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Past Salary Is Losing Steam As Sex-Based Pay Gap Excuse

By **Christine Webber** (October 28, 2020)


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Rizo v. Yovino,[1] has finally reached a conclusion after an unusual history, in which an en banc decision was vacated by the U.S. Supreme Court due to having been issued several days after its author, U.S. Circuit Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit, passed away.

Upon the case's return to the Ninth Circuit, another judge was randomly selected to join the en banc panel, and a new decision was issued, which, like the earlier en banc ruling, overturned the Ninth Circuit's 1982 decision in Kouba v. Allstate Insurance Co.,[2] and held that prior pay was not a factor other than sex that could be used as a defense in an Equal Pay Act claim. The defendant once again sought review by the Supreme Court, which recently denied certiorari.[3]

The Ninth Circuit's analysis began by holding that the list of three specific affirmative defenses in the EPA — seniority, merit and productivity systems — provide context for the fourth: any other factor other than sex. Thus, a factor other than sex must be one that, like the first three enumerated, is job-related and based on legitimate business reasons.

This standard is consistent with the great weight of circuit court decisions.[4] Only the U.S. Court of Appeals for the Seventh Circuit has held there is no limitation on other factors.[5] The U.S. Court of Appeals for the Eighth Circuit occupies a middle ground in which proposed factors are evaluated on a case-by-case basis to preserve business freedoms.[6]

Applying the job relatedness test to prior pay, the Ninth Circuit easily concluded that prior pay is not related to the new job.

While prior pay could be viewed as a proxy for factors such as education, skills or experience related to the prior job, that does not serve to make prior pay itself related to the new job; indeed, the employer is expected to point not to a mere difference in education or experience, but to how that education is relevant to the new job. This is consistent with the employer bearing the burden of proving that "sex provide[d] no part of the basis for the wage differential."[7]

The Ninth Circuit's conclusion that prior pay cannot satisfy standards applicable to the factor-other-than-sex defense is consistent with several other circuits, though more definitive. The U.S. Courts of Appeals for the Sixth, Tenth and Eleventh Circuits have all held that prior pay cannot be the sole reason for a pay differential, but have not barred it from being considered in all circumstances, in addition to prior experience.[8]

The U.S. Court of Appeals for the Second Circuit has not squarely addressed consideration of prior pay,

but in adopting a high bar for what can constitute a factor other than sex in Aldrich v. Randolph Central School District in 1992, the court cited "When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of 'Factors Other Than Sex' Under the Equal Pay Act"[9] by Jeanne Hamburg, which suggests openness to Rizo's rule.[10]

The Eighth Circuit has permitted use of prior salary as a defense to incumbent pay disparities only after ensuring in Drum v. Leeson Electric Corp. in 2009 "that an employer does not rely on the prohibited 'market force theory' to justify lower wages" for women based solely on gender.[11] Courts have held that reliance on prior pay alone is simply another form of the market force theory long rejected by the Supreme Court.[12]

Consistent with its outlier anything goes standard, the Seventh Circuit has explicitly accepted reliance on prior pay alone as a factor other than sex, without qualification.[13]

While the U.S. Court of Appeals for the Fourth Circuit recently ruled in Spencer v. Virginia State University that reliance on prior pay with the same employer was a factor other than sex,[14] the court did not discuss its rationale, and it seems to be in tension with its 2018 decision in U.S. Equal Employment Opportunity Commission v. Maryland Insurance Administration,[15] which held that a defendant must show job-related distinctions actually caused the pay difference.

Given the broad consensus that prior pay alone does not qualify as a factor other than sex, the long-standing rejection of market force theory by the Supreme Court, and agreement that factors must be job-related, Rizo appears to be leading a trend toward rejecting prior pay as a factor other than sex. This trend is also consistent with efforts at the state level to bar employers from asking candidates about their salary history — such laws are now in effect in 16 states or territories.[16]

Four of those states also bar consideration of prior pay if that information is obtained without asking the applicant to provide it.[17] Plainly, employers — whether in a state already subject to a statutory bar or not — need to be prepared to establish pay rates without basing them on prior pay going forward.

Employees have greater opportunities to challenge existing pay disparities too. Since employers tend to defend prior pay as a proxy for the value of past education or experience, we would expect to see employers relying directly on past experience or education rather than prior pay when challenged over pay disparities.

That shift will make it harder for employers to justify distinctions when men and women have equivalent past experience, but did not come to the employer with equivalent prior salaries — a far-too-common experience.

Moreover, courts have similarly made clear that the purported factor other than sex must be not merely a factor that could explain the pay disparity, but that it in fact explains the difference, considering contemporaneous evidence from when the decision was made.[18] That will make it harder for employers to defend pay disparities where the contemporaneous reason for the difference was prior pay, where courts no longer accept prior pay as a factor other than sex.

Finally, an employer's affirmative defense whether relying on one of the three enunciated defenses or a factor other than sex, must demonstrate that the permissible factors explain the entirety of the pay disparity.[19]

In light of the evolving law, both in courts' interpretation of the Equal Pay Act and in legislative changes at the state and local level, employers would be well served to review their employees' pay and make adjustments as necessary to ensure any remaining disparities can survive review under the evolving standards.

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[1] Rizo v. Yovino, 950 F.3d 1217 (9th Cir. 2020) (en banc).

[2] Kouba v. Allstate Insurance Co., 691 F.2d 873, 876–77 (9th Cir. 1982).

[3] Yovino v. Rizo, 2020 WL 3578691 (July 2, 2020).

[4] See, e.g., Aldrich v. Randolph Central School District, 963 F.2d 520, 525 (2d Cir. 1992); U.S. Equal Employment Opportunity Comm'n v. Maryland Ins. Admin., 879 F.3d 114, 123 (4th Cir. 2018); EEOC v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir.1988); Riser v. QEP Energy, 776 F.3d 1191, 1198-99 (10th Cir. 2015); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995).

[5] Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989).

[6] Taylor v. White, 321 F.3d 710, 720 (8th Cir. 2003).

[7] Rizo, 950 F.3d at 1228.

[8] Balmer v. HCA, Inc., 423 F.3d 606, 612 (6th Cir. 2005) (holding that consideration of prior salary is allowed only as long as the employer does not rely solely on prior salary, and that defendant proves that "sex provide[d] no part of the basis for the wage differential."); Riser v. QEP Energy, 776 F.3d 1191, 1198-99 (10th Cir. 2015) (prior pay could be considered, but cannot be the sole fact to justify pay disparity); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995) (employer may not rely on prior pay alone, but can use it as part of a 'mixed motive'); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1570-71 (11th Cir. 1988) (rejecting argument that prior pay was factor other than sex "under the facts of the present case").

[9] 89 Colum.L.Rev. 1085, 1095–99 (1989).

[10] Aldrich v. Randolph Central School District¸ 963 F.2d 520, 525 (2d Cir. 1992).

[11] Drum v. Leeson Elec. Corp.,565 F.3d 1071, 1073 (8th Cir. 2009).

[12] See e.g. Glenn v. General Motors Corp., 841 F.2d 1567, 1570 (11th. Cir. 1988) (citing Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974) ("The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.").

[13] Lauderdale v. Illinois Dep't of Human Servs., 876 F.3d 904, 908 (7th Cir. 2017).

[14] Spencer v. Virginia State Univ., 919 F.3d 199, 206 (4th Cir.), as amended (Mar. 26, 2019), cert. denied, 140 S. Ct. 381, (2019).

[15] U.S. Equal Employment Opportunity Comm'n v. Maryland Ins. Admin., 879 F.3d 114, 123 (4th Cir.

2018).

[16] Alabama, California, Colorado, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Puerto Rico, Vermont, Washington. https://www.hrdive.com/news/salary-history-ban-states-list/516662/. Additional states bar state agencies from making such inquiries, and there are numerous individual cities that bar employers from requesting such information. One of the local laws was challenged on first amendment grounds, but the Third Circuit rejected that claim and upheld the bar as reasonable regulation of commercial speech. Greater Philadelphia Chamber of Commerce v. City of Philadelphia, 949 F.3d 116 (3d Cir. 2020).

[17] California, Colorado, Massachusetts (prior pay cannot be used as a defense to age discrimination), Oregon. https://www.hrdive.com/news/salary-history-ban-states-list/516662/. Similar provisions are included in the Paycheck Fairness Act which passed the House of Representatives in 2019, but has not yet been voted on in the Senate.

[18] See, e.g., U.S. Equal Employment Opportunity Comm'n v. Maryland Ins. Admin., 879 F.3d 114, 123 (4th Cir. 2018); Mickelson v. New York Life Ins. Co., 460 F.3d 1304, 1312 (10th Cir. 2006); Stanziale v. Jargowsky, 200 F.3d 101, 107-08 (3d Cir. 2000).

[19] See, e.g., Riser v. QEP Energy, 776 F.3d 1191, 1199 (10th Cir. 2015) (proffered rationale explained only $3500 of a disparity in excess of $18,000). See also, 10-III COMPENSATION DISCRIMINATION IN VIOLATION OF TITLE VII, ADEA, OR ADA, EEOCCM s 10-III (2006 WL 4672890) ("The employer's explanation should account for the entire compensation disparity. Thus, even if the employer's explanation appears to justify some of a compensation disparity, if the disparity is much greater than accounted for by the explanation, the investigator should find cause.").
