

Ninth Circuit Rules that Prior Salary is not a "Factor Other than Sex" Under the Equal Pay Act

BY ROBERT G. YOUNG • APRIL 23, 2018

On April 9, the Ninth Circuit Court of Appeals issued an *en banc* decision in *Rizo v. Yovino*, holding that an employee's prior salary does not constitute a "factor other than sex" for purposes of justifying a pay disparity under the Equal Pay Act. In that case, a school district hired a female math teacher at a stepped salary level based on what she had been making in her previous position. The teacher later learned that subsequently-hired male teachers had been assigned to higher stepped salary levels, and she filed a claim under the federal Equal Pay Act. The school district sought to dismiss the claim, arguing that assigning an employee a starting salary level based on her prior compensation was a "factor other than sex" and therefore permissible under the catchall defense under the Equal Pay Act.

The Court rejected the School District's argument and instead construed the "factor other than sex" exception for pay differentials to require some nexus to the position in question, such as experience, educational background, ability, or prior job performance. In particular, the Court reasoned that Congress passed the Equal Pay Act to eliminate historical disparities in compensation based on sex, and therefore it would be inconsistent with the statute's underlying purpose to let an employee's compensation history justify a gender-based differential in pay in a current job. Instead, the Court decided that setting current pay based on an employee's compensation history may perpetuate past discrimination and thus is incompatible with the Equal Pay Act.

Client Tip: As institutions prepare for compliance with the revamped Massachusetts Equal Pay Act—which prohibits inquiries into a job candidate's past salary history—this case serves as a signal that federal law may be moving closer to Massachusetts law on this topic. Institutions should be prepared to justify any gender-based differentials in pay with specific (and, as much as possible, objective) reasons for compensation decisions that tie directly to the job in question.

©2026 Bowditch & Dewey LLP. All Rights Reserved.