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Thurgood Marshall
US Supreme Court Justice

HAB

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

June 29, 1983

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

MEMORANDUM TO THE CONFERENCE

Cases held for No. 82-52 - Ariz. Gov. Comm. v. Norris

For the reasons set forth below, I will vote to GVR all three of these cases in light of Norris.

1. 82-262 - Cal. v. Retired Public Empl. Assn.

This case concerns an employer-operated retirement plan, the California Public Employees Retirement System (PERS). Under PERS a female employee who retires before age 60 will receive higher monthly retirement benefits than a similarly situated male employee who retires at the same age. Similarly situated men and women who retire at age 60 receive equal benefits. A female employee who retires after age 60 will receive lower monthly benefits than a similarly situated male employee who retires at the same age.

The District Court held that PERS violates Title VII by classifying employees on the basis of sex. The District Court ordered the State to

> "raise monthly retirement benefits of members of the class to the level received by similarly situated members of the opposite sex without reducing the benefits of any individual. Such adjustments shall be retroactive to April 25, 1978, the date of the U.S. Supreme Court decision in City of Los Angeles v. Manhart, 435 U.S. 702 (1978)."

The Court of Appeals affirmed as to liability and affirmed in part and reversed in part as to the remedy, holding that employees who retired prior to March 24, 1972--the date when Title VII became applicable to public employees--were not entitled to relief. The Court of Appeals explained that "after the decision in Manhart pension administrators could no longer reasonably think that the distribution of unequal benefits did not violate Title VII" and that "in view of Manhart, the award should have been foreseen and taken into account by administrators, thus lessing the financial impact of the pension plan."

Petitioners contend that the plan does not discriminate on the basis of sex because women are favored at certain retirement ages whereas men are favored at other retirement ages. This contention finds no support in either Manhart or Norris, which establish that employers may not classify employees on the basis of sex in determining their retirement benefits. This principle means that an employer may favor neither men nor women, and in my view it also means that an employer may not adopt a plan that

favors a man over a similarly situated woman in some circumstances and favors a woman over a similarly situated man in other circumstances.

However, our decision in Norris does have a bearing on the relief ordered below. First, the Court of Appeals' discussion of this point relies on its decision in Norris, in which it held that the defendants were properly ordered to equalize all payments coming due after the District Court's decision. That part of the Court of Appeals' decision in Norris has now been disapproved by this Court. Second, although this case involves an employer-operated plan and petitioners were thus clearly put on notice by Manhart, the Court of Appeals should re-examine the relief ordered in this case in light of our recognition in Norris that relief affecting retirement benefits cannot truly be regarded as prospective insofar as it affects the return on contributions made in the past. I will vote to GVR in light of Norris.

2. Nos. 82-791 & 82-913, Teachers Ins. & Ann. Assn. v. Spirt and Long Island Univ. v. Spirt.

In these curved-lines cases a female professor at Long Island University(LIU) brought a class action against defendants LIU, Teachers Insurance and Annuity Association (TIAA), and College Retirement Equities Fund (CREF), challenging the use of sex-based mortality tables to calculate the pension benefits paid to retired LIU professors under the school's retirement program. The District Court held that the use of such tables violated Title VII, but that only CREF was liable for the violation. The court concluded that TIAA was exempted from liability by the McCarran-Ferguson Act. It enjoined CREF, but not TIAA, from using sex-based tables to calculate the number of annuity units to which a retiree is entitled upon retirement on or after May 1, 1980. It also enjoined LIU to cease using any plan that continued to use sex-based tables after June 1, 1980. The Court of Appeals affirmed in part and reversed in part, holding that both CREF and TIAA were liable and that the relief ordered by the District Court should therefore apply equally to both.

In 82-913 petitioner LIU does not challenge the correctness of the decision below but urges review on certiorari because of the importance of the issues raised and the conflict among the Circuits (see 82-794, discussed below). Since this Court has just addressed the subject in Norris and has resolved the conflict on the fundamental question whether the statute forbids the use of sex-based tables to calculate benefits under a plan funded by a third party, this is no longer a basis for review.

In 82-791, petitioners TIAA and CREF argue, first, that there is no sex discrimination because the actuarial value of the annuity policies obtained by male and female participants in the plan is equal. We have rejected this argument in Norris.

Petitioners in 82-791 also argue that they are not liable because

they are not employers. The courts below held that they constitute employers for purposes of Title VII because they are so closely intertwined with the universities and were created in order to provide retirement benefits for university employees. Norris says nothing that is directly relevant to this question. Moreover, the conclusion reached below appears to be reasonable, and the question is in my judgment too factbound to warrant review here.

Third, petitioners in 82-791 argue that the McCarran-Ferguson Act exempts them from liability. The Court of Appeals held that CREF was not exempted by the Act because it is not involved in the business of insurance--it has not underwritten any risks. This conclusion is consistent with our decision in Norris. As to TIAA, the Court of Appeals held that is involved in the business of insurance, but that Title VII is a law that "specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act. The correctness of this latter holding presents a substantial question, but in my view the question is not of sufficient importance to warrant review here.

Fourth, petitioners in 82-791 argue that the relief awarded was improper. They note that the relief, though affecting only future benefit payments, would affect the return on contributions made in the past. Given the view of five members of the Court in Norris that the plaintiffs there are entitled only to have benefit payments based on post-Norris contributions equalized, the Court of Appeals should take another look at this case in light of Norris. I will vote to GVR in light of Norris.

3. 82-794 - Peters v. Wayne State University

This case also involves a suit against a university, TIAA, and CREF. Here the Sixth Circuit held that the TIAA-CREF plan does not violate Title VII because the actuarial value of the annuities offered to a man and to a similarly situated woman are equal. This reasoning is directly inconsistent with the decision in Norris. I will therefore vote to GVR in light of Norris.

Sincerely,

T.M.

T.M.