

PUBLICATION

Deceased Judge Dooms Equal Pay Case Before the Supreme Court

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March 13, 2019

The Supreme Court has issued a ruling in a case that many hoped would bring clarity to the issue of equal pay. The Ninth Circuit had ruled that salary history was not a factor that could be used to determine compensation. However, the judge who authored the opinion died before the ruling was issued. The Supreme Court held that a court cannot count a judge's vote who is not living at the time the ruling is issued. The case has been sent back to the Ninth Circuit.

In 2012, after working for the Fresno County Office of Education for three years, Aileen Rizo learned she was paid less than a recently hired male coworker despite the fact she had much more experience than the male coworker. When she filed suit against the county, they argued the discrepancy was a factor of her prior salary history. Under the 1963 Equal Pay Act, an employer can consider factors other than sex when determining salary. On this basis, the county argued prior salary history is one such non-sex factor justifying Rizo's pay disparity.

A three-judge panel of the Ninth Circuit overturned the lower court's decision, which held that prior salary history did not fall under a legitimate 'any other factor' defense because women's earlier salaries are probably lower because of gender bias. The three-judge panel based its ruling on a 1982 Ninth Circuit case, *Kouba v. Allstate*, which held employers could use previous salary information so long as the employer was reasonable and the compensation was justified by a business policy. *Kouba* was decided by the en banc court, meaning all of the judges on the Ninth Circuit. Three-judge panels are required to follow prior decisions by the full court. Rizo's panel had no choice but to follow *Kouba*. The case was then appealed and heard by all the judges of the Ninth Circuit, which meant the earlier ruling did not have to be considered. Although the 11 judges unanimously sided with Rizo, their reasoning for the decision was divided. Six judges held that salary history is inherently discriminatory and cannot be used in setting compensation, but one of those judges died before the court released its decision. The county appealed to the Supreme Court and an opinion was issued last week: the Ninth Circuit decision was declared invalid because it counted the deceased judge's vote.

The Supreme Court did not address the real issue, but instead focused on the fact that Judge Reinhardt had died before the opinion was issued. The Court held that a deceased federal judge's vote on an opinion cannot be counted if the judge is no longer alive. As the Court reasoned, "federal judges are appointed for life, not for eternity." Indeed, the Court recently had a similar experience when Justice Antonin Scalia died unexpectedly. Even though Justice Scalia had voted on several cases that were still pending at the time of his death, the Court announced the split was 4-4 and could not issue a ruling on several cases because Justice Scalia's vote could not be counted.

Even before the Ninth Circuit's recent decision, circuit courts and statutes regarding whether an employer can use prior salary history to set compensation is patchwork at best. Some cities and states have passed laws barring prior salary history from being used to determine compensation. And while other appeals courts have ruled similarly to the Ninth Circuit, none so clearly declare that salary history cannot be used to justify paying men and women differently for similar jobs. Notably, since this case began, California passed a law making prior salary history inquiries unlawful. In 2016, the governor signed into law a ban on all employers, including state and local governments, banning inquiries into a person's salary history. The law took effect January 1,

2018. Under this new law, an employer may not use salary history as a factor in determining what salary to offer a candidate. Oregon, Delaware, Massachusetts, New York City, and Philadelphia have all passed local laws prohibiting inquiries about salary history. Additionally, Atlanta has recently banned salary history inquiries of candidates for jobs with the city of Atlanta, and New Orleans bans the inquiries not only of candidates for city employment but also of potential employees of contractors who work for the city.

The *Rizo* case has been sent back to the Ninth Circuit for reconsideration, which may convene a new en banc court to decide the issue. The decision to rule in Rizo's favor was unanimous, so it appears unlikely that the outcome will be different now. However, the real question is whether a judge will be convinced to change his or her vote to create a majority opinion.

For employers, this ruling by the Supreme Court – or the Ninth Circuit ruling, for that matter – does not provide uniform guidance because it was decided on a technicality. The law in this area remains extremely piecemeal. Employers must be certain they are aware of the federal, state, and local laws regarding prior salary history and compensation setting to avoid any violation. This is true for any employer in multiple cities, but even more so for multi-state employers.

For additional information regarding this case or the laws in your company's locations, please contact the author, [Melissa Vest](#), or any member of Baker Donelson's [Labor & Employment Group](#).