

Colorado PERA Prevails in Pay Equity Case

Plaintiff's counsel say they have 'an exceptionally strong appeal' on claims that were blocked from trial

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Colorado's largest pension fund defeated a pay discrimination claim against it in front of a federal jury earlier this month, but the matter might not be over.

On Feb. 7, a jury decided in favor of Colorado Public Employee's Retirement Association in a case where one of its former analysts, Elham Salemi, accused the organization of gender-based pay discrimination against her.

The weeklong trial came after Senior Judge Wiley Daniel granted a summary judgment motion last

year that weeded out six of Salemi's seven discrimination and retaliation claims.

The surviving discrimination claim came under the Equal Pay Act.

Although Salemi was paid less than any of her male colleagues in her department at Colorado PERA, there was insufficient evidence to show the discrepancy was on account of her gender, according to the jury verdict.

Denver-based Martinez Law Group won the verdict on behalf of Colorado PERA, but the plaintiff's counsel at Killmer Lane & Newman say they are currently planning to appeal.

Salemi, a former analyst at Colorado PERA, was an eight-year employee of the organization when it terminated her in 2012 for what it had cited as poor performance but what she claimed was retaliation.

Prior to her firing, Salemi, a Persian-American who was born in Iran, complained about receiving unequal treatment at Colorado PERA based on her race, gender and national origin and that she was passed over for promotion on that basis.

According to the background described in a March 2016 order, Salemi consistently received generally positive performance reviews from her supervisor over the years, though

they tended to contain the feedback that she should "improve her assertiveness skills, take more initiative in meetings and be more vocal and confident in her role within the department."

But Salemi would later allege she was treated differently from her white male colleagues, that she did not receive the same level of pay, work opportunities and tasks that they did, and that when she was promoted to analyst, it came over a year late.

Salemi wrote a complaint to the organization's human resources di-

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rector in June 2011.

After that, Colorado PERA conducted an internal investigation to determine whether she was treated differently based on her gender, race and national origin.

The organization concluded that her discrimination claims were unsubstantiated.

Within a month after Colorado PERA's investigation ended September 2011, and while she was on FMLA leave, Salemi filed a discrimination charge with the EEOC.

She returned to work in December, and soon afterward, she began teaching finance classes at Metro State University in Denver on the side.

Salemi's supervisor met with her several times over the next few months to speak with her regarding her performance of tasks, and he recommended Colorado PERA fire her for poor job performance, which it did in May 2012.

In October 2013, Salemi filed a lawsuit against her former employer claiming it willfully discriminated against her and retaliated against her by terminating her after she had filed her EEOC charge and had returned from FMLA leave. She brought seven causes of action

against Colorado PERA: discrimination and failure to promote under Title VII of the Civil Rights Act; race and national origin discrimination under 42 U.S.C. Section 1983; retaliation under Title VII, Section 1983, the First Amendment and FMLA; and wage discrimination under the Equal Pay Act.

In March 2015, Daniel would grant a motion for summary judgment in favor of Colorado PERA on all of the claims except for the one under the Equal Pay Act.

According to the order, Salemi failed to provide evidence of adverse action Colorado PERA took against her in the 300 days leading up to her EEOC charge, as well as evidence that her termination was influenced by her FMLA leave.

The court also found that she failed to show that she was qualified for the portfolio manager position to which she claimed her employer discriminatorily failed to promote her.

What remained for a jury to determine in the trial that ran from Jan. 30 to Feb. 7 was whether Colorado PERA discriminated against Salemi based on her gender, as she earned a lower salary than the male analysts and portfolio managers in her department.

The argument pivoted on whether she was performing "substantially equal work" compared to them.

Meghan Martinez, managing attorney of Martinez Law Group in Denver who represented Colorado PERA, said that she focused on explaining the factors behind Salemi's salary.

"You definitely have to have the context of the numbers" so the jury won't take a number like Salemi's income and conclude it was due to discrimination "because that's what the plaintiff believed," Martinez said. "That was the key to our claim, I thought."

"(The plaintiff's) job performance wasn't at the level she believed it to be," Martinez said, adding that witness testimony from her colleagues was important for illustrating that point to the jury.

Salemi said on the stand that she was doing the same work as the other male analyst in her department as well as the portfolio managers and the senior portfolio managers, according to Martinez.

"But she could not name a deal that she had sourced, lead and closed on her own for the Private Equity Department," Martinez said. "She also gave a conflicting report (versus another witness) of work she had done on due diligence."

The jury's verdict in favor of Colorado PERA was one Martinez said she had awaited for more than three years. Considering the EEOC charge Salemi filed two years prior, the con-

troversy dated back even further than the lawsuit.

"Here is a lady who filed a charge of discrimination in 2011, and our trial is in January of 2017," Martinez said. She doesn't think the litigation wasn't artificially prolonged by either party, however. "Sometimes things take a long time."

For Salemi, the chances of succeeding in court on the single surviving Equal Pay Act claim were slim.

"By the time we went to trial, almost none of the case remained, so the trial result on only a small fraction of the case was not really surprising," said plaintiff's counsel Darold Killmer, partner at Killmer Lane & Newman, in an email.

Killmer's firm is still working to revive those lost retaliation and discrimination claims and get them in front of a jury. He said he believes Daniel's summary judgment order on most of Salemi's claims was "a mistake," and he noted that they weren't permitted to appeal the summary judgment order until after the trial ended.

"We have an exceptionally strong appeal," Killmer said. "Colorado PERA has a highly discriminatory work environment, but we were prohibited from submitting almost all of the evidence which would prove it." •

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