

NINTH CIRCUIT

Federal Employee EEO Complaint Dismissed Because it Raised Same Matters as Previously Dismissed Union Grievance

Federal civil service law allows unionized federal employees seeking to bring discrimination claims through either their union's negotiated procedure or their agency's EEO process but not both. Plaintiff was removed from his position as a mechanic and challenged that decision through union procedures. He then filed an EEO complaint. The district court granted the agency's motion to dismiss and the Ninth Circuit affirmed.

The question on appeal was whether the EEO complaint raised the same "matter" as the union grievance. Adopting Federal Circuit law, the court held that "matter" refers to the underlying action in the grievance or complaint. It is broader than the legal theory and refers to the factual basis of the employee's adverse action.

The employee argued against dismissal claiming his EEO complaint contained hostile work environment allegations not raised in his union grievance. The panel ruled that his EEO complaint did not raise a hostile claim. It didn't help the plaintiff that he had checked a box on his EEO form indicating he had raised the same matters in a union grievance. Moreover, under the applicable regulations the plaintiff could have appealed the denial of his grievance to the EEOC and added a hostile work environment claim.

Heimrich v. U.S. Dep't of the Army, 947 F.3d 574 (9th Cir. 1/16/2020) (Gilman (6th Cir.), Paez, Rawlinson).

After Remand from Supreme Court, Ninth Circuit En Banc Again Holds that Prior Salary is Not a Defense to an Equal Pay Act Claim

The plaintiff began working for the County as a math consultant. It set her pay according to a standard procedure that started with the new hire's prior pay and added 5%. The plaintiff learned that a newly hired male math consultant was being paid \$17,000 more. She filed a complaint in California state court under Title VII, the federal Equal Pay Act, and California law. The County removed and moved for summary judgment.

The district court denied summary judgment despite existing Ninth Circuit precedent allowing an employee's prior pay to be used in setting salary in combination with other factors. The district court ruled that the precedent didn't apply to a pay decision based entirely on prior salary. The district court certified the question for immediate appeal.

A Ninth Circuit panel reversed but that decision went en banc. En banc, the court unanimously agreed with the district court, but only six of the 11 judges agreed on the rationale. One of those judges, Judge Reinhardt, the author of the majority opinion, had died before the opinion was released. The U.S. Supreme Court vacated the en banc decision because there was no majority opinion of living judges at the time the decision was issued. A new judge was drawn to replace Judge Reinhardt.

Writing for another majority of six (the remainder of the original majority plus Judge Watford who had originally concurred under a different rationale), Judge Christen largely reiterated the conclusions of the initial en banc opinion. The

majority first clarified that that the EPA has no intent requirement and the plaintiff need not prove the employer's justification is pretextual. Once the plaintiff shows a prima facie case, the defendant must prove on the Act's four affirmative defenses.

The majority held that the EPA defense of "any other factor other than sex" must be read in relationship to the three preceding defenses. If "any" factor other than sex was enough, that would swallow the first three defenses. Because the first three defenses (seniority, merit, quantity/quality of production) are all job-related, the majority held that the first "other" in the fourth more general defense also incorporated a "job related" requirement. The legislative history supported this reading, and the majority of circuits had reached the same conclusion.

The majority went on to hold that prior pay does not qualify as a job-related factor that can defeat a prima facie case. The majority rejected the notion that they were requiring employers to prove that the wages paid to the employees at prior jobs were unaffected by prior discrimination. The majority did not presume any particular employee's prior wages were depressed as a result of sex discrimination but the history of wage discrimination in America prevents prior pay from satisfying its burden of proving that sex played no role in a current wage disparity.

The majority recognized that prior pay could be used as a proxy for job-related factors such as skill, education and experience, and can be a function of factors related to the prior job. But prior pay is not a factor related to the work the employee is currently performing. An employer must counter a prima facie case by relying on job related factors actually associated with an employee's present position.

The majority noted that the present-day wage gap between men and women cannot be explained by

differences associated with unequal qualifications, effort, productivity, or any other factor. Therefore, the gap is a continuation of the very discrimination that Congress sought to end. Because allowing prior pay when used in combination with other factors as a defense only waters down the influence of historical discrimination, prior pay can't be used at all.

The majority made clear that prior pay can be used in setting a salary particularly if the employee raises it in job negotiations. Prior pay just can't be used as an affirmative defense in response to a proven wage differential. The majority recognized the inherent tension between these two propositions but wrote that off to the inherent terms of the EPA.

Writing for three, Judge McKeown would have followed existing EEOC guidance that prior salary may be used in combination with other factors in setting salary. Judge McKeown agreed with the majority that the current wage gap reflects historical discrimination. She also agreed that the employer was not entitled to summary judgement because it had relied on past salary alone. "Rizo's case is an easy one."

Judge McKeown argued that the majority's opinion would disadvantage some women who use prior salary as a bargaining chip for higher wages. She noted that a negotiated salary could be the source of an EPA violation. She disagreed that the majority's rule would function as a one-way ratchet to protect women from sex discrimination.

Writing for three judges (including Judge Tallman who also joined Judge McKeown), Judge Callahan disagreed that the fourth EPA defense was limited to job related factors. She would have held the relevant question whether the employer's defense promotes or perpetuates gender discrimination.

Judge Callahan would have ruled that once the plaintiff establishes a prima facie case, there is a presumptive violation. The employer must show that prior salary, when used as part of a multi-factor inquiry, does not reflect, perpetuate, or in any way encourage gender discrimination. She also would have affirmed the district court because the employer here relied only on prior pay.

Rizo v. Yovino, 950 F.3d 1217 (9th Cir. 2/27/2020) (en banc)

WASHINGTON COURT OF APPEALS

Public School Teacher Entitled to Restoration to Pay Status Where District Failed to Give Opportunity for Timely Hearing after Notice of Non-Renewal

Plaintiff was a teacher for the Central Valley School District. He was involved in criminal conduct and voluntarily agreed to inpatient medical treatment for alcohol addiction. The District considered him absent without leave. Ultimately, Cronin received a letter entitled, “Notice of Probable Cause for Discharge and Nonrenewal Pursuant to RCW 28A.405.210 and RCW 28A.405.300.” The letter, signed by the district superintendent, described several allegations of misconduct, including unprofessional conduct, a pattern of alcohol related incidents involving students and others, and unavailability for work. The letter asserted that the District had discussed these allegations with Cronin and afforded him an opportunity to respond.

Cronin filed a declaratory action against the District. Cronin sought to compel the District to participate in a statutory hearing to address his discharge from employment and the nonrenewal of his teaching contract. Cronin also sought back

pay with interest and double damages for willful and intentional withholding of wages. After two unpublished appeals, the trial court ordered the District to restore Cronin to pay status pending a statutory hearing and to pay him back wages and benefits. In addition, the court granted Cronin’s request for reasonable attorney fees and interest but denied his request for double damages and an additional award to compensate him for the increased tax consequences of a large lump sum payment. The District appealed raising a miasma of procedural issues and Cronin cross-appealed.

The Court ruled that RCW 28A.405.210 creates a conclusive presumption that a teacher is reemployed for the ensuing school year if the school district gives the teacher notice of nonrenewal but fails to provide the teacher an opportunity for a timely statutory hearing. Central Valley School District failed to provide Cronin an opportunity for a timely statutory hearing by rejecting his representative’s request for a hearing, which resulted in the hearing being delayed for almost seven years.

The Court affirmed the trial court’s summary judgment rulings (1) restoring Cronin to pay status pending a statutory hearing and awarding back pay and benefits, (2) denying Cronin’s request for an additional award to offset the tax consequences of a lump sum award of wages, and (3) determining Cronin’s reasonable attorney fees. The Court reversed the trial court dismissal of Cronin’s claim for exemplary damages under RCW 49.52.070.

Cronin v. Central Valley School District, -- Wn. App. 2d --, 456 P.3d 843 (Div. 3 1/30/2020) (Lawrence-Berry, Siddaway and Fearing)

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Larry Kuznetz represented the employee in *Cronin*.

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