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Reliance on Salary History No Defense to Pay Disparity Under Equal Pay Act

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Just in time for Equal Pay Day (April 10), in its *en banc* opinion in *Rizo v. Yovino, Fresno County Superintendent of Schools*, the Ninth Circuit held earlier this week that prior salary alone, or in combination with other factors, cannot justify a wage differential between male and female employees under the Equal Pay Act (“EPA”). In reaching this holding, the Ninth Circuit affirmed the district court’s denial of summary judgment to Fresno County and overruled a prior Ninth Circuit decision, *Kouba v. Allstate Insurance Co.*, 691 F. 2d 873 (9th Cir. 1982). The court in *Rizo* also took a view of available EPA affirmative defenses which conflicts with the views held by other circuits and the EEOC.

Plaintiff Aileen Rizo was a math consultant for Fresno County. When she was hired, she had master’s degrees in educational technology and mathematics education. Her salary, upon joining the County, was based on its hiring schedule, which dictated that a new hire’s salary was to be determined by taking the hired individual’s prior salary, adding 5% and placing the new employee on the corresponding step of the hiring schedule.

Fresno County did not dispute that it paid Rizo less than comparable employees for the same work, but it argued that the wage differential was lawful under the EPA, which provides defenses to wage disparities when 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 County argued that Rizo’s wage differential was based on the fourth “catchall exception” because a prior salary can constitute a “factor other than sex.”

In interpreting the meaning of the catchall exception in the EPA, the *en banc* court reviewed the legislative history of the EPA and the decisions of other federal circuits and concluded:

Prior salary does not fit within the catchall exception because it is not a legitimate measure of work experience, ability, performance, or any other job-related quality. It may bear a rough relationship to legitimate factors other than sex, such as training, education, ability, or experience, but the relationship is attenuated. More important, it may well operate to perpetuate the wage disparities prohibited under the ...[EPA]. Rather than use a second-rate surrogate that likely masks continuing inequities, the employer must instead point directly to the underlying factors for which prior salary is a rough proxy, at best, if it is to prove its wage differential is justified under the catchall exception.

The court took the *Rizo* case *en banc* to clarify the law and address the Ninth Circuit’s prior holding in the 1982 *Kouba* decision. In that case, the court had held that the EPA “does not impose a strict prohibition against the use of prior salary.” The three judge panel in *Rizo* concluded that *Kouba* permits an employer to “maintain a pay differential based on prior salary ... only if it showed that the factor ‘effectuate[s] some business policy’ and that the employer ‘use[s] the factor reasonably in light of the employer’s stated purpose as well as its other practices.” The *Rizo en banc* court overruled *Kouba*, (and criticized the concurring opinions), stating that it is impossible to reconcile “how what is impermissible alone [e.g., consideration of salary history], somehow becomes permissible when joined with other factors.”

In light of the Ninth Circuit’s *en banc* decision in *Rizo*, the law is now quite clear that employers may not use past salary as a factor in initial wage setting, “alone or in conjunction with less invidious factors.”

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As noted in one of the concurring opinions, the standard adopted by the majority opinion in *Rizo* is not aligned with the views of other federal circuit courts or the EEOC. The EEOC, which filed an amicus brief in the case, takes the position that a prior salary cannot by itself justify a compensation disparity, but that employers may consider prior salaries as part of a mix of other factors.

Similarly, the Tenth and Eleventh circuits hold that prior salary *alone* cannot justify a pay disparity. The Eighth and Second circuits also allow the use of prior salary, but require that the employer prove that its reliance on past salary is rooted in legitimate business reasons. The Seventh Circuit, on the other hand, has held that prior salary is a “factor other than sex” for purposes of stating a defense under the EPA.

In light of *Rizo*, employers in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington should carefully examine their compensation-setting practices to ensure that they comply with this newly articulated standard. The use of prior salary history in setting compensation is squarely in the robust California and national dialogue on pay equity, and there are bound to be further developments, which we will continue to monitor.

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