ORIGINAL

In the

Supreme Court of the United States

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, et al.,

Petitioners,

--VS--

MARIE MANHART, et al.,

Respondents.

No. 76-1810

C-1

Washington, D. C.
January 18, 1978

Pages 1 thru 58

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

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v.	:	No. 76-1810
MARIE MANHART, et al., Respondents.	:	

Washington, D. C.,

Wednesday, January 18, 1978.

The above-entitled matter came on for argument at 10:10 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DAVID J. OLIPHANT, ESQ., Deputy City Attorney, 111 North Hope Street, P.O. Box 111, Los Angeles, California 90051; on behalf of the Petitioners.

ROBERT M. DOHRMANN, ESQ., Schwartz, Steinsapir, Dohrmann & Krepack, Two Century Plaza, Suite 1900, 2049 Century Park East, Los Angeles, California 90067; on behalf of the Respondents.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in City of Los Angeles against Manhart and others.

Mr.Oliphant, you may proceed whenever you're ready.

ORAL ARGUMENT OF DAVID J. OLIPHANT, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. OLIPHANT: Mr. Chief Justice, may it please the Court:

We're here today because the Court of Appeals refused to follow the Supreme Court in General Electric vs. Gilbert.

The Manhart decision was issued just ten days before the Gilbert decision came down, and it was directly contrary to the Gilbert decision; nevertheless, two or the three judges refused to change their opinion.

We're also here because the Court of Appeals refused to follow the plain language of the statutes and the will of Congress. This is just a question of statutory construction, but what the respondents seek is a policy statement from the Court contrary to the plain language of the statute, contrary to the will of Congress, and contrary to the decisions of this Court in Gilbert and in Nashville, Nashville Gas vs. Satty.

In September a case was filed in the Northern District of California entitled Retired Public Employees Association vs. State of California. The case is a suit under

Title VII by females to recover back retirement contribution, and by males to increase retirement benefits. The California Public Employee Retirement System had both unequal contributions and unequal benefits, based on sex differentiated actuarial tables.

We cite this case simply to emphasize to the Court today that in this particular case only the female employees are before the Court; but the impact of this decision will affect male employees, their spouses, and a multitude of retirement systems across the country, as witness the many amicus briefs that have been filed.

QUESTION: Would it have any effect on the insurance companies charging more for annuities for women than for men?

MR. OLIPHANT: Ultimately it may, Your Honor, yes. But --

QUESTION: And higher rates, correspondingly, for joint and survivorship annuities for a husband and wife?

MR. OLIPHANT: Yes, Your Honor.

We'd like to point out first the four points that we would like to make in argument, and then commence the argument, if we may.

First, this case is just an application of the principles in General Electric vs. Gilbert.

Second, Title VII and the Equal Pay Act do not prohibit the practice challenged; that is, to measure contribu-

tions and benefits in retirement plans, using sex-differentiated mortality tables.

Third, the lower courts, in order to arrive at the contrary decision as they did, had to abdicate their responsibility and defer totally to decisions of administrative agencies that were contrary to the statute and contrary to their own authority to issue such bulletins.

And finally, Congress did not intend adopting different standards for discrimination under Title VII than were previously known in 1964 under the equal protection clause of the Fourteenth Amendment.

I'd like to begin by saying that first there is no discrimination in the retirement plan. The facts are simple. Males and females receive the same gross salary. The department simply withholds more for retirement from the female salary than from the males, because all the mortality experience and more particularly the department's mortality experience show that women have a greater life expectancy.

This is true at all ages, and of course it's true in retirement.

It is impossible to test or determine individual life expectancy; there's no way you can test for it, so you have to fund based on group mortality experience.

Group mortality experience, showing that women will receive far more payouts than men, you have only three ways of

doing it, given the greater life expectancy of females over males. You can either have the females pay the additional cost of their life expectancy, or you can have the employer pay it, or the female and the employer together, or you can have the males subsidize the females.

In the department's plan, the females paid a slightly higher contribution than the males, and that was matched by the department 110 percent, so that the department also paid more for the females than the males.

QUESTION: Mr. Oliphant, --

MR. OLIPHANT: Yes, sir?

QUESTION: -- is it true that members of one race, on an actuarial principle, might have a longer expectancy than members of another race?

MR. OLIPHANT: It's possible, but our current actuarial statistics seem to indicate that the difference between whites and non-whites, which is the only racial characteristic that I've seen studies on, indicate that they are getting closer and closer. As a matter of fact, in the later years, over the Seventies, it may be that the non-whites are actually outliving the whites.

QUESTION: Well, have insurance rates in fact been different for, say, for blanks than for whites?

MR. OLIPHANT: I think sometime back they were; they're not now.

QUESTION: If they were today, would this case be here on that possible basis?

MR. OLIPHANT: I don't know, Your Honor, because this case came under Title VII, and it came under the sex qualifications of Title VII. And Congress intended to treat sex in compensation entirely different than race in compensation.

QUESTION: You have just stated that race is no longer a factor, then, in the setting of insurance rates. How did that come about, by voluntary action on the part of the insurance companies?

MR. OLIPHANT: I believe so.

QUESTION: There was a time, at least within our lifetimes, when some insurance companies would not insure either American Indians or Negroes; is that not so?

MR. OLIPHANT: That's true, Your Honor, but I --

QUESTION: That's no longer so?

MR. OLIPHANT: That is true.

QUESTION: I didn't quite understand, did you say that in Title VII Congress treats sex discrimination entirely differently from the way the statute treats racial discrimination?

MR. OLIPHANT: In the compensation area, yes, Your Honor.

QUESTION: There's a BFOQ, of course, for discrim-

inating as between men and women, males and females, and that doesn't exist as a justification for discriminating among races; but, except for that, is there any difference in Title VII?

MR. OLIPHANT: Yes, Your Honor, there is the Bennett amendment to Section 703(h), which very specifically incorporates the Equal Pay Act into Title VII.

QUESTION: Yes.

MR. OLIPHANT: And the Equal Pay Act intended allowing pension differentials to continue.

There is quite a difference, I think, Your Honor, between race and sex in terms of longevity. It's very clear that in the sex area this is more than just something that may be cultural. As the blacks, for example, become more and more a part of the middle classes in our society, so their life expectancies are pulling together. The reverse is true with females. As more and more come into the work force, their life expectancy is expanding.

Our own department experience, as the Appendix shows, is that women are actually living longer than the men as they come into the work force.

QUESTION: Surely there are actuarial tables available for just people, aren't there? Life expectancy of people in the United States of America.

MR. OLIPHANT: Well, --

QUESTION: Of both sexes and every ethnic background.

MR. OLIPHANT: Well, there may be, Your Honor. At the time --

QUESTION: Well, are there not?

MR. OLIPHANT: I don't know. I think there --

QUESTION: I thought there were.

MR. OLIPHANT: -- have been some constructed, that would be a group statistic, including everybody. In terms --

QUESTION: Well, does the American Experience Table of Mortality, used by the insurance companies, distinguish between men and women?

MR. OLIPHANT: I don't know, Your Honor.

QUESTION: Well, it surely does and has for more than 50 years on the rates of annuities.

MR. OLIPHANT: Oh, yes, Your Honor.

QUESTION: Well, if they didn't distinguish, how would they have any basis for a different rate for annuities for women than for men?

MR. OLIPHANT: They do distinguish between men and women in the insurance --

QUESTION: Well, the answer must be that the American Experience Table does have a separate rating --

MR. OLIPHANT: I did not recognize the name of the table, Your Honor. I apologize.

QUESTION: Oh, I see.

MR. OLIPHANT: The insurance industry and the actuaries do distinguish, because you're talking about apples and oranges, trying to fund that.

If you go into a single table, what you do for funding purposes of annuities, essentially, is you make the males subsidize the females.

QUESTION: You mean just for this decision it would?

MR. OLIPHANT: Yes, Your Honor. If it were affirmed.

QUESTION: Or even, say, that you make the people who don't live so long subsidize the people who live longer.

MR. OLIPHANT: That's correct.

QUESTION: Like the, I suppose, males who don't live so -- the people who die younger subsidize the males who live longer.

MR. OLIPHANT: That's correct, too, Your Honor.

The difference is this, that of the males who die younger, that subsidize the males who die older, at the time that they purchase their annuity they have an equal life expectancy. That's not true between the male and the female at the time of purchase of annuity.

What the plaintiffs in this case seek is not equality but more than equality, greater benefits than the males.

QUESTION: Of course, that's what the plaintiffs not only sought but in a way were accorded, in the recent Nashville

case against Satty. Men just don't get pregnant, do they?

MR. OLIPHANT: That's right, Your Honor.

QUESTION: And so women were asking for a treatment by an employer for a condition that men just don't have, or ever get.

MR. OLIPHANT: That's right.

QUESTION: So that is, in a way, preferential treatment that they were asking for and were accorded.

MR. OLIPHANT: Well, this Court didn't award the pregnancy benefits in that, Your Honor.

QUESTION: No, but it's still in seniority --

MR. OLIPHANT: The Court awarded seniority.

QUESTION: That's right.

MR. OLIPHANT: But I think a distinction there is that the Court was talking about Section 703(a)(2) of Title VII, particularly equal employment opportunity status, as opposed to Section 703(a)(1), where we're talking about compensation.

I think there's a tremendous difference. One is depriving the individual of work; the other is a difference in compensation. Of course we are not saying here that there was inequitable treatment. The treatment was actuarily equal. There is no way to have identical treatment and come out equitably for males and females. It's just like the Gilbert case. It's actuarily a -- I guess the best way of putting it

would be not facially neutral but factually neutral.

Because the males and the females paid the same proportion, the same percentage of their total contributions to the retirement plan, and would actuarily end up with the same benefits.

QUESTION: It's not facially neutral, would you say it's facially discriminatory?

MR. OLIPHANT: No, Your Honor, I would not.

QUESTION: But they receive different compensation on the face of it, don't they?

MR. OLIPHANT: They receive the same gross pay, they receive different takehome pay.

QUESTION: Right.

MR. OLIPHANT: But, on a periodic basis, at the same time as they are receiving different takehome, the females are actually getting more, because the department was contributing more into the retirement plan for them, it's just --

QUESTION: But that's only available if they retire. If they quit, they don't get any of that.

MR. OLIPHANT: No, they get their retirement contribution back, plus interest.

QUESTION: But only the part they put in. Do they get the employer's contribution, too?

MR. OLIPHANT: Well, only if they retire, and they have to --

QUESTION: If they quit before retirement age, they only get their own contribution back, don't they?

MR. OLIPHANT: Well, that's correct, plus the interest that it's earned.

QUESTION: Yes.

MR. OLIPHANT: And that's true of any contingency retirement plan.

QUESTION: But you say this is facially neutral as well as factually neutral?

MR. OLIPHANT: No, I said factually neutral.

QUESTION: But if it's not facially neutral, you say it's not facially discriminatory?

MR. OLIPHANT: No, it is not discriminatory. It's different, I'll grant you that; but it's not discriminatory, because the treatment is equitable.

The package that's --

QUESTION: Are you defining the term "discriminate" to mean something that's cost-justified is not discriminatory?

In other words, that as long as you can explain there's a difference in cost to justify the difference in original payment, it's not discriminatory?

MR. OLIPHANT: I think that's partially correct. I think beyond that, I think you have to look at the total value package of what the employee is getting and --

QUESTION: What I'm really asking, I suppose, in

General Electric, as I understand the case, they held there was no prima facie case. I don't know whether you're arguing there's no prima facie case, or that if there's a prima facie case we have an affirmative defense that overcomes this.

MR. OLIPHANT: No, I say there's no prima facie case. For two reasons: one, because we were not discriminating, because of the equal value, if you will, of the packages, the female actually gets more dollars-and-cents in value, but it's equal in terms of actuarial basis. But more than that because the Bennett Amendment itself to Section 703(h) in effect says it shall not be an unlawful employment practice to differentiate, on the basis, it says, in determining the amount paid or to be paid in compensation or wages, so long as it's allowed by the Equal Pay Act.

And I think a legislative history is very clear this was allowed by the Equal Pay Act.

QUESTION: Of course I thought the Bennett Amendment provided affirmative defenses, that's really why I asked that question.

You say they qualify the prima facie case.

MR. OLIPHANT: I think they do, Your Honor. In Bowman vs. Franks, this Court said the whole of Section 703(h) was definitional of the Act. And I think that's what Congress intended.

The Equal Pay Act does not require equal amounts of

compensation. It's not an economically -- it's not designed to take over an employer's business and say, This is the level of compensation you'll provide; all it does is it prohibits payments of different rates of wages between the sexes, for equal work, where there is no other factor other than sex as a basis for the differential.

In this particular case the department pays the same gross salary schedule, and to that extent the wage rate is the same. Takehome is less, but, as we pointed out, the contribution is not lost, it's merely deferred to a later time. And at that same time larger matching amount is paid on behalf of the females for retirement.

If we turn around and gave the gross salary to the males and females and said: Go and buy your own annuity. Private industry would charge the females more than the males. We would not have violated Title VII. We would be paying them the same gross salary.

The only difference between that situation and our situation is that the department is providing the plan instead, doing what is properly private industry, and, in addition, is contributing extra money for the females than for the males.

QUESTION: Mr. Oliphant, under your new State law, you are now making equal payments, aren't you?

MR. OLIPHANT: Yes, Your Honor.

QUESTION: Have you had any threats of suits by males?

MR. OLIPHANT: We have complaints, I think we have about three complaints to the EEOC by male groups. On different -- the one that's in the Appendix by the Architects and Engineers Association, we really don't know what they're complaining about at this point, because we haven't received a complaint. But essentially what their cause is is that benefits and contributions are unequal.

QUESTION: Well, I take it you feel that the new State law is completely constitutional?

MR. OLIPHANT: Within -- well, all that the State law has said is that we must equalize. What we have done in order to comply with that is the department's paid the difference. We have essentially footed the bill.

I think an employer can do that, pay additional, if he wants to foot that bill; but that's not the question before the Court today.

QUESTION: Well, why doesn't he violate Title VII? Why couldn't a man sue him for violating Title VII, if he does that?

MR. OLIPHANT: Well, Title VII, I think, deals with differences in compensation -- I take you to the Equal Pay Act, which talks about wages. If wages does not include pensions, then I don't think we have any problem. I think the problem that arises is probably the Equal Pay Act problem, that we are paying more total compensation to males -- I'm sorry, to females

than to males because we're paying the difference; and the question is whether that violates the Equal Pay Act.

And that's another question down the road.

I think the question here is whether we were violating Title VII. The fact that we may have equalized because we're required to by State law, I don't think that indicates that we were violating the statute before. I don'tthink we were. We were treating both equitably.

It seems to me this is one of those Gordian knots that the Court is going to be faced with: the males on one side and the females on the other.

QUESTION: Well, of course, there's no doubt that a federal law supersedes a State law on a subject, unless there's a -- if it's addressed to the same subject, unless there's an express or implied exception to allow the State to legislate. And when you're legislating equality, it's hard to say that the federal statute requires equality but permits a State to require even more equality.

MR. OLIPHANT: I think that would be true, unless you were getting into a Tenth Amendment area. That would depend on whether you're talking about civil rights or simply regulating commerce.

QUESTION: I want to be sure of your position.

MR. OLIPHANT: Yes, sir.

QUESTION: Justice Rehnquist obviously is.

MR. OLIPHANT: I think we are --

QUESTION: I take it your position is this: that it's all right to use objectively verifiable differentiating factors between the sexes in the determination of these rates, but that you're not required to. And since the change in your law, you've gone along with it, and I take it from what you just said, you think this is all right.

MR. OLIPHANT: I don't think it would be appropriate to use unisex tables, Your Honor, because there the males would be paying for the females. I think the difference -- this is my own personal view -- the difference is that here the employer is paying the extra himself.

But it does impact on males, and we will be faced with that potential lawsuit from males, as the State of California is.

QUESTION: As Mr. Justice Rehnquist suggested, the females are getting higher pay for the same work, total pay, if you take into account the annuity.

MR. OLIPHANT: That's correct. That is correct.

QUESTION: Well, your complaint about the -- Ninth Circuit, is it -- Ninth Circuit opinion is that it requires that things which are different be treated as though they were the same.

MR. OLIPHANT: That's correct, Your Honor. It's just as much a denial of equal protection to treat things that

are dissimilar as equals, as it is to treat things that are equal in a dissimilar fashion.

QUESTION: Could the same argument be made about smokers and non-smokers, one subsidizes the other?

MR. OLIPHANT: The argument could be made, Your Honor, but it doesn't make sense in terms of annuities. Because --

QUESTION: Well, aren't there studies that show that the longevity of a non-smoker is greater than the longevity of a smoker?

MR. OLIPHANT: That's true, Your Honor. But if I were a non -- if I were a smoker -- well, let me put it this way: if I'm going to buy an annuity and they will give me a lower rate because I am a smoker, I will come in as a smoker and a drinker and overweight, whatever I can do to get the lowest rate.

QUESTION: Well, these are not identifiable differences, though, so far as the actuaries are concerned. Is there any way that you can measure how long a person has smoked and how many packages he smokes a day, the way you can measure the longevity of a man against a woman?

MR. OLIPHANT: No, Your Honor, because these factors are within the control of the individual. I can stop smoking tomorrow, I can stop drinking tomorrow, the day after I bought my annuity.

QUESTION: You hope!

[Laughter.]

QUESTION: Well, why is it, then, the insurance companies spend millions of dollars to stop their policyholders from smoking?

MR. OLIPHANT: I think you --

QUESTION: They do, don't they?

MR. OLIPHANT: They do, Your Honor. I think you have to look at the difference between insurance and annuity. In insurance, the risk of smoking or drinking or --

QUESTION: Well, don't these insurance companies sell annuities, that I'm talking about?

MR. OLIPHANT: I don't know of any. There may be, Your Honor. That sell annuities that are cheaper for smokers?

QUESTION: No, sir.

MR. OLIPHANT: No.

QUESTION: That advertise and spend all kinds of money to stop people from smoking.

MR. OLIPHANT: I would think that's a public service, Your Honor. It's --

QUESTION: Well, what other public service do they pay for? Other than --

QUESTION: They advertise about cancer and a whole lot of things, don't they?

MR. OLIPHANT: Yes, Your Honor.

I think if you were to provide lower rates in an

annuity policy for smoking, drinking and overweight, you'd be encouraging bad health.

QUESTION: Of course, anybody who is selling, who is only in the annuity business, wants his customer, the annuitant, to die as promptly as possible.

[Laughter.]

QUESTION: Isn't that correct?

MR. OLIPHANT: That's correct.

QUESTION: And so --

MR. OLIPHANT: That's one of the problems of equalizing. If you are in a system, as many are, where they allow you to take an annuity or a lump-sum alternative, then if unisex is the mandated thing, the male will take the lump sum, and he's going to come out better. He can go out and buy a private annuity. And the female will take the annuity, because she will come out better.

The result will be that --

QUESTION: Well, I suppose the women can argue that the reason their longevity is greater is because they've been discriminated against in the past, and if as many women had become company presidents as men had, they too would have died at an earlier age from stress.

MR. OLIPHANT: That argument I think can be made, but there's no statistics to bear it out, Your Honor.

QUESTION: You said the contrary a moment ago, that

the more the women come into the labor market, the longer they live.

MR. OLIPHANT: That's been our experience, Your Honor; very definitely.

QUESTION: But when you say this is your experience, you're not suggesting that this is the experience that has yet been reflected by the pervasive actuarial studies of the American Experience Table of Mortality?

MR. OLIPHANT: All that I have seen of actuarial studies has shown that the more females that come in the work force the longer the life expectancy they have. And I see nothing to show that the stress jobs make any difference.

As a matter of fact, in those areas where males and females have similar jobs, such as in teaching, the difference seems to carry on the same. The statistics of Teachers Insurance, one of the amici, indicate that female teachers live just as much longer than male teachers as females in the general population live longer than males.

I think, Your Honor, I'd like to reserve time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Oliphant.

Mr. Dohrmann.

ORAL ARGUMENT OF ROBERT M. DOHRMANN, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. DOHRMANN: Mr. Chief Justice, and may it please the Court:

This case is brought by women employees of the Los Angeles Department of Water and Power and by the union that represents many of them, the International Brotherhood of Electrical Workers, Local 18.

We are challenging an explicit sex classification which violates 703 of Title VII of the Civil Rights Act. It is an explicit violation of that Act, it is express discrimination in every case; money is taken from a woman's paycheck and not from a man's for one reason and one reason alone. That woman has become an imperfect and an imprecise surrogate for the term "long life" or "longevity"; and that's it.

QUESTION: Well, what do you say about the lawsuit that the men might bring if they are required to subsidize the women?

MR. DOHRMANN: Mr. Chief Justice, as the United Auto Workers and as the AFL-CIO point out, and indeed as the Society of Actuaries point out in the brief that they have filed with this Court, most plans in America are sex neutral. This is a rare plan that requires a mandatory contribution from the employee, and discriminates between employees on the basis of

sex. It is a very rare event.

And I know of no such litigation in which men, in the United Auto Worker plan or any other collectively bargained plan or in any other unilateral plan, in which men have contended: Wait a minute, if the contribution is the same for women as for men, the women are living longer than we are, and that's unfair.

There is no such litigation, Mr. Chief Justice, and I suggest that there's a very good reason why.

QUESTION: Why? When I put that question to you, it was a hypothetical question. I don't know whether there's any litigation or not. But the suggestion was made that if men must subsidize women by paying more, than the women pay for the same return, that that in itself is a discrimination.

MR. DOHRMANN: Well, Mr. Chief Justice, in order to reach that conclusion, one must conclude that it is lawful under Title VII to treat workers, individual workers of this petitioner or any employer subject to the Act, as men and as women as statistics rather than as individual workers. And that practice is impermissible under Title VII, and this Court has said so, and all courts beneath it have also said so.

It is improper and it's unlawful to treat women as women.

Let me give an example, --

QUESTION: Is it unlawful for a life insurance company

to charge more for women's annuities than for men?

MR. DOHRMANN: In the insurance context, not at all, because the insurance industry is not regulated by Congress to require that.

Let me give an example of that, if I may. If this employer, instead of operating a pension fund, had a severance pay trust, in which several cents per hour are put into a severance pay fund and at the end of the employment, whatever it is, that money, lump sum, is given to the employee. That employee may go to an insurer, whether he be a male or a female, and purchase an annuity. And at that point in time, having left the employment context, maybe the woman would pay more for the annuity than the man, maybe not; but, in any event, there is no longer the employment context and the practice need not be judged and cannot be judged under Title VII.

QUESTION: Well, you don't challenge the accuracy of the separate mortality tables at all, namely, that if X and Y go to buy an annuity, one's a man and one's a woman, you accept the fact that the insurance company or whoever is selling the annuity would say: Well, you as a woman have a life expectancy of a certain amount, and the man has a certain lesser life expectancy, and therefore we have to charge you more, the woman.

You don't challenge the accuracy of those?

MR. DOHRMANN: The accuracy of it? No. Once you divide men and women, as the insurance industry has commonly

done, you will find that a woman, on the average, lives longer than a man.

QUESTION: And if you were selling an annuity to a woman as distinguished from a man, and you could -- and you thought that it might cost you more to provide the annuity, because the woman has a greater life expectancy, you'd probably charge more, I suppose, or you'd go broke.

MR. DOHRMANN: As an insurer?

QUESTION: Yes.

MR. DOHRMANN: That's possible, yes.

However, there's one point that can be made: if an individual buys an annuity policy, or buys a policy of life insurance, that individual can have specifics concerning his age, weight, use of such substances as counsel mentioned, alcohol and tobacco, and an individual profile can be drawn.

QUESTION: But you can't -- if you don't challenge the accuracy of the life expectancy prediction for women, I take it you must agree, then, you can't individualize among the women which ones are going to live long and which ones are going to die sooner, or -- just like with the man?

MR. DOHRMANN: Correct. In any group pension plan, given, for example, to 12,000 employees; there's no way to tell whether men are going to live -- well, what particular employee is going to live longer.

QUESTION: And if you have to start collecting now

to provide the annuity later, you've got to make a judgment, I guess, because you have to --

MR. DOHRMANN: You have to make a judgment. Title VII commands that that judgment be made without respect to the individual's sex, race, national origin or religion.

QUESTION: Did the IBEW negotiate this contract for the employees?

MR. DOHRMANN: No, it did not. At that time the union was not the collective bargaining representative of the employees, it had not won bargaining rights, and did not negotiate it.

QUESTION: Was this -- did any other union, or was this just unilaterally --

MR. DOHRMANN: This was unilaterally adopted by the Department of Water and Power.

QUESTION: No -- it was not a product at all of collective bargaining.

MR. DOHRMANN: Correct.

QUESTION: Do insurance companies, in selling individual annuities, consider smoking habits, obesity, family history, and these other elements you mentioned in your brief?

MR. DOHRMANN: Yes, they can. They can make a complete medical profile of an individual.

QUESTION: But do their rates vary in accordance with

any one of these factors?

MR. DOHRMANN: I cannot speak for the industry, although the industry suggests, and the American Council of Life Insurance amicus curias brief, that that is so.

QUESTION: We could take judicial notice of the fact that they over-rate, up-rate for certain conditions, overweight being one of them.

MR. DOHRMANN: That's correct, Mr. Chief Justice.

In other words, once you can get into the individual posture, where there is a retail sale, if you will, of an insurance contract, yes, at that point the individual can be judged.

QUESTION: Just as they can refuse if they want, on the grounds of overweight that reaches impermissible proportions medically, they refuse to insure at all, don't they?

MR. DOHRMANN: Yes. The point in this case is that when you're administering a group plan, you cannot individually analyze each employee. It is possible if you wish to, to make an individual analysis; it's not commonly done. Most plans --

QUESTION: But the difference is between private and public.

MR. DOHRMANN: Pardon me, sir?

QUESTION: The difference is between private

insurance companies and public insurance companies.

MR. DOHRMANN: Yes. Correct, Mr. Justice Marshall.

QUESTION: Because, as I understand it, the private insurance companies are regulated by the State and nobody else.

MR. DOHRMANN: That is correct.

QUESTION: And some States don't even bother to regulate it.

MR. DOHRMANN: This is an uninsured plan, which isn't even regulated by the State of California. This employer manages its own uninsured pension plan.

QUESTION: Well, private insurance companies do issue group policies, do they not, in which no medical examination is required, and they just average out the whole group?

MR. DOHRMANN: The whole risk over the whole group; that is correct, Mr. Chief Justice.

QUESTION: That is because Title VII has nothing in the world to do with them.

MR. DOHRMANN: Well, nonetheless, --

QUESTION: Isn't that correct?

MR. DOHRMANN: Not exactly, Mr. Justice Marshall. If the policy is being issued to an employer --

QUESTION: But if it's issued to -- what kind of an employer?

MR. DOHRMANN: To an employer who has a pension plan

which it does not self-insure --

QUESTION: Right.

MR. DOHRMANN: And in that instance the insurer provides the mechanism for the employer to provide the benefit in turn, and that must be on a neutral basis. And it is commonly done on a neutral basis.

Here the department contends that it must measure longevity. Assuming it must, conceding that longevity is necessary as a measuring rod of fiscal soundness, why does it select sex? Why is that single immutable characteristic chosen rather than the others that we've discussed?

QUESTION: Well, that's because, for more than a hundred years, the American Experience Table of Mortality and its successors have identified statistically the fact that women outlive men by a substantial number of years.

MR. DOHRMANN: Mr. Chief Justice, at page 16 of the amicus brief of the government in this case, you will find that as recently as 1974 it had been identified that black persons in America have greater mortality or earlier mortality than do Caucasians.

What I'm saying, Mr. Chief Justice, --

QUESTION: And perhaps some day they may take that into account; but that isn't our case, is it?

MR. DOHRMANN: Our case is sex. And if the suggestion is because for one hundred years it has been noticed

that women live longer than men, my response is that since 1964, or since 1972 when the Act was amended to apply to this public employer, it is no longer lawful to look to that common experience, that statistics, and apply it in such a manner as in this case, so that women are given 15 percent less pay than men. Because it is assumed that each woman, because she is a woman, is going to live to some statistical average which is longer than each man.

QUESTION: But your suggestion that other factors could play a role, as they undoubtedly can, doesn't mean that it is as simple to classify on the basis of other factors -- if you're talking about smoking, drinking, obesity, you're going to have forms to fill out, you're going to have to take the word or reject the word of an applicant. One thing about a sex classification is that, at least until recently, it was quite easy to tell a man from a woman.

[Laughter.]

MR. DOHRMANN: Mr. Justice Rehnquist, may I say that at the Department of Water and Power of the City of Los Angeles, it is becoming increasingly less easy to tell the difference between a man and a woman, because women who formerly worked as clerks and stenographers are now employed, pursuant to apprenticeship programs, as cable splicers, as linemen, as tower line mechanics. They are entering professions they never before were in. Women, consistent with Title VII

and with the affirmative action plan of this department, save its pension plan, are doing the work that men did solely as men before, and now it's kind of --

QUESTION: Well, would you dispute the notion that it is generally easier to make a spot judgment as to whether a person is a man or a woman as opposed to the fact of whether they are a smoker or non-smoker, overweight or underweight, a drinker or a non-drinker?

MR. DOHRMANN: Yes, sex is immutable. As you say, it cannot be changed.

QUESTION: Well, not only can it not be changed, but it's readily identifiable.

MR. DOHRMANN: It is readily identifiable. But why is that identified and then used to penalize the person solely because she is a woman? She is -- she receives 15 percent less than a man in her paycheck, and yet her rent is the same, her medical bills are the same, her bills at the supermarket are the same.

QUESTION: That may be a very legitimate argument on your part. All I'm suggesting is that from the insurance company's point of view, it may be a much easier proposition to distinguish on the basis of sex than it is on the basis of individualized answers which are much more doubtful to come up with the truth about.

MR. DOHRMANN: Why not pool all risks, then, Mr.

Justice Rehnquist, even as now every other single risk is being pooled by this plan, and a vast majority of plans in America? Why can't we pool all risks? Why use sex?

QUESTION: It's a matter of choice.

MR. DOHRMANN: Yes, it is; and we contend that that choice is unlawful.

QUESTION: We have a contention here of a violation of a statute. Perhaps that choice will be made sometime by society as a whole, and by industry. But now we're confronted with the proposition that you say the women have to pay 15 percent more; the answer of the men to that is, if they don't pay 15 percent more, the men are required to pay -- to receive less pay ultimately because they subsidize the women's annuities.

MR. DOHRMANN: But who is to say, Mr. Chief Justice, that each man is going to live to his statistical abstract age? Men die young. Men live longer than the statistics say they're going to live.

As a matter of fact, if you'll note from the brief of the government, using the same mortality tables that the Department of Water and Power uses, the 1951 Group Annuity Tables, men and women share common death ages in 86 percent of the age groups.

QUESTION: But this went off on summary judgment, didn't it?

MR. DOHRMANN: That's correct.

QUESTION: So that if there's a dispute as to the -- as Justice White pointed out a moment ago, if there's a dispute as to the accuracy of the tables, that's something that should have been resolved by a trial on the issue of facts.

MR. DOHRMANN: Well, the accuracy of the tables is not in dispute, Mr. Justice Rehnquist. I only mentioned it or pointed it out to show that if there is any difference in longevity it occurs at the extremes of retirement age, rather than being a persistent distinction among the age groups as they progress through retirement.

QUESTION: When you say extremes of retirement age, you mean --

MR. DOHRMANN: I mean early deaths, people who die early after -- let's say, the retirement age --

QUESTION: What I'm trying to get you to say is what is early?

MR. DOHRMANN: Age 65. Say between 65 and 70. More men will die in the early retirement ages, that's age 65 to 70, unmatched by women's deaths; then in the area in which most people's longevity falls, the middle to late 70's, that 86 percent congruity that I mentioned occurs. And women and men die, matched each by the other, on the same or common death average.

QUESTION: But the unmatched women average death is about 88, and the unmatched men about 70.

MR. DOHRMANN: No. The figures that are used, the ones prepared by TIAA, and they are prepared in five-year increments. They could be done in single-year increments, and the same result would apply.

QUESTION: Mr. Dohrmann, --

MR. DOHRMANN: Yes, Mr. Justice Stewart.

QUESTION: -- the Chief Justice has indicated, in a question a few moments ago, that what we have here -- the issue before us is whether or not the practice of petitioner violates Title VII of the Civil Rights Act of 1964 as amended in 1972. Nobody, so far as federal law goes -- of course this wouldn't have been a violation on the part of any employer prior to 1964, it wouldn't have been a violation on the part of this employer prior to 1972 which brought public governmental employers under the statute.

Really, we're confronted here with a statutory question, aren't we?

MR. DOHRMANN: Yes, that's correct.

QUESTION: And I -- you haven't mentioned the Equal Pay Act and its incorporation in the 1964 statute. I take it we all accept these statistics, these actuarial tables. And I'm interested in the statutory argument, because that's our question here.

MR. DOHRMANN: Right. Mr. Justice Stewart, Section 703(a)(1), on its face, says it discriminates against a person by reason of sex if her compensation is less than that of a man.

In this case, as counsel admits, the woman takes home 15 percent less than does a man. It is deducted from her paycheck. She has no choice whatsoever.

QUESTION: How about the impact of the Bennett Amendment in the Equal Pay Act?

MR. DOHRMANN: This practice could only be saved if the factor used to deduct the 15 percent from the paycheck is, quote, "any other factor other than sex", end quote.

QUESTON: Why do you suppose they use the word "other" twice in that statute?

MR. DOHRMANN: Because I think the Congress wanted to make clear, and I think the Committee Reports underscore this, that other factors, such as merit systems, seniority systems, lifting weight requirements, those other factors, neutral as far as sex is concerned, would be employable by an employer in setting a wage rate.

Another factor other than sex. I adopt what the court below said in this case, it is playing with words to say that this practice is based on any factor other than sex.

So the Bennett Amendment, 703(h), is simply not available as a defense in this case.

QUESTION: Well, do you think it is a defense, or do you think it's one of the things that plaintiff needs to prove, the absence of the factors of the Bennett Amendment?

MR. DOHRMANN: No, I don't think it's on the burden of the plaintiff to show that the Bennett Amendment is not a defense, I think it's an affirmative defense of the employer, and the employer has failed to meet it.

The employer here has said that it is seeking to determine longevity, and it has decided that the sole measure of longevity will be sex.

QUESTION: But still -- the claim is, anyway, that it still is longevity that distinguishes that -- I suppose if the longevity tables change, or if there were some changes in it, why, their rates would change.

MR. DOHRMANN: If longevity changed, maybe the tables would change --

QUESTION: They still claim that the reason they deduct more from the women is because of that longevity.

MR. DOHRMANN: You correctly stated it earlier, Mr. Justice White. The problem is not in the maintenance of such tables, it is when they are used to apply the sole and only cost of longevity to one sex, even though it bears some, and only some, correlation to longevity and not a complete one.

This is not, as counsel would suggest, a situation in which all men cannot have the particular -- or do not under-

go the same particular condition that all women do, or that all women are capable of.

In this case we have two groups, we have men and we have women. They die at different times, but they are charged differently for the privilege of having a retirement income that is the same. And the women are the ones that have to pay more for it.

QUESTION: I take it from your statement that you concede that they, on the average statistically, will receive the retirement for a longer period?

MR. DOHRMANN: If there is such a thing as a statistical individual, that statistical individual will get more; but there is no such thing in the eyes of the law, Mr. Chief Justice, in my humble opinion. In my opinion, the law requires that they be treated as individuals, that these women at Water and Power be treated as individuals, and that they receive the same treatment as men; that they not be treated as women and charged something more for the disputable benefit or privilege of being a woman. It just does not follow.

In Griggs v. Duke Power, this Court said: individuals are to be tested so that the individual's capability to do the work assigned is the key that will be the decision -- in the decisional process of the employer.

Not some statistic, not something outside the employment relationship, not some casual acquaintanceship with a

particular race or sex group.

And may I underscore that if the Court of Appeals is not affirmed in this case, that that will leave the door open to the utilization of any other analysis which goes off on the basis of race, national origin or religion.

QUESTION: That wouldn't be true of the Equal Pay, if it were reversed on the Equal Pay Act.

MR. DOHRMANN: The Equal Pay Act would not pose a -- would not be a defense.

QUESTION: That applies only to sex, right?

MR. DOHRMANN: Yes, that only deals with sex.

QUESTION: The Bennett Amendment.

MR. DOHRMANN: That's correct, Mr. Justice Stewart.

QUESTION: And what would you suggest hypothetically might be some of these other studies? What might be its impact, if the judgment of the Court of Appeals is reversed?

MR. DOHRMANN: Well, as we pointed out, race --

QUESTION: Well, race, as my brother Rehnquist just --

MR. DOHRMANN: If you had, for example, a group insurance.

QUESTION: Race isn't covered by the Bennett Amendment at all.

MR. DOHRMANN: That's correct.

But what I'm saying is that in this situation if sex is permissible under 703(1) as an indicator, as an

indicator of longevity, then so also is any other class which is otherwise protected by 703(a)(1); then statistics could be used to, as we've talked earlier, to show that black persons will live short --

QUESTION: But they're not -- haven't you just agreed that that would not be true if the, if the basis upon which this Court decided the case were 703(h).

MR. DOHRMANN: Oh, excuse me, yes. If you found that this was based upon a factor other than sex, you are correct, that would be a limited holding that somehow or other this is a factor other than sex. And then it would not follow that the other classifications would be imperiled.

QUESTION: But even in the area of differentiation between males and females, what further impact would a judgment reversing the Court of Appeals for the Ninth Circuit have, in your submission?

I thought that's what you set out to tell us.

MR. DOHRMANN: Well, the further impact, of course, is that other cases -- there is another practice in which, unlike this one, the contribution levels are the same but benefits paid out at the end are lower. That is also, in our opinion, a pernicious practice. It is not our case; we are not here to argue about that practice. But we point out that it also would be in severe jeopardy were the Court to reverse the Court of Appeals in this case.

We'd like to point out also that the administrative agencies that have considered this question, that is, the Equal Employment Opportunities Commission and the Wage and Hour Administrator of the Department of Labor, have both concluded affirmatively and very strongly that this practice, this specific practice of charging women more to get the same benefit as men violates not only 703(a) of the Title VII, but also, also the Equal Pay Act.

QUESTION: Well, you said the same benefit, which you have several times conceded, I thought, that the ultimate benefit is not the same for women.

MR. DOHRMANN: No, I did not concede that, sir, and I -- and, Mr. Chief Justice, I cannot concede that in the sense that --

QUESTION: Well, you said that for an individual woman it may not be, but for women it is different.

MR. DOHRMANN: For women? Women cannot --

QUESTION: Women as a class.

MR. DOHRMANN: Yes, but we cannot consider women as a class. This Court has said it many times.

QUESTION: Then your reference should have been to a woman, not to women.

MR. DOHRMANN: My clients are individual employees of the Department of Water and Power. They, each of them, assert their right to be treated as an individual member and

an employee of the Department of Water and Power, and not as a woman who therefore is a member of a class that has a statistical capacity to live longer than men.

QUESTION: Mr. Dohrmann, I wonder if I have your point correctly. Are you suggesting that if upon retirement a retired person could sell the annuity that he or she would then be entitled to to a bank or something, at its discounted present value, the bank probably wouldn't pay one price to a man and another price to a woman, but would probably make an individual analysis of the longevity of the particular individual?

MR. DOHRMANN: Yes, that's correct, Mr. Justice Stevens. The gamble then -- and of course it's very precisely -- more precisely capable of measurement -- is how long is that person going to live.

In a particular context here, of course they don't know.

QUESTION: You started to tell us about the regulations.

MR. DOHRMANN: Yes.

QUESTION: And the first, what was it, a Labor Department regulation?

MR. DOHRMANN: The Labor Department regulations, Mr. Justice Stewart, reported at 29 C.F.R., Part 800, and I would specifically direct the attention of the Court to

Section 800.151, which thoroughly and very expressly condemns this practice.

QUESTION: Under the Equal Pay Act?

MR. DOHRMANN: Under the Equal Pay Act.

QUESTION: Has nothing to do directly with Title VII?

MR. DOHRMANN: Not directly with Title VII.

QUESTION: Because the Labor Department doesn't have jurisdiction; is that it?

MR. DOHRMANN: That's correct. But the Equal Pay Act can be -- the exceptions to the Equal Pay Act can be a defense. I point out, not only is --

QUESTION: Is this a consistent policy from the beginning, of the Labor Department, under the Equal Pay Act?

MR. DOHRMANN: Yes, it has. There has never been a ruling of the Labor Department on this matter that is inconsistent with that. There is --

QUESTION: How about EEOC under Title VII?

MR. DOHRMANN: The EEOC? I was just going to point out there is another regulation, 800.116(d), which deals with employer contributions, which could be read as inconsistent with 151; however, the government has pointed out to the Court in this case that 800.116(d) is under reconsideration and therefore we submit that, to the extent it had any applicability -- and it did not -- to this case, because this case deals with

employee contributions; if it had any applicability, because it is under reconsideration and 151 is not, it has lost its power to persuade.

QUESTION: When was the first regulation that you mentioned issued by the Labor Department?

MR. DOHRMANN: The first regulation issued by the Labor Department was 116(d) in 1965. And 151 was issued either in '65 or '66.

QUESTION: And the Equal Pay Act was enacted when?

MR. DOHRMANN: The Equal Pay Act was enacted in 1963, effective in 1964, to regulate --

QUESTION: Excuse me.

MR. DOHRMANN: I beg your pardon, Mr. Justice --

QUESTION: You proceed. I was going to -- I'm curious about EEOC regulations.

MR. DOHRMANN: Their regulations are reported at Title 29 C.F.R. 1604, and are also completely consistent with the position that I have given you today, and have never been inconsistent. They have always been a flat prohibition against this kind of practice.

QUESTION: And they appear in your brief, on what page?

MR. DOHRMANN: They appear in our brief at 36.

QUESTION: Thank you.

MR. DOHRMANN: Page 36 and following, there's a

discussion of the EEOC --

QUESTION: You mean the regulations have always been that way?

QUESTION: Yes.

MR. DOHRMANN: Yes, the regulations have always been consistent with the position that I have enunciated to the Court.

QUESTION: But its views haven't always been that way, have they?

MR. DOHRMANN: The Equal Employment Opportunities Commission? Yes, they have.

Mr. Justice White, they have, ever since they first took a position on this kind of fringe benefit, they have taken the position that this practice is not allowable; that the --

QUESTION: What is this opinion letter cited in one of the amicus briefs, from Mr. Duncan?

MR. DOHRMANN: There is an opinion letter of general counsel, apparently addressed to a private employer. This was --

QUESTION: Well, this was the general counsel of the EEOC.

MR. DOHRMANN: That was from the general counsel; he was not the Commission itself, he was the general counsel.

QUESTION: I understand that, but he's speaking on

behalf of -- purporting to speak on behalf of the Commission; and the opinion is in conflict with --

MR. DOHRMANN: That expression in that letter is indeed in conflict with the EEOC's own guidelines.

QUESTION: Yes.

MR. DOHRMANN: However, the government has pointed out in its --

QUESTION: But the guidelines weren't in existence at that time, were they?

MR. DOHRMANN: No. The guidelines that I'm now speaking of had not -- did not come out until 1972.

QUESTION: They came out eight years after the enactment of Title VII, didn't they?

MR. DOHRMANN: That's correct.

May I point out, however, -- Mr. Justice White, may I point out two quick things? One is that that letter of the EEOC general counsel came after the EEOC itself, in the Fourth Circuit case of Rosen v. Public Service Corporation [sic] -- the EEOC issued a letter determining that the practice in Rosen, which involved similar practices here, as well as mandatory retirement ages based on sex, but financial differences as well.

The EEOC determined in Rosen that that practice violated the Act. And that determination, upon which the lawsuit had been commenced in Rosen, was prior to this one

isolated letter written by the general counsel to a private company, which was published by a service, and if you will look at the provision in the Federal Register that is cited in the government's brief you will find that there is an EEOC statement that letters issued by the general counsel are for the purpose of private advice to particular inquirers, and that they do not have the force of precedent, and they are only to be for the personal use of the individual or company to whom the letter is written.

QUESTION: You mean it applies only to that particular company and to none other?

MR. DOHRMANN: It is a private reply of the general counsel to a letter -- to a request for a private ruling.

QUESTION: So you -- the amicus brief says this interpretation remained in effect until April of '72; you challenge that?

MR. DOHRMANN: I beg your pardon?

QUESTION: The amicus brief says that this interpretation, namely the general counsel's interpretation, remained in effect until April '72.

MR. DOHRMANN: Most definitely I challenge it, Mr. Justice White, if for no other reason than the Commission itself had issued cause determinations in cases as early as Rosen, and a determination in the Rosen case was issued very early in 1965, as you will note from both the district court

and the circuit opinions, discussing the background of the cases.

Mr. Chief Justice, in the time that remains, I would like to point out that 1972, when this Act was amended, the Congress noted that, to its dismay, in the years since 1964 when Title VII was enacted, women's position in employment had not only not improved, it seemed to have slightly deteriorated. And Congress very clearly enunciated, when it made this Act applicable to this employer, that discrimination against women is no less serious than any other form of prohibited discrimination, and the same degree of social concern applies to it.

We presented to you a very clear case in which this employer has taken sex and sex alone and, on the basis of that, made a very suspect determination that all women are going to live longer than all men. A conclusive presumption that, whether my clients be tower line mechanics or secretaries, they are going to live longer than the males beside whom they perform work for the same price; and that's not fair, and we ask for affirmance of the Ninth Circuit's decision.

QUESTION: That each of them is going to live longer.

MR. DOHRMANN: That each and every one of them is going to live longer.

QUESTION: Mr. Dohrmann, before you sit down, help

me on one factual matter.

The deduction from the paycheck, how is it, is it percentage of the paycheck or --

MR. DOHRMANN: Yes, it is percentage of the pay of the employee.

QUESTION: Is it one percentage for men and another percentage for women?

MR. DOHRMANN: That's correct.

QUESTION: And is it the -- for all men, is it the same percentage?

MR. DOHRMANN: No. It depends also upon the age of the employee. In other words, if an employee enters the employment at age 40, then that employee's contribution level will be a little higher amount out of his pay than it would be had he joined the employment with the department at age 30. The obvious reason being --

QUESTION: Then is the contribution the same from then on?

MR. DOHRMANN: Yes. The formula then is set, and remains the same through the employment years.

QUESTION: Have there been any lawsuits attacking that?

MR. DOHRMANN: No.

QUESTION: This plan, based upon the federal law that prohibits discrimination based on age.

MR. DOHRMANN: No, there has not, Mr. Justice Stewart. The reason that, as this Court recognized in Mann v. United Air Lines, there is an exemption in that Act, not applicable in Title VII, that age, or that bona fide pension plans which consider age are lawful and are exempted from the age discrimination.

QUESTION: If they pre-dated the statute.

MR. DOHRMANN: I beg your pardon?

QUESTION: If they pre-dated the enactment of the statute.

MR. DOHRMANN: If they pre-dated the enactment of the statute, that's quite correct.

QUESTION: Then that may not be true any more, under amendments.

MR. DOHRMANN: That may be, but it's not my case. Thank you.

QUESTION: Someone else put a question to you, and I want to see if I can clarify it. That if a union negotiated with the employer and says -- and agreed that "we're going to abolish the pension plan; that we will increase the pay by the average amount that the pension plan would cost", so that men and women doing the same work would get exactly, to the penny, the same amount, the same pay, on the theory that then each was to go out and buy his or her own annuity, or fund it in any way they wanted; do you think that would violate the

statute?

MR. DOHRMANN: No, I would not. Because that is the kind of severance pay I referred to -- or severance pay plan I referred to earlier, that --

QUESTION: But the women are going to have to pay more.

MR. DOHRMANN: That may be, Mr. Chief Justice; it also may not be. Each individual will go out into the insurance market and may be able to purchase from competitive insurers, based on their own profile, at a better price or a different price than each other.

QUESTION: Is there anything that you can point to that supports the idea that women can buy annuities cheaper than men can buy them?

MR. DOHRMANN: No, but all I know is that once the severance pay has been made, the employee then leaves the employment relationship, and what she does with the money is no longer subject to the provisions of Title VII of the Civil Rights Act.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Oliphant.

REBUTTAL ARGUMENT OF DAVID J. OLIPHANT, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. OLIPHANT: Mr. Chief Justice, I'd like to address very quickly the administrative agency point, first, that was made.

One of the problems in this case has been the chopping and changing opinions of the EEOC, and it's not true that the 1966 opinion letter of Charles Duncan was the only time that the EEOC said that they would follow the practice of unequal contributions to support equal benefits, or equal contributions to support unequal benefits. Which is what the Department of Labor's bulletin, 800.151, recognizes.

In our brief, in our reply brief, at the Court of Appeals level, we referred to a speech that was delivered to the Industrial Relations Research Association on April 16th of 1969, when Sonya Pressman, senior attorney of the Office of the General Counsel of the EEOC, stated: "The Commission to date has also followed the equal contributions or equal benefits standards of the Labor Department." Labor Law Reporter, Employment Practices, new development, 1969. CCH, paragraph 8004.

QUESTION: When did -- how about the annual report of the EEOC, did they reflect a change in view earlier than that? Or later than that?

MR. OLIPHANT: I don't think they reflected a change

in view until about 1972.

The problem is that the Department of Labor specifically, in its guidelines, and the EEOC at least through its general counsel, recognized you've got this problem in front of you.

QUESTION: This is a speech of the general counsel.

MR. OLIPHANT: That's true.

QUESTION: And that has what effect, if any?

MR. OLIPHANT: I think it's indicative of the way the Commission feels.

QUESTION: It could have been a purely political speech.

MR. OLIPHANT: That's true. But it's indicative, at least --

QUESTION: Do you want me to rely on that as -- well, do you want me to rely on it?

MR. OLIPHANT: No. I would like you to --

QUESTION: Then why bother us with it?

MR. OLIPHANT: To indicate that the EEOC had taken different positions, that its staff had taken different positions.

QUESTION: That a member of the staff had taken a different position; that's all you're saying.

MR. OLIPHANT: More than one member, Your Honor.

QUESTION: Well, who is the other one?

MR. OLIPHANT: Well, the first was the general counsel in --

QUESTION: Are you going to give me another speech? I shouldn't have asked the question.

MR. OLIPHANT: Charles Duncan.

QUESTION: I'm not interested in speeches.

MR. OLIPHANT: Well, the guidelines --

QUESTION: I can only speak for myself.

MR. OLIPHANT: The guidelines of the Department of Labor specifically recognized this problem, and allowed the "either/or", equal benefits or equal contributions, solution.

The other guideline of the Department of Labor, and it is just that, a guideline, nothing more, an interpretative bulletin, 800.151 says that costs may not be taken into account in determining fringe benefits, for males or females. And that particular guideline is plainly contrary to the legislative history of the Act, where both Houses said that costs of employment of females may be taken into account. And that legislative history is in the back of our opening brief, Your Honor.

QUESTION: Mr. Oliphant, could you help me a little more on the -- perhaps it's in the papers and I missed it, but on the way in which the contribution is made? I understand there's a larger contribution by the female than by the male. Is the difference depending on the age at which the

employee entered the employment?

MR. OLIPHANT: That's correct.

QUESTION: Now, what -- which is higher? Say, I came in at 30 and someone else came in at 35; which would make the higher contribution?

MR. OLIPHANT: The older age would make the higher contribution, because there's less period of time to accumulate sufficient funds to pay for your retirement.

QUESTION: But also there's less longevity.

QUESTION: No, no.

MR. OLIPHANT: No, because you're retiring at 65, either; either the young man or the --

QUESTION: A person 35 years old has a lesser, or a greater longevity, I guess, doesn't he?

MR. OLIPHANT: From 35, he does, but not -- but they're all retiring at the same age, 60 or 65.

QUESTION: The longevity he talks about is when they're apt to die.

MR. OLIPHANT: Right.

QUESTION: And you say the one who comes into the work force as an older person pays a higher?

MR. OLIPHANT: A higher contribution.

QUESTION: Because he pays for fewer years.

MR. OLIPHANT: Right. No. He's paying for the same retirement --

QUESTION: He's going to get the same result, but he's only -- but he's got fewer years to make the payments.

QUESTION: He's going to make payments for fewer years.

MR. OLIPHANT: Right.

QUESTION: Mr. Oliphant, to put it another way: Are all of these other things decided before the additional amount is put on? I mean, the age of the employee, et cetera, et cetera, et cetera; are all of those put in before he takes the 15 off?

MR. OLIPHANT: No, the -- well --

QUESTION: You've taken account of a whole lot of things.

MR. OLIPHANT: Right. And then --

QUESTION: Well, let me -- do you do it -- do you take the deduction in front or at the end?

MR. OLIPHANT: We take the contribution and the 14.84 percent was just an average which was figured for purposes of this lawsuit.

QUESTION: Oh, I see.

MR. OLIPHANT: But longevity is a function of age and sex, and in order to determine that we go to the actuarial tables. And from the actuarial tables, it's factored into the contribution rate. And --

QUESTION: Mr. Oliphant, does the record explain how

the differing contributions for each year were calculated?

MR. OLIPHANT: I don't think it does, Your Honor.

QUESTION: So we can't tell the extent to which the longevity figured as of the age of entering the employment of the company, to what extent age affected the contribution rate?

MR. OLIPHANT: No, Your Honor, because --

QUESTION: The record doesn't tell us that?

MR. OLIPHANT: The interrogatories may, but I don't think they do, Your Honor.

This came up on summary judgment, and --

QUESTION: Who made the -- oh, they made the motion.

MR. OLIPHANT: They made the motion, and conceded the accuracy of the actuarial tables and the good faith of the department.

QUESTION: The benefits that are calculated are a function of what? Is it of the number of -- it's -- tell me again, how is the benefit calculated?

MR. OLIPHANT: Years of service and retirement age.

QUESTION: Your salary level makes no difference?

MR. OLIPHANT: And salary level, yes.

QUESTION: Salary -- average over the period or at the retirement age?

MR. OLIPHANT: No, the last year of service, the final average salary for the last year of service, multiplied

by two percent or -- it's a little higher now -- 2.1 percent for each year of service.

QUESTION: For each year. And the contributions are a percentage of salary always?

MR. OLIPHANT: Yes.

QUESTION: I see. And the percentage depends on (a) your sex and (b) your age at which you joined the company?

MR. OLIPHANT: That's correct.

I think the important thing to recognize, in closing, is that it's not just sex, it's sex plus age, longevity, and that, as in Gilbert, is a factor other than sex. Just as pregnancy was.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:16 o'clock, a.m., the case in the above-entitled matter was submitted.]

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