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PERSPECTIVE

Prior pay can't justify pay differentials under Equal Pay Act

By Erin M. Connell

The 9th U.S. Circuit Court of Appeals again has ruled that under the Equal Pay Act, employers may not rely on prior pay to justify pay disparities between employees of the opposite sex who perform equal work. *Rizo v. Yovino*, 2020 DJDAR 1621 (9th Cir. Feb. 27, 2020). The *en banc* decision reaches the same result as a previous opinion by the late Judge Stephen Reinhardt before his passing in 2018. Although the 9th Circuit clarifies that the EPA does *not* prohibit consideration of prior pay in making starting pay offers, at least 18 states and 20 municipalities have passed salary history bans that do limit inquiries into applicants' prior pay. Two separate concurring opinions agree with the majority's result, but criticize it for embracing a view that puts the 9th Circuit at odds with other circuits, as well as guidance from the U.S. Equal Employment Opportunity Commission. Whether the Supreme Court grants review a second time remains to be seen. In the meantime, the decision illustrates yet another way in which courts and legislatures continue to narrow the ways in which employers may use prior pay to set compensation and in litigation.

Despite a lengthy procedural history, the facts of *Rizo* are straightforward. Aileen Rizo worked for the Fresno County school district as a math consultant. In 2012, she learned the school district paid male math consultants more than her because it had a policy of basing starting salary on an individual's prior salary plus a five percent increase. Accordingly, she sued under the EPA.

The school district moved for summary judgment, arguing that even though she was paid less than men for performing equal work, the pay differential was based on a "factor other than sex," and thus was permissible under the EPA. The school district argued that the practice of basing starting pay on prior pay was objective, encouraged candidates to leave their current jobs, prevented favoritism and encouraged consistency, and was a "judicious use of taxpayer dollars." The district court denied the motion on the basis that prior pay does not qualify as a "factor other than sex" under the EPA because it can perpetuate a discriminatory wage disparity between men and women. It certified an interlocutory appeal, however, on the question of whether "as a matter of law under the EPA, 29 U.S.C. § 206(d), an employer subject to the EPA may rely on prior salary alone when setting an employee's starting salary."

On appeal, a 9th Circuit panel reaffirmed its previous 1982 decision, *Kouba v. Allstate*, and held that an employer may rely on prior salary if it "show[s] 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 other practices.'" The full 9th Circuit granted *en banc* review, however, and in a decision written by the late Judge Reinhardt overruled *Kouba* and rejected the school district's defense. Judge Reinhardt reasoned that based on the "text, history and purpose of the Equal Pay Act," employers must not be allowed to "capitalize on the persistence of the wage gap and perpetuate that gap ad infinitum" by basing starting pay on prior pay, as any other result would "vitiate the very purpose for which the Act stands."

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In 2019, the Supreme Court vacated the 9th Circuit's decision. The court ruled that because Judge Reinhardt passed away before the decision was issued, his vote could not be counted, and only five of the other 10 members of the panel joined in his opinion. Accordingly, absent Reinhardt's vote, there was no majority.

On remand, the 9th Circuit reached the same conclusion as Judge Reinhardt. Writing for the majority, Judge Morgan Christen first finds the EPA's fourth "catchall" defense of a "factor other than sex" must be job-related. She then reasons that an employee's *prior* pay is not related to her *current* job. She explains, "The express purpose of the [EPA] was to eradicate the practice of paying women less simply because they are women. ... Allowing employers to escape liability by relying on employees' prior pay would defeat the purpose of the act and perpetuate the very discrimination the EPA aims to eliminate." She also clarifies that despite prior case law the could be read to "blur the lines" between Title VII and the EPA, the "familiar three-step *McDonnell-Douglas* framework that applies to Title VII claims is not used in EPA cases."

Only five of the 9th Circuit's judges joined the majority opinion. In a concurring opinion, Judge Margret McKeown, joined by Judges Richard Tallman and Mary Murguia, agrees that prior pay — on its own — is not a defense to unequal pay for equal work. She goes on to criticize the majority, however, for "embrac[ing] a rule not adopted by any other circuit — prior salary may never be used, even in combination with other factors, as a defense under the Equal Pay Act." Judge McKeown notes that other circuits have either rejected the majority's approach or declined to adopt it, and further notes it is at odds with guidance from the EEOC, the Agency charged with administering the EPA, which states in its Compliance Manual that using prior salary along with other job-related factors such as education, past performance and training to determine starting salary may be lawful in appropriate cases. She further states that the majority's holding may have a "chilling" effect that could disadvantage some women in starting pay negotiations because even though salary history bans typically contain exceptions for situations where job applicants volunteer their prior pay, the majority's holding effectively makes it a violation of federal antidiscrimination law to consider it even in situations where voluntarily disclosed.

Judge Consuelo Callahan provides a second concurrence, joined by Judges Tallman and Carlos Bea. She disagrees with the majority's conclusion that the fourth "catch all" defense must be "job related," and notes the majority "fails to appreciate Supreme Court precedent and creates an amorphous and unnecessary new standard for interpreting that subsection [of the EPA], which ignores the realities and dynamic nature of business." Instead, Judge Callahan agrees with the approach used in other circuit courts finding that when employers establish salary based on a multifactor salary system that includes prior salary, employers may rebut the presumption that the system is based on gender.

Although the Supreme Court ultimately may weigh in, employers should be mindful on the growing limitations on the use of prior pay. Indeed, just a few weeks before the *Rizo* decision, the 3rd Circuit upheld the city of Philadelphia's salary history ban, which the Chamber of Commerce for greater Philadelphia argued was unconstitutional. And in California, in addition to enacting a salary history ban, the state has amended its version of the EPA to expressly state that prior pay cannot justify pay disparities under the statute. The trend seems unlikely to reverse, underscoring now more than ever the importance of reviewing compensation systems and conducting internal audits to ensure pay practices do not run afoul of the patchwork of laws that limit reliance upon prior pay in compensation setting and to justify pay differences. ■

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