Notes and Brief Reports

The Norris Decision*

In a 5–4 decision, the United States Supreme Court ruled on July 6, 1983, that employers who offer retirement annuity plans that pay smaller monthly benefits to women than to similarly situated men violate the ban against sex discrimination in employment in Title VII of the Civil Rights Act of 1964.[1] The Court ruling also stated that employers are not exempt from Title VII's ban against sex discrimination even if the only annuities available on the open market are based on sex-segregated annuity tables. In the Court's majority opinion, Justice Thurgood Marshall stated that "it would be inconsistent with the broad remedial purposes of Title VII to hold that an employer who adopts a discriminatory fringe benefit plan can avoid liability on the ground that he could not find a third party willing to treat his employees on a non-discriminatory basis."

The Court also stated explicitly in a footnote to the majority opinion that "the issue in this case is *an employment practice* . . . " and that the "judgment will in no way preclude any insurance company from offering annuity benefits that are calculated on the basis of sex-segregated actuarial tables." In a separate concurring opinion, Justice Sandra Day O'Connor stressed further that the Court's "holding has no necessary effect on current proposals before Congress barring consideration of sex in all insurance plans, including individual purchases of insurance."

The Court's ruling is prospective and applies only to benefits derived from contributions made after August 1, 1983, the effective date of the judgment.

Background

Questions about the legitimacy of sex-based insurance options, particularly in retirement programs, have been raised with increasing frequency during the past decade. One of the first issues was formulated in terms of the inequitable treatment of husbands of deceased workers under the Social Security Act. In 1975, it was successfully argued before the Supreme Court that a widower caring for dependent children was entitled to the same benefits from his deceased wife's Social Security earnings record as would be a similarly situated widow.[2] In 1977, the Supreme Court extended this principle to aged widowers, who now, like widows, receive in effect the higher of a benefit based on their own earnings or one based on their deceased spouse's earnings.[3]

In both these cases, the Court ruled that sex-based distinctions in the Social Security Act violated the right to equal protection secured by the due process clause of the Fifth Amendment. According to the Court, the Social Security Act discriminated against women wage earners by affording them less protection for their survivors than was provided for the survivors of men.[4]

Court cases have focused rather narrowly on questions of discrimination in pension practices. In the Manhart case,[5] the Court held that the employer had violated title VII of the Civil Rights Act of 1964 by requiring women to make larger contributions to a defined benefit pension fund than were required by men in order to obtain the same monthly benefits upon retirement.

In two lower court cases, the Second and Sixth Circuit Courts disagreed on the limits of employer relationships under Title VII of the Civil Rights Act of 1964. In one case, the Second Circuit Court held that the Teachers Insurance and Annuity Association and the College Retirement Equities Fund (TIAA-CREF) should be viewed as an employer because universities delegated to it the responsibility of providing employee retirement plans.[6] However, in another case involving TIAA-CREF, the Sixth Circuit Court held that TIAA-CREF was not an employer since its responsibilities were administrative and managerial.[7] Both cases have been before the Supreme Court on review but were returned to lower Federal courts for resolution consistent with the Norris decision. (Five days after the Norris

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1 *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, etc., et al.* v. *Norris, etc.*, 103 S. Ct. 3492 (1983).

2 *Weinberger* v. *Wiesenfeld*, 95 S. Ct. 1225 (1975).

3 *Califano* v. *Goldfarb*, 97 S. Ct. 1011 (1977) eliminated the requirement that a widower without dependent children be receiving at least one-half of his support from his wife when she died to be eligible for benefits from her earnings record.

4 The 1983 amendments eliminated virtually all the remaining gender-based distinctions in the Social Security Act.

5 *Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978).

6 *Spirit* v. *Teachers Insurance and Annuity Association*, 691 F2d 1054 (CA2 1982).

7 *Peters* v. *Wayne State University*, 691 F.2d 235 (1981).

decision, TIAA-CREF announced that it was adopting merged-gender mortality tables for use in determining annuity benefits, but was waiting for decisions from the lower courts to determine effective dates.)

The Norris Case

Since 1974, the State of Arizona has offered its employees the option of enrolling in a deferred compensation plan administered by the Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans. After soliciting bids, the State governing committee selected several companies to participate in the administration of its plan. The plan offers three retirement options: (1) a single lump-sum payment upon retirement, (2) periodic payments of a fixed sum for a fixed period of time, and (3) monthly annuity payments for the remainder of the retiree's life.

Many employees favor lifetime annuities as a means of avoiding the payment of large taxes in one year on a single lump-sum distribution or as an alternative to speculating on their life expectancies by choosing a fixed-term annuity. For employees who elect to receive a monthly lifetime annuity, the amount of the annuity depends on (1) the amount of compensation the employee deferred, (2) the employee's age at the time of retirement, and (3) the employee's sex. The annuity tables used by the companies selected by Arizona to participate in its plan provided higher monthly annuities for men than for women who retired at the same age with equal deferred compensation because the sex-based tables recognized that on the average women live longer than men. No other factors correlated with longevity—such as occupation or weight—were used to classify individuals of the same age.

The lawsuit challenging this practice was filed by Nathalie Norris, aged 53, of Scottsdale, Arizona. Norris, who was employed by the State's Department of Economic Security, charged that by including an option that paid unequal annuity benefits to male and female retirees the State's plan violated the ban against sex discrimination in employment found in Title VII of the Civil Rights Act of 1964. In March 1980, a Federal district court upheld Norris' claim and ordered Arizona to equalize retirement annuity benefits for men and women (486F. Supp. 645). This decision was affirmed in March 1982 by the U.S. Court of Appeals for the Ninth Circuit in San Francisco (671 F.2d 330 (1982)).

Noting that its decision was clearly foreshadowed by the Manhart case, the Supreme Court agreed with the lower court's decision in finding a Title VII violation. Rather than requiring a retroactive equalization of annuity benefit amounts, however, the Court's remedy was prospective and applied only to benefits based on contributions made after August 1, 1983, the effective date of the judgment.

This departure from the decision of the lower courts was based on two considerations. First, at least to the extent that the difference in annuity benefits for men and women results from contributions made before the Manhart decision, the use of sex-based actuarial tables might have reasonably been assumed to be lawful. Second, the concurring opinion written by Justice O'Connor expresses the concern that a retroactive ruling had the "real danger of bankrupting pension funds . . . ." With reference to Manhart, O'Connor wrote that a "retroactive holding by this Court that employers must disburse greater annuity benefits than the collected contributions can support would jeopardize the entire pension fund. If a fund cannot meet its obligations, the harm would fall in large part on innocent third parties."

The Court also noted in the Norris case that all but one of the lower courts that had considered the question of sex discrimination in private pensions held "that the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage" [8]—that is, sex-discrimination is not permissible in either defined contribution or defined benefit plans. Only the U.S. Court of Appeals for the Sixth Circuit reached an opposite conclusion.[9]

Reactions to the Norris Decision

Early reaction to the Court's ruling was mixed.[10] Richard S. Schweiker, president of the American Council of Life Insurance, expressed concern that the decision would "result in the loss of a valuable retirement alternative for working men and women," and that "in practice, life annuities are likely to become less available as an option in employer sponsored pension plans." Schweiker stressed that the decision applied only to employer sponsored retirement plans. Other commentators, however, foresee that the Norris decision will have an important impact on practices outside the narrow issue of the ruling.

Mary W. Gray, president of the Women's Equity Action League, anticipates changes in the insurance practice of setting different rates and benefits for women in life and health insurance and privately purchased annuities as employers seek out insurance companies providing nondiscriminatory services. Gerald Fucciani, president of Professional (Pension) Plan Administrators and chairman of the Government Affairs Committee of the American Society of Pension Actuaries, expects a greater push for legislative remedies for past discriminatory practices in the pension field.

[8] See footnote 6.
[9] See footnote 7.
[10] **BNA Pension Reporter**, July 11, 1983, pages 1143-46.

A significant concern of public retirement plan sponsors is not compliance with the Norris ruling but whether Congress will approve legislation requiring retroactive remedies to past practices. A survey by the National Governors' Association showed that 37 State public employee plans use nondiscriminatory practices and 13 retain sex-based schedules. As the Norris decision is prospective, it is not anticipated that the cost of compliance for the 13 States will be high. If plans are required to "top-up" benefits to the higher level being paid to men, however, the costs to plan sponsors could be very high. To many analysts, a more preferable alternative would be to use blended tables.

Equity issues in other public and private insurance programs remain open and are still being addressed in Congress and in the courts. There is legislation before Congress that would prohibit sex discrimination in the writing and selling of insurance contracts that is supported by many public interest groups and most women's organizations. Supporters argue that discrimination on the basis of sex is no different than other forms of discrimination and that it is unfair to divide individuals into groups on the basis of an unchangeable characteristic.

Many insurance groups oppose the legislation on the grounds that eliminating sex-based pricing would prove prohibitively expensive, particularly if retroactive pricing provisions were applied to life insurance contracts.