Supreme Court Strikes Down Significant Pay Equity Case

LANDMARK 9TH CIRCUIT RULING SCRAPPED BECAUSE OF DECEASED JUDGE

Insights
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The Supreme Court took the unusual step today of vacating a 2018 federal appeals court decision because one of the judges counted in the majority was deceased by the time the decision was published, reversing a landmark pay equity ruling that concluded employers could not justify wage differentials between men and women by relying on prior salary. Although the justices did not examine the merits of the 9th Circuit's *Yovino v. Rizo* ruling in today's unsigned five-page opinion, their decision plunges employers back into a state of uncertainty regarding a controversial pay equity practice.

Employee Paid Less Than Others Solely Because Of Salary History
The facts of the case are straightforward. Aileen Rizo was hired as a math consultant by the Fresno County Office of Education in 2009. The county's Standard Operating Procedure for determining salary dictated that new employees would be given a 5 percent raise from whatever their salaries had been at their previous job and then placed into a structured salary schedule. Rizo was earning a little over $50,000 at her previous post in Arizona before joining Fresno County, so she was slotted into the appropriate step as dictated solely by that previous salary. The county did not take prior experience or any other factors into account when setting Rizo's salary.

A few years later, Rizo learned that male colleagues subsequently hired in similar roles had been placed into higher salary steps—assumedly because their salaries at previous employers had been higher than her previous salary. An internal complaint did not resolve the matter to her satisfaction, so she filed an Equal Pay Act (EPA) claim against the county in 2014.

Employee Eventually Earns Win In Court
Although she received a favorable ruling from a lower federal court which would have allowed her case to proceed to trial, a three-judge panel of the 9th Circuit Court of Appeals reversed that decision in 2017 and ruled in the county's favor. Because this matter was deemed sufficiently significant, however, the 9th Circuit heard the matter *en banc*—meaning a full complement of 11 judges ruled on the matter, setting controlling law for all employers in its jurisdiction (which includes those in California, Washington, Nevada, Arizona, Oregon, Alaska, Hawaii, Idaho, and Montana).

On April 9, 2018, the 9th Circuit's *en banc* panel made history by becoming the first federal appeals court to so explicitly reject the employer's contention that salary history could serve as a legitimate justification for a pay disparity under the EPA. While other circuit courts had already reached similar conclusions, none had done so in such a clear-cut and explicit manner. The employer had relied on the catchall provision of the statute that reads:

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***.

Because salary history is, technically, a factor "other than sex," the employer argued that it should be permitted to use it to justify any disparity. The *en banc* panel rejected the employer's argument, ruling 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 Untimely Death Taints Ruling

The county asked the Supreme Court to examine the ruling, hoping for a last-ditch victory. Today, the Court not only granted the county's request to hear the case, but also issued a *per curiam* (unsigned) opinion striking down the 9th Circuit's decision. The reason for its ruling, however, had nothing to do with the merits of the case; the brief decision mentions nothing about pay equity at all. Instead, the reasoning behind the decision stems from the fact that one of the 9th Circuit judges listed in the majority of the *en banc* ruling died 11 days before the case was issued.

The Honorable Stephen Reinhardt died on March 29, 2018—well after the December 2017 oral argument, but several days before the final opinion could be published on April 9, 2018. And although all 11 of the 9th Circuit judges on the *en banc* panel 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 crafted several alternate opinions concurring with the final outcome but expressing differing opinions as to how they would get there.

This was not acceptable, according to the Supreme Court's opinion. The 9th Circuit's *en banc* decision noted that Judge Reinhardt fully participated in the case (and, in fact, authored the majority opinion), going so far to say that the opinion and all concurrences were "final" and "voting was completed by the *en banc* court prior to his death." But as today's Supreme Court decision notes, "this justification is inconsistent with well-established judicial practice, federal statutory law, and judicial precedent." Part of the Court's rationale is the general assumption that a judge may change

his or her mind up to the very moment a decision is released, meaning that a decision is truly not "final" until it is actually published.

The Court concluded by gently slapping the 9th Circuit's judicial wrist and ruling that it had erred by counting 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's Next?

The Court vacated the *en banc* ruling and remanded the case back to the 9th Circuit for further proceedings. It is extremely likely that the appeals court will once again assemble an *en banc* panel to review the case and issue another opinion, and it seems like a foregone conclusion that the full panel will rule in Rizo's favor. The question, however, is what standard the majority of judges will set regarding the EPA's catchall provision, and how employers in the 9th Circuit's jurisdiction will be able to treat salary history when setting compensation.

As noted above, the 9th Circuit was not the first appeals court to limit the EPA's catchall provision to job-related factors as the 2nd Circuit (covering federal claims arising in New York, Connecticut, and Vermont), 6th Circuit (Ohio, Kentucky, Tennessee, and Michigan), 10th Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming), and 11th Circuit (Florida, Georgia, and Alabama) have all interpreted the "factor-other-than-sex" exception in a similar manner. However, each of these cases carried with them subtle nuances that may lead to differing conclusions on a case-by-case basis, and none provided such a definitive and clear-cut ruling as the 9th Circuit's now-rejected *en banc* decision.

It's worth noting that at least two circuits have shied away from issuing such a broad pronouncement—the 7th Circuit (which oversees federal courts in Illinois, Indiana, and Wisconsin) and 8th Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota). Looking further ahead, this means that there will continue to exist a split in the circuits regardless of how the 9th Circuit rules in Rizo's case, which could lead to eventual Supreme Court intervention—this time on the merits of the case.

To Ask Or Not To Ask: That Is The Question

In light of this controversy, employers across the country—and especially the west coast—must determine whether they should eliminate questions about salary history during the application process and during compensation finalization. While California and Oregon both have state laws barring employers from making such inquiries and using past salary history to establish compensation, what should employers in other states do?

On the one hand, the 9th Circuit's ruling is officially struck down and it is no longer controlling law. However, the fact that it may soon be teed up for another decision means that setting compensation based in whole or in part on salary history is fraught with danger in any jurisdiction governed by 9th Circuit precedent. After all, the court established a very broad interpretation of the EPA that was

Circuit precedent. After all, the court established a very broad interpretation of the EPA that was only struck down because of a technicality (not to mention a very narrow reading of a primary defense to legal claims), meaning that you may once again be susceptible to pay equity claims.

Whichever way you look at it, today's ruling—and the eventual conclusion of this saga, whenever it arrives—provides yet another reminder that you need to take the specter of pay equity claims seriously, taking immediate steps to address potential trouble spots. You should begin by working with your counsel to conduct a privileged pay audit to determine if you have compensation gaps. If any are identified, you should work with your counsel to ascertain whether any are justifiable—perhaps because of differences in experience, education, ability, job performance, seniority, quality of work, quantity, or another merit-based factor. Even in those states that have enacted salary inquiry bans, liability from past inquiries may be lingering. In some states, undertaking such an internal audit and then acting to remedy the situation will create a safe harbor shielding you from pay equity claims or damages.

You might also consider eliminating questions relating to salary history from your interview protocol and job applications. Instead, many employers now request an applicant's salary expectations at this stage in the process as a way to help negotiate a fair salary. You will also need to inform third-party reference check businesses operating at your command, and your hiring managers conducting job interviews, about any changes in your practice.

We will continue to monitor further developments and provide updates, so you should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our Pay Equity Practice Group.

This Legal Alert provides an overview of a specific Supreme Court case. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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