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Gray Area In 9th Circ. Pay Ruling Has Some Experts Puzzled

By **Braden Campbell**

Law360 (April 10, 2018, 9:30 PM EDT) -- The Ninth Circuit's decision Monday that employers cannot use workers' salary histories to excuse paying women less than men sent a clear signal that businesses with pay gaps between the sexes may be inviting legal jeopardy, but the blockbuster ruling included a seeming contradiction that left experts scratching their heads.

At the same time it **blocks employers** from escaping Equal Pay Act claims by basing workers' salaries on what they used to earn, Judge Stephen Reinhardt's majority opinion said it might be all right for pay history to play a role in salary negotiations, while explicitly declining to address "under what circumstances ... past salary may play a role" and leaving it to lower courts to flesh that out. This apparent inconsistency in the ruling raised eyebrows from some Ninth Circuit judges as well as employment lawyers.

"The majority left a big [question] that they didn't answer, which is, 'What happens in negotiations?'" said Marcia McCormick, a professor at St. Louis University School of Law who studies gender and employment law. "They didn't foreclose it, and in fact they say, 'We're not gonna even talk about how this is gonna play out,' which is very dissatisfying, always, to readers and people who are trying to comply with what the rules are."

The court on Monday ruled unanimously that California's Fresno County Superintendent of Schools Jim Yovino violated the Equal Pay Act through his district's policy of giving new workers slightly more money than they earned at their last job. The ruling came down one day before Equal Pay Day, which symbolizes the date on which women will have caught up to the pay men earned the previous year.

Under the act, an employer can excuse gaps in pay between men and women performing the same work if those gaps are based on a "factor other than sex." Because Fresno schools' policy carries forward existing pay gaps between men and women, it violates the law, the court said.

But the court split on the extent to which employers can consider workers' past salary when setting their pay, with the majority saying businesses can't do so, whether "alone or in combination with other factors" like education and experience.

The majority seems to backtrack on this categorical ban on factoring salary history into the compensation equation later in the ruling, however, saying it was announcing a rule but not "resolv[ing] its applications in all circumstances."

"We do not decide, for example, whether or under what circumstances past salary may play a role

in the course of an individualized salary negotiation," the majority said, adding its decision shouldn't pose "any obstacle to whatever resolution future panels may reach regarding questions relating to such negotiations."

While it may leave Ninth Circuit employers the option of considering workers' past salaries during negotiations, this portion of the ruling means companies may become guinea pigs for those "future panels" when they do, employment partner Megan Winter of Fisher Phillips' San Diego office told Law360.

"As a practical matter, I think employers trying to rely on an individualized situation are going to find themselves in an uphill battle [if they try] to use any sort of exception, and certainly are going to have to litigate that issue all the way to the end," Winter said.

Some Ninth Circuit judges argued the majority went too far by flatly banning salary history as a defense to Equal Pay Act claims. Joined by Judge Mary Murguia, Judge M. Margaret McKeown worried the ruling could harm women by blocking them from using their pay to negotiate a higher salary, writing that the majority's disclaimer "hardly cushions" the effect of its ruling by not saying how salary history can be used in pay talks.

Judge McKeown suggested the majority should have taken a more nuanced approach that let employers use salary history as one factor in a larger formula, as did Judge Consuelo Callahan in another concurrence.

Jay Holland, a Joseph Greenwald & Laake PA attorney who represents workers, suggested the majority's disclaimer may be a "nod to the concurrences." But "without further explication" from the court, Ninth Circuit employers will likely shut down workers' attempts to use their salary history to ask for higher pay at new jobs, he said.

"Does this mean that this rule of general application only applies in some antiseptic review of a stack of resumes?" Holland asked. "Most hirings involve some form of individual negotiation, so it's confusing."

The Ninth Circuit's lower courts aren't the only judicial bodies likely to grapple with the Yovino ruling in the coming years. Because it opens a rift with the Seventh Circuit over the use of salary history to justify pay gaps under the EPA, the decision is ripe for U.S. Supreme Court review, experts say.

The Seventh Circuit said in a 2005 ruling that salary history is a "factor other than sex" under the EPA. Other courts have previously ruled employers can use salary history alongside other factors, but the Ninth Circuit is the first to put salary history completely off limits.

"Had the middle ground held its ground, then I think the likelihood of the Supreme Court taking the case up would probably not be that great, despite the Seventh Circuit," Holland said. "Now, we have two essentially outlier circuits and several middle-of-the-road circuits. I think it's set up for review."

The Fresno schools' attorney said Monday he plans to appeal to the high court. If the justices take the case, it's hard to say which way they'll rule, attorneys say. The range of lower court opinions on the issue means a high court majority will have several models to choose from when crafting its ruling, and pay equity doesn't sit neatly on either side of the political line.

"[The result is] beyond impossible to predict with this court. We definitely have a mix of traditional conservatives and traditional liberals," said Angela Reddock-Wright, a mediator and attorney with

Los Angeles-based Reddock Law Group. “We’ve seen the Supreme Court sort of all over the place in recent years, so I think it’s difficult to anticipate what the ruling would be.”

--Editing by Philip Shea and Jill Coffey.
