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Recent Developments: Unconstitutional Sex-Based Mortality Tables

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Recent Developments

UNCONSTITUTIONAL SEX-BASED MORTALITY TABLES

In *Arizona Governing Committee for Tax Deferred Annuity and Compensation Plans v. Nathalie Norris* ___U.S.___, 103 S.Ct. 3492, 77 L.Ed.2d. 1236 (1983), the Supreme Court of the United States held that an employer may not offer its employees' life annuity plans from private insurance companies that use sex-based actuarial mortality tables. To allow employers to do so, the Court found, would in effect permit the practice of discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000 et seq., which makes it unlawful employment practice "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000 e-2(a)(1) (1964).

I.

Since 1974, Arizona's Governing Committee for Tax Deferred Annuity and Deferred Compensation plans has administered a deferred compensation plan whereby it has selected several insurance companies to participate in the "Plan" and, in turn, has offered its employees to enroll in the plan. When an employee chooses to participate in Arizona's plan, he must designate one of the participating companies chosen by Arizona in which he wishes to invest his deferred wages. Once the employee so designates and decides the amount of compensation to be deferred each month, Arizona is responsible for withholding the appropriate sums from the employee's wages and directing those sums to the appropriate company.

Insurance companies generally base the amount of monthly retirement benefits due a retired employee on: 1) the amount of compensation the employee defers; 2) the employee's age at retirement; and 3) the employee's sex. All the companies chosen by Arizona to participate in the plan employ sex-based mortality tables to calculate benefit amounts. The tables award a man larger monthly payments than a woman who deferred the same amount of compensation and retired at the same age.

On May 3, 1975, respondent Nathalie Norris, an employee of the Arizona Department of Economic Security, elected to participate in Arizona's plan, and invested her deferred compensation in Lincoln National Insurance Company's fixed annuity contract. *Norris*, 103 S.Ct. at 3495.

On April 25, 1978, Norris brought suit against the state, the governing committee and several of its members, alleging that the plan discriminates on the basis of sex.

II.

The Court's opinion first probed the question of whether the defendants would have violated Title VII had they conducted the entire plan themselves, without the participation of any insurance companies. The Court found direction in its opinion in *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), which was apparently the first challenge to contribution differences based on valid actuarial tables since the enactment of Title VII in 1974. In *Manhart*, the Court held that an employer had violated the statute by requiring its female employees to make larger contributions to a pension fund than male employees in order to obtain the same monthly benefits upon retirement. The Court found that the pension fund treated each woman "in a manner but for (her) sex would (have been) different." 435 U.S. at 710, quoting *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1174 (1971).

Applying the "but for" standard illustrated in *Manhart*, the Court in *Norris* wholly rejected the defendants' contention that the Arizona plan does not discriminate on the basis of sex because a man and a woman who defer the same amount of compensation will obtain upon retirement policies having approximately the same present actuarial value. The Court found no difficulty in holding that the "classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage." *Norris*, 103 S.Ct. at 3497. It further noted that the defendants' assumption that sex may be properly used to predict longevity is inconsistent with the lesson of *Manhart*: that Title VII requires employers to treat their employees as *individuals*, not "'as simply components of a racial, religious, sexual, or national class.'" *Norris*, 103 S.Ct. at 3498, quoting *Manhart*, 435 U.S. at 708 (emphasis by Court).

Thus, the majority opinion established that "it is just as much discrimination 'because of... sex' to pay a woman lower benefits when she has made the same contributions as a man as it is to make her pay larger contributions to obtain the same benefits." *Id.* at 3499.

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COMPUTER SOFTWARE COPYRIGHTABILITY

In *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), the United States Court of Appeals for the Third Circuit reversed the denial of Apple's motion for preliminary injunction seeking to restrain Franklin from infringing copyrights on 14 of its software programs. The unanimous three-judge panel ruled that copyright protection does extend to operating programs.

Franklin manufactures and sells the Ace 100 personal computer designed to be "Apple compatible" so that peripheral equipment and software designed for the Apple II could be used in conjunction with the Ace 100. In order to achieve this compatibility, Franklin admittedly copied 14 of Apple's operating system programs (the instructions which tell the computer which functions to perform). Operating programs can be stored on a variety of memory devices such as semi-conductor "micro-chips," which are connected to the circuitry, and "floppy disks" (flexible magnetic disks similar to phonograph records). These programs are referred to as software, whereas the machinery of the computer is known as hardware.

Franklin explained that designing its own programs would be impractical and would not ensure 100% compatibility because "there were just too many entry

CASE COMMENT: *Pouncey v. State*—Guilty and Insane

In *Pouncey v. State*, 297 Md. 264, 465 A.2d 475 (1983), the Court of Appeals held that a defendant in a criminal case could be found both guilty of a crime and insane at the time of its commission. In so holding, the Court determined that an insanity verdict does not necessarily defeat the element of criminal intent.

To reach a verdict of guilty, the demands of due process require that the prosecution prove beyond a reasonable doubt that the defendant engaged in a prohibited act (*actus reus*) and that the defendant possessed the criminal intent (*mens rea*) to commit such an act. *In re Winship*, 397 U.S. 358, 364 (1970); *see generally*, R. Perkins and R. Boyce, Criminal Law 78-81 (3rd ed. 1982). Traditionally, a finding of insanity during the commission of a crime would prevent the rendering of a guilty verdict because it was deemed that the defendant, in being insane, was incapable of forming the required criminal intent. *See Bethea v. United States*, 365 A.2d 64, 72 n.15 (D.C. App. 1976), *cert. denied*, 433 U.S. 911 (1976).

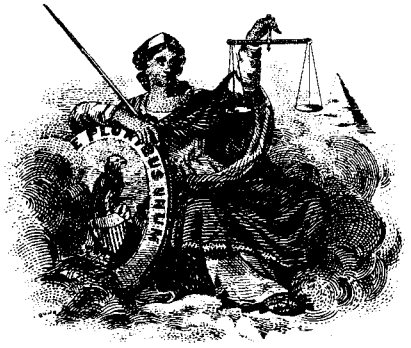
In *Pouncey*, the defendant was charged with the first degree murder of her five year old son. She pleaded not guilty and interposed the defense of insanity. The evidence disclosed that the defendant believed her son was pursued by the devil and the only way to prevent her son from going to hell was to kill him. The evidence further disclosed that the defendant had drowned her son and that she was legally insane at the time the crime was committed. The trial court found the defendant guilty of first degree murder and legally insane at the time of the offense. The defendant appealed to the Court of Special Appeals, claiming that the verdicts of guilty and insane were mutually inconsistent and that she was entitled to a verdict of not guilty. The Court of Appeals granted certiorari prior to a decision by the Court of Special Appeals.

In *Pouncey*, the Court of Appeals stated that the insanity defense in Maryland was defined by statute and court rule. *Pouncey v. State*, 297 Md. at 266, 465 A.2d at 476. The Court noted that the Health-General Code identifies the test for insanity and responsibility for criminal conduct and provides:

> A defendant is not responsible for criminal conduct if, at the time of that conduct, the defendant, because of mental retardation or a mental disorder, lacks substantial capacity:
> (1) To appreciate the criminality of that conduct; or
> (2) To conform that conduct to the requirements of law."

MD. HEALTH GEN. CODE ANN. §12-107 (1982).[1]

Having disclosed the statutory law, the Court noted that the verdict of guilty and insane was not without precedent in Maryland. Four years earlier, under a statute not different in substance from the criminal responsibility test set out above, the court in *Langworthy v. State*, 284 Md. 588, 399 A.2d 578 (1979), *cert. denied*, 450 U.S. 960 (1979), "held that a person found guilty of a crime charged, yet successful in asserting an insanity defense, could appeal from the guilty verdict." *Id., as cited in Pouncey v. State*, 297 Md. at 266-267, 465 A.2d at 477. The court in *Pouncey* then concluded that, "necessary to that determination was a finding that a guilty verdict is not inconsistent with a special verdict of insanity." *Id.*, 297 Md. at 267, 465 A.2d at 477.



Although the court in *Langworthy* was concerned with determining whether the verdict of guilty and insane was a final judgment and thus appealable, it did not miss the opportunity to interpret the insanity statute then in effect. Without pointing to any explicit legislative history directed to the statute, the court in *Langworthy* reasoned that since the Court of Special Appeals had previously determined that the demands of due process require a defendant be provided the opportunity to prove his innocence even though the prosecution has accepted the defendant's insanity plea, then the statutory scheme for insanity must contemplate that there first be a determination of guilt or innocence followed by a determination of insanity. *Langworthy v. State*, 284 Md. at 598, 399 A.2d at 584; *see also* case comment, *A Defendant Found Guilty But Insane May Appeal His Conviction:*

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III.

Concluding that Title VII would have been violated had the defendants run the entire deferred compensation plan themselves, without participation by insurance companies, the Court then focused attention on the issue of whether a Title VII violation has been committed, given the fact it was the insurance companies chosen by Arizona to participate in the plan that calculated and paid the retirement benefits.

The Court, for purposes of resolving the issue, found it necessary to define the limits of Title VII violations. In so doing, the Court again finding strength from its opinion in *Manhart*, found that Title VII "primarily govern(s) relations between employees and their employer, not between employees and third parties." *Norris*, 103 S.Ct. at 3499, quoting *Manhart*, 435 U.S. at 718, n. 33. However, the Court in *Manhart* was quick to point out that despite said "relations" such a limitation would not disallow an employer to set aside equal retirement contributions for each employee and let each, upon retirement, purchase benefits in the open market. *Manhart*, 435 U.S. at 717-18 (footnote omitted).

The defendants seized this language and argued they did not violate Title VII because the annuity plans offered by the companies participating in the Arizona plan reflect those available in the open market. Unfortunately, no relevance or substance was found in this defense by the Court; rather, it found that Arizona did not simply set aside retirement benefits and allow employees to purchase annuities in the open market, but created a plan whereby employees could obtain an annuity only if they invested in a company specifically chosen by Arizona. In essence, by requiring employees to choose from companies selected only by the state, Arizona became a party to each annuity contract entered into by one of its employees. The Court then reiterated the well established rule, that "both parties to a discriminatory contract are liable for any discriminatory provisions the contract contains, regardless of which party initially suggested inclusion of the discriminatory provisions." *Norris*, 103 S.Ct. at 3501-02, *See Williams v. New Orleans Steamship Ass'n.*, 673 F.2d 742, 750-51 (5th Cir. 1982), cert. denied, ___U.S.___ (1983).

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IV.

One of the main purposes of Title VII is to "make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). *Moody* illustrated the existence of a strong presumption in favor of retroactive relief for Title VII violations, and *Manhart* stressed that the presumption was one that could seldom be overcome. Upon examination of the relief afforded Norris by the district court below, which affected only those benefit payments made *after* the date of its judgment, the Supreme Court found that such an award was inconsistent with the presumption elicited in *Moody* and recognized in *Manhart*.

Before remanding the issue to the district court, the Supreme Court suggested that the lower court give more attention to the fact that, before *Manhart*, the use of sex-based tables might reasonably have been assumed to be lawful. In addition, the Court noted that the decision in *Manhart* should have put the defendants on notice that a man and a woman who make the same contributions to a retirement plan must be paid the same monthly benefits. Therefore, the lower court should examine whether the defendants, after *Manhart*, could have applied sex-neutral tables to the pre-*Manhart* contributions made by the plaintiff, Norris, and a similarly situated male employee without violating any contractual rights that the latter might have had on the basis of his pre-*Manhart* contributions. *Norris*, 103 S.Ct. at 3503-04. If the defendants could have done this, they should have in order to prevent further discrimination, and it would therefore be equitable that defendants be required to supplement any benefits coming due after the district court's judgment by whatever sum necessary to "make Norris whole." *Id.*

V.

Justice Powell, joined by three other justices, dissented as to the defendants' liability, basing his assertation on the premises that sex-based mortality tables reflect objective actuarial standards and employee classification on the basis of sex in reference to life expectancy is a "nonstigmatizing factor that demonstrably differentiates females from males and that is not measurable on an individual basis...." *Norris*, 103 S.Ct. at 3509.

The dissent further warned that the potential effect of the majority's holding would be to: 1) deny employees the opportunity to purchase life annuities at lower costs because (a) the cost to employers of offering unisex annuities is prohibitive, or (b) insurance carriers would not choose to write such annuities; 2) inflict the heavy cost burden of equalizing benefits sustained by those insurance companies and employers choosing to offer such on current employees; and 3) have a disruptive impact on the operation of an employer's pension plan as an unforeseen contingency jeopardizing the insurer's solvency and the insured's benefits. *Id.*

The potential effect of the majority's holding on insurance companies and employers has yet to be fully observed. Nonetheless, it is now clearly established that an employer or insurer can no longer fashion his personal policies on the basis of assumptions about the differences between men and women previously believed to be valid.

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Lack of Jury Impartiality
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In 1919, the Judicial Code, § 269 (28 U.S.C. § 391) espoused the principle that on any appeal, a court was to examine the trial record "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." The essence of this provision was incorportaed in Rule 61 of the Federal Rules of Civil Procedure. This harmless error provision instructs the district courts that throughout a trial proceeding judges "*must* disregard any error which does not affect the substantial rights of the parties." (emphasis added). Support for this principle can be found in *De Santa v. Nehi Corp.*, 171 F.2d 696 (2d. Cir. 1948), where the court held that it is considered best practice for appellate courts to act in accordance with the mandate of Rule 61. The principle of Rule 61 was ultimately codified by Congress to be specifically applied to appellate courts in 28 U.S.C. §2111 (1949).

In *McDonough Power*, the Supreme Court noted that a fair trial requires an impartial trier of fact—"[a] jury capable and willing to decide the case solely on the evidence before it," *Smith v. Phillips*, 455 U.S. 209, 217 (1982) and that an important safeguard of jury impartiality is the voir dire examination. The court held that in order to uphold the due process requirement of impartiality, prospective jurors must answer honestly questions posed to them.

With these principles in mind, the Supreme Court reviewed the varied responses given by prospective jurors in *McDonough* when the history of severe injuries question was posed. The range of responses indicated that each juror interpreted the question differently; some jurors' responses revealed injuries resulting from minor incidents while other jurors' responses failed to disclose injuries resulting from serious accidents. The court acknowledged that even though the jurors were mistaken by failing to disclose various injuries sustained by their family members, their responses were honest in light of their interpretation of the voir dire question.

The Supreme Court held that the policy of judicial management, evidenced by the harmless error rules of disregarding errors that do not interfere with the fairness of a trial, must be upheld because the importance of trial finality outweighs evidence of trial imperfection. To effect the policy behind the harmless error rules, the court adopted the following two-part test to evaluate the propriety of granting a motion for a new trial based on lack of information received from a juror on voir dire examinations: (1) "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire" and (2) "that a correct response would have provided a valid basis for a challenge for cause." ___ U.S. ___, ___.

There are two concurring opinions in *McDonough Power*. Justice O'Connor concurred with the majority, holding that "honesty of a juror's response is the best initial indicator of whether the juror in fact was impartial." ___ U.S. ___, ___. However, Justice O'Connor's concurrence is written with the view that the ultimate determinations regarding the existence of juror bias and the need for a new trial remain within the trial court's discretion.

In the second concurrence, Justice Brennan, joined by Justice Marshall, agreed with the majority's result but asserted a different test to evaluate the granting of a motion for a new trial based on lack of information by a juror on voir dire examination. Justice Brennan's test focuses on a juror's bias, not his honesty, and requires a party seeking a new trial to demonstrate that: (1) "the