9-20-1982

11-20-1982 Preliminary Memorandum

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Law Clerk, US Supreme Court

DVZ

X DVZ 9/29/82

Lodging 10/7/82: Resps have submitted a CA2 decision of September 29, 1982, Sprit v. Teachers Insurance & Annunity Ass'n, Nos. 79-7715, 79-7737, 79-7739 (Newman, Pierce, Cannella [S.D.N.Y.]), which follows the CA9 here in invalidating under Title VII a plan purchased by an employer from an insurer that pays women different benefits. It sees no difference in effect between the Manhart facts and those of the type here. It also finds that Manhart does not permit an employer to delegate insurance coverage to a discrminating insurer.

No change in recommendation.

X DVZ 10/7/82

PRELIMINARY MEMORANDUM

October 8, 1982 Conference
Summer List 1, Sheet 2

No. 82-52-CFX Straightlined with No. 82-262

ARIZONA GOVERNING COMM., et al. (employer)

v.

NORRIS, et al. (employees)

Cert to CA9 (Goodwin, Poole; Nielsen, dissenting)

Federal/Civil

Timely (w/ ext'n)

SUMMARY: A voluntary deferred compensation plan allowed retiring employees to choose between three forms of payments, including an annuity bought by petrs from independent insurance companies who use sex-based actuarial tables. The question is whether the employer has violated Title VII by offering this option.

FACTS AND DECISION BELOW: This case was decided on stipulated facts. Petr allows employees to enroll in a State Deferred Compensation Plan. The Plan, which is voluntary, works in two phases. During the "accumulation phase," employees may contribute as much of their pay check as they wish to one of a large variety of investment options. The employees pay no tax on the money put into the Plan and pay no tax on the money earned by the investment until it is distributed. This portion of the plan treats both sexes equally and is not under attack. Upon retirement, employees enter the "pay-out" phase of the Plan and must choose one of three options for the repayment of their deferred compensation. They may (1) have it returned in a lump sum (which they can then use, for instance, to buy the best annuity they can find), (2) receive a specific sum each month for a fixed number of months, or (3) receive a life annuity which petrs buy from an independent insurance company. The insurance companies providing option (3)[1] use sex-based mortality tables showing that women as a class live to receive more annuity checks than men as a class receive. As a consequence, men receive higher monthly annuity payments than women recieve. From the point of view of tax deferral, however, option (3) is the best for both sexes.

Claiming that option (3) violates the Fourteenth Amendment and, under the reasoning of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978), Title VII, resp brought an action on

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[1]There is some confusion in the record on this point. Petrs claim that the parties have stipulated that there are no insurance companies in Arizona who offer annuities based on unisex tables. Resp claims that it only stipulated that all companies designated as funding media by petr, Ariz. Governing Committee for Tax Deferred Compensation Plans, use sex-based tables.

behalf of herself and other women enrolled in the Plan, seeking to enjoin petrs from offering a sexed-based annuity, and to require petrs to augment the annuity checks of those retired women who chose option (3). The DC (Cordova) certified the class, rejected petrs' arguments that Title VII is not violated by a voluntary plan or by a plan containing nondiscriminatory options, and granted injunctive relief. In addition, the DC directed that retired female employees be paid equal annuity payments to men who accumulated the same deferred income. The Fourteenth Amendment claim was rejected, however, on the ground that resp failed to prove purposeful discrimination.

On appeal, petrs challenged both the finding of a Title VII violation and the relief ordered. On the violation point, petrs reiterated the defenses asserted below, and additionally argued that the DC's decision unduly interfered with the state's right to regulate the insurance business; that Title VII requires proof of intent, which is lacking since petrs did not themselves create the sex-based annuity scheme; that Manhart is limited to self-insured employers; that petrs' Plan falls within the "open market" exception to Manhart ("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," 435 U.S. at 717-18); and that petrs are not responsible for the discrimination in the Plan because the options merely reflect the limits in the marketplace. CA9 affirmed. On the regulatory issue, the DC reasoned that since the decision below dealt only with the ability of the employer to offer its employees discriminatory fringe benefits, it did not unduly interfere with the insurance business. It found that resp showed as much intent as Manhart required; that the existence of an option

within the "open market" exception and the Plan's voluntary nature did not cure the Title VII violation since women are entitled to the same benefit options as men; and that Title VII protects against an employer affirmatively adopting any discriminatory scheme, even if it is the only one available in the marketplace. Most significantly, in reliance on language in Manhart saying that "an employer can[not] avoid his responsibilities by delegating discriminatory programs to corporate shells," 435 U.S. at 718 n.33, CA9 held that Manhart is not limited to employer-operated pension schemes, but rather applies even when an employer buys annuities from independent companies.

Petrs' challenges to the award were also rejected. Noting cases in CA1 and DC's in NY, Cal, Mich, and Or. ordering payments by "passive abusers," CA9 held that the order directing payment to retired employees was not an abuse of discretion. It rejected a Tenth Amendment challenge on the ground that Title VII was enacted under the Fourteenth Amendment, thus giving Congress the power to intrude on the functioning of the states.

CONTENTIONS: Petrs claim that this decision extends Manhart to ban use of sex-based mortality tables by independent insurance company despite clear language in that opinion stating that Title VII was not "intended to revolutionize the insurance and pension industries," 435 U.S. at 717 and swallows the "open market" exception carved out in Manhart since it prohibits the employer from going to the open market to buy for the employee the best option available. The decision ignores the fact that the Plan was voluntary and that the employer has no control over the insurance industry's methods of operations. CA9 dealt incorrectly with the issue of intent. Furthermore, the relief granted violates the Tenth Amendment under National League of Cities v. Usery, 426 U.S. 833 (1973).

Resp argues that the case involves a staightforward application of Manhart and that other courts considering contentions similar to petrs' have agreed with CA9.

Four amici briefs were also received. The American Council of Life Insurance makes it clear why the insurance industry feels that this decision will have a tremendous impact on the insurance business. The Council claims that Manhart had little (or no) effect on the industry because it involved an unpopular fringe benefit (employer-operated annuities). By finding Title VII liability when an employer goes out and buys annuities for its employees, this case addresses a popular fringe benefit that affects 99% of the pension industry. Moreover, insurance companies cannot by most states' laws discriminatorily offer only to employers annuities calculated on unisex tables. But if they offered both options to everyone, the insurance companies would soon be insolvent because women would choose to buy unisex annuities, which give them higher monthly payments for a lower price, while men would choose annuities based on men-only mortality tables since that would maximize their benefits. Without men signing up for unisex insurance, that option would be unstable because there would be no men paying in more and receiving less to subsidize the women who receive more. To make a long argument short, this decision will require all insurance companies to use ONLY unisex tables, which is a result Manhart claimed it was not mandating.

The Academy of Actuaries agrees with the above reasoning. It notes that it is possible that Congress intended this result when it enacted Title VII, but thinks that since the result was not foreseen by the Manhart Court, cert should be granted to reconsider the Manhart decision before lower courts blithely require the entire industry to change its methods of operation.

The National Association of Insurance Commissioners argues that lower courts' extention of Manhart has lead to the federalization of the insurance industry, which is a reversal of the long-standing practice of reserving its regulation to the states. The Court should grant cert in order to decide whether this result is desirable.

The State of California and its Teachers' Retirement Association has filed a brief because it is involved in another case where it is making the same arguments rejected by CA9 in this case.

DISCUSSION: The Conference should consider this case with Calif. v. Retired Public Employees' Ass'n, No. 82-262, also on this list. Both cases demonstrate the problems encountered in applying Manhart. While none of the parties points to conflicts among the circuits, the Court may want to examine the insurance industry's claims about the dire results of the many decisions in this area. If cert is granted, it should be limited to the question whether Manhart applies to employers who purchase insurance from independent companies and perhaps to the question whether there is a defense in the fact that the marketplace did not offer nondiscriminatory choices.[2] The intent question is well settled (discriminatory impact is all that is required). The contentions based on the voluntary nature of the plan and the existence of nondiscriminatory options are simply variations on the familiar "separate but equal" argument. The Tenth Amendment issue borders on frivolous.

There is a response and four amicus briefs.

September 20, 1982 Dreyfuss Op'ns in pet'n

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[2] I assume that the stipulations are in the record, and that the Court would request the parties to reproduce them in order to resolve the factual dispute referred to in note 1.