

April 2019

Rizo v. Yovino: Another Step Toward Equality Through the Equal Pay Act

Corey Timpson

Follow this and additional works at: <https://digitalcommons.law.ggu.edu/ggulrev>

Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Corey Timpson, *Rizo v. Yovino: Another Step Toward Equality Through the Equal Pay Act*, 49 Golden Gate U. L. Rev. 49 (2019).
<https://digitalcommons.law.ggu.edu/ggulrev/vol49/iss1/6>

This Case Summary is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized editor of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

CASE SUMMARY

RIZO V. YOVINO: ANOTHER STEP TOWARD EQUALITY THROUGH THE *EQUAL PAY ACT*

COREY TIMPSON*

INTRODUCTION

Still prevalent in today's society is a vast inequality between men and women, such that men are oftentimes treated better than women in the same contexts. One realm of society where this inequality is evidenced is through the disparities in pay rates.¹ On average, for each dollar a man earns, a woman earns only 80.5 cents.² Despite the passage of the *Equal Pay Act* ("EPA"),³ the nearly 20% gap remains. The purpose of the EPA was to bridge the pay gap among men and women working similar jobs at the same workplace.⁴ Under the EPA, an employer cannot pay men and women differently for the same or similar jobs unless the pay disparity is based on: "(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."⁵ In a recent opinion issued by the United States Court of Appeals for the Ninth

* J.D. Candidate, Golden Gate University School of Law, May 2019; B.A. Psychology, University of California, Los Angeles, May 2016. Executive Research Editor, 2018-2019, *Golden Gate University Law Review*.

¹ Sonam Sheth, Shayanne Gal & Skye Goud, *Six Charts Show How Much More Men Make Than Women*, BUSINESS INSIDER (Aug. 27, 2018, 10:50 AM), <https://www.businessinsider.com/gender-wage-pay-gap-charts-2017-3>.

² *Pay Equity & Discrimination*, INST. FOR WOMEN'S POL'Y RES., <https://iwpr.org/issue/employment-education-economic-change/pay-equity-discrimination/> (last visited Oct. 16, 2018); Sheth et al., *supra* note 1.

³ 29 U.S.C. § 206(d) (2016).

⁴ *Facts About Equal Pay and Compensation Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/publications/fs-epa.cfm> (last visited Oct. 16, 2018).

⁵ 29 U.S.C. § 206(d) (2016).

Circuit (“Ninth Circuit”), an en banc panel provided some clarity to the last of these systems allowing for a pay difference.⁶ In *Rizo v. Yovino*, the en banc panel affirmed a district court’s denial of defendant’s summary judgment motion, holding that employers shall not consider prior salary as a factor other than sex to support a pay gap between men and women.⁷

I. BACKGROUND

A. FACTUAL BACKGROUND

Plaintiff Aileen Rizo (“Rizo”), with “a Bachelor of Science in Mathematics Education, a Master’s degree in Educational Technology, and a Master’s degree in Mathematics Education” and extensive work experience, sought employment as a math consultant with the Fresno County Office of Education (“County”) in 2009.⁸ After she was hired, the County determined her salary through Fresno County’s Standard Operating Procedure 1440 (“SOP 1440”).⁹ The procedure sets a new hire’s salary by increasing his or her prior salary by 5% and placing the resulting salary somewhere on a ten-stepped salary schedule.¹⁰ Each of the ten levels on the salary schedule is comprised of ten additional steps that must be satisfied before moving up a level.¹¹ Through SOP 1440, the County started Rizo’s salary at step one of level one.¹²

Nearly three years after her employment began, Rizo discovered that male math consultants were hired at higher salary steps than her.¹³ After making a formal complaint to the County regarding the salary differential, the County merely said “that all salaries had been set in accordance with SOP 1440” and that the system typically places women at higher steps than men.¹⁴ Disputing the County’s analysis, Rizo filed suit in early 2014 against the Superintendent of the Fresno County Office of Education, Jim Yovino, in his official capacity.¹⁵

⁶ *Rizo v. Yovino*, 887 F.3d 453, 456 (9th Cir. 2018).

⁷ *Id.* at 456-57.

⁸ *Rizo v. Yovino*, 2015 WL 13236875, at *3 (E.D. Cal. Dec. 4, 2015).

⁹ *Rizo v. Yovino*, 887 F.3d at 457.

¹⁰ *Id.*

¹¹ *Id.* (For example, step one of level four.).

¹² *Id.* at 458.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

B. PROCEDURAL BACKGROUND

Rizo filed a complaint alleging violation of the EPA; sexual discrimination under Title VII of the Civil Rights Act of 1964 and California Government Code section 12940(a); and failure to prevent discrimination under California Government Code section 12940(k).¹⁶ The County sought summary judgment in 2015, claiming that Rizo's salary was set based on her prior salary, which constitutes a "factor other than sex," and therefore it was not in violation of the EPA.¹⁷ The district court concluded that "a pay structure based exclusively on prior wages is so inherently fraught with the risk . . . that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand."¹⁸ The district court denied summary judgment for this reason.¹⁹

The County filed a petition for permission to file an interlocutory appeal, which was granted by the Ninth Circuit.²⁰ The three-judge panel found *Kouba v. Allstate Insurance Co.*,²¹ controlled its ruling.²² Under *Kouba*, prior salary alone may be considered in setting salaries if it is "reasonable and effectuated some business policy."²³ Thus, the panel vacated the summary judgment denial and remanded the case back to the district court to determine the County's business reasons behind SOP 1440.²⁴ By a majority vote, the Ninth Circuit agreed to rehear the current case en banc to explain the current effect of the law and the future of *Kouba*.²⁵

II. NINTH CIRCUIT ANALYSIS

A. CONSIDERATION OF PRIOR SALARY TO SET INCOMING SALARY IS INCONSISTENT WITH THE GOALS OF THE *EQUAL PAY ACT*

The United States Supreme Court emphasized that "[t]he Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve."²⁶

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982).

²² *Rizo v. Yovino*, 887 F.3d at 458.

²³ *Id.* at 458-59 (quoting *Kouba*, 691 F.2d at 874).

²⁴ *Id.* at 459.

²⁵ *Id.*; *see also* *Rizo v. Yovino*, 869 F.3d 1004 (9th Cir. 2017).

²⁶ *Rizo v. Yovino*, 887 F.3d at 460 (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974)).

Since the purpose of the EPA is to eliminate the gender pay gap, allowing prior salary to qualify under the catchall provision would effectively permit the pay disparities between genders to continue to exist.²⁷ Thus, the Ninth Circuit first affirmed the summary judgment denial because deciding a current salary based on prior salary goes against the purpose of the EPA.²⁸ Although the Ninth Circuit clarified that prior salary may be used in other circumstances such as individual salary negotiations, it may not be used as “a factor other than sex” in determining current salary.²⁹

B. STATUTORY INTERPRETATION INDICATES THAT PRIOR SALARY IS AN IMPERMISSIBLE “FACTOR OTHER THAN SEX”

Through statutory interpretation, the Ninth Circuit concluded that the catchall provision allowing for “a factor other than sex” to justify a gender wage disparity means a factor that is job-related, and not just any other factor.³⁰ *Noscitur a sociis* and *ejusdem generis* are used to bring meaning to a catchall provision in a statute.³¹ Under *noscitur a sociis*, “words grouped together should be given related meaning;³² and *ejusdem generis* stands for the notion that general terms used after a list of specific terms should be similar to the specific terms.³³ Thereby, because seniority systems, merit systems, and systems based on quality or quantity of production are all related to job performance, skill, and expertise, “a factor other than sex” must also be related.³⁴

The legislative history of the EPA further supports interpreting the catchall provision to only include job-related factors.³⁵ The Ninth Circuit looked to the Supreme Court’s reliance on legislative history in *Corning Glassworks v. Brennan*³⁶ to interpret “similar working conditions” under the EPA.³⁷ In drafting the EPA, Congress heard testimony from various industry representatives that testified to other valid, job-related factors used to determine salary, which were not represented by seniority or

²⁷ *Id.* at 460-61.

²⁸ *Id.* at 461.

²⁹ *Id.*

³⁰ *Id.* (For example, any arbitrary factor, such as birthdate or a factor that could potentially perpetuate the gender pay gap such as prior salary, would be impermissible since those factors are unrelated to the job.).

³¹ *Id.*

³² *Id.* (citing *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015)).

³³ *Rizo v. Yovino*, 887 F.3d at 462 (citing *Yates v. United States*, 135 S. Ct. 1074, 1086 (2015)).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Corning Glass Works v. Brennan*, 417 U.S. 188, 197-99 (1974).

³⁷ *Rizo v. Yovino*, 887 F.3d at 462.

merit systems, two original provisions of the EPA.³⁸ The Ninth Circuit reviewed the legislative history and concluded that the catchall provision was added as a means to justify pay differentials based on other similar job-related factors.³⁹ The Ninth Circuit further concluded that Congress attached the catchall provision to the EPA in response to “employers’ concerns that their legitimate, job-related means of setting pay would not be covered under” seniority or merit systems.⁴⁰

The Ninth Circuit’s conclusion that the catchall provision only applies to job-related factors does not extend to “business-related” factors.⁴¹ A distinction is required for EPA purposes despite the fact that some courts use these two terms interchangeably.⁴² Business-related factors are inclusive of factors that could benefit a company economically, and therefore, a pay differential disguised as a cost-saving mechanism would theoretically stand under the catchall provision.⁴³ However, the Supreme Court rejected this interpretation on multiple occasions, including in *Corning*.⁴⁴ The Supreme Court reasoned that, even if women would “accept lower salaries because they will not find higher salaries elsewhere,” it is not a “factor other than sex,” despite its cost-saving benefits.⁴⁵ Ultimately, the Ninth Circuit concluded that prior salary “is not a legitimate measure of work experience, ability, performance, or any other job-related quality” and thus cannot be used to justify a wage differential between men and women.⁴⁶

C. THE NINTH CIRCUIT OVERRULED *KOUBA* BECAUSE IT IS INCONSISTENT WITH ITS DETERMINATION IN *RIZO*

By deciding that prior pay as “a factor other than sex” is inconsistent with the EPA, the Ninth Circuit was required to overturn its prior ruling in *Kouba*.⁴⁷ In 1982, the Ninth Circuit found in *Kouba* that using prior pay to determine salary was not prohibited by the EPA.⁴⁸ This decision was used by the three-judge Ninth Circuit panel to remand *Rizo* back to the district court, prior to this court’s rehearing en banc.⁴⁹ However, as

³⁸ *Id.* at 463; 29 U.S.C. § 206(d) (2016).

³⁹ *Rizo v. Yovino*, 887 F.3d at 463.

⁴⁰ *Id.*

⁴¹ *Id.* at 465.

⁴² *Id.* at 466.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974)).

⁴⁶ *Id.* at 467.

⁴⁷ *Id.* at 468.

⁴⁸ *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 878 (9th Cir. 1982).

⁴⁹ *Rizo v. Yovino*, 887 F.3d at 468.

the decision of *Rizo* is inconsistent with that of the *Kouba* decision, *Kouba* must be overturned.⁵⁰

III. IMPLICATIONS OF *RIZO V. YOVINO*

The en banc decision in *Rizo* is a great step towards ending the serious wage gap between men and women. By clarifying what can be considered as a factor other than sex under the EPA, the court narrowed the means by which employers can perpetuate the ongoing pay disparities among men and women.⁵¹ The Ninth Circuit has effectively limited the factors to be considered in setting a person's salary to only those concerning job performance, skill, or other job-related factors.⁵² Not only are employers barred from basing salaries on sex, they are also prohibited from disguising discriminatory policies as something else, like prior salary—which is inherently based on sex because of the historic pay disparity among men and women.⁵³ The Ninth Circuit accurately interpreted the County of Fresno's "prior salary" criteria as one related to sex. Since women have been allowed to work, there has always been a pay gap between men and women.⁵⁴ Thus, by considering or even solely using prior salary, women will almost always be at a disadvantage when determining what their salary should be.

With our current political administration constantly attempting to knock down the claims of women across different areas of society,⁵⁵ this decision is a win. It will likely urge other women throughout the country to begin questioning their salaries and the policies that set them.⁵⁶ Furthermore, this decision will help guide lower courts in making determi-

⁵⁰ *Id.*

⁵¹ *See id.* at 456-57.

⁵² *Id.* at 460.

⁵³ *See id.* at 458.

⁵⁴ *Equal Pay Act*, HISTORY, <https://www.history.com/topics/womens-rights/equal-pay-act> (last updated Aug. 21, 2018).

⁵⁵ *See* Christine Wilkie, *Trump Mocks Kavanaugh Accuser Christine Blasey Ford's Account of Her Alleged Sexual Assault*, CNBC, <https://www.cnbc.com/2018/10/03/trump-mocks-kavanaugh-accuser-christine-fords-alleged-sexual-assault.html> (last updated Oct. 3, 2018, 2:09 PM).

⁵⁶ *See* Alyssa Roenigk, *Equal Ocean, Equal Waves, Equal Pay*, ESPN (Oct. 4, 2018), <http://www.espn.com/espnw/sports/article/24882273/equal-ocean-equal-waves-equal-pay-how-wsl-came-grant-equal-prize-money> (women surfers finally get equal pay after consistently advocating for it); *see also* Max Brantley, *ACLU Joins Pay Discrimination Case Arising from Women Doctors at VA Hospital in Little Rock*, ARK. TIMES (Oct. 31, 2018, 4:08 PM), <https://www.arktimes.com/Arkansas-Blog/archives/2018/10/31/aclu-joins-pay-discrimination-case-arising-from-women-doctors-at-va-hospital-in-little-rock>.

nations under the EPA because it sets a precedent for all courts within the Ninth Circuit—the largest of the 13 Circuit Court of Appeals.⁵⁷

On August 30, 2018, Yovino filed a petition for writ of certiorari to the United States Supreme Court.⁵⁸ Due to recent events securing a conservative majority on the Court by allowing for the affirmation of Brett Kavanaugh,⁵⁹ it is unclear whether this case will be affirmed, reversed, or remanded if the Court grants certiorari. The Supreme Court only grants certiorari if there is a compelling reason.⁶⁰ However, it would come as no surprise if the Court did in fact take this case because there is a circuit split between at least the Seventh and Ninth Circuits.⁶¹ This year our society has been shocked, and sometimes outraged, by daily events in our political climate and thus, we will have to wait and see whether the Court will grant certiorari in *Rizo* and ultimately what the outcome will be.

IV. CONCLUSION

Fortunately, the Ninth Circuit's decision in *Rizo* brings our society one step closer to fulfilling the goals of the EPA that women have been trying to achieve since its passage in 1963.⁶² With the new framework established by the Ninth Circuit, employers must justify how they set their employees' salaries, which must be based on factors that are job-related and may not be based on factors that have prolonged the continuing gender pay gap, such as prior salary.⁶³ This standard will require employers to examine factors such as years of experience, skill set, and other non-sex and non-discriminatory factors to set salaries for new employees.⁶⁴ Our society will bridge the gap concerning gender inequalities that have plagued our society from its inception when all men and women begin fighting for equality together. But until that day comes, our society must keep unequivocally advocating for women's rights.

⁵⁷ Andy Biggs & Bill Montgomery, *Split up the Ninth Circuit*, NAT'L REV. (June 15, 2017, 8:00 AM), <https://www.nationalreview.com/2017/06/split-ninth-circuit-appeals-court-its-far-too-large/>.

⁵⁸ *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018), *petition for cert. filed* (No. 18-272).

⁵⁹ Clare Foran & Stephen Collinson, *Brett Kavanaugh Sworn in as Supreme Court Justice*, CNN, <https://www.cnn.com/2018/10/06/politics/kavanaugh-final-confirmation-vote/index.html> (last updated Oct. 6, 2018, 8:02 PM).

⁶⁰ SUP. CT. R. 10, <https://www.supremecourt.gov/filingandrules/2017RulesoftheCourt.pdf>.

⁶¹ Liz Elting, *How the Rizo Case Will Affect the Gender Pay Gap*, FORBES, <https://www.forbes.com/sites/lizelting/2018/04/13/how-the-rizo-case-will-affect-the-gender-pay-gap/> #13ec62ff620e (last visited Oct. 31, 2018).

⁶² 29 U.S.C. § 206(d) (2016).

⁶³ *Rizo v. Yovino*, 887 F.3d at 468.

⁶⁴ *Id.* at 467.

