6-2-1983

06-02-1983 Clerk Memo

Alan S. Madans
Associate Justice, US Supreme Court

June 2, 1983

Mr. Justice:

Re: Arizona Governing Comm. v. Norris, 82-52
TM's draft majority

This is the case involving a retirement plan that provides women with lower monthly annuity payments than similarly situated men. In my bench memo, I recommended affirming the CA9's holding that the plan violates Title VII. You voted the other way at Conference, but indicated that you might vote with the majority as a matter of stare decisis.

TM does a good job of refuting petr's arguments that the plan's voluntary nature, offer of inferior nondiscriminatory alternatives, and use of private insurance companies distinguish this case from Manhart in any relevant respect. I think TM also dispels the notion that the Court's holding here is unfair to men. Although he appropriately concedes that men, as a group, will receive less total retirement income than women, as a group, he also appropriately relies on Manhart's holding that Title VII's unmistakable focus is on the individual. Discrimination against individuals because of the groups to which they belong cannot be justified on the ground that the groups are statistically different. If they could, I might add, employers could justify paying blacks less than whites by pointing to statistics proving that blacks miss more days of work than whites, and that it therefore is unfair to pay whites proportionally fewer dollars per day worked.

One point TM does not discuss in detail is the concern you expressed at argument and Conference that the effect of an affirmance would be to drive the annuity option out of the plan. My view is that petr's argument to this effect is tantamount to a warning that if it cannot offer discriminatory benefits, it will not offer any at all. Moreover, the representation that sex neutral annuities are not a realistic option is refuted by a neutral amicus brief filed by an insurance industry group; by the experience of several insurers and private employers, including, as I recall, the University of Minnesota; and by the common sense notion that there is too much profit at stake for insurers not to find ways to cope with a change in their actuarial strategy. In short, I do not believe that the fact petr dropped the annuity option after the CA9's decision should influence you in deciding this case.

Given my earlier recommendation, and the persuasiveness of TM's opinion, it is my hope that you will consider joining TM in holding that petr's plan violates Title VII. Such a vote, in my view, would best comport with principles of stare decisis and with your vote in Manhart. TM has made a play for your vote, I suspect, in discussing your concurrence in Manhart in n. 14.

If you do join the liability section of TM's opinion, I believe you also should join TM's remedy discussion. TM has chosen a compromise approach that distinguishes between pre-Manhart contributions and post-Manhart contributions. Payments for women from the date of the DC decision should be the same as payments for men insofar as those payments represent investment

of post-Manhart contributions, but the employer may not be liable for inequalities attributable to pre-Manhart contributions. The holding is fairly complicated, and perhaps undesirable from an administrative standpoint, but it is defensible and consistent with your joinder of the remedy section in Manhart.

According to LFP's clerk, their chambers has been assigned the dissent (I never saw a note from the CJ to this effect). I assume you will at least want to see what LFP has to say. If you do decide to join TM, I would be happy to write any separate opinion in which you might choose to express any reservations as you did in Manhart.

ASM