



Practices that contribute to pay disparity

A new law and the recent *Rizo* decision offer new hope in the battle for equal pay

BY ALEXIS MCKENNA

In conjunction with the “Me Too” movement, women are not only expressing how they have had enough with the pervasive sexual harassment in our society, but also how they are tired of overall sex discrimination. One issue that remains a dominant concern is gender pay disparity. The Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, and corresponding state laws, made it illegal for employers to pay employees differently based on gender, yet half a century later a significant difference in the earnings of women to men remains.

During 2017, women who worked full time earned 81.8 percent of what men earned, reflecting median weekly earnings for all female full-time workers of \$770, compared with \$941 per week for men, according to a study by The Institute for Women’s Policy Research (IWPR).¹ The statistics are worse for Black and Latina women, and even more so if their salaries are compared to those of White men. Black women had median weekly incomes of \$657 – 61.7 percent of the weekly earnings of White men, while Hispanic women fared the worst, earning median weekly incomes of \$603 – 56.6 percent of the weekly earnings of White men.² Asian women’s median weekly earnings in 2017 were 93 percent of White men’s, but only 74.8 percent of Asian men’s earnings.³

Gender gap is worse in higher paying jobs

IWPR’s analysis concludes that women’s weekly median earnings are lower than men’s in nearly every occupation, including those predominantly

done by women. Further, the gender pay gap is less severe for lower paid jobs, worse in higher paid jobs. IWPR studies also show that while progress was made in the 1980s and 1990s, that progress has significantly stalled in recent decades.⁴ If the rate of annual earnings of women compared to men continues at the same rate as it has since 1985, women’s average income will not be on par with men’s until 2059.⁵

A myriad of factors is involved in this wage gap. In general, female-dominated occupations pay less than that of men, including those with similar skill levels and educational qualifications.⁶ Women also suffer from the lack of sufficient paid family leave and the subsidization of childcare. Also, despite the laws against discrimination, women continue to be discriminated against in hiring, training, promotion, and overall compensation.

Banning past salary inquiry

Discrimination in pay has continued over the years in a subtle but insidious way through the practice by employers of setting pay based on prior salary history. This practice compounds prior pay disparity: basing salaries off prior salaries will continue the practice of paying women less than men, who historically were getting more. To allow this practice to continue would compound the disparity in perpetuity. However, steps are being taken to close this loophole. In 2017, California joined at least three other states (Delaware, Massachusetts and Oregon) as well as various municipalities, in banning inquiries into the salary history of job applicants. The California law, AB 168, went into effect January 1, 2018, and makes it unlawful for an employer to seek the

compensation history of an applicant orally or in writing, personally or through an agent; and makes it unlawful for an employer to use salary history information as a factor in offering a position to an applicant, or in deciding what salary to offer.

On April 9, 2018, just one day shy of Equal Pay Day⁷, the Ninth Circuit issued an en banc decision, holding that salary history, alone or combined with other factors, cannot justify a wage differential between men and women, and doing so violates the Equal Pay Act.⁸

In *Rizo*, the plaintiff, Aileen Rizo, sued her employer, the superintendent of Fresno County schools, for violations of the Equal Pay Act, as well as for sex discrimination under Title VII and the Fair Employment and Housing Act. Fresno County Office of Education did not dispute that it paid Rizo less than her male counterparts. It had a policy of setting a new employee’s salary by taking their prior salary and adding five percent. The County claimed that this practice, despite creating a wage differential, was lawful under the fourth exception to the Equal Pay Act. The relevant part of the Act states:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such



payment is made pursuant to (i) a seniority system; (ii) 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.⁹

The three-judge panel that originally heard this case for the Ninth Circuit had agreed with the County, finding prior salary to be a “factor other than sex.” It relied on the Court’s decision in *Kouba v. Allstate Insurance Co.* (9th Cir. 1982) 691 F.2d 873, which had allowed a system that based salaries on prior salary along with ability, education and experience.

Rehearing the case en banc, the Ninth Circuit Court, overturned *Kouba*, and held that any factor which fell within this fourth category must be job-related, and that prior salary, whether considered on its own or with other factors, is not job-related.¹⁰ Therefore, prior salary cannot be used to justify paying one sex over another for equal work.

As Judge Reinhardt, who wrote the majority decision in *Rizo* prior to his death, put it, “although the [Equal Pay]

Act has prohibited sex-based wage discrimination for more than fifty years, the financial exploitation of working women embodied by the gender pay gap continues to be an embarrassing reality of our economy.” So-called “gender neutral” factors, such as prior pay history, which may sound gender neutral on their face but in fact simply compound the problem, must be eradicated. Women need better access to well-paid jobs and increases must be made to wages in industries that are predominantly female. This is not a zero sum game where men lose out if women gain better wages. Growing the incomes for women only serves to strengthen families and the economy in general.

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Endnotes

¹ See Gender Wage Gap By Occupation Fact Sheet 2017, https://iwpr.org/wp-content/uploads/2018/04/C467_2018-Occupational-Wage-Gap.pdf.

² *Id.*

³ Per the IWPR study, Asian workers appear to be the highest paid racial group overall. *Id.*

⁴ *Id.*, n.17.

⁵ The Gender Wage Gap: 2017 Earnings Differences by Race and Ethnicity, <https://iwpr.org/publications/gender-wage-gap-2017-race-ethnicity/>

⁶ See Gender Wage Gap By Occupation Fact Sheet 2017

⁷ Equal Pay Day is the approximate day the average woman must work into the new year to reach what the average man made by the end of the previous year.

⁸ *Rizo v. Yovino* (9th Cir. 2018) 2018 U.S. App. LEXIS 8882.

⁹ *Id.*, at p. 5-6, citing 29 U.S.C. § 206(d)(1) (emphasis added).

¹⁰ *Id.*, at p. 13

