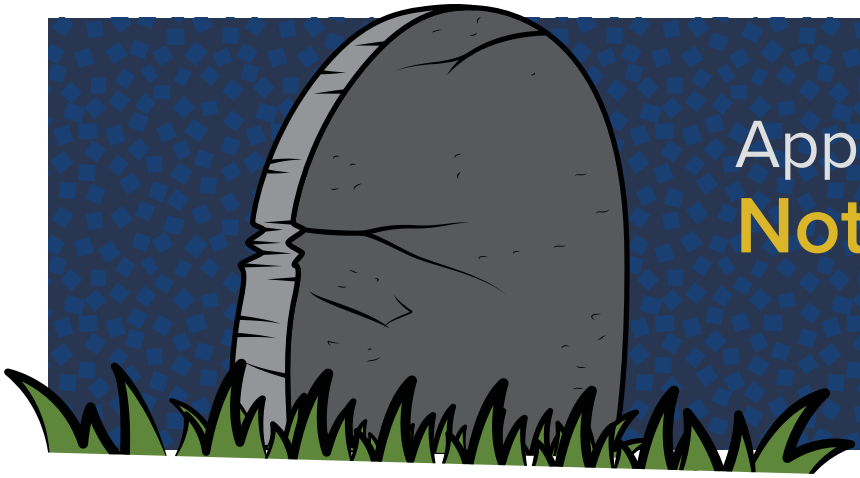

Appointed For Life, Not For Eternity

BY BILLY S. FAWCETT

THE U.S. SUPREME COURT issued an interesting unanimous opinion on February 25, 2019, in which it vacated a landmark 9th Circuit decision, *Yovino v. Rizo,* where the Ninth Circuit ruled that salary history is not an affirmative defense to an Equal Pay Act violation. The Court essentially avoided ruling on the underlying issues and instead found that a deceased judge cannot issue opinions, even if he wrote the opinion before he died.

In *Yovino v. Rizo,* formerly a landmark case, the Ninth Circuit decided that employers cannot use salary history as a legitimate non-discriminatory reason for paying female employees less than similarly situated male employees. The case began when the Fresno County Office of Education hired Aileen Rizo as a math consultant. Despite her extensive experience, the only consideration made by the Fresno County Office of Education in determining her salary was her salary at her most recent employer, which it used to place candidates into "steps." This methodology was its standard practice and, ironically, was designed and adopted to avoid gender discrimination and equal pay lawsuits. Rizo learned later that similarly situated male colleagues had been hired at higher steps than her. Rizo then filed a lawsuit in the Eastern District of California.

The district court denied the Fresno County Office of Education's motion for summary judgment, following recent Tenth and Eleventh Circuit decisions, while cleverly avoid a precedential 9th Circuit case from the early 1980s. In doing so, the district court noted that using only previous salary as a method for determining salary would perpetuate the wage gap. The Fresno County Office of Education appealed.

A three-judge panel for the Ninth Circuit vacated the lower court's decision. Using the Ninth Circuit precedent that the district court was able to avoid, it ruled that the Fresno County Office of Education's reliance solely on prior salary could be a legitimate non-discriminatory business decision, and, importantly, that solely relying on previous salary is not de-facto gender discrimination. Rizo then asked for an en banc rehearing.

En Banc Decision

Typically, an appeal is held before a panel of three judges. However, after the panel issues an opinion, a party can request a rehearing en banc. Circuits generally only hear cases en banc when the case deals with an important issue like interpreting new law, overturning its own precedent, or if the appellate opinion might conflict with statutory law. In many circuits, an en banc hearing is a hearing before all of the appellate judges in the circuit. However, the Ninth Circuit Court of Appeals is by far the busiest Appellate Circuit in the nation, having over 10,000 pending appeals (with the next closest Circuit having only 6,000 pending appeals). So, a hearing in front of all of the appellate judges in the Ninth Circuit would be nearly impossible logistically, and oral arguments would be utter pandemonium. To avoid this, the Ninth Circuit, along with other larger circuits, does not have to use all of its judges when sitting en banc. Instead, the Ninth Circuit hears cases en banc with eleven judges.

In the *Yovino* case, the en banc panel overturned the three-judge panel's decision and instead ruled in favor of the plaintiff. Judge Stephen Reinhard wrote the majority opinion for the en banc panel. Sadly, Judge Reinhardt died eleven days before the opinion was formally entered. Before his death, he participated fully in the case and finished writing the decision. The Ninth Circuit thought that because of this, it could publish the decision as written, even after Judge Reinhard passed away. The school district appealed that decision to the U.S. Supreme Court.

The U.S. Supreme Court's Decision

The U.S. Supreme Court ruled not on the issue of salary history as a form of wage discrimination, but rather on whether a judge can posthumously issue an opinion. In other words, instead of deciding this case on the merits, the Supreme Court found an interesting, albeit important, reason to remand the case back to the lower courts. Many legal scholars are frustrated with the Court's decision to remand the case without ruling on the merits, as there is a split among the circuits regarding the issue of whether employers might face liability for setting salary based on an applicant's salary history.

The U.S. Supreme Court ruled that Judge Reinhardt could not sign onto an opinion after his death. It held that "federal Judges are appointed for life, not eternity." It relied on well-established precedent that a judge must have the "power to participate" in the decision at the time it was rendered. So, even though he wrote the majority opinion, Judge Reinhardt was obviously not able to participate at the time the decision was issued.

While the precedent that no judge should be able to rule from the grave makes sense, the decision seems somewhat unfair because the judge

completed the opinion while still alive. The Court addressed this when it pointed out that there is a general principle that a judge can change his mind up until the decision is entered. The Court also mentioned, as somewhat of an aside, that the five other votes supporting Judge Reinhardt's opinion were concurrences, which means while they agreed with the decision, they agreed for different reasons.

Because Judge Reinhardt's vote does not count, it leaves a 5-5 tie with no majority opinion, but rather four different opinions reaching the same conclusion. This means that the en banc decision is not binding on the Ninth Circuit. Therefore, all of the notoriety about this landmark ruling is for naught, as employers are once again free to consider previous salaries when determining what to pay their employees.

Going Forward

Employers in the Ninth Circuit have surely faced a rollercoaster of emotions over the past several months regarding this decision. An en banc court reversed a nearly forty-year old precedent when it decided that it was inappropriate to consider salary history when setting an employee's salary. Then the U.S. Supreme Court nullified that decision because of the death of the judge who authored the majority opinion.

Now employers sit in an awkward position. The en banc decision showed that the Ninth Circuit would likely prevent employers from using previous salary history as a defense to paying women less than men, and the Supreme Court did not really stop the Ninth Circuit from ruling in that manner. Rather, the Supreme Court decision likely will only delay the Ninth Circuit in finding that salary history cannot be used to justify paying women less than men.

Of course, there are no guarantees that the Ninth Circuit will ultimately rule in this way. While President Trump may not be able to accomplish his mission of turning the most liberal circuit in the country conservative, within the coming months, roughly one third of the active judges in the Ninth Circuit will be conservative. Under a liberal president, or if President Trump had not been able to nominate so many judges, it would be a foregone conclusion that the Ninth Circuit would grant a rehearing to a case similar to *Yovino* and issue a very similar ruling to the *Yovino* decision. However, considering that the Ninth Circuit has very recently had an infusion of new conservative blood, the odds of the Ninth Circuit ruling en banc again that previous salary cannot be the sole consideration for determining salary have decreased. The decision was already close in that it was 6-5, and of the six in the majority, there were four separate concurrences, and no judge joined the majority opinion in its entirety. Indeed, the Ninth Circuit might not prohibit employers from using past salaries as a defense against wage discrimination until the Supreme Court tackles this issue, which it will likely do within a few years, as the split between circuits has recently become more pronounced.

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