**No. 16-15372**

Published Opinion Filed April 27, 2017
A. Wallace Tashima and Andrew D. Hurwitz, Circuit Judges,
and Lynn S. Adelman, District Judge

# UNITED STATES COURT OF APPEALS

# FOR THE NINTH CIRCUIT

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**Aileen Rizo,**
*Plaintiff-Appellee,*

**v.**

**Jim Yovino, Fresno County Superintendent of Schools,**
*Defendant-Appellant.*

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Appeal from the United States District Court
for the Eastern District of California
E.D. Cal. Case No. 1:14-cv-00423-MJS
Michael J. Seng, Magistrate Judge, Presiding

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# PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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**SIEGEL & YEE**
Dan Siegel, Cal. Bar. No. 056400
Kevin Brunner, Cal. Bar No. 271510
499 14th Street, Suite 300
Oakland, CA 94612
Telephone: (510) 839.1200
Facsimile: (510) 444-6698

*Attorneys for Appellee*
Aileen Rizo

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## I. THE PANEL DECISION AND THIS COURT'S PREVIOUS DECISION IN *KOUBA v. ALLSTATE INSURANCE CO.* CONFLICT WITH EXISTING OPINIONS OF OTHER COURTS OF APPEALS ON AN IMPORTANT ISSUE DEMANDING NATIONAL UNIFORMITY.

This Petition seeks rehearing by the panel initially but, barring that, by the Court *en banc* (FRAP 35 and 40) to correct a panel decision that perpetuates and intensifies a conflict between this Court's decision in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982) and the later decisions of other courts of appeals in *Angove v. Williams-Sonoma, Inc.*, 70 F.App'x 500 (10th Cir. 2003); *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995); *Price v. Lockheed Space Operations Co.*, 826 F.2d 1503 (11th Cir. 1988); and *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988).

Contrary to the decisions of the Tenth and Eleventh Circuit Courts of Appeal, the decision of the district court below (ER [Excerpts of Record] 24-46), and the position of the United States Equal Employment Opportunity Commission[1], this Court maintains that it is not unlawful under the Equal Pay Act, 29 U.S.C. §206(d), for an employer to base compensation paid to new employees ***solely*** on

[1] Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellee and in Favor of Affirmance

those new employees' prior wages for previous employers. The practice approved by the Court simply perpetuates the history of gender bias in American society, contrary to the explicit purpose of the Equal Pay Act.

The district court took judicial notice of data from the United States Bureau of Labor Statistics that demonstrates how sole reliance on prior salary by the Fresno County Office of Education simply perpetuates the historical difference in pay between male and female teachers. In 2014 the median weekly salaries in the "Education, training, and library occupations" were $1,140 for men and $897 for women, with similar disparities for each of the subcategories included in that grouping. ER 32-33, fn. 6.

Further, uniformity of decision is important in the application of the Equal Pay Act in the context of a national economy in which many companies conduct business throughout the United States. FRAP 35-1; see *Environmental Protection Information Center, Inc. v. Pacifica Lumber Co.*, 257 F.3d 1071, 1077 (9th Cir. 2001)[2]. Allowing

[2] Appellee acknowledges that harmonizing this Court's rulings on the issue presented with those of the Tenth and Eleventh Circuits will not completely eliminate conflicts among the Courts of Appeals. See, *Wernsing v. Department of Social Services, State of Illinois*, 427 F.3d

employers to utilize pay practices that under compensate women in comparison to men in some parts of the country while not allowing those practices in other areas will create economic distortions inconsistent with the Act.

## II. THE PRACTICE OF BASING NEW EMPLOYEES' SALARIES ON THEIR PRIOR COMPENSATION HISTORY SHOULD NOT BE PERMITTED UNDER THE EQUAL PAY ACT AS "A DIFFERENTIAL BASED ON ANY OTHER FACTOR OTHER THAN SEX."

Congress passed the Equal Pay Act to address the widespread, systematic discrimination against women in the payment of workplace compensation. *Corning Glass Works v. Peter J. Brennan,* 417 U.S. 188, 195 (1974): "Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry - the fact that the wage structure of 'many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.' S.Rep. No. 176, 88th Cong., 1st Sess., 1 (1963). The solution adopted was quite simple in

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466, 469-70 (7th Cir. 2005), rejecting the claim that sole reliance on prior salary violates the Equal Pay Act.

principle: to require that 'equal work will be rewarded by equal wages.' Ibid."

"In order to make out a case under the Act, the Secretary [of Labor] must show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'" *Corning,* 417 U.S. at 195, quoting 29 U.S.C. 206(d)(1).

As the panel stated, the Equal Pay Act plaintiff has the burden of establishing a prima facie case of discrimination. *Stanley v. Univ. of Southern California*, 178 F.3d 1069, 1073-74 (9th Cir. 1999). Slip. Op. at 6. Because the Equal Pay Act creates a system of strict liability and no intent to discriminate is required (*Maxwell v. City of Tucson,* 803 F.2d 444, 446 (9th Cir. 1986), all a plaintiff need do to establish a *prima facie* violation of the Act is to show that she is receiving lesser wages for substantially equal work. *Hein v. Oregon College of Education,* 718 F.2d 910, 916 (9th Cir. 1983).

To defend an Equal Pay Act claim once a *prima facie* violation has been established, an employer may prove one of the four statutory exceptions to the Act by showing that the disparity flows

from: "(i) a seniority system; (2) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) **a differential based on any other factor other than sex.**" *Maxwell, supra,* 803 F.2d at 446, quoting 29 U.S.C. §2069(d)(1) (emphasis added). The exceptions are affirmative defenses which the employer must plead and prove. *Corning, supra,* 417 U.S. at 196-97; *Kouba, supra,* 875 F.2d at 875.

In developing its rationale for concluding that working on a night shift was not a valid "factor other than sex" justifying a pay differential, the Supreme Court in *Corning* reviewed the Act's history to determine that Congress' intent was to allow differentials in pay only if based upon "well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act." 417 U.S. at 201. The Court adopted the reasoning presented by employers during the House and Senate hearings considering the Act, that bona fide job evaluation systems focus on skill, equal effort, responsibility and working conditions:

> Indeed, the most telling evidence of congressional intent is the fact that the Act's amended definition of equal work incorporated the specific language of the job evaluation plan described at the hearings by

> Corning's own representative—that is, the concepts of 'skill,' 'effort,' 'responsibility,' and 'working conditions.'

417 U.S. at 201. In language relevant to the present dispute, the Court rejected the idea that taking advantage of a situation as a "matter of economics" does not justify a differential under the Act. 417 U.S. at 205.

In *Glenn, supra*, General Motors attempted to justify wage disparities among salaried employees by arguing that males transferring from hourly positions received higher salaries than women hired "off the street" or transferred from lower paid secretarial positions because of its policy against imposing wage cuts on employees who transfer into salaried positions. The court described GM's defense as a variant of the "market force theory" and rejected it. "[T]he argument that supply and demand dictates that women *qua* women may be paid less is exactly the kind of evil that the [Equal Pay] Act was designed to eliminate, and has been rejected." 841 F.2d at 1570, citing *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1037 (11th Cir. 1985), which cites *Corning*, 417 U.S. at 205.

The *Glenn* court summarized the legislative history of the "factor other than sex" exception:

> The legislative history thus indicates that the "factor other than sex" exception applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business. The pay disparity at issue here does not result from any of these reasons. Consequently, resort to the legislative history does not support GM's position, but rather buttresses the district court's conclusion that a "factor other than sex" does not explain the pay disparity.

841 F.2d at 1571. *Glenn* explicitly declined to follow the Seventh Circuit's holding in *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir.), *cert. denied*, 484 U.S. 848 (1987). It pointed out that contrary to congressional intent, the Seventh Circuit implicitly used the market force theory to justify the pay disparity resulting from maintaining an employee's salary upon a change of assignment within the university. *Id.*[3] By allowing employers to base employee salary upon past compensation, this Court has done the same.

[3] But see *Taylor v. White,* 321 F.3d 710, 719 (8th Cir. 2003), where the Court of Appeals rejects *Glenn*, agrees with *Covington* and concludes that the Court's decision in *Kouba* does not sufficiently defer to employer discretion in setting salaries. See also, *Wernsing v. Department of Social Services, State of Illinois, supra*, 427 F.3d at 469-70, rejecting the claim that sole reliance on prior salary violates the Equal Pay Act.

## III. UTILIZING PRIOR SALARY AS THE SOLE BASIS FOR SETTING COMPENSATION CANNOT BE JUSTIFIED AS AN "ACCEPTABLE BUSINESS REASON" WHEN ITS EFFECT IS SIMPLY TO PERPETUATE PAST PAY DISCRIMINATION.

In *Kouba* the Court held that an employer seeking to justify a compensation differential between men and women as based on a factor other than sex must prove an "acceptable business reason" for utilizing that factor. *Kouba,* 691 F.2d at 876. Courts have construed the employer's burden as a "heavy one." *Beck-Wilson v. Principi,* 441 F.3d 353, 365 (6th Cir. 2006); *Aldrich v. Randolph Cent. School District,* 963 F.2d 520, 526 (2nd Cir. 1992).

"[I]f prior salary alone were a justification, the exception would swallow up the rule and inequality in pay among genders would be perpetuated." *Irby,* 44 F.3d at 955. Utilizing prior salary alone is a variant of the discredited market forces theory. That approach "is not tenable and simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the EPA." *Siler-Khodr. v. University of Texas Health Science Center,* 261 F.3d 542, 549 (5th Cir. 2001).

The possibility that a employer could justify a factor that causes a wage differential between men and women by showing that it is

based upon "an acceptable business reason" may be reasonable in the abstract and practical under certain circumstances. But a business reason that is tantamount to an endorsement of practices forbidden by the Equal Pay Act - a factor based on historical market forces - should never be allowed.

In this case, the employer argued that its reliance on prior salary is justified for four reasons:

(1) the policy is objective, in that no subjective opinion as to the new employee's value is considered;

(2) the policy encourages candidates to leave their current jobs because they will always receive a pay increase;

(3) the policy prevents favoritism and ensures consistency; and

(4) the policy represents a judicious use of taxpayer dollars.

The panel concluded that the County can justify its use of prior salary by showing that its approach "effectuate[s] some business policy" and that it uses the factor "reasonably." (Slip. Op. at 11) However, the County's justifications for its policy are most readily construed as simply creating a pretext for gender discrimination.

The first and third justifications offered by the County are basically the same, the claim that the policy is objective and

discourages favoritism. But an "objective" policy that simply duplicates the history of gender bias in the setting of the salaries of employees in the field of education cannot ever be considered "reasonable" in light of the purposes of the Equal Pay Act, however well it serves a business policy of cutting the costs associated with employee compensation.

Employers should be encouraged to utilize objective factors in setting employee compensation, as long as the objective factor is not gender or one based on gender such as prior salary. For example, the County here could base initial compensation on such objective factors as an applicant's education or years of relevant experience.

The fourth rationale for the County's policy, that it represents a "judicious use of taxpayer dollars," is simply a restatement of the idea that an employer may pay employees less because their previous salaries reflected the historical discrimination between the pay of women and men. This overt statement of the "market forces theory" is inconsistent with the EPA.

Finally, the County claims that its policy of giving new employees a five percent raise over their prior salaries allows it to attract well-qualified candidates. While it may be true that some

candidates are attracted to work for the County by the promise of a pay raise, by using prior salary as a base the County simply perpetuates the history of gender bias in setting employee compensation.

In light of specific evidence that simply confirms the factual premise upon which the Act is based - historical, gender based bias in men's and women's compensation - the practice of basing salary solely on prior compensation should be rejected as a defense comprising "a factor other than sex."

## CONCLUSION

As the district court stated, "[A] pay structure based exclusively on prior wages is so inherently fraught with the risk - indeed, here, the virtual certainty - that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate non-discriminatory business purpose." ER 40. For this reason and all of the reasons set forth above, petitioner

Aileen Rizo urges this Court to order that this case be heard by the panel that decided it or en banc.

Dated: May 10, 2017

SIEGEL & YEE

By *"s/" Dan Siegel*

Attorneys for Appellee
AILEEN RIZO

## CERTIFICATE OF COMPLIANCE

I certify that this petition complies with the type-volume limitation of FRAP 35-4 and 40-1 because it does not exceed 4200 words and has been prepared in a proportionally spaced typeface using the Microsoft 10 word processing program in 14-point Georgia font.

Dated: May 10, 2017

SIEGEL & YEE

By *"s/" Dan Siegel*

Attorneys for Appellee
AILEEN RIZO

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 10, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*"s/" Dan Siegel*