the Supreme Court to examine the ruling. The high court not only granted the county’s request to hear the case, but also issued a per curiam (unsigned) opinion striking down the Ninth Circuit’s decision. Interestingly, the reasoning for the Supreme Court’s ruling had nothing to do with the merits of the case. In fact, the brief decision mentions nothing about pay equity. The Supreme Court vacated the Ninth Circuit’s decision because one of the judges listed in the majority of the en banc ruling died 11 days before the case was issued.

U.S. Circuit Judge Stephen Reinhardt died on March 29, 2018. His untimely death came well after the December 2017 oral arguments, but several days before the final opinion was published on April 9, 2018. Although all 11 of the Ninth Circuit judges said they would have ruled in Rizo’s favor, only a bare majority of six judges joined the majority opinion that set what had been the controlling standard. The five other judges wrote alternate opinions concurring with the final outcome but expressing different opinions as to how they would get there.

The Supreme Court decided this was not acceptable. The Ninth Circuit’s en banc decision noted that Judge Reinhardt fully participated in the case and wrote the majority opinion. The decision went so far as to say that the opinion and all concurrences were “final” and “voting was completed by the en banc court prior to his death.” Nevertheless, the Supreme Court unanimously agreed to vacate the Ninth Circuit decision based upon “well-established judicial practice, federal statutory law, and judicial precedent” that a judge may change his or her mind up to the very moment a decision is released. That means that a decision is not “final” until it is actually published.

The court concluded that the Ninth Circuit erred in its ruling when it counted Judge Reinhardt as a member of the majority. “That practice,” it said, “effectively allowed a deceased judge to exercise the judicial power of the United States after his death. But federal judges are appointed for life, not for eternity.”

### **What to Expect Next**

The Supreme Court vacated the en banc ruling and remanded the case back to the Ninth Circuit for further proceedings. It is likely the appeals court will again assemble an en banc panel to review the case and issue another opinion. It is also likely that the full panel will rule in Rizo’s favor again. The questions remain: What standard will the majority of judges set regarding the EPA’s catchall provision? Will employers in the Ninth Circuit’s jurisdiction be able to use salary history when setting compensation?

As noted earlier, the Ninth Circuit was not the first appeals court to limit the EPA’s catchall provision to job-related factors. The Second Circuit (covering federal claims arising in New York, Connecticut and Vermont); Sixth Circuit (Ohio, Kentucky, Tennessee and Michigan); Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming); and Eleventh Circuit (Florida, Georgia and Alabama) have all similarly interpreted the “factor other than sex” exception. But the decisions in each of these jurisdictions carry subtle nuances that can lead to differing conclusions in different cases. None provided such an explicit ruling as the Ninth Circuit’s decision rejecting salary history as a basis to justify a wage disparity between a man and woman in the same position.

At least two circuit courts have avoided issuing a broad pronouncement — the Seventh Circuit (Illinois, Indiana and Wisconsin) and Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota). There will continue to be a split in the circuits regardless of how the Ninth Circuit rules in Rizo’s case. This could eventually lead to the Supreme Court ruling on the merits of the case.

### **To Ask or Not to Ask?**

Employers across the country — and especially on the West Coast — must determine whether they should eliminate questions about salary history during the application process and when determining compensation. In the Ninth Circuit, California, Oregon and Hawaii have state laws barring employers from asking about and using salary history to establish compensation. Many other states have salary history ban bills pending. What should employers do?

The Ninth Circuit’s ruling is officially struck down, so it is no longer controlling law. However, the Rizo decision may be promptly revisited, which means that setting compensation based on salary history is not advisable in any jurisdiction governed by Ninth Circuit precedent. Because the court established a very broad interpretation of the EPA that was only struck down as a result of a technicality, employers could be susceptible to pay equity claims if salary history is used to justify pay disparities.

The rulings in the Ninth Circuit and in other cases throughout the country should serve as a reminder that employers must take the possibility of pay equity claims seriously. Employers should take immediate steps to identify and address potential trouble spots. Start by working with your legal counsel to conduct a privileged pay audit to determine if you have compensation gaps. If the audit reveals pay gaps, you should work with your counsel to determine whether any are justifiable.

Lawful justifications for differentials in pay include factors such as experience, education, ability, job performance, seniority, quality of work, quantity, or another merit-based factor. In states that have enacted salary inquiry bans, liability from past inquiries could still be lingering. Undertaking an internal pay audit, then acting to remedy the situation, can create a safe harbor from liability in some states (such as Massachusetts and Oregon) and may help limit exposure to liquidated damages in many jurisdictions.

Companies are well-served to be proactive. Many employers historically have requested an applicant's salary history during interviews and on applications, with the intent of determining a fair salary. Avoid asking questions regarding salary history during the hiring process and consider omitted prior history inquiries from your job applications. Instead ask an applicant or employee for his or her salary expectations. This provides an additional data point, often used in conjunction with market survey data, to determine a fair salary for the position. You will also need to inform recruiters, third-party reference check businesses and your hiring managers conducting job interviews, about any changes in your practice.

Pay equity — including pay transparency and salary history bans — is more than a passing fad as more jurisdictions pass laws intended to close the pay gap. Progressive employers will benefit from embracing the changes and ensuring their compensation practices are compliant, resulting in equitable compensation.

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