



The Supreme Court Remands the Ninth Circuit's Pay Bias Decision Due To Judge Reinhardt's Death

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On February 25, 2019, the United States Supreme Court vacated a decision previously decided by the full Ninth Circuit because it was filed after Judge Stephen Reinhardt, who authored the opinion, died. In the case, *Rizo v. Yovino*, the Ninth Circuit held that employers could not rely upon an employee's prior salary as a "factor other than sex" in defending against a claim under the Equal Pay Act. We discussed the Ninth Circuit's decision [here](#). Notably, the Ninth Circuit was the only federal circuit court to decide that employers could *never* rely upon salary history as a factor other than sex. All eleven judges (including Judge Reinhardt) in the Ninth Circuit had agreed that prior law should be overturned, and that the employer's utilization of salary history *altoneto* set salaries was impermissible.

In its decision, the Supreme Court explained that "federal judges are appointed for life, not for eternity." The justices stated that "[b]ecause Judge Reinhardt was no longer a judge" when the decision was filed, the Ninth Circuit erred, which "effectively allowed a deceased judge to exercise the judicial power of the United States after his death."

The Court's decision has the effect of restoring prior law in the Ninth Circuit. However, employers in the Ninth Circuit should continue to be cautious in utilizing prior salary to set wages, given that 10 current judges agree that salary history alone is not sufficient to justify a pay disparity.

Key Takeaways

1. Employers in the nine western states covered by the Ninth Circuit (including Arizona and Nevada) should continue to ensure objectivity in setting compensation levels.
2. The *Rizo* decision will potentially impact employers nationwide because the case had created a circuit split on whether employers can justify a wage differential between male and female employees by relying on prior salary, signaling that the issue may eventually find its way to the United States Supreme Court.

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