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Employment Law Quarterly Update Newsletter

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Ninth Circuit re-deciding whether employers can rely exclusively on prior salaries to determine pay, even if it may cause pay disparity between men and women

by Daniela E. Pavuk

Under both Federal (Equal Pay Act) and Montana law (Mont. Code Ann. § 39-3-104), it is unlawful for any public or private employer to pay women less than men for equivalent work. During hire, however, employers often rely on an applicant's past salary to determine pay. According to the 2015 U.S. Census Bureau, women on average continue to earn \$0.80 for every \$1.00 that men earn. Earlier this year, the Ninth Circuit Court of Appeals (whose rulings apply to Montana employers) tackled use of past salaries in *Rizo v. Yovino*.

In *Rizo*, Fresno County schools employed plaintiff Aileen Rizo as a math consultant. The County used a standardized schedule, which relied on her prior salary, to determine her starting salary. While Rizo's starting salary was almost \$10,000 more than her last job, it fell at the bottom of the County's pay schedule. Several years into employment, Rizo learned she was paid less than her male colleagues in the same position.

Rizo sued. In response, the County argued that Rizo's salary was based on "any other factor other than sex," which is a recognized affirmative defense under the Equal Pay Act. The "other factor" was prior salary. The County listed four business reasons supporting its standardized schedule for determining salaries primarily on the basis of prior salary, arguing the pay policy is: (1) objective; (2) attracts quality employees with automatic 5% pay increase over their prior salary; (3) prevents favoritism and ensures consistency; and (4) is a judicious use of taxpayer dollars.

In denying the County's summary judgment motion (if the County won, the case would be over), the district court determined that prior salary alone can never qualify as a "factor other than sex", because: "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[.]" *Rizo*, 2015 WL 9260587, *9. The Ninth Circuit reversed the district court's decision.

The Ninth Circuit three-judge panel relied on a prior ruling in *Kouba v. Allstate Ins. Co.* (1982) to hold that prior salary alone can be a "factor other than sex" under the federal Equal Pay Act if the employer

demonstrates that its use of prior salary “effectuate[s] some business policy” and is done “reasonably in light of [its] stated purpose as well as its other practices.” The case was sent back to the district court to evaluate whether the County’s four offered business reasons effectuated a business policy or whether prior salary was “reasonably” used.

Employer Takeaway: If you use past salaries to determine pay for your employees, make sure use of past salary effectuates some business policy of your company and is done reasonably in light of stated purpose as well as other practices. To avoid the issue altogether, don’t rely on past salaries and consider setting salaries based on education and relevant experience.

Development: On August 29, 2017, the Ninth Circuit Court of Appeals ordered the case to be reheard en banc (heard before all judges), to take place the week of December 11, 2017. The law in the Ninth Circuit *may* change.

Equal Employment Opportunity Commission’s Mental Health Conditions Guidance

by Daniela E. Pavuk

Under the Americans with Disabilities Act, a person who suffers from a mental health condition (e.g. major depression) is protected against discrimination and harassment at work, has workplace privacy rights regarding that condition, and may be entitled to a reasonable accommodation that can help the person perform essential job functions. With discrimination charges based on mental health conditions on the rise, the EEOC’s guidance to employees provides important takeaways for employers:

1. Mental health conditions like major depression, post-traumatic stress disorder, bipolar disorder, schizophrenia, and obsessive compulsive disorder “should easily qualify” as substantially limiting a major life activity.
2. An employee/applicant can keep his or her mental health condition private except under the following specific instances:
 - When requesting reasonable accommodation;
 - After a job offer, but before employment begins, if everyone in the same job category is asked;
 - For affirmative action purposes – voluntarily disclosed by employee;
 - When objective evidence on the job shows the employee cannot perform job functions or poses a safety risk because of his or her mental health condition.
3. An employer does not have to excuse poor performance, even if caused by a mental health condition. As such, the EEOC advises employees to ask for reasonable accommodation before problems occur and suggests the employee bring a copy of the EEOC publication “The Mental Health Provider’s Role in a Client’s Request for a Reasonable Accommodation” (available at www.eeoc.gov) to his or her medical appointment. Be familiar with this publication as well.
4. If the employee is permanently unable to perform the essential job functions, a possible accommodation may be requesting reassignment to another job so long as the employee can perform the essential job functions of that job with or without reasonable accommodation.

The Guidance is available: www.eeoc.gov/eeoc/publications/mental_health.cfm

Food for Thought

Montana is **not** an employment “at will” state. Once an employee completes his or her probationary period, an employer must have good cause to terminate. "Good cause" means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. Absent a written policy that shortens or extends the time period, the probationary period in Montana is six months. An employee during his or her probationary period, however, cannot be terminated for any protected class reasons (illegal discrimination).

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