10-1977

City of Los Angeles Department of Water & Power v. Manhart

Lewis F. Powell Jr.

Grant

City's contributory pension plan was invalidated under Title VII because on basis of actuarial tables women were required to contribute more (15%) than men. City also contributed more for women.

CA 9 decided this prior to Gilbert – but on rehearing CA 9 distinguished Gilbert

PRELIMINARY MEMORANDUM

Summer List 9, Sheet 3 ~~DC and~~ CA 9 decided Nixon

No. 76-1810 Cert to CA 9 (Chambers, Duniway, Kilkenny)

CITY OF LOS ANGELES, DEPT. OF WATER AND POWER summary judgment motion!

v.

MANHART Federal/Civil Timely

1. SUMMARY: The mandatory retirement pension plan for Los Angeles City employees requires that females contribute more per month than men. Similarly, the city contributes more into the fund for females than it does for men. The contributions are in accordance with actuarial formulae which indicate that women live longer than men. Monthly payments out of the retirement fund are the same for men as for women. Based on the actuarial assumptions, the average lump sum to be received by women equals the average lump sum to be received by men. (No account is taken

GRANT. See back.
Nancy

of present discounted value, however.) The issue is whether this scheme violates Title VII, particularly where no actuarial generalization other than the sex of the employee is utilized.

2. FACTS: The average payment is 15% higher for women each month than it is for men. The case was brought as a class action. The district court awarded injunctive relief, and also ordered restitution, plus interest, of all sums paid by female employees above what was paid by their male co-workers during the period when Title VII was applicable. The Ninth Circuit affirmed on November 23, 1976. On December 7, 1976, General Electric Co. v. Gilbert (45 U.S.L.W. 4031) was handed down, and petitioners sought rehearing. Rehearing was denied in an opinion that found Gilbert did not require a different outcome.

3. CONTENTIONS: The City raises many objections based on Gilbert. First, Gilbert's footnotes 17 and 18 hold that the validity of a benefits plan can be determined by hypothesizing the circumstances without a benefits plan. In Gilbert, it would be permissible for GE to afford no health insurance at all. Then females wishing full coverage would have to purchase it on their own, and would pay more than men if pregnancy benefits were included. Here, the City could dispense with all retirement benefits. Then female workers would have to purchase it on their own if they wished. To obtain the samelevel of payment per month after retirement as a man, a woman would have to pay more because of her greater longevity. Hence, the City argues, it is permissible for the City to require greater payments from women in its own retirement plan, keeping in mind that the matching payments from the City are also higher.

Second, Gilbert relied on the Bennett Amendment to Title VII, especially as interpreted by Senator Humphrey during debate. The legislative history indicated that different treatment, included earlier retirement options, would not violate Title VII. The Ninth Circuit, on petition for rehearing, merely states "We did not find it to be persuasive legislative history; the Supreme Court did find it persuasive. We are, of course, bound by that conclusion, but we do not think that it follows that the judgment in this case is erroneous." (Petn. at D-2). The Bennett Amendment would allow differences in benefits between the sexes "based on any factor other than sex"; the City argues that longevity is such a factor.

The City also objects to the Ninth Circuit's reliance on EEOC guidelines and Equal Pay Act regulations. On rehearing, the Ninth Circuit gave almost preclusive effect to these interpretations, and distinguished Gilbert by reason of the split in administrative interpretation there.

Separate mortality tables by gender are accepted actuarial practice; the City argues that it would be costly to switch, and that it should not be obliged to make any back-payments where no intentional discrimination has been shown, in keeping with 42 U.S.C. § 2000e-5(g). Further, the alternative suggested by the Ninth Circuit, to lower benefits, would violate the Equal Pay Act, which prohibits the achievement of equality by lowering the benefits previously accorded to one sex.

The City insists that only a rational basis need be found for its sex-based distinction, in keeping with Kahn v. Shevin, Schlesinger v. Ballard, and Geduldig v. Aiello. Lastly, it

invokes National League of Cities v. Usury, 426 U.S. 833 (1976) for the principle that the imposition of the court's injunction and back-pay order interfers with its Tenth Amendment right to order its own employees.

The respondent would limit Gilbert to its test of facial discrimination. In Gilbert, no one sex received coverage not enjoyed by the other; by contrast, here females are subject to a higher charge per month than men. Concerning the legislative history, respondent restricts Senator Humphrey's remarks only to the type of benefits explicitly mentioned in the colloquoy, and then concludes that the Bennett Amendment history was not necessary to the decision in Gilbert anyway. Finally, respondent stresses as predominant what was only one of the many points made by the Ninth Circuit: that this case involves the use of only sex-related actuarial characteristics. Respondent hints that, perhaps if gender had been included along with a list of other actuarial criteria (average length of life of family, smoking and drinking habits, etc.) that it would have been permissible.

4. DISCUSSION: The fundamental principle ~~of~~ behind the district court and court of appeals decisions was that Title VII prohibits the use of generalizations specific to sex groups, even if accurate. "Congress gave a strong indication that it did intend to place sex discrimination in pension and retirement plans, even when based on actuarially sound tables, within the type of discrimination forbidden by Title VII." "Setting requirement contribution rates solely on the basis of sex is a failure to treat each employee as an individual; it treats each employee only as a member of one sex." (9th Cir. op., quoted in Pet. at C-20).

The validity of that principle was not resolved in Gilbert. Gilbert allowed a justification in terms of financial cost, but the assumption in the financial estimation was not that women would cost more for treatment than men, but that pregnancy was an additional cost over and above all else to be treated in a medical plan. This case is close to what would have been the Gilbert situation if GE had provided for pregnancy benefits and then assessed women higher costs. Footnotes 17 and 18, supra suggest that such a system would have been permissible. However, the analogy is not precise because the Gilbert footnotes were referring to women voluntarily choosing to have pregnancy benefits; whereas here no choice is involved.

While Gilbert does not control the outcome here, there is little doubt that the Ninth Circuit was doing its utmost to restrict Gilbert to its facts. This is shown not only by the minimal respect shown to this Court's interpretation of the legislative history surrounding the Bennett Amendment, but also by the Ninth Circuit's reaching out to administrative regulations as a source of distinguishing Gilbert.

The administration of pension plans is of tremendous monetary concern to employers and employees. If Title VII is held to outlaw actuarial assumptions based on gender, the impact will be tremendous. The Ninth Circuit on rehearing notes that the City here has voluntarily abandoned its gender-specific mortality tables,*/ but the use of such actuarial tables is still the overwhelming practice in industry, by everyone's admission.

*/ No mootness problem presents itself, because of the restitution order.

A second important question raised in this petition is whether the remedial order would itself violate the Equal Pay Act. If employers were to provide what amounted to higher lump sums to women than to men for the same amount of contribution by each, as the Ninth Circuits commands, it is undeniable that men would be subsidizing women's pension benefits. The permissibility of that result comes down to the same question initially posed, whether harm, or benefit, is to be discerned on the basis of actuarial aggregates.

The Tenth Amendment claim does not commend itself as particularly worthy of cert. The type of intrusion into municipal employment resulting from the district court order does not approach the concerns expressed in National League of Cities. And the City's claim to be liable for restitution only for bad faith violations of Title VII is precluded by Albermarle Paper Co. v. Moody, 422 U.S. 405. Similarly, petitioner's reliance on Kahn, Ballard, and Geduldig are all distinguishable as not involving Title VII.

There is one final important aspect of the case that commends it for cert. This is the issue whether discriminatory intent could be inferred from the fact that among all possible actuarial generalizations, only sex was used in this pension plan. The City does not defend this aspect of its plan, whereas respondent attempts to make it the dominant distinguishing feature. Should cert. be granted, it would be useful to determine the extent to which pension plans routinely rely on gender-specific actuarial assumptions to the exclusion of all others, and whether there is a justification in terms of accuracy for such practice. However, no intention to discriminate has been found here, and

it would be quite unlikely in view of the higher contributions made into the plan by the City itself for women.

5. RECOMMENDATION: Cert. should be granted.

A response has been filed.

8/8/77 Campbell CA op. in pet.
tap

SEP 27 1977

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 76-1810

CITY OF LOS ANGELES, DEPT. OF WATER & POWER

vs.

MANHART

Brennan thinks
There complete with
Equal Pay Act
& probably Title VII.

Grant.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.		✓											
Stewart, J.		✓											
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											

LFP/lab 12/27/77

To: Nancy Date: December 27, 1977

From: L.F.P., Jr.

No. 76-1810 City of Los Angeles, Dept. of Water & Power v. Manhart

While in Richmond, I spent several hours reviewing the available briefs in the above case.

Although at first blush the case seems rather simple and straightforward, it becomes apparent fairly quickly that this is by no means true. My initial reaction upon reading CA-9's first opinion was that it probably was right: i.e., the determination of contributions to the pension plan fund should be viewed on an individual (unisex) basis rather than involving two groups based on sex.

But the amicus briefs cast the case in quite a different light. The brief on behalf of the Teachers Insurance and Annuity Fund and that on behalf on the Society of Actuaries are quite illuminating, and demonstrate that the two critical elements in determining a fair contribution to a pension plan fund are "age" and "sex".

Apart from the actuarial aspects of the case (which rather strongly support petitioner), our primary concern must be the correct interpretation of the relevant statutes: Title VII and the Equal Pay Act. I particularly need your help on interplay of these two statutes and their legislative history.

The briefs supporting petitioner (and Judge Kilkenny's dissent) criticize the CA 9 majority for relying upon a fairly recent "guideline" from EEOC as being contrary to the statutes and the intent of Congress.

The amicus brief on behalf of the Teachers Insurance and Annuity Association (which provides retirement and other benefit plans for some 500,000 teachers and employees of colleges and universities) emphasizes the far-reaching consequences of the rationale of CA 9's decision. (Br. p. 2 et seq.). It also points out that EEOC is attempting to extend this decision to annuity plans of private insurers such as those of TIAA, noting that six litigations are now pending against educational institutions and TIAA. (Br. p. 3). That brief further states that a failure to recognize the difference in costs between providing annuities for men and women will "impose tens of millions of dollars of added costs upon the already strained resources of higher education". (Br. p. 4).

It may be that statements such as the foregoing are the centerpieces of a "parade of horrors". Before I reach a conclusion as to the nature and extent of the consequences, I want to read far more carefully the brief filed by the Society of

Actuaries. Obviously both age and sex must be taken into account in determining the funding of a group pension plan, just as they are controlling factors if an individual purchases an annuity policy. It is possible, I assume, for the actuarial problem to be met by homogenizing the two groups - i.e., having only one group - and simply averaging the actuarial consequences of sex. This would require increases in contributions made by men and decreases in the contributions made by women. The question then would arise whether there was sex discrimination against the men who were required to pay larger contributions because of the longer life expectancies of women. The answer to this question would, it seems to me, provide the answer to the question presented by this case. It is perfectly clear that CA 9 was wrong in thinking that an individual's contribution could be determined on an "individualized" basis. If a single annuity were being purchased, this of course would be appropriate. But in a group plan I agree with the brief filed on behalf of TIAA stating that it is impossible to make a fair cost determination on an individualized basis (Br. p. 11).

I am missing from my set, the brief on behalf of respondents. I would appreciate it, Nancy, if you would make sure that I see this before the argument.

L.F.P., Jr.

Nancy - Should not this case be remanded for trial? There seems to be little agreement as to the factual posture.

BENCH MEMO

TO: Mr. Justice Powell

FROM: Nancy Bregstein DATE: Jan. 15, 1978

RE: No. 76-1810, City of L.A. v. Manhart

I. Introduction

This is a very difficult case, because of the intricacies of insurance law and the uniqueness of trying to fit the relevant insurance concepts into the framework of Title VII law. At first I thought it clear that CA 9 was wrong, both because it ignored the uniqueness of the insurance aspects of the case and because it did not pay sufficient attention to General Electric v. Gilbert. After reading all the briefs and some law review articles,

however, I think I have been persuaded that the pension plan at issue here violates Title VII. The case is an important one and the basic principles the Court adopts here will apply to many other kinds of pension plans; on the other hand, the particular facts of this case and the specifics of this pension plan may distinguish this case from others that will arise. It is important, therefore, to lay down correct basic principles as well as to apply them properly to this particular pension plan. Then it will be up to the lower courts to apply the principles to other variations of plans, as described in the brief of the Society of Actuaries (Actuaries' Br.).

I will proceed in the following order: description of this plan and why its features are relevant to decision of the legal issues; basic Title VII principles; effect of the insurance context on the basic Title VII principles; legislative history and administrative interpretation. In certain sections, I will suggest questions to ask the parties to clarify certain points.

II. This Pension Plan

The Actuaries' Br. is very helpful in understanding how various pension plans differ. The plan in this case is a contributory, non-insured defined benefit plan, meaning that the amount of monthly benefits per participant is determined in advance, and contribution levels are determined accordingly; employees contribute to

the plan; and the plan is self-insured. Because actuarial tables show that the average life expectancy of women is longer than for men, the Department's female employees are required to contribute more money out of each paycheck than the male employees. The employer also makes greater contributions for the female employees than the male employees. (I am not sure exactly how much the employer contributes in relation to each female employee's contribution. It is unclear whether the employer's extra contribution per female equals the disparity between the contributions between the male and female employees. This question might be asked, just to be sure we have the facts straight.)

This set-up is relevant to the legal analysis because it may determine whether the Equal Pay Act applies. If this were a non-contributory plan (in which the employer would fund the plan entirely without any contributions from employees), and if the wages paid male and female employees were equal even though the monthly pension benefits were not, it is not clear that the Equal Pay Act would apply. If the Equal Pay Act were not applicable, exception (iv) to the Equal Pay Act might not be applicable; and it is that exception that is incorporated into Title VII through the Bennett Amendment. This point will be discussed below. The important point for now is that the Department's plan operates by requiring women to forego a greater portion of their "current income" (wages) than men. The result in this case, therefore,

If non-contributory, result might differ

Because Plan is Contributory

might differ from the result in a case where the pension plan operated without deducting differential amounts from the wages of men and women. (As discussed infra, I have concluded that the result in a particular case should not turn on whether the discrimination affects wages paid (or contributions required) or benefits received; but it is at least arguable that there is such a distinction.)

Another important fact in this case is that the pension plan does not divide employees by any other predictive factor than gender. This is a narrower (and somewhat easier) case, therefore, than one in which many predictive factors are used to group employees with others exhibiting similar risks.

Finally, it is importatnt to note that this is a group plan. This factor explains the relative breadth of the predictive grouping because part of the rationale of group insurance is that accurate predictions about the longevity of the individual participant are not as important as when an individual buys insurance. Especially with a large enough group, the individual differences tend to average out.

III. Basic Application of Title VII

Under basic Title VII principles, this seems like an easy case. Women receive less money than men in take-home pay, simply because they are women. It would also seem that the Equal Pay Act is violated, because that Act requires that wages be equal. In determining whether

wages are equal, one only counts money that is "free and clear" and can be used immediately. Money invested by the employer in a pension plan would not qualify as wages. ??

Similarly, it would seem that a plan in which women received lower monthly pension benefits also would violate Title VII, regardless of whether contributions to the fund were made by the employees (men and women in equal amounts) or by the employer. (It is not as clear that this situation would come under the proscription of the Equal Pay Act because, as noted above, that Act applies only to wages and probably does not concern pension plans or other fringe benefits at all.)

The plan in the instant case seems to violate Title VII for the following reasons: It is an explicitly sex-based classification. Petrs argue that the distinction between men and women is not based on sex per se but rather on longevity, but this is not correct. If the predictive groupings were based on a wide range of factors relevant to mortality (e.g., age, build, physical condition, personal history, military service, family history, occupation, habits, morals, gender, residence, and hobbies), so that an individual's own risk of outliving his/her savings were predicted in the same manner as it would be if the individual purchased an individual annuity, then it could be argued that the risk classification was based on longevity and not gender. (I cannot prejudge at this point whether it would violate Title VII to include gender among other relevant mortality factors in determining what an

individual's contribution to, or benefits from, a plan should be, in the group insurance context or in the individual insurance context. The latter, of course, is not covered by Title VII at all as of now; in the former, it would defeat part of the purpose of group insurance to group participants into such particularized-risk sub-groups.)

Here, on the other hand, gender has been substituted for longevity as the relevant criteria. It is the sole indicator of longevity that has been employed. Under traditional Title VII principles, this use of gender per se as a substitute for other predictive factors clearly would be illegal.

Is this true? What other identifiable criteria are an indicator of longevity?

Since this case involves an explicit distinction based on gender, it is unnecessary to look for disparate impact. The discriminatory impact falls exactly along gender-based lines: all women assume the burden of financing the few women who will live longer, even though the majority of men and women live the same length of time and therefore will require the same number and amount of monthly pension payments; and all men receive the benefit of lower contributions (in this case) or higher monthly benefits (in a case of equal contributions) simply because some men die young. The only women who are not prejudiced by this arrangement are those who happen to live long enough to benefit from "extra" pension payments; and even they, in effect, are no better off than the men who live an average man's life-span. (See p. 16, infra.)

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Do they ?

It should be noted at this point that the two sides in this case have interpreted the statistics about relative male and female longevity quite differently. Petrs and their supporting amici argue that the relevant and correct comparison is by "order of death". See TIAA brief at 25 n. **. Under this comparison, by which each male and female who dies is given a number in order of death, the male in the matched pair always will be younger than the female in the pair. Respondents and their amici, on the other hand, emphasize the overlap in male and female ages of death. This overlap shows that about 80% of males and females share common death ages, with 20% of the males dying younger and 20% of the females dying older. See SG's brief at 17 n. 13; UAW brief at 14 n. 3. The latter comparison is more accurate because:

> "In the present context, the relevant consideration is age at death, not order of death. Retirement benefits are paid for the number of years one lives after retirement, so that a person's age at death is a measure of the total amount of money the fund will pay to that person. The order in which people die does not affect the amount of money each beneficiary receives, in total, from the fund."

UAW brief at 14 n. 3 (emphasis in original).

The critical question is whether the fact that women, on the average, live longer than men, on the average, justifies the greater burden placed on all women (either in terms of lower present income or lower future monthly income). (The separate question whether resps have failed to make out a prima facie case of discrimination, supposedly because men and women receive "actuarially

equivalent" benefits from the plan, will be discussed infra along with the relevance of General Electric v. Gilbert.) This is where the concepts distinct to insurance come into play. In terms of their legal significance, the special attributes of insurance must qualify as a "business necessity" if they are to constitute a defense to a prima facie Title VII violation. The only other possible relevance of the insurance factors would be to a "BFOQ" (bona fide occupational qualification) defense. That defense is not applicable outside of the hiring or assignment context, and would not make sense in the present context.

Petrs and the insurance amici argue, for several reasons, that it is proper to treat women as a group in the insurance context when it might not be proper (and would violate Title VII) in other contexts. Their arguments are best answered in the brief of the UAW and AFL-CIO, at 27-39, and in the SG's brief at 22-31. Essentially, the arguments break down into three categories: (1) rationality, (2) economics, and (3) subsidization.

(1) Rationality: Petrs and the insurance amici argue that insurance principles require that relative risks of different groups be taken into account to determine how much funding is necessary in order to have enough money to continue paying monthly benefits during the lives of all the participants. Since it is known that women as a group live longer than men as a group, it would be irrational to ignore this distinction. There are two answers to this point.

First, dividing individuals into groups according to risk is less critical in the context of group insurance than individual insurance. In group insurance, and especially with a large group, the differing risks of the individual participants tend to average out. Part of the reason for having group insurance is that it provides coverage for individuals who otherwise would have a hard time obtaining insurance at a reasonable rate in the private, individual insurance market. (The UAW and AFL-CIO explain that this is why group insurance is less expensive to the individual participants and why unions are more concerned with getting good pension plans than higher wages, which could be invested in individual annuities.) For this reason, group insurance usually is not broken down into the various actuarial categories that would be used if an individual were to purchase insurance. In the Department's plan, for example, no effort is made to divide employees into the various categories that would be employed by a private insurer. See UAW/AFL-CIO brief at 27 & n. 17. The UAW and AFL-CIO do not concede that the use of gender would be acceptable if other criteria also were used; their point is that it is no less rational to exclude gender as a factor in assessing contributions than it is to exclude other widely accepted predictive factors. This observation is confirmed by the fact that most plans do not differentiate on the basis of gender either in assessing contributions or in determining monthly benefit levels. See Actuaries' brief at 18.

Second, it is far from clear that a plan must use differentiated contribution levels in order to use separate mortality tables for predictive purposes. In other words, the plan could use two separate mortality tables to determine how much funding the plan would require without requiring differential contributions. (The objection to this method on the ground that men would subsidize women will be discussed below.) As stated in the UAW/AFL-CIO brief, at 29:

> "But the fact that it is useful to take sex as well as other factors into account in determining the benefits available to the entire group for a given cost, or the cost for given benefits, certainly does not indicate that benefits or costs, once determined, must be distributed by sex as well, or that it is 'irrational' not to do so. Indeed, . . . it is the essence of group insurance, as opposed to individual insurance, that, to the degree possible, all members of the group be offered equal benefits at equal cost."

The SG's brief also accepts the validity of using gender-based mortality tables for prediction but not for contribution requirements. This sounds feasible; you might want to ask counsel for both sides whether they would foresee any practical problem in using gender-based mortality tables for one purpose but not the other.

(2) Economics: The economic argument is that it is essential to take gender into account in distributing costs and benefits in pension plans because "[i]f individuals are forced to pay premiums which subsidize other persons' risks that are substantially greater than their own . . . they will eventually withdraw from the pool." TIAA brief at 6; see Life Ins. Council brief at

46. For purposes of argument, resps and supporting amici accept that this may be the case when dealing with individual insurance. (The UAW and AFL-CIO note, however, that it is not clear why it is so critical to make distinctions on the basis of gender and not other factors equally relevant to longevity. You might want to ask how significant gender is as a predictor of longevity as compared to other factors.) But in a group pension plan, many people who are more likely to die early pay for the risks of people who can expect to live longer and therefore probably will get more benefit payments (blacks for whites, smokers for non-smokers, unhealthy people for healthy people). Adverse selection will not occur in the group insurance context, because these plans usually are mandatory and would not work if they were not mandatory--because persons with lower risks would go elsewhere to obtain cheaper coverage. The possibility that groups will self-select (i.e., largely male workforces will self-insure rather than join insured plans) is not significant, because (a) there is no harm in that, and (b) it usually will not happen, because the insurer offering the plan can take into account the gender-composition of a particular employer's workforce in determining what the desired level of coverage will cost.

(3) Subsidization: This argument is similar to the economic argument above, but it emphasizes the equitable considerations instead of the economic effect of having some individuals "subsidize" others' risks. Here,

as in the rebuttal to the economic argument, it must be recognized that all sorts of subsidization takes place in the group insurance or pension context. Two examples, in addition to the examples cited above in the economic context, include "the practice of providing survivor's benefits at no extra cost to the employee" (which requires single employees to subsidize married employees) and "the recent negotiation of plans providing for full, or nearly full, retirement benefits after a specified number of years of service, regardless of age. Under such plans, persons who begin working at a young age receive benefits actuarially superior to those who begin working later, for they can receive benefits for many years longer." UAW/ AFL-CIO brief at 38 n. 27. If it is not discriminatory for all of these other subsidizations to take place--"indeed, if this pooling of higher and lower risks is the central advantage of group employee pension plans"--it is hard to "perceive any inherent inequity if the same process occurs between men and women." Id. at 39.

Indeed, the latter probably sounds more inequitable to us only because we are accustomed to thinking in gender-based terms, and recognition of differences between men and women seems very natural. But since gender is an immutable characteristic, like race, and prima facie is ~~an~~ invalid classification under Title VII, while factors such as smoking are not, it would make more sense in terms of the purposes of Title VII to resort to factors other than gender as a basis for group subsidy before resorting to that inherently suspect factor.

what factors

One commentator has countered the subsidy argument by saying that under a plan in which neither contribution nor benefit levels were determined by sex, "male retirees would not subsidize women; they would merely lose the advantage of classification in a group determined by sex." Bernstein & Williams, Title VII and the Problems of Sex Classifications in Pension Programs, 74 Colum. L. Rev. 1218, 1222 (1974).

I think my view of the case might have been different if the statistical correlation between living longer and being female were great. But the fact that over 80% of men and women share common death ages means that the vast majority of women are bearing the burden of supporting those women fortunate enough to live longer, and the vast majority of men reap a windfall from the fact that some unfortunate men will die young. The inequity of this situation is that whether an individual reaps a windfall or bears a burden depends solely on the accident of gender.

The fact that men are burdened equally in the context of life insurance premiums is no answer. At first the fact that the actuarial facts of life seem to present a double-edged sword seemed to belie the existence of any discrimination. But in Stanton v. Stanton, 421 U.S. 7, the Court held unconstitutional a Utah statute establishing different ages of majority for men and women. In that case the woman was harmed by being declared an adult at age 18, for she lost her right to support payments from her father. But in other respects the woman was benefited by

becoming an adult at 18 rather than 21. The fact that the gender-based rule cut both ways, sometimes benefiting men and sometimes women, did not prevent the Court from concluding that it was a classification without rational basis.

Finally, I do not think an affirmance in this case is precluded by General Electric v. Gilbert. In one sense, the two cases are quite similar. Both involve a claim by women that they are entitled to a benefit that men would not receive because of a physiological factor unique to women. It could be argued, on the basis of Gilbert, that an employer has no obligation under Title VII to spend more money for his female employees simply because they live longer than men on the average, just as the employer in Gilbert was not obliged to spend more for his female employees by covering them for pregnancy.

But the differences between the two cases are more apparent than the similarities. Gilbert involved a case of disparate impact, whereas this is a case of an explicitly gender-based classification that operates to the detriment of most women. Second, Gilbert involved a factor completely unique to women, whereas the instant case involves a factor (longevity) that does not differ for the vast majority of men and women. While no man can become pregnant, many men live as long as many women. Third, pregnancy was a specific risk not covered in the General Electric plan, while all other risks common to men and women were covered. The Gilbert opinion quoted

from Geduldig v. Aiello, 417 U.S. 484, 496-97:

> "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."

Gilbert, slip op. at 9 (emphasis supplied).

The inquiry into aggregate risk protection was undertaken in Gilbert only after the Court found a facially neutral scheme, and it is argued that the same inquiry is unnecessary in this case because the plan is facially discriminatory. See, e.g., SG's brief at 20 n. 16. ("[T]he aggregate analysis of class risks and benefits has no place in a case challenging explicit sex discrimination. Aggregate analysis may be a useful tool in demonstrating whether facially neutral plans in fact have a gender-based effect [citing Gilbert and Satty]. However, this Court has never suggested that explicit discrimination on the basis of sex or race can be justified by a showing of offsetting benefits to the racial or sex class.") Although the SG's point is arguable, it is also arguable in this case that the actuarial benefit to women is the same as to men, and therefore that there is no discrimination, although there is differentiation. In other words, even though women contribute more and therefore have less take-home pay, they (as a class) receive more than men in benefits.

Even accepting the applicability of the test as stated in Gilbert, it seems to me that the Department's

plan imposes on women a risk not imposed on men--the risk of having inadequate current income after retirement. The whole purpose of the pension plan is to guarantee retirees a certain level of monthly income. In the case of a plan where women and men make equal contributions but receive unequal monthly benefits, even the women who live to a ripe old age have not had the benefit of the same amounts of money, on a current basis, as the men. In view of the purpose of a pension plan, it does not seem satisfactory to say that the woman has received the "actuarial" equivalent of the man, when the man was not deprived of anything by not receiving more money after he died. If the risk is that one will not have enough money to live on after retirement, then the woman who receives smaller monthly paychecks, even for a longer time than a man, is not equally protected against the very risk insured against. The same is true, in slightly different particulars, when the woman must give up more of her current paycheck in order to assure herself a monthly pension payment equal to a man's. And of course for the majority of women who do not outlive their co-workers, even the actuarial benefit is absent.

A helpful comparison between Gilbert and the instant case is suggested in the UAW brief at 23:

> ". . . Gilbert would be parallel to the present case only if the General Electric Company had covered pregnancy, but had provided all women with benefits at a lower level than men because of the extra risk of disability then presented by women as a group. In that event . . . , the 'actuarial equality' on a group basis could not obscure the

> fact that, among non-pregnant persons, only women, and not men, would be paying the disability costs of pregnant women."

If women were given the choice of having pregnancy coverage at an extra cost, that would be one thing; but it would not be fair to charge only women and not men for the added cost of pregnancy coverage if many of the women would never become pregnant, simply because there was a greater chance of women becoming pregnant than men. And the instant case is an even stronger case, because men cannot become pregnant, whereas the majority of men die as young as the majority of women.

IV. Legislative History

The legislative history is particularly unhelpful because the prohibition of sex discrimination was not given much consideration when Title VII was enacted. Two elements of legislative history on related and subsequent matters, however, support the view expressed thus far in this memo. (See also p. 23, infra.)

First, one of the reasons for not including a prohibition of age discrimination in Title VII was that Congress was concerned about affecting pension plans which generally discriminate on the basis of age. As we know from United Airlines v. McMann, Congress exempted bona fide retirement plans from the strictures of the Age Discrimination in Employment Act. One of the main reasons for doing so was to take away the disincentive to hiring older workers that would have existed if employers had been

required to include them, on an equal basis, in participation in pension plans. The same argument has been made with respect to women (i.e., that employers would be disinclined to hire women if they had to be included in pension plans on an equal basis, despite the higher cost of providing benefits for women as a class); yet Congress did not exempt pension plans from Title VII. This could simply indicate, however, that Congress was not as aware of the pension problems with respect to women as with older people.

On the other hand, there was a proposal in 1970 (the Esch Amendment) to incorporate in Title VII an exemption similar to the one in the ADEA. The amendment would have provided: "[I]t shall not be an unlawful employment practice to observe a pension or retirement plan, the terms or conditions of which . . . provide for . . . reasonable differentiation between employees, provided that such pension or retirement plan is not merely a subterfuge to evade the purposes of this title." See UAW brief at 41-42. This proposal was abandoned in committee after Congresswoman Griffiths wrote to the committee explaining why the amendment would be contrary to the premises of Title VII. The Congresswoman did not address the problem at issue here in specific terms, but this sequence of events lends support to the view that Congress did not intend to exempt pension plans from principles otherwise applicable under Title VII.

The other bits of legislative history addressed by the parties are the Bennett Amendment and the Humphrey-Randolphy colloquy.

The Bennett Amendment provides that Title VII does not prohibit anything authorized by the Equal Pay Act. The Equal Pay Act exempts from its strictures wage differentials 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". Petrs argue that the wage differential in this case is based on longevity, which is a "factor other than sex" within the meaning of exception (iv) and therefore is permitted under the Bennett Amendment.

The premise of petrs' argument is that the average longevity of women is a factor other than sex. I share the CA's view that this is ridiculous: the differential here

> "is based upon a presumed characteristic of women as a whole, longevity, and it disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that the difference is not based on sex is to play with words."

Perhaps if the plan measured longevity by several relevant factors, even including sex, it could be said that the differential was based on a factor other than sex. But when gender is used as the only indicator of longevity, it is hard to see how this can be a gender-neutral factor. Petrs argue that sex has to have some part in the exception (iv) factor, because otherwise the differential could not be attacked in the first place as a sex-based classification. This contention ignores the existence of cases of disparate impact. If persons who are often absent

are paid less, then the lower salary would be excepted under exception (iv) even if it turned out that women are absent more often than men (as long as placing a penalty on absenteeism was not being used as a pretext for sex discrimination). On the other hand, women could not be paid less simply on a finding that, on the average, women were more guilty of absenteeism, because then being a woman, rather than being absent often, would trigger the penalty. And being a woman is not a factor other than sex.

V. Administrative Regulations

The regulations interpreting the Equal Pay Act (by the Wage and Hour Administrator of the Department of Labor) and Title VII (by the EEOC) are conflicting. Furthermore, the EEOC has changed its position, and the Labor Department presently is considering changing its position. The interpretation of the Labor Department cited by petrs and their amici does not even apply, technically, to the facts of this case. In view of all this administrative confusion, I tend to think the Court would be ill-advised to rely too heavily on any of the administrative positions on this issue.

The conflicting regulations are cited in the brief of the ACLU and AAUP, at 6-7. The most recent EEOC guideline provides: "It shall not be a defense under title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." It is not clear that this "guideline"

would apply to the facts of this case, where the monthly benefits are equal, but only because females have to make higher contributions (which are matched by the employer). If the employer paid for all the funding of a plan that paid equal monthly benefits to males and females, I doubt that anyone (including the males) would have a Title VII claim. All the employees would be equally protected against the risk of a retirement without adequate income. The reason the females in the instant case have a Title VII claim is because they must forego part of their present income to obtain this equal future benefit.

The Wage and Hour Administrator's interpretive bulletin is found at 29 C.F.R. §§ 800.116(d) and 151. These provisions seem to conflict. Section 800.116(d) provides:

> "If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d) [the Equal Pay Act], if the resulting benefits are equal for such employees."

The first sentence would seem to permit an employer to make equal contributions to a pension plan, which would result in lower monthly payments for women if gender-based actuarial tables were used for payments, without violating the Equal Pay Act. This makes sense in view of the fact that that Act is not concerned with fringe

benefits and other terms and conditions of employment; it is concerned with equal pay for equal work. When pay that otherwise would go into the employee's pocket goes into a pension plan, there probably is no violation of that Act. The second sentence would cover this case if the plan were wholly employer-funded and did not require differential contributions by male and female employees. The interpretive bulletin does not address this problem. Since the result in terms of the employee's paycheck is that women go home with lower wages, it is not surprising that that possibility is not also listed as permissible under the Equal Pay Act.

Section 800.151 deals with the problem of greater cost to an employer in employing employees of one sex or the other. It says:

> "A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group does not qualify as a differential based on any 'factor other than sex,' and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. 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 purposes 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 . . . ."

Since the Department's sole justification for deducting a greater amount from women's wages than from men's is the greater cost, on the average, of providing equal monthly pension benefits to women, it would seem to be considered

prohibited under the Equal Pay Act by the Wage and Hour Administrator.

Furthermore, this view is consistent with the view of the Congress that passed the Equal Pay Act. That Congress considered the problem, brought to its attention by employers, of the higher cost of employing women, primarily in terms of pension and welfare benefits. The Committee Report, excerpted in the UAW brief at 58-59, rejected this argument as justification for paying women lower wages. It is worth reading the excerpt in its entirety; its conclusion was that the Secretary of Labor could grant exceptions similar to that contained in a bona fide seniority system for an employer who could show that "on the basis of all of the elements of the employment costs of both men and women, [the] employer will be economically penalized by the elimination of a wage differential . . . ." The employer could not justify a wage differential solely on the basis of higher pension costs for women.

VI. Conclusion

The available evidence suggests that differential wage payments for men and women, in order to fund equal monthly pension benefits, violates both Title VII and the Equal Pay Act. Although not directly relevant to the instant case, it seems to me that the provision of differential monthly benefits for men and women in a plan funded wholly by the employer or by equal employee

contributions also would violate Title VII, but perhaps not the Equal Pay Act. (This would not be because the differential is authorized by the Equal Pay Act within the meaning of the Bennett Amendment exception to Title VII, but rather because pension benefits themselves are not covered by the Equal Pay Act.)

Despite this evidence, and the straightforward concept that a classification that is based explicitly on gender and results in economic detriment to individual women is prohibited by Title VII, I am troubled by the nagging feeling that accurate actuarial classifications do not sound like the kind of "discrimination" Congress intended to prohibit. Yet Congress made the exception for bona fide retirement plans in the ADEA, and could have done the same thing in Title VII, either in 1964 or in 1970 when such an amendment was proposed.

Title VII does not apply to insurance plans unconnected with employment, so an affirmance in this case would not affect private insurance arrangments that involve classification of insureds on the basis of many factors, including gender. And it makes sense that non-group insurance should be able to take advantage of all possible methods of assigning risks accurately and charging customers in accord with their respective levels of risk. Since the individual assignment of risk seems to play a very unimportant part in group plans, an affirmance here should not have a massive effect.

I have not discussed the appropriate form of relief. The parties devote very little attention to it, and I thought I would wait for your reaction on the merits before considering whether the amounts over-paid by the women should be refunded to them.

N.J.B.

76-1810 CITY OF LOS ANGELES v. MANHART Argued 1/17/78

Decided on Respr summary judg-
ment here. Respr conceded accuracy of Tables
& good faith of City.
Suit under Title VII.

Oliphant (City atty - L/A)

CA 9 ignored Gilbert + the plain language. Also ~~was~~ contrary to Manhattan Gas v Satty

For purists:

No discrimination. Same gross salary. Funding has to be on group expectancy - no other way.

At all ages - especially at retirement age - expectancy of women is longer

Congress intended to treat sex differently from race as to compensation. Bennett Amend incorporates Equal Pay Act as to Pension.

If a single Table is used for both sexes, the men will subsidize women.

Treatment here was actuarially - factually - equal.

Oliphant (cont.)

The City contributes the same for men & women — Here women actually are fed. more. Retirement income is compensation. Viewing compensation in terms of "lifetime", women come out better — including the City's contribution.

If pension plan were abolished but same gross pay continued, the women would pay more than men for annuities

Dohrmann (Resp.)

Explicit sex discrimination.

Most plans in U.S. do not make this discrimination.

"Women on average live longer than men".

~~Question~~

In groups inv. not feasible to make individual judgments.

→ Conclusive presumption that each woman will live longer than each man

MEMORANDUM TO MR. JUSTICE POWELL

FROM: Nancy Jan. 20, 1978

RE: No. 76-1810, City of Los Angeles v. Manhart

I see two-and-a-half possible ways of making the decree in this case non-retroactive:

(1) Under the Albemarle standard. In Albemarle, the CA had held that the standard for awarding backpay is the same as the standard for awarding attorney's fees under Title II of the Act: "Thus, a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust." This Court stated that the Newman v. Piggie Park standard was not directly in point, because the purpose served by the award of attorney's fees in Piggie Park could also be served by awarding attorney's fees under Title VII. Instead, this Court looked to the "make-whole" purpose of Title VII; and it rejected the district court's views that the employer's lack of "bad faith" and the plaintiffs' failure to ask for back pay at the beginning of the lawsuit (resulting in prejudice

to the employer) should not preclude an award of back pay. Evaluating the purpose of Title VII, the Court held: "[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421. On the bad faith point, the Court said: "the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor. If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries." Id. at 422.

Here, it could be argued that discrimination in pension plans is not at the core of employment discrimination, and, even if a violation, is a very subtle form of violation. Thus a refusal to award backpay would not "frustrate the central statutory purposes". I am not sure I like this approach, however, because it may be insonsistent with the Albemarle Court's emphasis on the make-whole purpose of the statute. If the Court holds there is a violation of Title VII here, then there is a strong arguments that plaintiffs should be made whole.

As to the bad faith point, here the employer has shown

affirmative good faith in matching the higher contributions of the women employees. (The employer paid 110% of each man's and each woman's contributions to the plan.) Furthermore, if the standard adopted by the Court in Albemarle would result in back pay less frequently than the Piggie Park standard for attorney's fees (a point about which I am not sure), then perhaps here it could be said that there are "special circumstances [that] would render such an award unjust." The unjustness would come from the fact that the employer has not benefited, economically or otherwise, by requiring higher contributions from the female employees. The ones who really have benefited are the male employees who, up 'til now, have been paying lower contributions than they would have if men and women equally shared the burden of funding the plan. I am not sure how far this point can be taken, however. It might be argued that in the classic employment discrimination situation where an employer pays his white employees more than his black employees who perform the same work, the persons who have benefited are the white employees. (This assumes that the employer would have paid whites less and blacks more, if he had had to pay them equally,

rather than that they employer would have raised the black pay rate to that of the whites.) Yet in that situation, the courts have required back pay from the employer, without imposing any penalty on the white employees. When the Court confronted the ~~xix~~ situation of possibly penalizing white employees (in the seniority/layoff context), it ruled that the whites could not be penalized/ for the employer's discrimination, even if they had received the benefit of that discrimination.

The situation here may be unique, however, because of the specific nature of a pension plan. Some employees already have retired and have been drawing benefits. The courts cannot go after their money. Even with respect to the employees who are still working and contributing to the plan, there may be problems of vested interests in a certain level of benefits for a certain level of contribution. Because we know very little about this, the best course might be to remand to the district court for it to figure out whether there are special circumstances that would render the award unjust, not feasible, or otherwise inappropriate. Much more thought would have to be given to this option, though, to make sure that it would not conflict with, or undermine, the law on back pay in more traditional employment discrimination situations. (I know that you are not happy with Albemarle, but unless your Brethren want to cut back on it, it has to be dealt with.) I think the most promising route is to focus on the uniqueness of pension plans (with their vested rights, etc.), and to remand to the district court to consider whether awarding back pay in this context somehow

would be unjust.

(2) Statutory defense. 42 U.S.C. § 2000e-12(b) provides:

> "In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission . . . ."

I take it that this defense is a defense to the imposition of liability, and not a defense to prospective (injunctive) relief. Otherwise a court could not rule contrary to an administrative interpretation of the statute.

Here the employer could not claim reliance on an EEOC regulation per se, but he could claim that he relied on the interpretations of the Wage and Hour Administrator (Dept of Labor) of the Equal Pay Act, one of whose defenses is incorporated into Title VII through the Bennett Amendment. This is shaky ground for two reasons. First, the bulletin of the Wage and Hour Administrator does not address the factual situation here (requiring women to make higher contributions to a plan out of their paychecks). As I mentioned, the bulletin (a copy of which is attached) only addresses situations where the employer has made unequal contributions to a plan or equal contributions that will result in lower monthly benefits to retired women. In neither situation are lower wages for women involved. It could be argued that these employer actions do not violate the Equal Pay Act

because they do not come within its scope, not because they are authorized exemptions to the Act. In x my view, the Bennett Amendment would not make these employer actions legal under Title VII because they simply are not within the scope of the Equal Pay Act.

Yet, as you pointed out, an inference could be drawn from these regulations (especially by non-lawyers) that all differential treatment of men and women in pension plans is legal, in the view of the Wage and Hour Administrator. Still, I am not sure how far I'd want to go in allowing an employer to assert,as a defense to back pay, his reliance on administrative bulletins that may not even be applicable. This is especially a problem in view of the fact that the statutory provision quoted above refers only to interpretations by the EEOC. Early in Title VII's history, the EEOC did promulgate ~~regulations saying~~ guidelines saying it would follow the Labor Dept's interpretations, but this is one step removed from an interpretation of the EEOC itself. I would have to look into this more closely.

(3) This is the half-possibility. There is that language I pointed out to you in 42 U.S.C. § 2000e-5(g): "If the court finds that the employer has intentionally engaged . . . in an unlawful employment practice . . . , the court may~~enjoining~~ issue an injunction or ~~take such~~ order other affirmative action, including back pay. This requirement of intent will not get us very far, however, because it applies equally to injunctive relief as to back pay. It seems to

mean only that the employer's conduct must be more than accidental.

* * * * * *

I don't think it would be easy to make this award non-retroactive, partly because of the fact that an award here would be more like restitution of funds wrongfully withheld than is the case in most other back pay situations. Here the female employee already has performed the work, received payment, and been required to give back some of the money in the form of a higher contribution to the pension plan. Resps make a strong argument that they have more equity on their side than the employee who has been fired or not hired, and receives reinstatement and back pay. The only possible way out would be based on the specific characteristics of a pension plan -- the idea that the overpayments could not be taken out of the plan without infringing the vested rights of the plan's male (and female) participants. Yet it is unclear why the employer should not be required to give the women their overpayments back (rather than taking the money out of the fund), as would be the case in a standard employment discrimination case. It would be unfair --and probably impractical--to require the present male employees to make higher payments to make up for their lower payments in the past. It would be wrong to penalize the present employees, when it was the older (and perhaps now retired) employees who received the greatest benefit.

I think these things should be considered by the district court (which does not discuss this problem) in the first instance (but of course with some guidelines from this Court). The district court awarded back pay only from the date of the EEOC regulation in 1972, but it did not explain why. My guess would be that the employer asserted reliance on the regulations of the Wage and Hour Administrator before then.

Just as a final remark, it should be noted that the retroactivity problem in this case is less troublesome than will be the retroactivity problems in cases involving certain other kinds of pension plan. The Society of Actuaries informs us that this kind of plan--where men and women made different contributions for equal benefits--is very rare. Many plans do not discriminate in contributions or benefits. But the real problem would occur with respect to plans where the contributions are equal but the monthly benefits are unequal. I cannot imagine that a court would want to award retroactive benefits to women who, up 'til now, have been getting lower monthly paymants. Here it probably is a misnomer even to call it "back pay". The Court should have this problem in mind when it rules on this case.

Nancy

File

76 – 1810

Albemarle - backpay may be denied only for reasons that, if applied generally, would not "frustrate the central statutory purposes"

This discrimination certainly was not deemed to be a "central statutory purpose.

Affirmative good faith here – matched the higher contributions of women.

Albemarle (+ Piggie Park) said there are "special circumstances that would render award unjust"

Can rely on Albemarle to sustain non-retroactivity.

(Note for Conference

Affirmed (prospectively) 4 - 3

76-1810 CITY OF LOS ANGELES v. MANHART Conf. 1/20/78

The Chief Justice Reverse (tentative)

Q is whether VII (of 14th Amend) requires a unisex plan.

Mr. Justice Brennan

Absent

Mr. Justice Stewart Affirm (not retroactively)

As to take home pay, treatment is different. The Plan does not come under Equal Pay Act. Clearly not a BFOQ exception.

Altho case is extremely close, concludes Title VII is violated.

But not to apply retroactively. It would be inequitable. The employer has been contributing as much for women as for men. This is one of rare cases where back pay is not warranted. Can deny retroactive relief + sustain only injunctive relief under Albermarle.

Mr. Justice White Affirm

Under Title VII must treat employees as "people" - not as men & women.

x x x

(After PS & I address the retroactivity issue, Byron said he could go along with us on this.)

Mr. Justice Marshall affirm 1/23/78

Absent - but will vote by memo

(Sum & sheet)

Mr. Justice Blackmun Reverse

Best briefs are by Lefkowitz. COS.

Burden of proof was on plaintiffs.

The classifications here was neutral, and life expectancy is legitimate basis.

Mr. Justice Powell Affirm (Prospectively)

The Plan does classify on basis of sex. The Q is whether the classifications is discriminatory. Close question for me. Viewed as a group there is no discrimination. But viewed individually, a woman ~~~~ who dies before or at same age as a man doing same work, the woman is penalized.

I agree generally with PS & Byron but only prospectively. Sustain injunction but reverse as to "back pay".

Mr. Justice Rehnquist Reverse

Agree with Harry.

Bennett Amend & Equal Pay Act are relevant.

Gilbert does not really control.

Justified in following precedent of insurance industry.

Mr. Justice Stevens Affirm

Congress should have validated this type plan. But it did it.

(No purposeful violation & could go along with non-retroactiveness.)

? John doesn't think men will have valid claim.

John has ideas as to what should be said in opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 23, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1810, City of Los Angeles v. Manhart

I vote to affirm the judgment of the Court of Appeals. There is no question that Los Angeles distinguishes among its employees based on their gender; the take-home pay of women employees is lower than that of men employees solely because the women are women. The argument that women are required to contribute more because they live longer does not make sense as applied to any individual woman, since there is no way to know how long she will live. We might have a different case if gender were just one of several factors affecting longevity that the City considered in fixing pension plan contributions, but when it is virtually the only factor considered we have a classic case of sex discrimination.

I will reserve judgment for the moment on the issue of the validity of the "refund" ordered by the District Court with regard to excess contributions since 1972. While I understand the concern about disrupting ongoing pension planning, the case seems difficult to distinguish from ones in which we have upheld back pay awards. Indeed, the case is in some ways a stronger one for retroactive relief than the back pay cases, since respondents had actually earned the money that they now seek and since the City was theoretically holding the money in trust for their retirement.

T.M.

check p 7

LFP

Joins
Byron
Potter

: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: 3/24/78

2nd DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 76-1810

City of Los Angeles, Department of Water and Power, et al., Petitioners, v. Marie Manhart et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March —, 1978]

Reviewed
LFP
3/24
Will
join
only if
P 7 is
changed
,

MR. JUSTICE STEVENS delivered the opinion of the Court.

As a class, women live longer than men. For this reason, the Los Angeles Department of Water and Power required its female employees to make larger contributions to its pension fund than its male employees. We granted certiorari to decide whether this practice discriminated against individual female employees because of their sex in violation of § 703 (a)(1) of the Civil Rights Act of 1964, as amended.[1] We agree with the District Court and the Court of Appeals that the statute forbids the practice; we disagree, however, with the relief ordered by those courts.

For many years the Department[2] has administered retirement, disability, and death benefit programs for its employees.

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[1] The section provides:

"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 . . . ." 42 U. S. C. § 2000e-2 (a)(1).

[2] In addition to the Department itself, the petitioners include members of the Board of Commissioners of the Department and members of the plan's Board of Administration.

Upon retirement each employee is eligible for a monthly retirement benefit computed as a fraction of his or her salary multiplied by years of service.[3] The monthly benefits for men and women of the same age, seniority, and salary are equal. Benefits are funded entirely by contributions from the employees and the Department, augmented by the income earned on those contributions. No private insurance company is involved in the administration or payment of benefits.

Based on a study of mortality tables and its own experience, the Department determined that its 2,000 female employees, on the average, will live a few years longer than its 10,000 male employees. The cost of a pension for the average retired female is greater than for the average male retiree because more monthly payments must be made to the average woman. The Department therefore required female employees to make monthly contributions to the fund which were 14.84% higher than the contributions required of comparable male employees.[4] Because employee contributions were withheld from pay checks, a female employee took home less pay than a male employee earning the same salary.[5]

Since the effective date of the Equal Employment Opportunity Act of 1972,[6] the Department has been an employer within the meaning of Title VII of the Civil Rights Act of

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[3] The plan itself is not in the record. In its brief the Department states that the plan provides for several kinds of pension benefits at the employee's option, and that the most common is a formula pension equal to 2% of the average monthly salary paid during the last year of employment times the number of years of employment. The benefit is guaranteed for life.

[4] The Department contributes an amount equal to 110% of all employee contributions.

[5] The significance of the disparity is illustrated by the record of one woman whose contributions to the fund (including interest on the amount withheld each month) amounted to $18,171.40; a similarly situated male would have contributed only $12,843.53.

[6] Pub. L. 92-261; 86 Stat. 103 (effective March 24, 1972).

1964. See 42 U. S. C. § 2000e. In 1973, respondents[7] brought this suit in the United States District Court for the Central District of California on behalf of a class of women employed or formerly employed by the Department. They prayed for an injunction and restitution of excess contributions.

While this action was pending, the California Legislature enacted a law prohibiting certain municipal agencies from requiring female employees to make higher pension fund contributions than males.[8] The Department therefore amended its plan, effective January 1, 1975. The current plan draws no distinction, either in contributions or in benefits, on the basis of sex. On a motion for summary judgment, the District Court held that the contribution differential violated § 703 (a)(1) and ordered a refund of excess contributions made during the the period prior to the amendment of the plan.[9] The United States Court of Appeals for the Ninth Circuit affirmed.[10]

The Department and various *amici curiae* contend that: (1) the differential in take-home pay between men and women was not discrimination within the meaning of § 703 (a)(1) because it was offset by a difference in the value of the pension benefits provided to the two classes of employees; (2) the differential was based on a factor "other than sex" within the meaning of the Equal Pay Act and was therefore

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[7] In addition to five individual plaintiffs, respondents include the individuals' union, the International Brotherhood of Electrical Workers, Local Union No. 18.

[8] See Cal. Govt. Code § 7500 (West, 1977 Cum. Supp.).

[9] The Court had earlier granted a preliminary injunction. *Manhart* v. *City of Los Angeles, Department of Water and Power*, 387 F. Supp. 980 (CD Cal. 1975)

[10] *Manhart* v. *City of Los Angeles, Department of Water and Power*, 553 F. 2d 581 (1976). Two weeks after the Ninth Circuit decision, this Court decided *General Electric Co.* v. *Gilbert*, 429 U. S. 125. In response to a petition for rehearing, a majority of the panel concluded that its original decision did not conflict with *Gilbert*. *Id.*, at 592 (1977). Judge Kilkenny dissented. *Id.*, at 594.

protected by the so-called Bennett Amendment;[11] (3) the rationale of *General Electric Co.* v. *Gilbert*, 429 U. S. 125, requires reversal; and (4) in any event, the retroactive monetary recovery is unjustified. We consider these contentions in turn.

I

There are both real and fictional differences between women and men. It is true that the average man is taller than the average woman; it is not true that the average woman driver is more accident-prone than the average man.[12] Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid.

It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females.[13] Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less. This case does not, however, involve a fictional difference between men and women. It involves a generalization that the parties accept as unquestionably true: women, as a class, do live longer than men. The Department treated its women employees differently from its men employees because the two

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[11] See nn. 22 and 23, *infra*.

[12] See Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1174 (1971).

[13] "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703 (a) (1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past." *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (CA7 1971).

classes are in fact different. It is equally true, however, that all individuals in the respective classes do not share the characteristic which differentiates the average class representatives. Many women do not live as long as the average man and many men outlive the average woman. The question, therefore, is whether the existence or nonexistence of "discrimination" is to be determined by comparison of class characteristics or individual characteristics. A "stereotyped" answer to that question may not be the same as the answer which the language and purpose of the statute command.

The statute makes it unlawful "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." 42 U. S. C. § 2000e–2 (a)(1) (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

That proposition is of critical importance in this case because there is no assurance that any individual woman working for the Department will actually fit the generalization on which the Department's policy is based. Many of those individuals will not live as long as the average man. While they were working, those individuals received smaller paychecks because of their sex, but they will receive no compensating advantage when they retire.

It is true, of course, that while contributions are being collected from the employees, the Department cannot know which individuals will predecease the average woman. Therefore, unless women as a class are assessed an extra charge,

they will be subsidized, to some extent, by the class of male employees.[14] It follows, according to the Department, that fairness to its class of male employees justifies the extra assessment against all of its female employees.

But the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful. Actuarial studies could unquestionably identify differences in life expectancies of average members of groups defined by race or by national origin, as well as by sex.[15] But a statute which was designed to make race irrelevant in the employment market, see *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 436, could not reasonably be construed to permit a take-home pay differential based on a racial classification.[16]

Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices which classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals. The generalization involved in this case illustrates the point. Separate mortality tables are easily interpreted as reflecting innate differences between the sexes even though a significant part of the lon-

[14] The size of the subsidy involved in this case is open to doubt, because the Department's plan provides for survivors' benefits. Since female spouses of male employees are likely to have greater life expectancies than the male spouses of female employees, whatever benefits men lose in "primary" coverage for themselves, they may regain in "secondary" coverage for their wives.

[15] For example, the life expectancy of a white baby in 1973 was 72.2 years; a nonwhite baby could expect to live 65.9 years, a difference of 6.3 years. See Public Health Service, IIA Vital Statistics of the United States 1973 Table V–III.

[16] Fortifying this conclusion is the fact that some States have banned higher life insurance rates for blacks since the 19th century. See generally M. James, The Metropolitan Life—A Study in Business Growth 338–339.

gevity differential may be explained by the social fact that men are heavier smokers than women.[17]

Finally, there is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage. It is true that insurance is concerned with events that are individually unpredictable, but that is characteristic of many employment decisions. Individual risks, like individual performance, cannot be predicted by resort to classifications proscribed by Title VII. Indeed, the fact that this case involves a group insurance program highlights a basic flaw in the department's fairness argument. For whenever insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy; smokers subsidize pension benefits for nonsmokers; unmarried workers subsidize married workers.[18] Treating different classes of risks as though they were the same for purposes of group insurance is a common practice which has never been considered inherently unfair. Group insurers frequently treat smokers and nonsmokers as though they were equivalent risks; it is less common to treat men and women alike.[19] Only habit makes one "subsidy" seem less fair than the other.[20]

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[17] See R. Retherford, The Changing Sex Differential in Mortality 71–82 (1975). Other social causes, such as drinking or eating habits—perhaps even the lingering effects of past employment discrimination—may also affect the mortality differential.

[18] A study of life expectancy in the United States for 1949–1951 showed that 20-year-old men could expect to live to 60.6 years of age if they were divorced. If married, they could expect to reach 70.9 years of age, a difference of more than 10 years. R. Retherford, The Changing Sex Differential In Mortality 95 (1975).

[19] The record indicates, however, that the Department has funded its death benefit plan by equal contributions from male and female employees. A death benefit—unlike a pension benefit—has a lesser value for persons with longer life expectancies. Under the Department's concept of fairness, then, this neutral funding of death benefits is unfair to women as a class.

[20] A variation on the Department's fairness theme is the suggestion that

An employment practice which requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them was a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for the person's sex would be different." [21] It constitutes discrimination and is unlawful unless exempted by the Equal Pay Act or some other affirmative justification.

II

Shortly before the enactment of Title VII in 1964, Senator Bennett proposed an amendment providing that a compensation differential based on sex would not be unlawful if it was authorized by the Equal Pay Act which had been passed a year earlier.[22] The Equal Pay Act requires employers to pay

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a gender-neutral pension plan would itself violate Title VII because of its disproportionately heavy impact on male employees. Cf. *Griggs* v. *Duke Power Co.*, 401 U. S. 424. This suggestion has no force in the sex discrimination context because each retiree's total pension benefits is ultimately determined by his *actual life span;* any differential in benefits paid to men and women in the aggregate is thus "based on [a] factor other than sex," and consequently immune from challenge under the Equal Pay Act, 29 U. S. C § 206 (d); cf. n 24, *infra*. Even under Title VII itself—assuming disparate impact analysis applies to fringe benefits, cf. *Satty* v. *Nashville Gas Co.*, 46 U. S. L. W. 4026, 4028—the male employees would not prevail. Even a compeltely neutral practice will inevitably have *some* disproprortionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequence.

[21] See Developments in the Law: Employment Discrimination in Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1170; see also *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1205 (CA7 1971) (STEVENS, J., dissenting).

[22] The Bennett Amendment became part of § 703 (h), which provides in part:

"It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount

members of both sexes the same wages for equivalent work, except when the differential is pursuant to one of four specified exceptions.[23] The Department contends that the fourth exception applies here. That exception authorizes a "differential based on any other factor other than sex."

The Department argues that the different contributions exacted from men and women were based on the factor of longevity rather than sex. It is plain, however, that any individual's life expectancy is based on a number of factors, of which sex is only one. The record contains no evidence that any factor other than the employee's sex was taken into account in calculating the 14.84% differential between the respective contributions by men and women. We agree with

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of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6 (d) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. § 206 (d))." 78 Stat. 257; 42 U. S. C. § 2000e-2 (h).

[23] The Equal Pay Act provides, in part:

"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: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 77 Stat. 56-57.

We need not decide whether retirement benefits and withheld contributions are "wages" under the Act, because the Bennett Amendment extends the Act's four exceptions to all forms of "compensation" covered by Title VII. See n. 22, *supra*. The Department's benefit plan is "compensation" under Title VII. See, *e. g.*, *Peters* v. *Missouri-Pacific R. Co.*, 483 F. 2d 490, 492 n. 3 (CA5 1973), cert. denied, 414 U. S. 1002.

Judge Duniway's observation that one cannot "say that an actuarial distinction based entirely on sex is 'based on any other factor other than sex'. Sex is exactly what it is based on." 553 F. 2d, at 588.[24]

We are also unpersuaded by the Department's reliance on a colloquy between Senator Randolph and Senator Humphrey during the debate on the Civil Rights Act of 1964. Commenting on the Bennett Amendment, Senator Humphrey expressed his understanding that it would allow many differences in the treatment of men and women under industrial benefit plans, including earlier retirement options for women.[25]

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[24] The Department's argument is specious because its contribution schedule distinguished only imperfectly between long-lived and short-lived employees, while it distinguished precisely between male and female employees. In contrast, an entirely gender-neutral system of contributions and benefits would result in differing retirement benefits precisely "based on" longevity, for retirees with long lives would always receive more money than comparable employees with short lives. Such a plan would also distinguish in a crude way between male and female pensioners, because of the difference in their average life spans. It is this sort of disparity—and not an explicitly gender-based differential—that the Equal Pay Act intended to exclude from the concept of discrimination.

[25] "MR. RANDOLPH. Mr. President. I wish to ask of the Senator from Minnesota [Mr. Humphrey], who is the effective manager of the pending bill, a clarifying question on the provisions of title VII.

"I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing.

"Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law?

"MR. HUMPHREY. Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it." 110 Cong. Rec. 13663–13664 (1964).

Though he did not address differences in employee contributions based on sex, Senator Humphrey apparently assumed that the 1964 Act would have little, if any, impact on existing pension plans. His statement cannot, however, fairly be made the sole guide to interpreting the Equal Pay Act, which had been adopted a year earlier; and it is the 1963 statute, with its exceptions, on which the Department ultimately relies. We conclude that Senator Humphrey's isolated comment on the Senate floor cannot change the effect of the plain language of the statute itself.[26]

III

The Department argues that reversal is required by *General Electric Co.* v. *Gilbert*, 429 U. S. 125. We are satisfied,

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[26] The administrative constructions of this provision are not very enlightening. The Wage and Hour Administrator, who is charged with enforcing the Equal Pay Act, has vacillated. He has never approved different *employee* contribution rates, but he has said that either equal employer contributions or equal benefits will satisfy the Act. 29 CFR § 800.116 (d) (1976). At the same time, he has stated that a wage differential based on differences in the average costs of employing men and women is not based on a "factor other than sex." The Administrator's reasons for the second ruling are illuminating:

29 CFR § 800.151 (1976).

"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 purposes 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 than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill effort, and responsibility." *Ibid.*

To the extent that they conflict, we find that the reasoning of § 800.151 has more "power to persuade" than the *ipse dixit* of § 800.116. Cf. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140.

however, that neither the holding nor the reasoning of *Gilbert* is controlling.

In *Gilbert* the Court held that the exclusion of pregnancy from an employer's disability benefit plan did not constitute sex discrimination within the meaning of Title VII. Relying on the reasoning in *Geduldig* v. *Aiello*, 417 U. S. 484, the Court first held that the General Electric plan did not involve "discrimination based upon gender as such."[27] The two groups of potential recipients which that case concerned were pregnant women and nonpregnant persons. "While the first group is exclusively female, the second includes members of both sexes." See 429 U. S., at 135. In contrast, each of the two groups of employees involved in this case is composed entirely and exclusively of members of the same sex. On its face, this plan discriminates on the basis of sex whereas the General Electric plan discriminated on the basis of a special physical disability.

In *Gilbert* the Court did note that the plan as actually administered had provided more favorable benefits to women as a class than to men as a class.[28] This evidence supported the conclusion that not only had plaintiffs failed to establish a prima facie case by proving that the plan was discriminatory

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[27] Quoting from the *Geduldig* opinion, the Court stated:

"[T]his case is thus a far cry from cases like *Reed* v. *Reed*, 404 U. S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities." *Id.*, at 134.

After further quotation, the Court added:

"The quoted language from *Geduldig* leaves no doubt that our reason for rejecting appellee's equal protection claim in that case was that the exclusion of pregnancy from coverage under California's disability-benefit plan was not in itself discrimination based on sex." *Id.*, at 135.

[28] See 429 U. S., at 130–131, n. 9.

on its face, but they had also failed to prove any discriminatory effect.[29]

In this case, however, the Department argues that the absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex. But even if the Department's actuarial evidence is sufficient to prevent plaintiffs from establishing a prima facie case on the theory that the effect of the practice on women as a class was discriminatory, that evidence does not defeat the claim that the practice, on its face, discriminated against every individual woman employed by the Department.[30]

In essence, the Department is arguing that the prima facie showing of discrimination based on evidence of different contributions for the respective sexes is rebutted by its demonstration that there is a like difference in the cost of providing benefits for the respective classes. That argument might prevail if Title VII contained a cost justification defense comparable to the affirmative defense contained in § 2a of the

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[29] As the Court recently noted in *Nashville Gas Co.* v. *Satty*, No. 75-536, slip op., at 7, the *Gilbert* holding "did not depend on this evidence." Rather, the holding rested on the plaintiff's failure to prove either facial discrimination or discriminatory effect.

[30] Some *amici* suggest that the Department's discrimination is justified by business necessity. They argue that, if no gender distinction is drawn, many male employees will withdraw from the plan, or even the Department, because they can get a better pension plan in the private market. But the Department has long required equal contributions to its death benefit plan, see n. 17, *supra*, and since 1975 it has required equal contributions to its pension plan. Yet the Department points to no "adverse selection" by the affected employees, presumably because an employee who wants to leave the plans must also leave his job, and few workers will quit because one of their fringe benefits could theoretically be obtained at a marginally lower price on the open market. In short, there has been no showing that sex distinctions are reasonably necessary to the normal operation of the Department's retirement plan.

Robinson-Patman Act.[31] But neither Congress nor the courts have recognized such a defense under Title VII.[32]

Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund. 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 contributions could command in the open market.[33] Nor does it call into question the

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[31] 15 U. S. C. § 13. Under the Robinson-Patman Act proof of cost differences justifies otherwise illegal price discrimination; it does not negate the existence of the discrimination itself. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 44–45. So here, even if the contribution differential were based on a sound and well recognized business practice, it would nevertheless be discriminatory, and the defendant would be forced to assert an affirmative defense to escape liability.

[32] Defenses under Title VII and the Equal Pay Act are considerably narrower. See, *e. g.*, n. 30, *supra*. A broad cost differential defense was proposed and rejected when the Equal Pay Act became law. Representative Findley offered an Amendment to the Equal Pay Act that would have expressly authorized a wage differential tied to the "ascertainable and specific added cost resulting from employment of the opposite sex." 109 Cong. Rec. 9216. He pointed out that the employment of women might be more costly because of such matters as higher turnover or state laws restricting women's hours. *Id.*, at 9205. The Equal Pay Act's supporters responded that any cost differences could be handled by focusing on the factors other than sex which actually caused the differences, such as absenteeism or number of hours worked. The Amendment was rejected as largely redundant for that reason. *Id.*, at 9217.

The Senate Report, on the other hand, does seem to assume that the statute may recognize a very limited cost defense, based on "all of the elements of the employment costs of both men and women." S. Rep. No. 176, 88th Cong., 1st Sess., 4. It is difficult to find language in the statute supporting even this limited defense; in any event, no defense based on the *total* cost of employing men and women was attempted in this case.

[33] Title VII and the Equal Pay Act govern relations between employees

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.[34] Finally, we recognize that in a case of this kind it may be necessary to take special care in fashioning appropriate relief.

IV

The Department challenges the District Court's award of retroactive relief to the entire class of female employees and retirees. Title VII does not require a District Court to grant any retroactive relief. A court that finds unlawful discrimination "may enjoin [the discrimination] and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U. S. C. § 2000e–5 (g). To the point of redundancy, the statute stresses that retroactive relief "may" be awarded if it is "appropriate."

In *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, the Court reviewed the scope of a district court's discretion to fashion

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and their employer, not between employees and third parties. We do not suggest, of course, that an employer can avoid its responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to "any agent" of a covered employer, 42 U. S. C. § 2000e (d), and the Equal Pay Act applies to "any person acting directly or indirectly in the interest of any employer in relation to any employee." 29 U. S. C. § 203 (d). In this case, for example, the Department could not deny that the administrative board was its agent after it successfully argued that the two were so inseparable that both shared the city's immunity from suit under 42 U. S. C. § 1983.

[34] Title VII bans discrimination against an "individual" because of "such individual's" sex. 42 U. S. C. § 2000e–2 (a)(1). The Equal Pay Act prohibits discrimination "within any establishment," and discrimination is defined as "paying wages to employees . . . at a rate less than the rate at which [the employer] pays employees of the opposite sex" for equal work. Neither of these provisions makes it unlawful to determine the contribution rates of a group of employees by considering the group's composition.

appropriate remedies for a Title VII violation and concluded that "back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.*, at 421. Applying that standard, the Court ruled that an award of backpay should not be conditioned on a showing of bad faith. *Id.*, at 422–423. But the *Albemarle* Court also held that backpay was not to be awarded automatically in every case.[35]

The *Albemarle* presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the District Courts' duty to determine that such relief is appropriate. For several reasons, we conclude that the District Court gave insufficient attention to the equitable nature of Title VII remedies.[36] Although we now have no doubt about

[35] Specifically, the Court held that a defendant prejudiced by his reliance on a plaintiff's initial waiver of any backpay claims could be absolved of backpay liability by a district court. *Id.*, at 424. The Court reserved the question whether reliance of a different kind—on state "protective" laws requiring sex differentiation—would also save a defendant from liability. *Id.*, at 423 n. 18.

[36] According to the District Court, the defendant's liability for contributions did not begin until April 5, 1972, the day the EEOC issued an interpretation casting doubt on some varieties of pension fund discrimination. See 37 Fed. Reg. 6836. Even assuming that EEOC's decision should have put the defendants on notice that they were acting illegally, the date chosen by the District Court was too early. The court should have taken into account the difficulty of amending a major pension plan, a task that cannot be accomplished overnight.

Further doubt about the District Court's equitable sensitivity to the impact of a refund order is raised by the court's decision to award the full difference between the contributions made by male employees and those made by female employees. This may give the victims of the discrimination more than their due. If an undifferentiated actuarial table had been employed in 1972, the contributions of women employees would no doubt have been lower than they were, but they would not have been as low as the contributions actually made by men in that period. The District

the application of the statute in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful. The courts had been silent on the question, and the administrative agencies had conflicting views.[37] The Department's failure to act more swiftly is a sign, not of its recalcitrance, but of the problem's complexity. As commentators have noted, pension administrators could reasonably have thought it unfair—or even illegal—to make male employees shoulder more than their "actuarial share" of the pension burden.[38] There is no

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Court should at least have considered ordering a refund of only the difference between contributions made by women and the contributions they would have made under an actuarially sound and nondiscriminatory plan.

[37] As noted earlier, n. 26, *supra*, the position of the Wage and Hour Administrator has been somewhat confusing. His general rule rejected differences in average cost as a defense, but his more specific rule lent some support to the Department's view by simply requiring an employer to equalize either his contributions or employee benefits. Compare 29 CFR § 800.151 (1976) with *id.*, § 800.116 (d). The Equal Employment Opportunity Commission requires equal benefits. See 29 U. S. C. § 1604.9 (e) (1976). Two other agencies with responsibility for equal opportunity in employment adhere to the Wage and Hour Administrator's position. See 41 CFR § 60.20.3 (c) (Office of Federal Contract Compliance); 45 CFR § 86.56 (1976) (HEW). See also 40 Fed. Reg. 24135 (HEW).

[38] "If an employer establishes a pension plan, the charges of discrimination will be reversed: if he chooses a money purchase formula, women can complain that they receive less per month. While the employer and the insurance company are quick to point out that women as a group actually receive more when equal contributions are made—because of the long-term effect of compound interest—women employees still complain of discrimination. If the employer chooses the defined benefit formula, his male employees can allege discrimination because he contributes more for women as a group than for men as a group. The employer is in a dilemma: he is damned in the discrimination context no matter what he does." Note, Sex Discrimination and Sex-Based Mortality Tables, 53 B. U. L. Rev. 624, 633–634 (1973) (footnotes omitted).

reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision.

Nor can we ignore the potential impact which changes in rules affecting insurance and pension plans may have on the economy. Fifty million Americans participate in retirement plans other than Social Security. The assets held in trust for these employees are vast and growing—more than $400 billion were reserved for retirement benefits at the end of 1977 and reserves are increasing by almost $50 billion a year.[39] These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules govering pension and insurance funds, like other unforeseen contingencies, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.[40] The EEOC itself has recognized that the administrators of retirement

[39] American Council of Life Insurance, Pension Facts, 1977 21, 23 (1977).

[40] In 1974, Congress underlined the importance of making only gradual and prospective changes in the rules that govern pension plans. In that year, Congress passed a bill regulating employee retirement programs. Employee Retirement Income Security Act of 1974, 88 Stat. 832. The bill paid careful attention to the problem of retroactivity. It set a wide variety of effective dates for different provisions of the new law; some of the rules will not be fully effective until 1984, a decade after the law was enacted. See, *e. g.*, 29 U. S. C. § 1061 (a) (Sept. 2, 1974); *id.*, § 1031 (b) (1) (Jan. 1, 1975); *id.*, § 1086 (b) (Dec. 31, 1975); *id.*, § 1114 (c)(4) (June 30, 1977); *id.*, § 1381 (c)(1) (Jan. 1, 1978); *id.*, § 1061 (a) (Dec. 31, 1980); *id.*, § 1114 (c) (June 30, 1984).

plans must be given time to adjust gradually to Title VII's demands.[41] Courts have also shown sensitivity to the special dangers of retroactive Title VII awards in this field. See *Rosen* v. *Public Serv. Elec. & Gas Co.*, 328 F. Supp. 454, 466–468 (NY 1971).

There can be no doubt that the prohibition against sex-differentiated employee contributions represents a marked departure from past practice. Although Title VII was enacted in 1964, this is apparently the first litigation challenging contribution differences based on valid actuarial tables. Retroactive liability for payments since 1965 could be devastating for a pension fund.[42] The harm would fall in large part on innocent third parties. If, as the courts below apparently contemplated, the plaintiffs' contributions are recovered from the pension fund, the administrators of the fund must meet unchanged obligations with diminished assets.[43] If the reserve

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[41] In February 1968, the EEOC issued guidelines disapproving differences in male and female retirement ages. In September of the same year, EEOC's general counsel gave an opinion that retirement plans could set gradual schedules for complying with the guidelines and that the judgment of the parties about how speedily to comply "would carry considerable weight." See *Chastang* v. *Flynn & Emrick Co.*, 541 F. 2d 1040, 1045 (1976).

[42] The plaintiff's assert that the award in this case would not be crippling to these defendants, because it is limited to contributions between 1972 and 1975. See n. 1, *supra*. But we cannot base a ruling on the facts of this case alone. As this Court noted in *Albemarle*, *supra*, equitable remedies may be flexible but they still must be founded on principle. "Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy." 422 U. S., at 417.

[43] Two leading commentators urging the illegality of gender-based pension plans noted the danger of "staggering damage awards," and they proposed as one cure the exercise of judicial "discretion [to] refuse a back-pay award because of the hardship it would work on an employer who had acted in good faith . . . ." Bernstein and Williams, Title VII and the Problem of Sex Classification in Pension Programs, 74 Colum. L. Rev., 1203, 1226, and 1227 (1974).

proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated reduction in the contributions of past employees.

Without qualifying the force of the *Albemarle* presumption in favor of retroactive relief, we conclude that it was error to grant such relief in this case. Accordingly, although we agree with the Court of Appeals' analysis of the statute, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 24, 1978

Re: #76-1810 - City of Los Angeles
v. Manhart

Dear John:

Please join me.

Sincerely yours,

Byron

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 24, 1978

Re: No. 76-1810, Los Angeles, Dept. of Water & Power v. Manhart

Dear John,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 27, 1978

Re: 76-1810 - City of Los Angeles, etc.
v. Manhart et al.

Dear Lewis:

Do you think these changes are sufficient? I should point out that I would very much like to retain footnote 17 and the text reference at the top of the page.

Respectfully,

Mr. Justice Powell

Attachment

gevity differential may be explained by the social fact that men are heavier smokers than women.[17]

Finally, there is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage. It is true that insurance is concerned with events that are individually unpredictable, but that is characteristic of many employment decisions. Individual risks, like individual performance, cannot be predicted by resort to classifications proscribed by Title VII. Indeed, the fact that this case involves a group insurance program highlights a basic flaw in the department's fairness argument. For whenever insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy; ~~smokers subsidize pension benefits for nonsmokers~~; unmarried workers subsidize married workers.[18] Treating different classes of risks as though they were the same for purposes of group insurance is a common practice which has never been considered inherently unfair. Group insurers frequently treat ~~smokers and nonsmokers~~ as though they were equivalent risks; it is less common to treat men and women alike.[19] Only habit makes one "subsidy" seem less fair than the other.[20]

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[17] See R. Retherford, The Changing Sex Differential in Mortality 71–82 (1975). Other social causes, such as drinking or eating habits—perhaps even the lingering effects of past employment discrimination—may also affect the mortality differential.

[18] A study of life expectancy in the United States for 1949–1951 showed that 20-year-old men could expect to live to 60.6 years of age if they were divorced. If married, they could expect to reach 70.9 years of age, a difference of more than 10 years. R. Retherford, The Changing Sex Differential In Mortality 95 (1975).

[19] The record indicates, however, that the Department has funded its death benefit plan by equal contributions from male and female employees. A death benefit—unlike a pension benefit—has a lesser value for persons with longer life expectancies. Under the Department's concept of fairness, then, this neutral funding of death benefits is unfair to women as a class.

[20] A variation on the Department's fairness theme is the suggestion that

March 30, 1978

No. 76-1810 City of Los Angeles v. Manhart

Dear John:

Please join me.

Sincerely,

Mr. Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 3, 1978

Re: No. 76-1810 - City of Los Angeles v. Manhart

Dear John:

As of now, I join all but Part IV of your opinion. I might circulate a dissent to Part IV.

Sincerely,

T.M.

Mr. Justice Stevens

cc: The Conference

April 11, 1978

76-1810 Los Angles Department of Water v. Manhart

Dear John:

According to the "clerk grapevine", there is some sort of a movement to persuade you to change much of Part IV that resolves the retroactive issue, and remand the case for a determination by the District Court as to whether in fact serious consequences would result from retroactivity.

I write to say, as I stated at Conference, that my willingness to decide the case as we did depends upon our also holding that our decision applies prospectively. There are thousands of these plans in effect in both profit and nonprofit organizations across the country. In my view, it is essential to avoid - or at least to minimize to the extent we can - the extensive confusion and uncertainty that would result if each of these plans had to be reexamined to determine whether the consequences of retroactive application of our decision would be unduly adverse.

Sincerely,

Mr. Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 14, 1978

Re: No. 76-1810 - City of Los Angeles v. Manhart

Dear John:

If nothing else is circulated in this case, I have no objection to it coming down either Tuesday or Wednesday.

Sincerely,

T.M.

Mr. Justice Stevens

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
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nal draft in part + in part 1/13/78 t draft 1/14/78	out 3/24/78	join JPS 3/24/78	join JPS 3/24/78	join all but Part IV	Concurring in part + in the judgment 2nd draft 4/4/78	join JPS 3/30/78		~~1st draft~~ 2nd draft 3/24/78
				may dissent 4/3/78				4th draft 3/30/78 5th draft 4/4/78
l draft 1.7/78				Con + dis 1st draft 4/7/78				6th draft 4/14/78
				2nd draft 4/12/78				
				76-1810 LA. Dept of Water v. Manhart				