University of Arkansas at Little Rock Law Review

Volume 2 | Issue 2 Article 6

1979

# Civil Rights - Unequal Contributions to Employee Retirement Plans Determined by Using Sex Segregated Morality Tables Constitute Unlawful Sex Discrimination under Title VII

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NOTES

CIVIL RIGHTS — UNEQUAL CONTRIBUTIONS TO EMPLOYEE RETIREMENT PLANS DETERMINED BY USING SEX SEGREGATED MORTALITY TABLES CONSTITUTE UNLAWFUL SEX DISCRIMINATION UNDER TITLE VII — *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978).

Female employees of the City of Los Angeles Department of Water and Power brought a class action alleging that the Department's retirement plan violated section 703 of Title VII of the Civil Rights Act of 1964.[1] The plan in question provided equal benefits upon retirement to equally situated male and female employees.[2] The level of contribution, however, was based upon sex segregated mortality tables.[3] Since female employees as a class live longer, the total cost of their retirement benefits was higher than comparable male employees.[4] Benefits from the retirement plan were funded by employee contributions which were then matched at 110% by the Department.[5] As a result of their experience and the mortality tables, the Department required female employees to make contribu-

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1. 42 U.S.C. § 2000e-2(a) (1976). The statute reads in part:

(a). It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The class action included five individual plaintiffs and their union, the International Brotherhood of Electrical Workers, Local Union No. 18. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 706 n.7 (1978). Defendants were the Department, members of the Department's Board of Commissioners and the Board of Administration of the Retirement Plan. Manhart v. City of Los Angeles Dep't of Water & Power, 553 F.2d 581, 583 (9th Cir. 1976).

2. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 705 (1978).

3. Manhart v. City of Los Angeles Dep't of Water & Power, 387 F. Supp. 980, 981-82 (C.D. Cal. 1975). The sex based mortality tables which are based on actual mortality figures demonstrate that the average woman lives approximately five years longer than the average man. *See* Treas. Reg. § 1.72-9 (1960) (value of joint and survivor annuity for man of 65 is same as value for women of 70 for annuity of the same amount).

4. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 706 (1978). The Department reasoned therefore that the overall benefits paid to women, since over a longer period of time, would offset their higher initial contributions. The result would be a total overall average equality for men and women workers.

5. Manhart v. City of Los Angeles Dep't of Water & Power, 553 F.2d 581, 583 (9th Cir. 1976). The U.S. Supreme Court also noted that there were no private insurance companies involved in the administration or payment of benefits. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 705 (1978).

tions which were 14.84% higher than the contributions of comparable male employees.[6] The female employees, therefore, brought home less pay than male employees earning the same salary since their retirement contributions were withheld from their paychecks.[7]

In their action, the female employees alleged that this disparity constituted unlawful discrimination on the basis of sex and sought an injunction ordering the Department to equalize contributions.[8] The Department defended by contending that the greater average longevity of women reflected in the sex segregated mortality tables justified the disparity because women would ultimately collect an equal total benefit. Any discrimination, therefore, was based on longevity, not sex.[9] The district court rejected this position and granted summary judgment for the plaintiffs.[10] On appeal, the Ninth Circuit affirmed finding that Title VII did not allow a pension plan to be based upon broad abstract generalizations about the sexes.[11] The court noted that these circumstances presented a new and unique problem in Title VII litigation. In the past, it was possible to measure challenged general group characteristics on an individual basis. In this case, however, it was impossible to determine longevity in advance for each individual.[12] The United States Su-

6. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 705 (1978). The Court illustrates this disparity by pointing to the record of one woman whose contributions, when supplemented by the interest they accrued, amounted to $18,171.40. A similarly situated male would have contributed only $12,843.35. *Id.* at 705 n.5.

7. To illustrate the difference, assume a female employee and male employee both earned a gross salary of $1000 per month. Assuming a retirement contribution of 5%, the male's withholding would be $50. A female employee's contribution, on the other hand, would be 5.74% or 14.84% higher, resulting in a deduction of $57.40.

8. Manhart v. City of Los Angeles Dep't of Water & Power, 387 F. Supp. 980, 981-82 (C.D. Cal. 1975).

9. *Id.* at 982, 984.

10. *See* Manhart v. City of Los Angeles Dep't of Water & Power, 553 F.2d 581, 584 (9th Cir. 1976). The district court's opinion granting summary judgment for plaintiffs is unpublished. In a published opinion granting a preliminary injunction, the district court found that sex discrimination exists whenever general fact characteristics are applied automatically to individuals. It noted that sterotyped treatment, whether rational or irrational, is "dead" under Title VII. This opinion deals with the issuance of a preliminary injunction since the court's opinion on the summary judgment is unpublished. Manhart v. City of Los Angeles Dep't of Water & Power, 387 F. Supp. 980, 981-85 (C.D. Cal. 1975).

11. Manhart v. City of Los Angeles Dep't of Water & Power, 553 F.2d 581 (9th Cir. 1976). Two weeks after this decision, the U.S. Supreme Court decided General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), which held that an exclusion of pregnancy benefits from an otherwise comprehensive disability plan did not violate Title VII. Defendants petitioned for a rehearing in light of *Gilbert* but this was denied by the Ninth Circuit which said that the facts of *Manhart* were sufficiently distinguishable.

12. Manhart v. City of Los Angeles Dep't of Water & Power, 553 F.2d 581, 586 (9th Cir. 1976).

preme Court, noting that the basic policy of Title VII is fairness to individuals rather than fairness to classes, held that the challenged differential violated both the language and spirit of Title VII of the Civil Rights Act of 1964, in spite of the reliance on widely used actuarial tables to estimate longevity. *City of Los Angeles Department of Water and Power v. Manhart,* 435 U.S. 702 (1978).

The retirement plan operated by the Los Angeles Department of Water and Power was similar to pension programs throughout the United States. These pension plans are generally categorized as money purchase or defined benefit plans.[13] In a money purchase plan, predetermined contributions fund the plan; interest accumulates on that sum over the years; and the aggregate of the corpus and interest is paid out upon retirement in proportional installments calculated from the life expectancy of the recipient. In a defined benefit plan, contributions are made in installments and predetermined monthly benefits are paid out upon retirement regardless of the total actually contributed. Under either type of plan, it is clear that the financial soundness depends upon being able to estimate the longevity of the participants.[14]

Pension plans resemble annuities, which are periodic payments commencing at a specified time (retirement) and continuing through a fixed period (until death) in return for the payment of a stipulated amount.[15] Such plans are to be distinguished from life insurance in which the insured contributes toward a lump sum payment at death. The difference is that the annuity insures against the risk of living too long, while a life insurance policy insures against the risk resulting from premature death.[16] The operation of a pension plan is similar to a group insurance policy where risks are pooled. Low risk individuals in effect subsidize higher risk people. Under the annuity or pension plan, the person will collect payments for so long as he or she lives. The total amount received is dependent

13. Bernstein & Williams, *Title VII and the Problems of Sex Classifications in Pension Programs,* 74 COLUM. L. REV. 1203, 1207-08 (1974).

14. Under the money purchase plan, the estimation of longevity is necessary so that recipients, on the average, do not live longer than the projected life span upon which the proportional payments are based. Should this occur, the result would be reduced monthly benefits. Under a defined benefit plan, the financial soundness would be jeopardized since both contributions and payments are already established, using mortality tables. If additional payments were being made because of greater longevity, then contributions, either from the employer or employee, would have to be increased.

15. Comment, *Equal Protection, Title VII, and Sex Based Mortality Tables,* 13 TULSA L.J. 338, 341 n.20 (1977)(citing S. HUEBNER & K. BLACK, LIFE INSURANCE 132 (5th ed. 1958); AMERICAN COUNCIL OF LIFE INSURANCE, LIFE INSURANCE FACT BOOK 124 (1977)).

16. Reilly v. Robinson, 360 N.E.2d 171, 173 (Ind.), *cert. denied,* 434 U.S. 825 (1977).

upon longevity, not the amount paid in.[17] As a result, the economic health of the plan is dependent upon being able to estimate the average longevity of the participants so as to determine the appropriate amount of contributions. The method traditionally used is the mortality table.

A mortality table is simply columns of figures showing persons at different ages, the number of deaths per 1000 persons at that age, and the average life expectancy of a person who has reached that age.[18] This table allows the determination of the death rate of a group as a whole. Tables of mortality are computed from the combined experience of the life insurance companies of America based on insurable lives and are now regarded as one of the best means of arriving at expectancy of life.[19] The group being evaluated must be large enough to allow the law of averages to operate but sufficiently homogeneous to make the prediction accurate. Because of the fact that women live longer than men as a group, present mortality tables are sex based.[20] Since the purpose of the mortality table is to set contribution rates, use of the tables results in higher rates for women.

Given the widespread reliance on sex based mortality tables and their resulting impact on women, the question may be raised as to whether that use results in unconstitutional discrimination on the basis of sex. Under the fourteenth amendment to the Constitution, every person is entitled to equal protection under the law.[21] The traditional standard used to test for possible equal protection violations, often termed the rational basis test, requires that a classification must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[22] "It is enough that the State's ac-

17. Comment, *Equal Protection, Title VII and Sex Based Mortality Tables*, 13 TULSA L.J. 338, 342 (1977). If the person fulfills his or her life expectancy, as reflected in the mortality tables, he or she will receive the full benefit of his or her contribution, no more or less. An annuitant who dies before his projected life expectancy would not collect the total amount contributed and a surplus would be created. This surplus, in turn, will go to fund the additional money benefits of those participants who exceed their life expectancy.

18. 29 AM. JUR. 2d *Evidence* § 894 (1967).

19. 29 AM. JUR. 2d *Evidence* § 895 (1967).

20. *Mortality Tables and the Sex-Sterotype Doctrine: Inherent Discrimination in Pension Annuities*, 51 NOTRE DAME LAW. 323 (1975).

21. U.S. CONST. amend. XIV, reads in part: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

22. F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

tion be rationally based and free from invidious discrimination."[23] In certain cases, however, such as race, suspect classes are involved. In this situation, state action will be subject to rigid scrutiny and must be shown to be necessary to the accomplishment of some permissible state objective.[24] The United States Supreme Court has not explicitly held sex to be a suspect classification but has indicated that gender based differences "must serve important governmental objectives and must be substantially related to achievement of those objectives."[25] This distinction has given rise to an intermediate standard which is invoked because of the traditional stereotyping of females that has characterized thinking, and the fact that sex, like race, is an immutable characteristic frequently bearing no relation to the ability to perform or contribute to society.[26]

One court considering a retirement system using sex based mortality tables found a violation of equal protection under the fourteenth amendment. In *Reilly v. Robertson,*[27] the Indiana Supreme Court decided that an annuity account operated by the Indiana State Teacher Retirement Fund which paid lower monthly benefits to females upon retirement was unconstitutional. The equal protection clause of the fourteenth amendment was directly applicable because the retirement fund was an agency of the state government and, therefore, the plan constituted "state action."[28] Applying the traditional rational basis standard,[29] the court ruled that classifying annuitants by sex was arbitrary and without rational relationship to the object of the legislation, which it found to be to induce teachers to remain in teaching through the incentive of a preferential retirement system.[30] The court rejected arguments of the Retire-

23. Dandridge v. Williams, 397 U.S. 471, 487 (1970).

24. Loving v. Virginia, 388 U.S. 1, 11 (1967).

25. Craig v. Boren, 429 U.S. 190, 197 (1976). The Court held that an Oklahoma statute which prohibited the sale of 3.2% beer to males under age 21 and females under age 18 was a gender based denial of equal protection.

26. Frontiero v. Richardson, 411 U.S. 677, 686 (1973). Although this opinion implies that sex is to be a suspect class, it is only a plurality decision. The standard applied in Craig v. Boren, see text at n.25, *supra,* and note 25, is the present test.

27. 360 N.E.2d 171 (Ind.), *cert. denied,* 434 U.S. 825 (1977).

28. The prohibitions of the fourteenth amendment are directed at the states. To come under the amendment, there must be sufficient state involvement to constitute state action. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). In this case, the criteria is met because the Teachers Retirement Fund was operated by the State.

29. The classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. See text at n.23, *supra.*

30. Reilly v. Robertson, 360 N.E.2d 171, 176 (Ind.), *cert. denied,* 434 U.S. 825 (1977). The Court did not apply the higher "intermediate standard" of Craig v. Boren, since, in its opinion, the plan did not even meet the rational basis test.

ment Fund that the use of sex based mortality tables was necessary to this objective and did not consider whether the use of sex based tables would have been substantially related to the additional objective of insuring a viable annuity.[31]

In spite of the applicability of equal protection analysis to the retirement system in *Reilly,* there are limitations on the scope of the fourteenth amendment. These appear to considerably reduce the value of constitutional challenges to the use of sex based mortality tables in calculating retirement benefits or contributions. First, the amendment is directed only at state action.[32] Thus, private conduct between employer and employee in the non-governmental sector would not be covered. This implies that applicability to the private insurance area is limited. Second, it is now clear that a showing of discriminatory purpose or intent is necessary in making out an equal protection violation.[33] It seems unlikely that such a showing of discriminatory intent or purpose can be made in the retirement context.

Because of the limitations on constitutional equal protection discussed above, a more effective means of challenging the use of sex based mortality tables is through Title VII of the Civil Rights Act of 1964.[34] Title VII prohibits discrimination by employers on the basis of race, color, religion, sex or national origin.[35] Title VII of the Civil Rights Act applies to hiring, discharge, compensation, promotion, and terms, conditions and privileges of employment. Under Title VII it is clear that disparate treatment of men or women resulting from sex stereotypes is not permissible.[36] The very essence of this civil rights legislation has been characterized as protecting the indi-

31. *Id.* Additionally, at trial it was shown that a mortality table which ignored sex had been previously used for many years without impacting adversely on the fund.

32. Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

33. Washington v. Davis, 426 U.S. 229, 238-48 (1976). Various Courts of Appeals had held that substantially disproportionate impact standing alone without regard to purpose was sufficient; but the Court said: "to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement." *Id.* at 245. Under Title VII, discriminatory purpose need not be proved; the Court said it was not disposed to adopt this more rigorous standard for the purposes of applying the fourteenth amendment. *Id.* at 247-48.

34. As the Court noted in Washington v. Davis, 426 U.S. 229, 247-48 (1976), under Title VII discriminatory purpose need not be proved. Thus, a Title VII challenge to sex based mortality tables can be maintained merely by showing disparate impact on men and women. This eliminates one of the major barriers to proving a case under the equal protection standard, that of showing discriminatory intent.

35. 42 U.S.C. § 2000e *et. seq.* (1976).

36. Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971). United Air Lines rules required that stewardesses remain unmarried. No policy or rule restricting employment to single male stewards was enforced.

vidual from being treated differently simply because he or she is a member of a sex defined group.[37] Title VII has been held to cover an employer's retirement program.[38] Treating women differently as a class under a retirement system, therefore, is a violation of Title VII.[39]

Even if sex based discrimination exists, an employer may still avoid liability if he can show his conduct comes within one of the statutory exemptions under Title VII. Under the bona fide occupational qualification (BFOQ) exemption, Section 703(e), an employer may discriminate if the classification is reasonably necessary for the normal operation of his business.[40] This exemption has been narrowly interpreted by the courts to require that the very "essence" of the business be damaged if the BFOQ were not permitted.[41] Furthermore, Equal Employment Opportunity Commission guidelines make it clear that the fact that the cost of benefits is higher for one sex than the other has no impact on the essence of the business and is no defense under Title VII.[42]

A more pertinent exemption under Title VII is provided by

37. *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1172-74 (1971).

38. Rosen v. Public Serv. Elec., 477 F.2d 90 (3rd Cir. 1973). Early retirement option for women violated Title VII. Differentiation between men and women in a retirement system solely on the basis of sex is prohibited.

39. Bartness v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1190 (7th Cir. 1973). Mandatory retirement for women violated Title VII.

40. 42 U.S.C. § 2000e-2(e)(1) (1976). The section reads in part:

> It shall not be unlawful employment practice for an employer to hire an employee on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that business enterprise.

41. There are two tests used by the courts to determine if a BFOQ is permitted. Both standards were approved by the U.S. Supreme Court in Dothard v. Rawlinson, 433 U.S. 321 (1977). Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971) held that "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively." *Diaz* also makes it clear that mere convenience alone is an insufficient justification. In an earlier case, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969), the same court said an employer could rely on the BFOQ exception only by proving that all or substantially all women would be unable to perform the job safely or efficiently.

In *Manhart*, the BFOQ defense was raised in the lower courts but was not addressed directly by the U.S. Supreme Court. The Court of Appeals decided that the discriminatory practice in no way affects the ability of the Department to provide water and power to the citizens of Los Angeles, which was the essence of their business. Manhart v. City of Los Angeles Dep't of Water & Power, 553 F.2d 581, 587 (9th Cir. 1976).

42. 29 C.F.R. § 1604.9(e) (1977). Subsequent decisions have noted that discrimination in employment cannot be tolerated, the expense or inconvenience in complying with the law notwithstanding. Johnson v. Pike Corp. of Am., 332 F. Supp. 490, 495-96 (C.D. Cal. 1971).

what is known as the Bennett Amendment.[43] The Amendment permits employers to differentiate between the sexes in paying wages or compensation when such action comes within an exemption to the Equal Pay Act, which forbids discrimination on the basis of sex in wages paid for equal work. The procedural effect is to incorporate section 206(d) of the Equal Pay Act into Title VII.[44] Since subsection (iv) of that section allows a differential based on "any other factor other than sex",[45] the challenge to the defendant is to show some non-sex based justification for a differential in pay or, in this instance, the different level of contributions to the retirement system required of the female employees.

Another question arising under the Bennett Amendment has been whether Congress intended that all differences between men and women in industrial benefit plans would be violative of Title VII. To support the position that some differences were to be allowed, reliance has been placed on a colloquy between two Senators which occurred during the final floor debate of the Civil Rights Act of 1964. In response to a question, Senator Humphrey, floor manager of the Act, indicated that prevailing pension and retirement plans which differentiated on the basis of sex would not be changed.[46] He apparently felt that the Bennett Amendment authorized such differences; however, this assumption proved to be erroneous.[47] The United States Supreme Court interpreted Title VII to

43. 42 U.S.C. § 2000e-2(h) (1976) states in pertinent part: "It shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amounts of wages or compensation paid . . . to employees . . . if such differentiation is authorized by the provisions of [the Equal Pay Act]."

44. 29 U.S.C. § 206(d)(1) (1976). This subsection states:

> No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar . . . 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; (iv) a differential based on any other factor other than sex.

45. *Id.*

46. Sen. Randolph addressing Sen. Humphrey: "I have in mind that the social security system treats men and women differently . . . Am I correct . . . in assuming that similar differences in treatment in individual benefit plans, including early retirement options for women may continue in operation under this bill if it becomes law?" Sen. Humphrey in reply: "Yes. That point was made unmistakably clear earlier today by adoption of the Bennett amendment; so that there can be no doubt about it." Manhart v. City of Los Angeles Dep't of Water & Power, 553 F.2d 581, 589 (9th Cir. 1976) (citing 110 CONG. REC. 13663-64 (1964)).

47. Some of the examples given in the senatorial colloquy have been found to violate Title VII. *See, e.g.*, Rosen v. Public Serv. Gas & Elec. Co., 477 F.2d 90 (3d Cir. 1973) (earlier retirement option for women than men violates Title VII); Bartmess v. Drewrys U.S.A., Inc.

permit differentiations between men and women in industrial benefit plans only if the differentiation can be sustained under section 206(d) of the Equal Pay Act.[48] If the difference is based on some factor other than sex, it is permissible; on the other hand, if there is no justification apart from differences between sexes, it is a violation of Title VII.

The status of retirement programs under the Equal Pay Act and Title VII, through the Bennett Amendment, was further confused by inconsistent administrative guidelines. The Administrator of the Wage and Hour Division of the Department of Labor, charged with implementation of the Equal Pay Act, has interpreted the Act as allowing either equal employer contributions and unequal benefits or unequal contributions and equal benefits.[49] The Equal Employment Opportunity Commission, however, has interpreted Title VII as prohibiting retirement plans where the benefits were unequal.[50]

Recent cases involving employer disability plans have also provided a source of comparison for the *Manhart* situation. In *General Electric Company v. Gilbert*,[51] the United States Supreme Court held that comprehensive disability plans that excluded pregnancy benefits did not constitute sex discrimination under Title VII. In the final hours before adjournment, however, the Ninety-Fifth Congress passed a bill, S. 995, which reversed the holding of the United States Supreme Court in *Gilbert*.[52] The Act amended Title VII to

444 F.2d 1186 (7th Cir. 1971) (earlier mandatory retirement option for women violates Title VII).

48. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 144-45 (1976). The Supreme Court cited this same dialogue favorably in support of its holding that disability plans which exclude pregnancy benefits for women do not violate Title VII. The key difference between the *Gilbert* and *Manhart* situations is that the discrimination is characterized differently under subsection (iv) of 206(d) of the Equal Pay Act. In *Manhart* it was longevity which was sex based, in *Gilbert* it was a specific physicial disability which only incidentally could occur in women. It is also clear that cost alone will not qualify as a factor other than sex under § 206(d)(1)(iv). *See* 29 C.F.R. § 1604.9(b) (1977).

49. 29 C.F.R. § 800.116(d) (1977). This regulation did not apply directly to benefit plans funded and administered by employees and employers. However, the Department in *Manhart*, 553 F.2d at 589, cited the regulation as implying that the "either-or" rule was acceptable in all plans. The Ninth Circuit rejected this position finding that the pertinent EEOC regulations were entitled to greater deference. *See* note 50 *infra*.

50. There were no EEOC guidelines precisely on point, but 29 C.F.R. § 1604.9(f) (1977) stated that unequal benefits were not permitted even if contributions were equal. Thus it could be inferred that equality in both contributions and benefits was required. Given conflicting regulations, the lower courts in *Manhart* gave greater deference to the EEOC ruling since it was charged directly with responsibility for Title VII, which was the basis of the claim. Manhart v. City of Los Angeles Dep't of Water & Power, 553 F.2d 581, 590 (9th Cir. 1976).

51. 429 U.S. 125 (1976).

52. Section 701 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976) was amended

make it clear that sex discrimination includes any discrimination because of pregnancy, childbirth, or related medical condition. In its *Gilbert* decision the Court relied on an earlier equal protection case, *Geduldig v. Aiello*,[53] in which it had held that exclusion of pregnancy benefits was discrimination on the basis of a specific physical disability, not sex. Even though it is true only females can become pregnant, the disability plan did not divide men and women into two exclusive and distinct classes. Rather, women would be found in both classes the Court identified under the plan, pregnant women and non-pregnant persons.[54] The conclusion of the Court was that a classification composed of members of one sex constitutes discrimination on the basis of sex only it if includes *all* members of that sex.[55]

In *City of Los Angeles Department of Water and Power v. Manhart*[56] the Court acknowledged that this case did not involve a fictionalized or sterotyped generalization about women; rather it involved a generalization that was unquestionably true: women as a class live longer than men.[57] But the Court further noted that it was equally true that all individuals do not share the characteristic which differentiates the class. Many women do not live as long as the average man, while some men outlive the average woman.[58] The

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by adding a new subsection (k) to provide:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in Section 703(h) . . . shall be interpreted to permit otherwise. Act of Oct 31, 1978, Pub. L. No 95-555, 92 Stat. 2076 (to be codified in 42 U.S.C. § 2000e (1976)).

53. 417 U.S. 484 (1974). *Geduldig* was brought under the equal protection clause of the fourteenth amendment. The Court said as to the exclusion of pregnancy benefits: "[T]he program divides potential recipients into two groups - pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes." *Id.* at 496-97 n.20.

54. General Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976) (citing *Geduldig*).

55. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 134-35 (1976). It has been argued that longevity, like the pregnancy related disabilities in *Gilbert*, constitutes an additional risk unique to women and that since women live longer, there is no discrimination in the total average benefits available to men and women under the retirement plan. *See* Manhart v. City of Los Angeles Dep't of Water & Power, 553 F.2d 581 (9th Cir. 1976) (Kilkenney, J., dissenting). However, in *Manhart*, unlike *Gilbert*, men and women are clearly divided into two separate and distinct classes. All women make higher contributions than their male counterparts. Manhart v. City of Los Angeles Dep't of Water & Power, 553 F.2d 581, 592-93 (9th Cir. 1976).

56. 435 U.S. 702 (1978).

57. *Id.* at 707.

58. Taking 1000 men and 1000 women age 65 in the general population, the death ages

Court concluded that since Title VII's focus on the individual is unambiguous, even this true generalization about a class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.[59] The basic policy requires fairness to individuals, not fairness to classes.

When viewed as a group program, insurance is traditionally concerned with events which are individually unpredictable. The Court noted, however, that there is no evidence Congress intended to allow employers to resort to classifications prohibited by Title VII when predicting an individual's risk and determining his or her cost.[60] A plan which requires women to contribute more money simply because each of them is a woman and not a man directly conflicts with the language and policy of Title VII. The Court stated that such a plan violated the basic test of "treating a person in a manner which but for the person's sex would be different" and constituted unlawful discrimination.[61]

The Department argued that under the Bennett Amendment, longevity, not sex, was the distinguishing factor between the contribution levels. Therefore, based on the "any other factor other than sex" exemption, the contended retirement program was lawful under Title VII.[62] The Court rejected this position relying on Judge Duniway's statement in the Ninth Circuit Court of Appeals decision on the case: one cannot "say that an actuarial distinction based

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of 68.1% can be paired. The remaining 32% of the women with later death ages would constitute 16% of the total group of 2000. Thus, only 16% of the group, women, live longer, or 16% of the group, men, die sooner than the majority of the sample. Using sex based actuarial tables imposes the additional burden of the small group of high risk women exclusively upon women and credits the advantage of low risk men to other men. Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs*, 74 COLUM. L. REV. 1203, 1221-22 (1974).

59. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978). While women as a class may live longer than an equal class of men, some women will not live as long as the average man. The Court notes that while they are working they receive smaller paychecks because of their sex, but they will receive no compensating advantage when they retire. Thus, a generalization about their class is being incorrectly applied to them. Prior to *Manhart*, the statute's requirement of individual determination had not generally been a total barrier to the employer's reliance on some characteristic. For example, courts had found that even if it was true that women as a class were not as strong as men, the employer could test them individually for a job requiring heavy lifting. *See* Rosenfield v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

60. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 710 (1978). It is worth noting again that the risk insured against in a pension plan is that of living longer than anticipated. Thus, women are a high risk category from this perspective. The court notes that under insurance programs, the grouping of risks is common. Better risks always subsidize poorer risks, *i.e.* smoker and non-smoker, the flabby and the fit.

61. *Id.* at 711.

62. 29 U.S.C. § 206(d), incorporated in Title VII by 42 U.S.C. § 2000e-2(h) (1976).

entirely on sex is 'based on any other factor other than sex.' Sex is exactly what it is based on."[63]

As to Senator Humphrey's colloquy, implying that differences in retirement benefits were allowable, the Court was not persuaded, concluding that the Senator's isolated comment could not change the plain meaning of the statute.[64] In addressing the discrepancy between two inconsistent administrative rulings of the Wage and Hour Administrator, the Court found no basis for relief. The Wage and Hour Administrator had ruled that grouping employees solely on the basis of sex for purposes of comparison of costs necessarily rested on the invalid assumption that sex factors alone could justify a wage differential.[65] The Court said that the Wage and Hour Administrator's earlier rule allowing either equal retirement contributions or equal benefits for men and women was less persuasive than his subsequent rule that grouping employees solely on the basis of sex was not allowed under the Equal Pay Act.[66]

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63. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 713 (1978) (citing Manhart v. City of Los Angeles, Dep't of Water & Power, 553 F.2d 581, 588 (1976)).

64. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 713 (1978). The Court apparently agreed with the Ninth Circuit which had rejected the Humphrey statement on five grounds: (1) it was made hours after the passage of the amendment; (2) the same Congress passed the Civil Rights Act of 1964 and the Equal Pay Act, so it was unlikely that Humphrey's erroneous interpretation of the latter was accepted by many members of the Senate; (3) House members never heard the statement; (4) every case considering the subject held earlier retirement options for one sex violate Title VII; (5) since the Bennett amendment only incorporated the Equal Pay Act, it was questionable whether a statement on the incorporating statute was significant when erroneously interpreting the incorporated statute. Manhart v. City of Los Angeles Dep't of Water & Power, 553 F.2d 581, 589-90 (9th Cir. 1976).

65. City of Los Angeles Dep't of Water & Power, 435 U.S. 702, 714 n.26 (1978) (citing 29 C.F.R. § 800.151 (1977)). It said a wage differential based on the higher costs of employing men or women is not based on a factor "other than sex" and therefore would violate the Equal Pay Act. On the other hand, the earlier ruling in 29 C.F.R. § 800.116(d) (1977), authorized an employer to make either contributions which were equal, or pay equal benefits. As a result of the *Manhart* decision, the Department of Labor has proposed that this regulation be withdrawn as originally written and a new amended version substituted. 43 Fed. Reg. 38029, Aug. 25, 1978.

66. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 714 n.26 (1978). The reasons for the administrator's second ruling, 29 C.F.R. § 800.151 (1977) were as follows:

> To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual . . . .

The Court also distinguished *General Electric v. Gilbert*[67] by pointing out that the Department's plan in *Manhart* discriminated on its face on the basis of sex whereas the *General Electric* plan discriminated on the basis of a special physical disability.[68] The *Manhart* plan divided employees into two groups composed entirely and exclusively of members of the same sex, whereas in *Gilbert* the two groups were not mutually exclusive. The Department had contended that, like *Gilbert*, there was no discriminatory effect in their plan because the final cost of benefits provided to both classes was equal.[69] The difference in contributions was thus justified by the like difference in the cost of providing benefits. This argument, the Court said, was an insufficient justification to overcome the prima facie discrimination to individual women employees under the *Manhart* plan and furthermore, under Title VII, cost justification was no defense.[70] The Court's conclusion was that the Department's practice violated Title VII.[71]

The dilemma of *Manhart* can be clearly posed: how to deal with a valid class characteristic which *cannot* be determined on an individual basis. The unequivocal rule of the decision is that under Title VII, an employer who operates an annuity fund must treat each employee as an individual. Sex based generalization about a class, even if true, cannot influence compensation or terms and conditions of employment. Since sex based mortality tables embody the generalization that women live longer than men, they affect the terms upon which women participate in annuity or retirement funds. Con-

67. 429 U.S. 125 (1976).

68. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 715 (1978).

69. In *Gilbert*, the Court found no prima facie discrimination nor any discriminatory effect. It was shown that the effect of the *Gilbert* plan actually favored women since the overall cost of providing them benefits was higher than the cost of providing benefits to males. This higher cost was carried by the employer and the ultimate effect was that the plan provided more favorable benefits to women than men. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 130-31 n.9 (1976).

70. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978).

71. The district court, affirmed by the Ninth Circuit, had granted retroactive relief. The Supreme Court concluded this was erroneous, vacated the judgment and remanded for reconsideration of this question. Although under Title VII there is normally a presumption in favor of retroactive relief, in this case the Court concluded that the district court gave insufficient attention to the equitable nature of Title VII remedies. There was no reason to think the threat of backpay was needed to insure compliance and, in fact, the pension administrators had apparently acted in good faith in the face of conflicting administrative rulings and regulations. Additionally, the potential impact on insurance and pension plans could have a damaging economic effect and since this was apparently the first litigation challenging contribution differences based on valid actuarial tables, some caution in formulating a remedy was warranted. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 719-20 nn.36 & 37 (1978).

sequently, use of the sex based tables results in illegal discrimination under Title VII.

The scope of the *Manhart* holding is limited to the employer-employee context.[72] The Court notes that the decision is not intended to revolutionize the insurance and pension industries, nor is it intended to call into question insurance industry practices of considering the composition of a work force.[73] But whether a plan is funded by employers, employees, or jointly funded, equalization of contributions or benefits will require adjustments. In a defined benefit plan that is wholly employee funded, the equalization of contributions will require that males pay more than they have previously paid for the same benefits. When costs are shared between employers and employees, as in *Manhart,* the employer could bear the additional cost caused by reducing female contributions to the same level as males or, as in the employee funded plan, he could require males to make greater payments or share the expense. In a money purchase plan, the increase in cost would affect the amount of monthly benefits rather than periodic contributions. An increase in cost would require an adjustment by lowering the benefits paid future retirees. This adjustment in benefits would be downward from present rates for men and upward from present rates for women.[74]

Two problems are created by these adjustments. First, insofar as the employer is required to bear the additional cost, there will be a disincentive to hire women. Whether an employer operates a plan himself or purchases it through a private insurance firm, the more women he employs, the greater the cost will be. The second problem is that male employees may react negatively, feeling that

72. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 717-18 (1978). "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contribution could command on the open market." *Id.* As discussed earlier, it is unlikely that equal protection challenges to sex based mortality tables would be upheld by the U.S. Supreme Court. *See* discussion notes 33 & 34, *supra.* Therefore, this may limit the scope of liability to Title VII employers.

73. *But see* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (Burger, C.J., dissenting). The Chief Justice notes that to have a workable group pension program it is only rational to permit the use of statistically sound and proven disparities in longevity between men and women. The reality of differences in human mortality is what the tables reflect. He contends that so revolutionary an effect upon common pension plan practice should not be read into the statute without some clear statement that Congress had such an impact in mind.

74. *See* Bernstein & Williams, *Title VII and the Problems of Sex Classifications in Pension Programs,* 74 COLUM. L. REV. 1203 (1974).

they are being required to subsidize female employees.[75] A male retiree, however, who knows the female employee worked as long as he did, was paid the same wages and faces the same expenses should not be overly concerned because that person may outlive him and draw greater total benefits.

As indicated by the Court,[76] subsidization is the whole premise of group insurance, and treating different classes of risks as though they are one is a common practice never considered inherently unfair. A plan requiring equal benefits and equal contributions would be merely a change in form wherein all annuitants would subsidize those annuitants who exceed their life expectancy as opposed to men subsidizing men and women subsidizing women.[77] This could be achieved by using unisex tables.[78] Under these tables, only the total number of employees will determine cost and their sex will have no impact. In this way, sex would be eliminated as a factor in any decision of contributions and benefits under a retirement plan.

In spite of these potential problems in adjusting employee retirement plans, the immediate impact of the *Manhart* decision is limited by the Court's language in the opinion.[79] Under Title VII only employers are directly prohibited from considering sex in determining employee contributions. The prohibition does not extend to benefit providers, such as insurance companies, which are outside the employer-employee relationship.[80]

In a larger sense, however, if *Manhart* is viewed as a statement of public policy against sex discrimination, it would be indicative that substantial changes in insurance and pension practices may become necessary. Nearly all actuarial data presently used for pension and insurance planning is sex based. While Title VII is limited

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75. *Id.* at 1222.

76. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 710 (1978).

77. Comment, *Equal Protection, Title VII and Sex Based Mortality Tables*, 13 TULSA L.J. 338, 361 (1977).

78. Bernstein & Williams, *supra* note 74 at 1229.

79. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 717-18 (1978). "[W]e do not suggest that the statute was intended to revolutionize the insurance and pension industries . . . . Nor does (our holding) call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan." *Id.*

80. The First Circuit has found the employee-employer relationship to be sufficient under Title VII in a case where an annuity association was completely separate from a college. Even though the employees looked solely to the association (the Teacher's Insurance Annuity Association, TIAA) for payment, the fact that the college required all employees to participate and established a method for premium payments brought it within the scope of the *Manhart* decision. Equal Employment Opportunity Comm'n v. Colby College, 589 F.2d 1139 (1st Cir. 1978).

in its reach, there are many other federal and state regulations which could be used to change pension practices.[81] A strong public policy against sex discrimination, coupled with the rule of *Manhart* that even true generalizations about a class cannot be applied to individuals, would affect assumptions that are basic to present financial planning. The ultimate impact of the decision will be measured by how insurance and pension practices change, the interpretation courts give to the decision and whether Congress acts to expand or limit the *Manhart* rule.

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81. Insurance commissioners in the various states will, of course, interpret the *Manhart* decision in light of their state laws, but changes could be required in current practices. Also one commentator has suggested that if the prohibitions of the Age Discrimination in Employment Act (ADEA) are applied to retirement plans using the same reasoning found in *Manhart*, discrimination against individuals can be shown. *See* Rothman, *Discrimination by Sex and Age in Pension, Annuities and Life Insurance*, 672 INS. L.J. 30 (1979).