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# EMPLOYMENT LAW UPDATE

*Relationship-Driven Results* *May 2017*

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## LEGISLATIVE

## JUDICIAL

### Federal

### Ninth Circuit Confirms that Prior Salary History May Be Considered when Setting Compensation—with Some Strings Attached

In *Rizo v. Yovino*, a math consultant sued the Fresno County Superintendent of Schools ("the County") for violation of the federal Equal Pay Act, arguing that it was improper for the County to consider her prior salary history when setting her starting compensation. Federal law generally prohibits employers from paying employees of one sex more than employees of the other sex for performing the same work. However, a pay differential is permissible where it is based on: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential in pay based on any factor other than sex.

Plaintiff Aileen Rizo ("Rizo") argued that the County violated the Equal Pay Act by paying her male colleagues' higher salaries than she received, even though they performed the same work.

The County utilizes a salary schedule to set compensation for new hires. The schedule consists of 12 "Levels," each of which has progressive "Steps" within it. New math consultants are paid starting salaries within Level 1, which consists of 10 different steps. To determine which Step within Level 1 on which a new employee will begin, the County considers the employee's most recent prior salary and places the employee on the step that corresponds to his or her prior history, increased by 5%. Based on her prior salary, Rizo was placed on Step 1 of Level 1. Rizo later discovered that her male colleagues started on higher Steps within Level 1, and consequently received higher starting salaries than she did. Rizo thereafter initiated this lawsuit in federal court.

The County moved for summary judgment on the Equal Pay Act claim, raising the affirmative defense that plaintiff's salary was based on "any other factor other than sex," namely, her prior salary history. The County asserted that its use of the salary schedule was permissible because it: (1) is an objective formula; (2) encourages qualified candidates to seek employment with the County because it guarantees that the candidate will always get at least a 5% raise; (3) prevents favoritism and ensures consistency in application; and (4) represents a judicious use

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of taxpayer resources. The district court denied the County's motion without considering the County's proffered business reasons for the pay differential, reasoning that prior salary alone can never qualify as a factor other than sex. According to the district court, reliance on prior salary history risks perpetuation of wage disparity between the sexes, regardless of whether a resulting pay differential was motivated by a legitimate non-discriminatory business purpose.

The Ninth Circuit disagreed. In *Kouba v. Allstate Ins. Co.* (9th Cir. 1982) 691 F.2d 873, the Ninth Circuit had already resolved the question of whether prior salary history can justify a differential in pay "based on a factor other than sex." According to the court in *Kouba*, it can—*so long as reliance on prior salary effectuates a business policy and the employer uses the factor reasonably in light of the employer's stated purposes as well as its other practices*. In *Rizo*, the Ninth Circuit relied on this precedent to conclude that the district court should not have denied summary judgment without first considering the four business reasons offered by the County for the use of the salary schedule. The Ninth Circuit reversed the district court's ruling and instructed the lower court to reconsider the County's motion.

Although many have touted the *Rizo* decision as a shocking departure from current trends disfavoring consideration of prior salary history in setting compensation, the Ninth Circuit did nothing more than simply follow established precedent—precedent that does *not* hold that prior salary *automatically* qualifies as a permissible factor other than sex. Employers must still be able to demonstrate that any pay differential based on prior salary is justified by a legitimate business reason and is applied in a reasonable fashion.

## California

### Court of Appeal Reverses Summary Judgment Ruling Based on Business Errand Exception to the Going and Coming Rule

The "going and coming rule" provides that "[i]n general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if the employee, while commuting, is on an errand for the employer, then the employee's conduct is within the scope of his or her employment from the time the employee starts on the errand until he or she returns from the errand or until he or she completely abandons the errand for personal reasons."

In *Sumrall v. Modern Alloys, Inc.*, Juan Campos ("Campos"), an employee of Modern Alloys Inc. ("Modern Alloys"), was driving his personal car from his home to Modern Alloys' yard when he struck Plaintiff Michael Sumrall ("Sumrall"), who was riding his motorcycle. Campos was going to the yard to pick up a work truck, which he would then drive to his jobsite. Campos did not receive payment for his time until he got to the jobsite; in other words, the time he spent driving the work truck from the yard to the jobsite was uncompensated.

Sumrall sued Modern Alloys alleging that it was vicariously liable for Campos' actions. Modern Alloys moved for summary judgment, claiming Campos was not acting within the scope of his employment pursuant to the going and

coming rule. Sumrall opposed the motion, claiming the business errand exception applied. The trial court granted summary judgment and Sumrall appealed.

The Court of Appeal reversed. It held that although Campos was on his normal commute, there was a reasonable inference that Campos was on a business errand for Modern Alloy's benefit while commuting from his home to the yard: if the yard was his workplace, then the going and coming rule would apply; but if the jobsite was his workplace, then Campos was likely on a business errand.

From a policy standpoint, the court reasoned that because Campos performs hauling of vehicles, equipment, and workers from the yard to the jobsite, despite not being paid to do so, Modern Alloys has "arguably assumed the 'allocation of a risk' under the respondent superior doctrine, and the business errand exception to the going and coming rule may reasonably apply." The court further noted that the scope of employment, for purposes of vicariously liability, is broad. Moreover, whether an employee is on a business errand for the benefit of his or her employer is usually a question of fact for the jury, which will often survive summary judgment.

This ruling serves as a warning to companies that request that their employees make detours for the benefit of the company during their commute. Such requests may ultimately result in imputed liability to the employer for acts of the employee.

**Court of Appeal Affirms Summary Judgment in Favor of Employer, Holds that Employer Was Not Required to Permit Employee to Rescind Resignation**

In *Featherstone v. Southern California Permanente Medical Group*, a California Court of Appeal affirmed summary judgment in favor of the employer, Southern California Permanente Medical Group ("SCPMG"), in connection with claims for wrongful termination and violations of the Fair Employment and Housing Act ("FEHA"). Plaintiff Ruth Featherstone ("Featherstone") claimed she was suffering from a temporary disability of an "altered mental state" at the time of her resignation from SCPMG, and that SCPMG acted with discriminatory animus by refusing to allow her to rescind the resignation.

Featherstone began working for SCPMG as an at-will employee in 2009. In October 2013, Featherstone took a leave of absence to have and recover from sinus surgery. On December 16, 2013, Featherstone returned to work without any work restrictions. On December 23, 2013, in a telephone conversation with her supervisor, Featherstone resigned from her position effective immediately. Following their conversation, the supervisor emailed Featherstone, asking her to confirm her resignation in writing. A few days later, Featherstone responded to the supervisor's email and confirmed her decision to resign.

On December 31, 2013, Featherstone informed SCPMG's HR department that at the time of her resignation, she was suffering from an adverse drug reaction and, as a result, requested that SCPMG allow her to rescind her resignation. SCPMG declined and Featherstone filed suit. Featherstone alleged that upon returning to work, she suffered a "temporary" disability, which arose as a result of a

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"relatively uncommon side effect of the medication" she was taking. She further claimed this "adverse drug reaction" caused her to suffer from an "altered mental state," for which she was later hospitalized. She asserted causes of action against SCPMG for unlawful discrimination based on disability in violation of FEHA; failure to prevent unlawful discrimination in violation of FEHA; failure to accommodate a disability in violation of FEHA; failure to engage in the interactive process to determine a reasonable accommodation in violation of FEHA; and wrongful termination in violation of public policy. The trial court granted SCPMG's motion for summary judgment on all of the claims and Featherstone thereafter appealed.

The Court of Appeal affirmed for two primary reasons. First, the court held that Featherstone could not show that she had suffered an adverse employment action. An "adverse employment action" is one that affects the terms, conditions or privileges of employment. Because Featherstone was no longer employed by SCPMG at the time, the refusal to allow her to rescind her resignation could not be considered an adverse employment action. Second, the court found that Featherstone failed to show that SCPMG had actual or constructive knowledge of her alleged disability in the form of an altered mental state. Featherstone had returned to work from her leave of absence with no restrictions. Further, there was no evidence that Featherstone's supervisor knew or had reason to suspect that Featherstone was suffering from any altered mental state at the time of her resignation. Therefore, summary judgment was affirmed in SCPMG's favor.

*This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Ryan Nell, Lauren Bates, Jennifer Suberlak, Shannon Finley, Cameron Flynn, or Cameron Davila at (858) 755-8500; or Grant Waterkotte, Jennifer Weidinger or Tristan Mullis at (310) 649-5772.*