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# Title VII—Employee Retirement Plans—Unequal Contribution Requirements as Constituting Unlawful Discrimination on the Basis of Sex—Manhart v. City of Los Angeles, Department of Water and Power, 553 F.2d 581 (9th Cir. 1976), cert. granted, 98 S. Ct. 51 (1977)

Thomas G. Hankley

TITLE VII—EMPLOYEE RETIREMENT PLANS—UNEQUAL CONTRIBUTION REQUIREMENTS AS CONSTITUTING UNLAWFUL DISCRIMINATION ON THE BASIS OF SEX—*Manhart v. City of Los Angeles, Department of Water and Power*, 553 F.2d 581 (9th Cir. 1976), *cert. granted*, 98 S. Ct. 51 (1977).

I. INTRODUCTION

In *Manhart v. City of Los Angeles, Department of Water and Power*,[1] a case recently granted certiorari by the Supreme Court,[2] the Ninth Circuit held that, even given a reasonable justification for doing so, Title VII will not permit group characteristics to be attributed to the individual where the group is defined solely on the basis of sex. In reaching its decision the court both extended the scope of Title VII and defined the limits of the recent Supreme Court holding in *General Electric Co. v. Gilbert*.[3]

II. FACTS OF THE CASE

The *Manhart* suit was brought as a class action on behalf of female employees and retirees of the City of Los Angeles, Department of Water and Power (the Department), alleging that the Department's retirement plan violated section 703 of Title VII.[4] The plan, which was funded and managed completely within the Department, required a monthly contribution from each employee which was matched 110% by the Department.[5] Using sex-based mortality tables, the plan required 15% larger contributions from female employees than identically situated male em-

1. 553 F.2d 581 (9th Cir. 1976), *cert. granted*, 98 S. Ct. 51 (1977).

2. 98 S. Ct. 51 (1977).

3. 429 U.S. 125 (1976).

4. 42 U.S.C. § 2000e-2(a) (1970). The statute reads in pertinent part: "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 . . . sex . . . ."

The complaint also alleged claims for relief based on the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), and the fourteenth amendment of the United States Constitution, as well as a pendent claim based on art. 1, §§ 1, 21 of the California Constitution. Only the Title VII claim was reviewed by the Ninth Circuit on appeal. 553 F.2d at 584-85.

The suit named as defendants the Department, the members of both the Department's Board of Commissioners and Board of Administration of the Employees' Retirement, Disability and Death Benefit Insurance Plan, and the Department's general manager and chief accounting officer. *Id.* at 583.

5. 553 F.2d at 583.

ployees.[6]

The women argued that this disparity in contributions constituted unlawful discrimination on the basis of sex.[7] They sought an injunction ordering the Department to equalize male and female contribution rates under the plan and to refund excess contributions paid in the past.[8]

The Department took the position that any discrimination in the plan was on the basis of longevity, not sex, and that such discrimination did not violate Title VII.[9] It further argued that even if the line were drawn according to the sex of the employee, Title VII was not intended to prohibit sexual distinctions which were both statistically valid and justified by the nature of the determination to be made.[10] In support of this position the Department pointed out that it is undisputed that women as a class live five years longer than men.[11] Therefore, since women will receive the same monthly retirement benefits as their male counterparts over a longer period of time, it is not discriminatory to require them to pay more into the plan.[12] Furthermore, since it is impossible to determine in advance when an individual employee is going to die, group statistical characteristics represent the only feasible basis on which to compute contributions.[13]

The district court granted summary judgment in favor of the women and the Department appealed.[14] Over the vigorous dissent of Judge Kilkenny, the Ninth Circuit affirmed.

III. A NEW PROBLEM IN TITLE VII LITIGATION

Judge Duniway, writing for the majority, rejected the Department's argument that the classification involved was based on longevity, not sex.[15] However, he did recognize that the circumstances of the case presented a new and unique problem in Title VII litigation.[16] In the past, two basic policy considerations have guided the courts: "(1) the policy against attributing general group characteristics to each individual member of the group, the major thrust of the statute, and (2) the policy allowing relevant employment factors to be considered in differentiating

6. *Id.*
7. *Id.* at 584.
8. *Id.* at 583.
9. *Id.* at 585.
10. *Id.*
11. *Id.* at 583.
12. *Id.*
13. *Id.* at 586.
14. *Id.* at 584.
15. *Id.* at 588.
16. *Id.* at 586.

among individuals."[17] Prior to *Manhart* the two had not conflicted due to the fact that the general group characteristics challenged were capable of being measured on an individual basis. For example, in *Rosenfeld v. Southern Pacific Co.*[18] and in *Bowe v. Colgate-Palmolive Co.*[19] the Ninth and Seventh Circuits respectively held that even if it is true as a general proposition that women as a class are less strong than men as a class, individual women cannot be penalized by an exclusion of all women from jobs requiring heavy lifting. An important basis of both decisions was that the individual woman could be tested as to her ability to perform the physical tasks in question.

In determining the cost of a pension plan, however, the relevant characteristic is the longevity of those receiving the benefits.[20] As the Department correctly pointed out, it is impossible to determine longevity in advance on an individual basis.[21] The only way to administer such a plan is to make an informed prediction by attributing group statistical characteristics to the individual members of the group.

Yet such classification is exactly what Title VII seeks to prohibit.[22] The very essence of civil rights legislation is to protect the individual

17. *Id.*

18. 444 F.2d 1219 (9th Cir. 1971).

19. 416 F.2d 711 (7th Cir. 1969). *See also* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (refusal to hire women with preschool children because of belief that family responsibilities would interfere with job performance found unlawful); Berg v. Richmond Unified School Dist., 528 F.2d 1208, 1212-13 (9th Cir. 1975) (requiring pregnant women to take mandatory leave after six months of pregnancy because, on average, pregnant women are supposed to be incapable of working adequately after that point found unlawful); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972) (forced retirement of all women at earlier age than men because of belief that, on average, men are capable of adequate performance longer than women found unlawful); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) (employer's rule which forbids or restricts employment of married women and which is not applicable to married men found unlawful); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388-89 (5th Cir. 1971) (refusal to hire men as flight attendants on belief that men, on average, are emotionally unsuited for the work found unlawful); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235-36 (5th Cir. 1969) (refusal to hire women as telephone switchmen because of belief that, on average, women are incapable of working long hours and doing heavy lifting involved found unlawful).

The *Manhart* court also distinguished those cases in which it was held illegal to require women to retire at an earlier age than men. 553 F.2d at 586 (citing Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90, 96 (3d Cir. 1973); Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1190 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971)). There is no rational basis for such a requirement. In *Manhart*, by contrast, the higher female contribution rate is based upon undisputed actuarial tables that show women as a group live five years longer than men as a group.

20. 553 F.2d at 586.

21. *Id.*

22. *Id.*

from being treated differently simply because he or she is a member of a sex-defined group.[23]

In *Henderson v. Oregon*,[24] a case which relied heavily on the lower court decision in *Manhart*,[25] the Oregon district court noted that the actuarial fact of female longevity expresses a composite trait which may or may not hold true for individual members of the class involved:

> The great majority of men and women—84 per cent—share common death ages. That is, for every woman who dies at 81 there is a corresponding man who dies at 81. The remaining 16 per cent are women who live longer than the majority and men who live shorter. As a result, each woman is penalized because a few women live longer and each man benefits because a few men die earlier.[26]

This result is proscribed by Title VII because the use of such statistics has a disparate impact on some women: the subclass of short-lived women are penalized while long-lived men are not. It is well established that a practice which penalizes *some* women because of their sex is forbidden by Title VII regardless of whether all or even most women are disadvantaged thereby.[27]

IV. *GILBERT* DISTINGUISHED

Judge Kilkenny entered a vigorous dissent to the majority's position[28] based on his interpretation of *General Electric Co. v. Gilbert*.[29] *Gilbert* represents the latest guideline from the Supreme Court for determining whether an employment practice violates Title VII as unlawful sex discrimination.

In *Gilbert* female employees of General Electric brought a class action challenging the company's disability plan which excluded pregnancy-

23. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1172-74 (1974).

24. 405 F. Supp. 1271 (D. Ore. 1975). The practice challenged in *Henderson* was the payment of lower monthly retirement benefits to women than to men although both contributed equal amounts to purchase the benefits.

25. 387 F. Supp. 980 (C.D. Cal. 1975).

26. 405 F. Supp. at 1275 n.5.

27. *See* Jacobs v. Martin Sweets Co., 550 F.2d 364, 371 (6th Cir. 1977); Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038, 1044-45 (3d Cir. 1973).

28. 553 F.2d at 594-98 (Kilkenny, J., dissenting).

29. 429 U.S. 125 (1976).

The *Manhart* case was originally decided on November 23, 1976, two weeks before the Supreme Court handed down its decision in *Gilbert*. In reliance upon *Gilbert* the Department and other defendants subsequently petitioned for a rehearing, suggesting a rehearing in banc. 553 F.2d at 592. Judge Kilkenny's dissent was directed to the denial of the petition for rehearing. Nos. 75-2729, 75-2807, 75-2905, slip op. at 702 (9th Cir. Apr. 18, 1977). It appears that the original *Manhart* opinion was unanimous. *See* Nos. 75-2729, 75-2807, 75-2905, slip op. at 1, 18 (9th Cir. Nov. 23, 1976).

related disabilities from its coverage.[30] The Fourth Circuit Court of Appeals affirmed a district court ruling that the exclusion violated Title VII. The Supreme Court reversed.[31]

The Supreme Court reasoned that there was a difference between a classification based on gender and a classification based on "an objectively identifiable physical condition with unique characteristics."[32] It provided a simple standard for determining whether or not a classification is gender-based: does the characteristic involved divide employees into groups that consist exclusively of one sex or the other? Quoting from its decision in *Geduldig v. Aiello*,[33] the Court stated:

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.[34]

In addition, the Court held that Title VII's ban on employment discrimination did not necessarily mean that greater economic benefits must be paid to one sex or the other because of their differing roles "in the scheme of human existence."[35] Absent evidence that the plan was worth more to men than women, the program was facially nondiscriminatory where "the package going to relevant identifiable groups . . . cover[ed] exactly the same categories of risks."[36]

Kilkenny reasoned that according to the precepts of *Gilbert* the *Manhart* plan was facially nondiscriminatory because longevity was an objectively identifiable criterion for requiring larger contributions from women.[37] He argued that longevity, like pregnancy-related disabilities, constitutes an additional risk, unique to women, and that the greater contributions required of female employees did not destroy the parity of benefits accruing to men and women alike because women live longer than men.[38] Kilkenny further noted that the Department could have eliminated the plan completely without violating Title VII.[39] He therefore

30. 429 U.S. at 127-28.
31. *Id.* at 128.
32. *Id.* at 134 (quoting Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974)).
33. 417 U.S. 484 (1974).
34. 429 U.S. at 135 (quoting 417 U.S. at 497 n.20).
35. 429 U.S. at 139 n.17 (quoting the district court opinion, 375 F. Supp. 367, 383 (E.D. Va. 1974)).
36. 429 U.S. at 139.
37. 553 F.2d at 596.
38. *Id.*
39. *Id.* at 596-97.

concluded that the Department could allocate the additional cost of female longevity to female employees without a violation.

The majority of the court rejected Kilkenny's contention that the pregnancy exclusion of *Gilbert* was analogous to the use of longevity statistics in *Manhart*. Unlike the program involved in *Gilbert*, the Department's plan in *Manhart* divided employees into groups consisting exclusively of one sex or the other. Women, because they were women, were required to make larger contributions to the plan than men. The Department's use of longevity statistics thus failed to meet the standard, established in *Gilbert*, that an objectively identifiable characteristic other than sex be used to divide employees into groups that are not exclusively male or female.[40] While *Gilbert* does permit an employer to take into account differences in the cost of employing men and women, Judge Duniway argued that it does not support the dissent's conclusion that an employer may allocate such costs to the individual when they are computed on the basis of a group characteristic.[41]

It may be further noted that under *Gilbert* a class characteristic is never applied to the individual without proof that the characteristic is true of the individual; *i.e.*, a particular female employee is *not* denied disability benefits because females as a class can become pregnant. Rather, she is denied disability benefits *only if she is pregnant*.[42] By contrast, a female employee under the Department's plan in *Manhart* must contribute more than her male counterpart because women as a class live longer than men.

V. DEFENSES CONSIDERED

Once the court decided that the Department's program discriminated against women because of their sex, it had to consider two possible defenses under Title VII: (1) the Bona Fide Occupational Qualification (BFOQ) exception, and (2) the so-called "Bennett Amendment."

A. The BFOQ Exception

The BFOQ exception[43] allows an employer to discriminate in hiring for a particular position and in job assignment where it is reasonably

40. *Id.* at 592-93.

41. *Id.* at 593.

42. 429 U.S. at 139.

43. 42 U.S.C. § 2000e-2(e) (1970). This provision reads in relevant part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

necessary for the business to have an employee of a particular sex.[44] The *Manhart* court noted that the Equal Employment Opportunity Commission (EEOC), which has administrative responsibility for enforcing Title VII and whose interpretations of that Act have been held to be entitled to great deference,[45] has issued guidelines instructing that the BFOQ exception "be interpreted narrowly."[46] In accord with the EEOC's guidelines, the Fifth Circuit has said that "the use of the word 'necessary' [in section 2000e-2(e)] requires that we apply a business *necessity* test, not a business *convenience* test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined"[47] by not permitting the discriminatory employment practice. The essence of a business is not eroded by denial of the right to use a discriminatory employment practice unless "the practice is necessary to the safe and efficient operation of the business."[48]

The *Manhart* majority correctly held that the discriminatory practice "in no way affects the ability of the Department to provide water and power to the citizens of Los Angeles."[49] Even if the relevant business function were considered to be that of providing a stable and secure retirement plan, sexual discrimination is not necessary to protect the essence of that function.[50] Judge Duniway noted that the Department's cost argument did not meet the necessity test because while "[a]ctuarial distinctions arguably enhance the ability of the employer and the pension administrators to predict costs and benefits more accurately, . . . it cannot be said that providing a financially sound pension plan requires an actuarial classification based wholly on sex."[51]

The EEOC has decreed that "[i]t 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."[52] In fact, it is doubtful

44. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 387 (5th Cir. 1971).

45. 553 F.2d at 587 (citing Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Hutchison v. Lake Oswego School Dist., 519 F.2d 961, 965 (9th Cir. 1975)).

46. 553 F.2d at 587 (citing 29 C.F.R. § 1604.2(a) (1976)).

47. 553 F.2d at 587 (quoting Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971)).

48. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). *See also* Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971); Local 189, United Papermakers v. United States, 416 F.2d 980, 989, 992 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

49. 553 F.2d at 587.

50. *Id.*

51. *Id.*

52. 29 C.F.R. § 1604.9(e) (1976). The Commission amplified this guideline in subsequent decisions. In Decision No. 74-118, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6431 (Apr. 26,

that cost alone would ever substantiate a BFOQ exception.[53] As one court stated, "[D]iscrimination in employment cannot be tolerated, the expense or inconvenience in complying with the law notwithstanding."[54]

B. The Bennett Amendment

The Department also argued that the plan was exempt from the ban of Title VII by virtue of the Bennett Amendment.[55] The Bennett Amendment[56] incorporates section 206(d) of the Equal Pay Act[57] into Title VII, thereby allowing an employer to differentiate on the basis of sex in paying wages where the payment is made pursuant to a differential based on a factor other than sex.

The majority held that the amendment was inapplicable for the simple reason that an actuarial distinction based entirely on sex clearly does not constitute a differential based on a factor other than sex.[58] The court dismissed administrative guidelines and legislative history raised by the Department as either inapplicable or unpersuasive, or both, citing other legislative and administrative authority in support of its own position.[59]

1974), the Commission concluded that an employer unlawfully discriminates against women on the basis of sex by paying lower monthly pension benefits to women than to men where the women had contributed the same amount as the men to the retirement plan. The Commission concluded that sex-based actuarial tables cannot justify women having to pay more than similarly situated men. *See also* Decision No. 75-147, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6447 (Jan. 13, 1975). The Commission found that an employer could not require a higher contribution from members of one sex where benefits to members of both sexes were the same.

53. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 799 & n.8 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

54. Johnson v. Pike Corp. of America, 332 F. Supp. 490, 496 (C.D. Cal. 1971).

55. 553 F.2d at 589.

56. 42 U.S.C. § 2000e-2(h) (1970). The provision states in relevant part:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount 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 206(d) of Title 29.

57. 29 U.S.C. § 206(d) (1970). The section states in relevant part:

> (1) 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.

58. 553 F.2d at 588, 593.

59. As set forth in its report on the Equal Pay Act, the House Committee on Education and Labor apparently viewed 29 U.S.C. § 206(d)(1)(iv) as a general exclusion covering

Unfortunately, one of the sources that the court labelled "erroneous" and "unpersuasive" was a dialogue between Senator Randolph and Senator Humphrey, the floor manager of Title VII, in which Senator Humphrey stated that the Bennett Amendment was intended to make it "unmistakably clear" that certain differences in treatment between men and women in industrial benefit plans would be allowed.[60] The Supreme

distinctions based on other differentials comparable to seniority, merit, and quantity or quality of production. *See* H.R. REP. NO. 309, 88th Cong., 1st Sess., *reprinted in* [1963] U.S. CODE CONG. & AD. NEWS 687, 689. The Senate Committee on Labor and Public Welfare took the position that subdivision (iv) would permit differences where an employer could demonstrate significantly higher costs in employing a particular sex. *See* S. REP. NO. 176, 88th Cong., 1st Sess. (1963). In *Manhart*, the Department did not equate longevity with such things as seniority, merit or production, nor did it claim that higher contributions from women were necessary for it to avoid being penalized economically. It merely asserted that the pension fund would be better funded and easier to administer by requiring women to pay at a different rate. 553 F.2d at 589.

The Department pointed out a statement by Senator Humphrey that the Bennett Amendment made it unmistakably clear that differences in treatment under industrial benefit plans could continue, *see* note 60 *infra*, in support of its position that valid actuarial distinctions do not constitute sex discrimination. However, the court found Humphrey's statement to be unpersuasive because: (1) it was made hours after the passage of the amendment; (2) the same Congress passed both the Civil Rights Act of 1964 and the Equal Pay Act, so it was unlikely that Humphrey's erroneous interpretation of the latter was accepted by many members of the Senate; (3) House members never heard the statement; (4) every case that has considered the subject has held that earlier retirement options, for one sex or the other, violate Title VII; and (5) since the Bennett Amendment only incorporated the Equal Pay Act exemptions into Title VII, it was questionable whether a statement during debates on the incorporating statute was significant when it erroneously interpreted the statute to be incorporated. 553 F.2d at 589-90.

The Department also cited administrative guideline 29 C.F.R. § 800.116(d) (1975) of the Administrator of the Department of Labor's Wage and Hour Division (cited with approval in *Gilbert*, 429 U.S. at 144-45) in support of its position. The majority said that this guideline was not on point because it referred to the use of outside insurers, whereas the plan before the court was funded and administered within the Department. 553 F.2d at 590. Also, to the extent that the regulation was on point it conflicted with EEOC regulation 29 C.F.R. § 1604.9 (e)-(f) (1976). Under § 1604.9 a benefit plan which provides unequal benefits to employees violates Title VII even if employer contributions are equal. The majority felt that the EEOC was entitled to more deference in a Title VII case than was the Wage and Hour Administrator. 553 F.2d at 590.

The majority found additional support for its decision in the fact that after the passage of Title VII Congress expressly exempted actuarially based pension funds from the provisions of the Age Discrimination Act of 1967, 29 U.S.C. § 653(f)(2) (1970). In fact, age was rejected as a type of Title VII discrimination because of the Senate's fear of the implications for industrial pensions and group insurance. The court claimed that this indicated Congress realized that actuarially based distinctions would fall within the scope of discrimination prohibited by Title VII. 553 F.2d at 590.

60. 553 F.2d at 589.

> SEN. 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

Court cited the same dialogue *in support* of its holding in *Gilbert*.[61] Judge Kilkenny, in dissent, interpreted the Supreme Court's approval of the Humphrey statement as support for his position that the discrimination, if any, fostered by the use of actuarial statistics was not within the purview of Title VII.[62]

The Humphrey statement arguably supports the contention that *Gilbert* excludes pension plans from the scope of Title VII. However, such an interpretation presumes that the Supreme Court, in finding Humphrey's comment to be persuasive, was sanctioning, without qualification, industrial benefit plans that differentiate between employees solely on the basis of sex-related characteristics. What *Gilbert* in fact found this legislative history to establish was that the Bennett Amendment was added to Title VII for the purpose of allowing industrial benefit plans to continue to differentiate between men and women if such differentiation would be permitted pursuant to section 206(d) of the Equal Pay Act.[63] To interpret the Court's finding in line with Judge Kilkenny's view would undermine both congressional intent to define Title VII broadly[64] and well-established case law holding that retirement plans fall within the purview of Title VII.[65]

On the other hand, Kilkenny may have been taking the position that the Department's plan was exempt from Title VII not because such plans had been excluded, but because it discriminated on the basis of the extra cost to the plan to cover the longer life expectancy of women, rather than on the basis of sex. The majority rejected this approach as well:

> How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a

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?

SEN. 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. 13663-64 (1964), *quoted in Manhart*, 553 F.2d at 589.

61. 429 U.S. at 144-45.

62. 553 F.2d at 598.

63. Such an interpretation is consistent with the plain language of the Bennett Amendment that an employer may differentiate upon the basis of sex "if such differentiation is authorized by the provisions of section 206(d) of Title 29." 42 U.S.C. § 2000e-2(h) (1970).

64. *See* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971). The breadth of congressional intent is evident in the use of such all-inclusive language as "in any way," "tend to deprive," and "otherwise adversely affect" in describing employment practices prohibited by § 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) (1970).

65. As the majority noted, every court that has considered the problem has decided that

> 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.[66]

Even accepting Kilkenny's conclusion that the contribution rate was based on the greater cost of insuring females, cost will not qualify as a "factor other than sex" pursuant to section 206(d). The EEOC in its guidelines concerning fringe benefits has stated that it is "an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits."[67] In amplification of this general principle, the guideline further states that "[i]t shall be an unlawful employment practice for an employer to have a pension or retirement plan . . . which differentiates in benefits on the basis of sex."[68]

The Wage and Hour Administrator of the Department of Labor has specifically stated that "[a] wage differential based on claimed differences between the average cost of employing . . . 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 . . . .'"[69]

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retirement plans are covered by Title VII. 553 F.2d at 589-90 (citing Chastang v. Flynn & Emrich Co., 541 F.2d 1040, 1042 (4th Cir. 1976); Fitzpatrick v. Bitzer, 519 F.2d 559, 570 (2d Cir. 1975), *rev'd on other grounds*, 427 U.S. 445 (1976); Peters v. Missouri-Pacific R.R., 483 F.2d 490, 495 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973); Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90, 94-95 (3d Cir. 1973); Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1188 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971)).

66. 553 F.2d at 593.

67. 29 C.F.R. § 1604.9(b) (1976).

68. *Id.* § 1604.9(f).

69. *Id.* § 800.151.

Kilkenny claimed that this section conflicted with *id.* § 800.116(d) which was noted favorably in *Gilbert*. 553 F.2d at 597. Section 800.116(d) states:

> 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), if the resulting benefits are equal for such employees.

The majority noted that § 800.116(d) deals with employer contributions, not with compulsory employee contributions at issue in *Manhart*, which must be equal under § 800.151. This analysis is consistent with the basic purpose of these guidelines. Both guidelines have as their fundamental objective the goal of working against sex discrimination. Therefore, before concluding these guidelines are in conflict, there should be an attempt to interpret them in such a manner that they will work together in achieving their common goal. The general rule of § 206(d) of title 29 is that an employer may not discriminate on the basis of sex. If § 800.151 is construed as an amplification of § 206(d), and if § 800.116(d) is interpreted as a specific type of exception to § 206(d) pursuant to subdivision (iv), then, as the majority concluded, these guidelines are not incompatible.

Moreover, there is substantial legislative history indicating that the "factor other than sex" exception was not added to allow employers to place the additional cost of female longevity, as a class, upon all women employees. Though Congress discussed the alleged greater cost of hiring women than men, Congress defeated two bills which would have allowed any wage differential "attributable to ascertainable and specific added costs resulting from employment of the opposite sex"[70] or which does not exceed "ascertainable and specific added costs resulting from employment of the opposite sex."[71] In rejecting these bills, supporters of the Equal Pay Act contended that while costs could be a valid basis for wage differentials, such wage differentials would have to be based upon a specific and ascertainable additional cost for each employee,[72] and would have to consider *all* cost factors.[73] Thus, the statutory exception for a wage differential on "any factor other than sex" has no application where the employer bases it on "the average cost of employing women employees *as a group* and the average cost of employing men employees *as a group*."[74]

In any event, the Humphrey-Randolph dialogue was far from determinative in either *Manhart* or *Gilbert*. Both courts cited it merely in the course of dismissing other authorities raised against their already declared holdings.[75]

The majority thus found neither of the asserted exceptions to Title VII applicable and held that the plan impermissibly applied group characteristics to the individual.[76] In so holding, however, it was careful to restrict

70. H.R. 6060, H.R. 1936, 88th Cong., 1st Sess. (1963).
71. 109 CONG. REC. 9217 (1963) (amendment offered by Rep. Findley to H.R. 6060).
72. *Id.* at 9206-08 (remarks of Rep. Goodell).
73. *Id.* at 9207 (remarks of Rep. Thompson).
74. Wirtz v. Midwest Mfg. Corp., 58 Lab. Cas. (CCH) ¶ 32,070 (S.D. Ill. 1968).
75. 429 U.S. at 133-40; 553 F.2d at 589-90.
76. 553 F.2d at 590-91.

The Ninth Circuit also discussed the merits of refunding to the female employees those amounts that they had contributed in excess of the amounts contributed by their male counterparts. The court rejected good faith as an absolute defense to the obligation to provide back pay. It relied upon Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006-07 (9th Cir. 1972), in holding that the right to monetary awards for past violations would depend upon balancing of equities, fundamental concepts of fair play, the merits of the plaintiff's claim, public policy, and the hardship imposed against a good faith employer.

In *Manhart* the court held that a balancing of such factors justified the district court's decision to award a refund of all excess contributions made on or after April 5, 1972. This holding was based upon two points weighing against the Department. First, the state statute requiring that pension plans be administered on a sound actuarial basis did not require the Department to use sex-based tables. Second, the money in question rightfully belonged to the employees, but was illegally taken away from them. Since one of the

its ruling to plans based solely or predominantly on sex distinctions.[77] The court thereby implied that a plan using a significant number of other factors (*e.g.*, smoking, drinking habits, weight, medical history, etc.) in addition to sex, might be viewed as a legitimate effort to determine longevity on an individual basis, thereby avoiding violation of Title VII.[78]

VI. CONCLUSION

The Ninth Circuit's position that generalizations based on sex may not be used in dealing with individual women expresses the very essence of Title VII. Title VII dictates that each woman employee be considered on her individual merits, and not penalized for general characteristics of her gender, even when those characteristics may be statistically supported. While exceptions have been created they are narrowly defined and the retirement plan at issue in *Manhart* simply did not satisfy any recognized exception.

Other than an ancillary conflict in interpreting the Humphrey-Randolph discussion, *Gilbert* and *Manhart* are perfectly consistent in dealing with very different situations. The fact situations in the two cases might be comparable if, in *Gilbert*, pregnancy had been included in the disability program and all women were charged to support it. Under those circumstances individual women would be penalized for the potential of their sex-group to become pregnant. Likewise, if, in *Manhart*, the Department had paid benefits to all employees for a fixed period of time (say ten years) and women had objected that because of their greater longevity the plan had a disparate impact upon them, the fact situations would parallel one another. Those who lived longer, regardless of sex, would be penalized under such a plan.

As it stands, *Gilbert* holds that there is no sex discrimination when people are not divided into groups consisting solely of one sex or the other, and *Manhart*, at least as decided by the Ninth Circuit, holds that there is sex discrimination when they are so divided. It is to be hoped that the Supreme Court will recognize this consistency and affirm the Ninth Circuit position on review.

Thomas G. Hankley

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primary purposes of Title VII is to make persons whole after having suffered unlawful employment discrimination, Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), it was only fair to return the employees' money. 553 F.2d at 591-92.

77. 553 F.2d at 591.

78. *Id.* at 587, 591.