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Discrimination in payment Retirement System

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Terry Ann Lunt-Aucoin, Executive Director, Maine Human Rights Commission

Joseph E. Brennan, Attorney General

Re: MacKnight et al v. University of Maine and TIAA-CREF

This responds to your request for an opinion as to whether Judge Gignoux's decision in Colby College v. EEOC, 113 FEP Cases 1363 (DCMe., 1977) is dispositive of the question of whether unequal pay-out for males and females under the University of Maine's Retirement System is a violation of the Maine Human Rights Act.

Question Presented:

Is a retirement plan under which similarly situated males and females make equal retirement contributions, and the contributions of the employer are equal for both male and female employees which results in unequal retirement benefits for males and females because the benefits are computed on separate sex longevity tables violative of the Maine Human Rights Act prohibitions against discrimination on the basis of sex in compensation, terms, conditions or privileges of employment?

Summary of Conclusion:

Under the Maine Human Rights Act, and the guidelines promulgated by the Commission pursuant to it, a pension plan which provides for unequal payout (a lower payout rate to females) on the basis of the sex of the person receiving the pension, discriminates on the basis of sex against individual female employees in violation of the Maine Human Rights Act.

Facts:

Professional employees of the University of Maine are required to contribute a designated percentage of their salaries to the TIAA-CREF plan. Both the University of Maine, as employer, and similarly situated male and female employees make equal contributions to the retirement plan. Although the employee and employer contributions to the retirement pension fund are equal, the TIAA-CREF uses sex-segregated actuarial tables to determine the monthly retirement

benefits which will be paid to retired professional employees of the University of Maine, and as a result of the use of sex-segregated actuarial tables, female employees receive smaller monthly benefits than similarly situated male retired employees who have made the same contributions to the retirement fund.^{1/} Four University of Maine female professional employees, Ruth Nadelhaft, Marie Urbanski, Nancy MacKnight and Mary Ann Hartmen all filed complaints with the Maine Human Rights Commission alleging that the disparity in the amounts of pension benefits between similarly situated males and females as a result of the University of Maine's selection of TIAA-CREF, and TIAA-CREF's use of sex-segregated actuarial tables, constituted unlawful sex discrimination in violation of the Maine Human Rights Act.

At the January 1978 meeting of the Maine Human Rights Commission, the Commission voted on the four complaints and found reasonable grounds to believe that unlawful employment discrimination had occurred. Subsequently both the University of Maine and TIAA-CREF requested reconsideration by the Commission of their finding of reasonable grounds. At their March 9, 1978, meeting the Commission voted to grant reconsideration of that finding. The basis for the granting of reconsideration was Judge Gignoux's decision in Colby College v. TIAA-CREF, 13 FEP Cases 1363 (DC Me., 1977) and the City of Los Angeles Department of Water and Power, et al v. Manhart, 46 L.W. 4347 (April 25, 1978) case which was then pending before the Supreme Court. The Human Rights Commission then requested this office to give them an opinion on the effect of the Colby College case on Maine law.

Discussion:

Title 5 M.R.S.A. § 4572 provides in pertinent part that it shall be unlawful employment discrimination, for any employer "to discriminate with respect to . . . compensation, terms, conditions or privileges of employment . . . or any other matter directly or indirectly relating to employment . . ." Section 4553(4) defines an employer as

" . . . any person in this state employing any number of employees wherever the place of employment of such employees, and any person outside this state employing any number of employees whose usual place of employment is in this state; any person acting in the interest of any employer, directly or indirectly . . . "

There can be no doubt that both the University of Maine and TIAA-CREF fall within this definition. The Maine Human Rights Commission in §304(E) (1) of its employment guidelines has provided that "fringe benefits, as used in this section, includes . . . retirement benefits." 304(E)(2) provides that it is an unlawful employment practice to discriminate on the basis of sex with regard to fringe benefits. The

^{1/} This discussion is concerned with only one of the TIAA-CREF options, the single-life annuity option.

Maine Human Rights Act defines discriminate as: "meaning without limitation to separate or segregate."

The question presented by the Maine Human Rights Commission's request is whether the use of separate sex actuarial tables, which result in unequal benefits for similarly situated males and females who have made equal contributions to the fund constitutes a violation of the Maine Human Rights Act. A question identical to that presented by the University of Maine under the Maine Human Rights Act was raised in the Colby College case, supra, with regard to the interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e. In that case, Judge Gignoux considered the question of whether Colby College and TIAA-CREF have violated Title VII by participation in, and the management of, a periodic retirement annuity benefit plan which distinguished between similarly situated male and female employees on the basis of sex in the disbursement of unequal benefit payments. Judge Gignoux's decision, which found that Colby College and TIAA-CREF were not in violation of Title VII was based on a construction of Title VII in accordance with what is known as "the Bennett Amendment" which provided in pertinent part:

"It shall not be an unlawful employment practice under this sub-chapter 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 206(d) of Title 29."

Section 206(d) of Title 29 is the Equal Pay Act. The Administrator of the Wage and Hour Division of the Department of Labor had interpreted the Equal Pay Act, when dealing with the question of insurance or retirement benefit plans, to require either equal employer contributions or equal employee benefits but not requiring both. In the Colby College case, the Equal Employment Opportunity Commission took the position that even though Title VII gave statutory deference to the Equal Pay Act, that the Title VII guidelines which mandated equal pay-in and equal pay-out controlled over the Equal Pay Act guidelines which required either equal pay-in or equal pay-out. In his decision in the Colby College case, Judge Gignoux found that the Wage and Hour Administrator's regulations interpreting the Equal Pay Act took precedence over the Commission's interpretation of Title VII. Because he found that equal pay-in, with unequal pay-out did not violate the Equal Pay Act, he therefore found that it was also not violative of Title VII. In reaching his decision which involved an interpretation of both Title VII and the Equal Pay Act, Judge Gignoux placed great emphasis on the Supreme Court's holding in General Electric v. Gilbert that the EEOC guidelines were not entitled to great deference because the EEOC had not been granted rule and regulation making power; and, in addition, because the EEOC had changed its interpretation of that portion of its law which dealt with retirement and insurance benefits.

Judge Gignoux's decision in the Colby College case was a decision based on an interpretation of Title VII in accordance with the Equal Pay Act. It is distinguishable from the case presented under the Maine Human Rights Act by the University of Maine case in several ways. First, unlike the situation presented by Title VII, there is no Bennett Amendment under the Maine Human Rights Act. Therefore, there is no limitation on construction of the Maine Human Rights Act similar to that on the construction of Title VII. In addition, the regulations promulgated pursuant to the Maine Human Rights Act by the Maine Human Rights Commission have interpreted the Maine Human Rights Act to prohibit discrimination in the provision of fringe benefits on the basis of sex. Fringe benefits have been defined to include retirement benefits. The Maine Law Court, in the M.H.R.C. v. Local 1361, United Paper Workers International Union case, 383 A.2d 369 (Me., 1978), held that the interpretive guidelines of the Maine Human Rights Commission were entitled to great weight in determining the meaning of the Maine Human Rights Act.

Also significant in assisting the Commission in its determination of whether to reconsider its finding of reasonable grounds to believe sex discrimination has occurred in the four TIAA-CREF cases concerning the University of Maine is the United States Supreme Court's recent decision in the Manhart case, supra. Although Judge Gignoux distinguished the Court of Appeal's decision in Manhart in his decision in the Colby College case, the reasoning of the Supreme Court in its decision in the Manhart case is extremely significant in interpreting the validity of unequal payout as well as unequal pay-in under the Maine Human Rights Act.^{2/} The Manhart case dealt with a challenge under Title VII to a pension scheme which provided equal retirement benefits for both male and female employees but required different and higher contributions from female employees than from male employees. In considering the validity of this scheme under Title VII the Supreme Court found that a scheme of unequal pay-in violated Title VII, despite the Bennett Amendment and despite the Department of Labor's interpretations of the Equal Pay Act. In analyzing the validity of the Los Angeles Water and Power Department's pension scheme under Title VII, the Supreme Court focused on the requirement of Title VII that decisions regarding compensation, terms, conditions and privileges of employment are to be made on an individual rather than a gender related basis. The court found that the statute "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class," and stated that "even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." The Court found that as a matter of legislative policy, the United States Congress had decided that classifications based on sex are unlawful. It then indicated that there was no reason to believe, in light of a statutory scheme which mandated focusing on the individual and prohibited determinations based on sex as a class, there was a special definition in the context of employee group insurance or pension plan coverage which permitted discrimination which would otherwise be forbidden. The Court indicated this was so even though insurance is generally concerned with events that are not predictable on an individual basis. As the court pointed out, in any insurance scheme the better risks always subsidize the poorer risks.

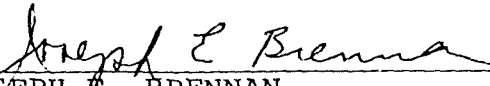
^{2/} Respondents in the University of Maine cases acknowledge that the Manhart case is a significant consideration in the Commission's determination in this case.

The court then addressed the Equal Pay Act question. The Equal Pay Act administrative interpretation, which required either equal pay-in or equal pay-out, was found not to be in accordance with the statutory language which permitted unequal pay when made pursuant to: (a) a seniority system; (b) a merit system; (c) a system measuring earnings by quantity or quality of production; or (d) a differential based on any factor other than sex. The court found that "One cannot say that an actuarial distinction based entirely on sex is 'based on any other factor than sex.' Sex is exactly what it is based on." The court found that the classification of the Los Angeles Water and Power Department, that all women would pay higher pension plan contributions because women as a class tended to live longer could not pass the test of demonstrating that it was based on a factor other than sex.

Having found that separate sex actuarial tables are based on sex, the court rejected the contention that they were based on a "factor other than sex," i.e. longevity.

It is conceded in the University of Maine cases that the distinction in the pay out of benefits is based on one factor and that is sex, and that different sex actuarial tables are used because sex is the most easily measurable characteristic since it is statistically true that women, as a class, live longer than men as a class. The Maine Human Rights Act and the Commissions' employment guidelines make a sex-based distinction in fringe benefits unlawful. The Maine Human Rights Act is to be construed consistently with Title VII and, as the Manhart case makes clear, class-based distinctions on the basis of sex are unlawful. After the Manhart decision, the Colby College decision, which was based on the Equal Pay Act's apparent authorization of either equal pay in or equal pay out, is of questionable validity. The Colby College case was always distinguishable from a case arising under the Maine Human Rights Act because of the absence of anything comparable to the "Bennett Amendment" in Maine. Maine law now finds additional support in the Manhart decision.

Based both on its own statutes, and on the laws it is entitled to look to for guidance, the Maine Human Rights Commission could clearly find reasonable grounds to believe discrimination on the basis of sex had occurred in the use of separate sex actuarial tables which result in unequal benefits to similarly situated male and female employees.



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