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# Sex Discrimination in Pension and Retirement Annuity Plans After Arizona Governing Committee v. Norris: Recognizing and Remediating Employer Non-Compliance

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# Sex Discrimination In Pensions and Retirement Annuity Plans After *Arizona Governing Committee v. Norris*: Recognizing and Remediating Employer Non-Compliance

MARY L. HEEN\*

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## I. INTRODUCTION

The Supreme Court's decision in *Arizona Governing Committee v. Norris*,<sup>1</sup> issued on July 6, 1983, requires employers to convert to sex-neutral systems for payment of employee retirement annuity and pension benefits. In *Norris*, the Court held that Title VII of the Civil Rights Act of 1964,<sup>2</sup> as amended, prohibits the use of sex-based actuarial tables to calculate sex-differentiated employee retirement benefits.<sup>3</sup> This prohibition applies whether the employer provides retirement benefits through self-insurance or funds its plan through an insurance contract with an outside insurer.<sup>4</sup> Both public and private employer must abide by the decision, but insurance or annuities obtained outside of the employment context cannot be reached under Title VII and hence are outside the prohibition.

Many employers, particularly those with self-insured plans, converted to sex-neutral systems<sup>5</sup> prior to *Norris* because of numerous cases foreshadowing the Court's decision, including the Supreme Court's 1978 landmark decision in *Los Angeles Dept. of Water &*

*Power v. Manhart*.<sup>6</sup> In *Manhart*, the Court ruled that an employer had violated Title VII by requiring its female employees to make larger contributions to a pension fund

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*Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978). The remaining twenty-four states converted after 1978. Among the thirteen responding states that did not use sex-neutral factors at the time of the survey, two states were to adopt sex-neutral factors on July 1, 1983, and two more states were considering legislation to implement such factors. See *Hearings on S. 372 Before the Comm. on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. 201 (1983) (testimony of Raymond C. Scheppach, ex. dir., Nat'l Governors' Ass'n); *Reaction to Norris Decision Varies Among Public Employee Plans*, 10 PENS. REP. (BNA) No. 453 at 1196-99 (July 18, 1983).

In many localities, teachers, city workers, police, and firefighters are covered by separate local governmental pension systems. These systems may or may not have converted to sex-neutral tables in the states listed above. In addition, some states offer voluntary supplemental retirement plans. The sex-based plan challenged in *Norris*, for example, was a supplemental deferred compensation plan for Arizona state employees; Arizona's primary retirement plan, however, used a sex-neutral system.

Many private employers also converted to sex-neutral pension systems prior to *Norris*. According to a survey conducted by Buck Consultants, Inc., of 264 companies maintaining a total of 566 plans (including 257 companies with defined benefit plans and 309 defined contribution plans maintained by 207 companies), 58% of the 255 companies with defined benefit plans offering annuity options had sex-distinct factors at the time of the *Norris* decision, but they report they will now convert to sex-neutral systems. In 1978, when *Manhart* was decided, 11% of the total number of surveyed firms were using unisex factors for most of their plans and for most plan purposes. "From the start of 1978 through early 1983, an additional 29% of the companies converted to unisex option factors, and 42% of the companies had converted to unisex option factors by the time *Norris* was decided, according to the survey." See *Firms Plan to Switch to Unisex Plans in Response to Norris*, *Buck Survey Says*, 10 PENS. REP. No. 469 at 1688-89 (Nov. 7, 1983). Of the 207 surveyed companies with defined contribution plans, 41% are potentially affected by *Norris*. Of that group, only 16% were already operating on a unisex basis when *Norris* was decided.

6. 435 U.S. 702 (1978). As the Supreme Court noted in *Norris*, 463 U.S. \_\_\_\_ n. 9, 103 S.Ct. 3492 n. 9, all but one of the lower courts that had previously considered the question held that sex-differentiated retirement benefits are no more permissible under Title VII than are sex-differentiated employee pension plan contribution rates. See *Spirit v. Teachers Ins. & Annuity Ass'n (TIAA)*, 691 F.2d 1054 (2d Cir. 1982), *vacated and remanded*, 103 S.Ct. 3565 (1983) *modified and aff'd*, 735 F.2d 23 (2d Cir.), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_ (1984). *Retired Pub. Employees' Ass'n of Cal. v. California*, 677 F.2d 733 (9th Cir. 1982), *vacated and remanded*, 714 F.2d 95 (9th Cir. 1983); *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Women in City Gov't United v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *Hannahs v. New York State Teachers Retirement Sys.*, 26 Fair Empl. Prac. Cas. (BNA) 527 (S.D.N.Y. 1981); *Probe v. State Teachers' Retirement Sys.*, 27 Fair Empl. Prac. Cas. (BNA) 1306 (C.D. CAL. 1981); *Shaw v. International Ass'n of Machinists & Aerospace Workers*, 24 Fair Empl. Prac. Cas. (BNA) 995 (C.D. Cal. 1980). See also 29 C.F.R. § 1604.9(f) (1984) ("It shall be an unlawful employment practice for an employer to have a pension or retirement plan . . . which differentiates in benefits on the basis of sex"). *But see Peters v. Wayne State Univ.* 691 F.2d 235 (6th Cir. 1982), *vacated*, 103 S.Ct. 3566 (1983).

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1. 103 S.Ct.3492 (1983).

2. 42 U.S.C. § 2000e.

3. Section 703(a) of Title VII provides:

[i]t shall be an unlawful employment practice for an employer (1) to . . . discriminate against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin; or (2) . . . limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of race, color, religion, sex, or national origin.

4. Employee pension plans are typically funded through either a group annuity contract offered by a life insurance company, called an insured plan, or through a trust established by an employer and administered through a bank or trust company, sometimes called a trustee or noninsured plan. See A. MUNNELL, *THE ECONOMICS OF PRIVATE PENSIONS* 216-17 (1982).

5. According to a recent survey by the National Association of State Budget Officers, by early 1983, the following 37 states had adopted sex-neutral actuarial tables for their primary state employee retirement plans: Alaska (Jan. 1981); Arizona (1976); Arkansas (1957); California (July 1982); Colorado (Jan. 1980); Connecticut (Oct. 1982); Delaware (since inception of plan); Hawaii (July 1982); Idaho (Jan. 1979); Illinois (Sept. 1961); Indiana (ca 1980); Iowa (Nov. 1979); Kansas (date unknown); Louisiana (1970); Maine (late 1960); Maryland (Jan. 1981); Michigan (1982); Minnesota (1977); Mississippi (July 1980); Missouri (1972/1977); Montana (1979); Nevada (June 1982); New Hampshire (1982); New Jersey (July 1979); North Carolina (1981); North Dakota (1977); Ohio (Apr. 1983); Oregon (1978); South Carolina (Jan. 1982); South Dakota (July 1974); Tennessee (July 1982); Texas (Sept. 1975); Utah (Jan. 1982); Vermont (1981/1982); Washington (1982/1983); Wisconsin (since inception); Wyoming (July 1981).

Three of those states, Arkansas, Delaware, and Wisconsin, have used sex-neutral tables since the inception of their retirement systems. In another ten states, use of sex-neutral actuarial tables predates the imposition of such tables on state by the Supreme Court's decision in

than similarly situated male employees in order to obtain the same monthly benefits upon retirement. *Norris* extends the *Manhart* requirement of sex neutrality in contributions to the benefit stage. Some employers did not quickly comply with *Manhart*, and similar footdragging with respect to the requirements of *Norris* should be anticipated.<sup>7</sup>

After *Norris*, there is no legitimate excuse for public or private employers who do not bring their employee retirement plans into compliance with Title VII. *Norris* requires all covered employers<sup>8</sup> with employee retirement plans to provide sex-neutral benefits based on pension or annuity plan contributions made after August 3, 1983; in addition, under certain circumstances, discussed below, benefits based on contributions made prior to August 3, 1983, should be paid on a sex-neutral basis. Those employers who do not quickly and voluntarily comply become potential targets for Title VII enforcement actions.

While the decision in *Norris* advances economic equality for women and men, there are significant limitations on its impact. The employer in *Norris* was required to provide sex-neutral payments only for those benefits based on pension or annuity plan contributions made after August 1, 1983. That ruling on retroactivity sharply restricts the scope of relief for active and retired

employees unless the plan fits under various conversion and cost theories explained later.<sup>9</sup> Another limitation derives from the perimeters of Title VII itself. *Norris* affects only employer-sponsored plans, leaving many women who purchase annuities or insurance plans on the open market subject to lower benefits calculated from sex-based mortality tables.<sup>10</sup>

Moreover, the *Norris* decision does not address the harsh economic realities often faced by older women. Retired women workers are often *doubly* disadvantaged by discrimination. First, many women are employed in low-wage industries and in occupations without pension plans.<sup>11</sup> 49 percent of men are covered by a private pension plan on their longest job compared to only 21 percent of women.<sup>12</sup> Furthermore, even if covered by a pension plan, interrupted work patterns frequently disqualify women from receiving pension benefits. Prior to enactment of the Retirement Equity Act of 1984, few women received pension credits for employment before the age of twenty five or for the years in which they worked less than 1000 hours.<sup>13</sup> Divorced homemakers had little or no income protection and widows were left without anticipated pension benefits if their spouse's plan terminated on the worker's death, or if he did not elect a plan option providing for survivors' benefits.<sup>14</sup> In

7. See, e.g., *Women in City Gov't United v. City of New York*, 515 F. Supp. 295, 300 (S.D.N.Y. 1981). In 1983, the New York City Retirement System announced that it would bring its system into compliance with *Manhart* (decided in 1978), and that it would refund excess contributions, an estimated total of five million dollars, made by women employees during the post-*Manhart* period. See *Money To Go To Women For Excess Pension Payments*, Civil Service Sentinel, Dec. 26, 1983 at 5; *City Trustees Vote to Refund \$5 Million to Female Participants*, 10 PENS. REP. (BNA) No.473 at 1807 (Dec. 5, 1983). Another year passed, however, before the city brought its plan into compliance for future contributions. In February 1985, in partial settlement of relief issues, the city also agreed to equalize (for class members who were active employees on or before July 31, 1983) contribution rates with the lower rates applicable to similarly situated males retroactive to April 25, 1978, the date of the *Manhart* decision, with interest. See *Women in City Gov't United v. City of New York*, 75 Civ. 2868 (MJL), Proposed Consent Decree (Feb. 13, 1985).

8. Title VII defines "employer" as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . ." 42 U.S.C. § 2000e(b). Title VII also makes unlawful certain employment practices of labor organizations, 42 U.S.C. § 2000e-2(c), which are defined as follows: "a labor organization engaged in an industry affecting commerce, and any agent of such an organization . . ." 42 U.S.C. § 2000e(d), and those of employment agencies, 42 U.S.C. § 2000e(2)(b).

Title VII was amended, effective March 24, 1972, to include state and local government employers within its coverage. 42 U.S.C. § 2000e(a) and (f).

9. See *infra* text and accompanying notes 98-103, 109-118.

10. See *infra* notes 32 and 61; Comment, *A Step Toward Insurance Equity: Arizona Governing Committee v. Norris*, 7 HARV. WOMEN'S L.J. 251 (1984). Some pension and annuity industry experts are concerned that the *Norris* decision may result in adverse selection. Men who will receive lower sex-neutral benefits upon retirement under employer-sponsored plans may elect to take their accumulations out of their employer-sponsored fund as a cash lump sum and purchase higher yielding annuities on the open-market where benefits may still be calculated on the basis of sex. Hager & Zimpleman, *The Norris Decision, Its Implications and Application*, 32 DRAKE L. REV. 913, 940 (1982-83). But see *infra* note 80 and accompanying text, regarding relative rarity of lump sum options in defined benefit plans, the type of plan covering the majority of workers.

11. About eighty-five percent of state and local workers are covered by pension plans, compared to about forty-nine per cent of the private work force. PRESIDENT'S COMM'N ON PENSION POLICY, COMING OF AGE: TOWARD A NATIONAL RETIREMENT INCOME POLICY 12, 16 (1981). On the average, public sector plans pay higher benefits than private sector plans. In the private sector, the largest percentage of covered workers is found in the highly unionized manufacturing, mining, and transportation industries while the lowest percentage is found in the non-union service and retail trade industries, where women tend to be concentrated. See A. MUNNELL, *THE ECONOMICS OF PRIVATE PENSIONS* 199-206 (1982).

12. CONGRESSIONAL RESEARCH SERV., *WOMEN AND RETIREMENT INCOME PROGRAMS: CURRENT ISSUES OF EQUITY AND ADEQUACY II*, H.R. DOC. NO. 190, 96th Cong., 1st Sess. II (1979).

13. PRESIDENT'S COMM'N ON PENSION POLICY, COMING OF AGE: TOWARD A NATIONAL RETIREMENT INCOME POLICY, 27-28, (1981), [hereinafter cited as PENSION POLICY].

14. PENSION POLICY, *supra* note 13, at 32.

1982, nearly 40 percent of older men and only 19 percent of older women had some income from pensions and/or annuities.<sup>15</sup> The problems have now been addressed, at least in part, by the Retirement Equity Act of 1984.<sup>16</sup>

In addition to low rates of coverage, women are disadvantaged by lower benefits.<sup>17</sup> When women workers who are covered by a pension plan retire, they frequently receive pension benefits based upon discriminatorily depressed wages.<sup>18</sup> So, two discriminatory factors are present. On top of their economically disadvantaged position, sex-based actuarial tables result in retired women receiving even lower pension benefits than similarly situated men. *Norris* merely addresses the latter discrimination: the application of sex-based actuarial tables in making benefit computations. Therefore, it has limited impact on the overall economic plight of older women.

The factors discussed above have contributed to the relegation of elderly women to the very bottom of the

economic ladder in this country. According to U.S. Department of Labor statistics, in 1979, women over 65 had the lowest median income of any sex or age group—\$2,800. This figure was approximately one-half of the median income for men in that age bracket. In 1977, the median income for women over 65 was \$3,087, compared to \$5,526 for men. More than 2.6 million older women had incomes below the poverty level in 1983. While women account for only 59 percent of the total non-institutionalized aged population, they account for 71 percent of the elderly poor.<sup>19</sup> Although *Norris* does not address these broader economic concerns, it will benefit many women covered by employer-sponsored retirement and other fringe benefit plans.

This article is intended to help employees and practitioners determine whether an employer's pension or annuity plan violates Title VII, and if so, to identify the scope of relief which may be obtained. Part I discusses the Supreme Court's decision in *Arizona Governing Committee v. Norris*. Part II discusses the various types of pension and retirement plans, and describes how to identify sex discrimination in typical plans. Part III briefly addresses the more difficult question of how to remedy employer non-compliance, and discusses the relief issues raised by both retirees and present employees (with regard to benefits based on post-*Norris* contributions and pre-*Norris* contributions) once a Title VII violation has been found.

## II. THE SUPREME COURT'S DECISION IN ARIZONA GOVERNING COMMITTEE V. NORRIS.

In *Norris*, the Supreme Court reaffirmed its adherence to strict standards of employer sex-neutrality under Title VII. Nathalie Norris and a class of women employed by the state of Arizona filed their case in 1978, shortly after the Court's *Manhart* decision. They charged that the state's deferred compensation plan unlawfully discriminated on the basis of sex by providing smaller monthly retirement annuity-benefits to women than to similarly situated men. The Arizona plan paid different sums to men and women based solely on the sex of the employee while ignoring such individual characteristics as medical history, weight, smoking or alcohol consumption.

Arizona advanced a series of arguments to avoid responsibility for the sex-based operation of its deferred compensation plan. Arizona first argued that whatever the intrinsic illegality of sex-discriminatory annuity

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15. S. RIX, OLDER WOMEN: THE ECONOMICS OF AGING, Women's Research and Education Institute of the Congressional Caucus for Women's Issues 9-10 (1984).

16. The Act reduces the maximum age conditions, for purposes of participation (21) and minimum vesting requirements (18), adopts more liberal "breaks in service" rules for non-vested participants (maternity and paternity leaves are not treated as a break in service), and requires plans to provide automatic survivor benefits to the surviving spouse of a retiree or a vested participant who dies before retirement, unless the spouse consents to waive such benefits. Retirement Equity Act of 1984, Pub. L. No. 98-369, §§ 102 (a)-(e), 103 (a), 202 (d)-(e), 98 Stat. 794 (codified as amended in scattered sections of 26 and 29 U.S.C.).

17. The median private pension amount in 1976 for men was \$2,060 and for women was \$1,340, while the median public pension amounts were \$4,830 for men and \$2,750 for women. See WOMEN'S STUDIES PROGRAM AND POLICY CENTER AT GEORGE WASHINGTON UNIVERSITY, OLDER WOMEN: THE ECONOMICS OF AGING 8-12 (1980).

18. See generally COMMITTEE ON OCCUPATIONAL CLASSIFICATION AND ANALYSIS, ASSEMBLY OF BEHAVIORAL AND SOCIAL SCIENCES, NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE (D. Treiman & H. Hartman, eds. 1981); TREIMAN, HARTMAN & ROOS, *Assessing Pay Discrimination Using National Data*, in COMPARABLE WORTH AND WAGE DISCRIMINATION 137-54 (Remick ed. 1984); SPECIAL ISSUE: COMPARABLE WORTH, 8 WOMEN'S RTS. L. REP. (Winter 1984).

In 1939, median earnings for women who worked year round, full-time in the experienced labor force were fifty-eight percent of the median earnings for men. In 1981, women's earnings were at fifty-nine percent of the median for men. See BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, NO. 673, THE FEMALE-MALE EARNINGS GAP: A REVIEW OF EMPLOYMENT AND EARNINGS ISSUES (1982). The gap is even larger for minority women. See U.S. Dept. of Labor News Release 84-443 (Oct. 29, 1984). During a time marked by a dramatic increase in the number of women in the labor force, the wage gap has been a major factor leading to the "feminization of poverty." See BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, WOMEN AT WORK 28 (1983).

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19. RIX, *supra* note 15, at 13.

payments, it could not be held legally responsible for the discriminatory activities of the insurance companies which it had selected to invest and disburse its employees' deferred compensation funds. Arizona also argued that the sex-based plan did not violate Title VII because: 1) it was based on legitimate actuarial data indicating that women, as a group, live longer than men; 2) it was purely voluntary; 3) it permitted women to avoid the effects of discriminatory annuity payments by opting to receive their deferred compensation in a lump sum payment; 4) it left women annuitants no worse off than if they had purchased private annuities on the open market; and 5) the state had not intended to discriminate against women when it adopted the plan. Arizona further argued that even if its deferred compensation plan violated Title VII, it should not be required to increase the monthly payments of women annuitants to eliminate the unlawful discrimination.

In deciding the *Norris* case, the lower courts held that none of Arizona's arguments served to validate its provision of an employee fringe benefit which treated individual women less favorably than individual men, solely because of their sex. The district court enjoined the state from carrying out its obligations under the deferred compensation plan through use of sex-based actuarial tables and ordered that future annuity payments to retired women employees be made equal to those for similarly situated male employees.<sup>20</sup>

On appeal, the Ninth Circuit Court of Appeals affirmed, holding that the deferred compensation plan was a "privilege" of employment and a "fringe benefit," and therefore covered by Title VII. The Ninth Circuit rejected each of Arizona's attempts to evade the applicability of *Manhart's* reasoning to its deferred compensation plan, and upheld the relief awarded by the district court as fully authorized by the Supreme Court's decision in *Manhart*.<sup>21</sup>

The Supreme Court, in a per curiam opinion, affirmed in part, reversed in part, and remanded the case for further proceedings consistent with its opinion. The decision was divided into two distinct parts—liability and relief. Justice Marshall wrote the opinion for the Court with regard to liability. In a disconcertingly close decision, the Court held that the retirement annuity plan discriminated on the basis of sex in violation of Title VII.

With regard to relief, the Court held, as expressed in an opinion by Justice Powell, that all retirement benefits derived from contributions made after the Court's decision must be calculated without regard to the sex of the beneficiary. Justice O'Connor provided the swing vote by joining Justices Marshall, Brennan, White, and Stevens on the liability issue, but concurring with Justices Powell, Rehnquist, Blackmun and Chief Justice Burger, in granting significantly more limited relief than that awarded by the courts below.

The significance of *Norris* to the development of Title VII analysis rests in three major areas, as discussed in greater detail below. First, the Court reaffirmed the principle, most clearly set forth in *Manhart*, that the plan's explicit use of sex distinctions constituted unlawful discrimination *on its face*. *Norris* leaves no doubt as to the illegality under Title VII of explicitly sex-differentiated employee benefits.<sup>22</sup>

Second, the Court held that the focus must always be on the requirement of sex-neutral payments to individual employees, and not on the employer's cost of providing equal payments. Thus, although the employer's cost of providing equal fringe benefits to women (or Blacks) as a group may be greater, once an employer chooses to provide a particular type of fringe benefit, cost is no defense to Title VII liability for the overt discriminatory provision of those benefits.<sup>23</sup>

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22. Proving the use of a sex-based classification establishes the employer's intent to discriminate, thus reaching the end point of Title VII disparate treatment analysis. Compare cases of facial discrimination, e.g., *Norris*, 103 S.Ct. 3492; *Manhart*, 435 U.S. 702; *Dothard v. Rawlinson*, 433 U.S. 321, 332-33 (1977); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), with cases in which factual issues exist as to the fact of differential treatment on the basis of sex or race, e.g., *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 8 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

In contrast to the intentional discrimination analysis used in disparate treatment cases (established either through evidence of explicit sex-based treatment or through certain factual inferences and presumptions in a pretext analysis), in disparate impact cases, plaintiffs may challenge employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than on others and cannot be justified by business necessity. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

23. Compare the Ninth Circuit's analysis of cost defense in a disparate impact challenge to compensation discrimination in *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1495 (9th Cir. 1983), cert. denied, 104 S.Ct. 3544 (1984) (challenge to employee medical policy head-of-household rule) with the Supreme Court's rejection of cost as a defense in *Manhart*. As the Court recognized in *Manhart*, 435 U.S. at 718 n. 34, the sex composition of the workforce may be taken into account in computing the employer's cost of providing the fringe benefit: Title VII does not make it unlawful "to determine the funding requirements for an establishment's benefit plan by considering the composition of the entire [work]force." The difference in cost of

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20. *Norris v. Arizona Governing Comm.*, 486 F. Supp. 645, 652 (D. Ariz. 1980), *aff'd*, *Norris v. Arizona Governing Comm. for Tax Deferred Annuity*, 671 F.2d 330 (9th Cir. 1982), *aff'd in part and rev'd in part*, 103 S.Ct., 3492 (1983).

21. *Norris v. Arizona Governing Comm.*, 671 F.2d 330 (9th Cir. 1982).

Third, although cost provided no justification for discrimination, the Court held that cost constitutes a highly relevant factor in fashioning appropriate relief for discrimination in pension and retirement plans. Because of the Court's concern regarding the sensitive long-term funding assumptions involved in making pension plan pay-outs, the *Norris* Court held that lower courts must depart from the usual Title VII practice of providing "make whole" relief where the cost of a retroactive remedy would endanger the solvency of pension plans, and where the employer could have believed that *Manhart* did not apply. This holding is troubling in two important respects. First, there were no findings below regarding the total cost to Arizona of equalizing all future benefits under the plan. The Court merely relied on estimates regarding the high cost to state and local governments generally of retroactively equalizing benefits under such unfunded plans.<sup>24</sup> Second, the decision perpetuates the discrimination against women participants in the plan until sometime in the next century, and may encourage some employers to continue questionable pension practices until a court has held them unlawful.

#### A. Factual Background

Arizona established its challenged deferred compensation plan in 1974 as an optional fringe benefit to pro-

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providing benefits for respective classes of employees can be taken into account in the pay-out stage by factoring such costs into sex-merged or "unisex" tables used to compute benefits, or by requiring employers themselves to equalize benefits paid to individual employees.

Unisex tables have been developed for both defined benefit and defined contribution plans. See *infra* notes 82-85,<sup>87</sup> and accompanying text; see also, e.g., *U. of Minnesota Adopts Unisex Plan for Pensions: Right Thing to Do*, CHRON. OF HIGHER EDUC. 25 Oct. 13, 1982, at 25; Fellers & Jackson, *Non-Insured Pension Mortality: The UP-1984 Table*, Presentation at the Joint Program, Conference of Actuaries in Public Practice, Society of Actuaries 3 May 1975, at 3. The sex-merged or composite mortality table described by Fellers and Jackson is appropriate for valuation of pension plans covering groups having 10-30% female employees, if used without adjustment. The table can be set back or set forward for use with groups with a different male-female percentage.

24. See *Norris*, 103 S.Ct. at 3510. Justice Powell relied upon general figures in a Department of Labor Cost Study estimating the cost of retroactive relief for all types of pension plans—public or private, funded and unfunded. That study has been criticized as severely overstating the costs involved, and of containing serious technical flaws which invalidate its results. See *Review of A Report On the Cost Study of the Impact of An Equal Benefits Rule On Pension Benefits*, Hearings on S. 372. Before the Comm. on Commerce, Science and Transportation, 98th Cong., 1st Sess. (1983) (statement of D. Grubbs, consulting actuary). Cf. *Manhart*, 435 U.S. at 722 n. 42 ("[W]e cannot base a ruling on the facts of this case alone. . . . [E]quitable remedies may be flexible, but they still must be founded on principle.")

vide supplemental retirement benefits to state employees.<sup>25</sup> Deferred compensation plans enable employees to defer a portion of their taxable income until retirement, at which time they are, presumably, taxed at a lower rate.<sup>26</sup> Such plans, therefore, are of particular importance in recruiting and retaining senior or highly qualified employees whose salaries place them in a relatively high tax bracket.

Persuant to IRS guidelines, which were substantially codified as Section 131 of the Revenue Act of 1978,<sup>27</sup> Arizona employees were permitted to defer the payment of income taxes not only on deferred wages, but also on the interest such deferred wages earn. IRS guidelines provide that in order to avoid the immediate recognition of income by the employee pursuant to the "constructive receipt" or "economic benefit" doctrines, the deferred wages and accrued interest may not be held in a funded or secured plan and must continue to be treated as the property of the employer.<sup>28</sup> Employees are permitted to

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25. Arizona's Deferred Compensation Plan states its purpose as follows:

. . . [T]he purpose of [the plan] is to attract and hold certain individuals by permitting them to enter into agreements with the Committee which will provide for monthly payments on retirement, as well as death benefits in the event of death before or after retirement.

*Norris* Joint Stipulated Statement of Facts (Joint Appendix 10), Exhibit 10, at 10; Exhibit 11, at 10.

The benefits provided under the plan did not affect the amount of benefits an employee would receive under the state's primary retirement plan, which were made on a sex-neutral basis. See ARIZ. REV. STAT. ANN. § 38-874A; Brief for Petitioners in *Arizona Governing Committee v. Norris* at 3 n. 4.

26. For a description of the development, characteristics, and unique tax status of state government deferred compensation plans such as Arizona's, see H.R. REP. NO. 1445, 95th Cong., 2d Sess. 50-53 (1978), S. REP. NO. 1263, 95th Cong., 2d Sess. 63-65 (1978).

When an unfunded, non-qualified plan is maintained by a governmental unit or a church, the plan may cover all or any part of the employer's workforce. Under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 18, 26, and 42 U.S.C.), other employers may maintain such plans only to provide benefits in excess of those permitted under qualified plans, or to provide deferred compensation for a group of employees consisting primarily of highly compensated or management employees. *Id.*

27. 26 U.S.C. § 457 (1984).

28. Unfunded, non-qualified deferred compensation plans were first developed by private employers as a result of Rev. Rul. 68-99, 1968-1 C.B. 193 and 72-75, 1972-1 C.B. 127, which discussed the applicability of the constructive receipt doctrine to such deferred compensation arrangements.

When, in 1972, the Internal Revenue Service issued its first favorable private letter ruling authorizing a state or local government employer to establish a non-qualified deferred compensation plan for all or a part of its workforce, Arizona promptly enacted ARIZ. REV. STAT. ANN. § 38-871-874 (1974 & 1983 Supp.) providing for a voluntary deferred compensation plan. See ARIZ. ADMIN. COMP. R. 2-9-01 (1984).

choose an investment vehicle for their deferred wages from among options provided by the employer, although legal control over the deferred wages—including the legal right to decline or accede to an employee's investment or payout preference—continues to rest with the employer until actual receipt by the employee. The state bore the cost of making the necessary payroll deductions, and of channelling those sums to the company designated by the employee, but did not itself contribute to the amount deferred by an employee.

Under Arizona's plan, when a participating employee reached retirement, the employee could elect to receive the accumulated amount of deferred wages and accrued interest over time in one of three options: 1) a lump sum (provided on a sex-neutral basis); 2) fixed payments over a specific term of up to 15 years (sex-neutral); or 3) in form of a life-time annuity (sex based). Because of the tax benefits associated with deferred compensation,<sup>29</sup> and in the hope of providing a secure retirement income, most employees elected the life-time annuity option, which entitles an employee to receive a monthly payment until death.<sup>30</sup>

When Arizona invited bids from insurance companies to act as investment vehicles for its deferred compensation plan, it made no attempt to assure that the annuity payments to Arizona retirees would be nondiscriminatory.<sup>31</sup> In fact, each of the group annuity contracts

entered into by the state under the deferred compensation plan provided for calculation of benefits pursuant to sex-based actuarial tables, resulting in lower monthly payments to individual women than to individual men who had deferred the identical amounts of income.<sup>32</sup> Sex was the only factor that the actuarial tables used to classify individuals of the same age; the tables did not in-

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had a 12% lower mortality rate overall, and a 27% lower rate between the ages of 25 and 34. *Id.* at 60-61. It was not until the 1950's, however, that insurance companies began charging women lower rates for life insurance based on lower mortality of women as a group. *Id.* at 61.

Today a number of separate sex-based tables have been compiled for different types of insurance, such as individual life insurance, group life insurance, individual annuities, group annuities (pensions), and industrial life insurance. *Id.* at 61-62. nn. 31-35. Some of these tables are based on mortality data more than twenty years old while others are more up to date. Even where unisex tables have been used, they have not been used consistently. As Ms. Blevins observed in her Note, "In group life insurance, where women would benefit if sex-based mortality tables are used, unisex tables are used and women pay higher premiums. In group annuities where men benefit from sex-based mortality tables, sex-based tables are used. Hence women pay more than the insurance is worth in both areas." *Id.* at 64. Such discriminatory inconsistencies, formerly found fairly frequently in employee benefit plans, are unlawful under Title VII.

Although insurance companies have discontinued the use of explicit racial classifications in setting rates and benefits, they steadfastly maintain the practice of using sex-based classifications. Higher life insurance rates for blacks, once the custom, were also justified by insurance companies as "dictated entirely by actuarial findings." M. JAMES, *THE METROPOLITAN LIFE: A STUDY IN BUSINESS GROWTH* 338 (1947). See also, e.g., G. MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 316-17, 955, 1262-63 (1944) (history of differential treatment accorded blacks by white insurance companies); M.S. STUART, *AN ECONOMIC DETOUR: A HISTORY OF INSURANCE IN THE LIVES OF AMERICAN NEGROES* (1940); C. G. WOODSON, *Insurance Business Among Negroes, in THE NEGRO AS A BUSINESSMAN* (1929 & reprint 1969) (development of black insurance companies); G. STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 138-140 (1910); Fellers & Jackson, *Non-Insured Pension Mortality: The UP-1984 Table*, *SOCY OF ACTUARIES* 3 (May 1975) (Presentation at the Joint Program, Conference of Actuaries in Public Practice); Note, *The Constitutionality of Racial Classifications in Mortality Tables*, 11 *RUTGERS L. REV.* 757 (1956). Risk classifications based on race (or religion) are now generally rejected as contrary to public policy. See *Lange v. Rancher*, 262 Wis. 625, 56 N.W.2d 542 (1953) (state insurance commissioner may not bar blacks from state insurance program simply because statistics show that blacks as a group have a lower life expectancy); J. GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 87 (1959) (discussion of state statutes prohibiting race discrimination by insurance companies).

*Compare, e.g.,* California Insurance Code §10140, prohibiting life or disability insurers from discriminating on the basis of race, religion, or national origin in the issuance of policies or in setting premiums for such insurance, with California Insurance Code §790.03 (f), which requires "differentials based upon the sex of the individual insured or annuitant in rates or dividends or benefits" for "any contract of ordinary life insurance or individual life annuity applied for and issued on or after January 1, 1981." See note 61, *infra* for discussion of a California amendment bringing its law into compliance with *Norris*.

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29. Because the principle attraction of a deferred compensation plan is tax savings, it will generally be self-defeating to elect a lump sum payment, which would be taxed on the entire amount in a single year. Unless an employee has only a small amount accumulated, the election of a lump sum payment will force the employee to pay income taxes on the amount at rates at least as high (or possibly higher) than the employee would have paid in the absence of such a plan.

30. As of August 18, 1978, a total of 1,675 employees were participants in the plan, including 681 women. Of the 681 participating women, 572 tentatively elected an annuity option. As of the same date, 10 women had retired, with 4 electing a life-time annuity payout. *Arizona Governing Comm. v. Norris*, 103 S. Ct. at 3495.

31. The state's contract procurement documents asked the bidders to quote annuity rates for men and women. 103 S.Ct. at 3501 n. 19.

32. As the Court noted, the insurance companies participating in the plan used different means of classifying individuals on the basis of sex. Several of the companies used separate male and female actuarial tables. Another company used a single table based on male mortality rates, but applied a six year "set back" for women, *i.e.*, by treating a woman as if she were a man six years younger and had the life expectancy of a man that age. 103 S.Ct. at 3495 n. 2.

The history and use of sex-based mortality tables is described in Note, *Challenges to Sex-Based Mortality Tables in Insurance and Pensions*, 6 *WOMEN'S RTS. L. REP.* 59 (1979-80). The first separate women's mortality tables were deployed in England in the late 1700's, but were never widely adopted. In the early 1900's in the United States, women had trouble getting any kind of insurance, based on insurance companies' misconceptions about increased female mortality due to child birth hazards, although a 1916 study reported that women



corporate other factors that correlate with longevity. Thus, despite the fact that 84 percent of women as a group will not live longer than their male counterparts,<sup>33</sup> all individual women were to receive lower monthly annuity payments than identically situated men, solely because of their sex.

Nathalie Norris, an employee in Arizona's Department of Economic Security, elected in 1975 to participate in the plan. She requested that her deferred compensation in the amount of \$199.50 per month be invested in Lincoln National Life Insurance Company's fixed annuity contract. After exhausting administrative remedies, Norris brought suit against the state, the plan's governing committee, and several individual members of the committee, claiming that the defendants were violating Title VII by offering an annuity plan which provided sex discriminatory benefits. She represented a certified class consisting of all female employees of the state "who enrolled or will in the future enroll in the State Deferred Compensation Plan."<sup>34</sup>

33. See *Norris*, 671 F.2d 332 n.1; Bergmann & Gray, *Equality in Retirement Benefits*, 8 CIV. RTS. DIG. 25-29 (1975).

34. 103 S.Ct. at 3495.

## B. The Shifting Alliances of the Norris Court

### 1. Liability

The Court's holding on the issue of Title VII liability constitutes a reaffirmation of the analysis applied in *Manhart*. Justice Marshall, writing for the majority on liability, considered first whether the state would have violated Title VII "if they had run the entire deferred compensation plan themselves, without the participation of any insurance companies."<sup>35</sup> Based upon the reasoning of *Manhart*, the Court held in *Norris* that the "classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than the pay-in stage."<sup>36</sup> The Court reiterated the basic teaching 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,'"<sup>37</sup> Justice Marshall emphasized that *Manhart* "squarely rejected the notion that, because women as a class live longer than men, an employer may adopt a retirement

35. 103 S.Ct. at 3496.

36. 103 S.Ct. at 3497.

37. 103 S.Ct. at 3498, quoting *Manhart*, 435 U.S. at 708.



plan that treats every individual woman less favorably than every individual man.”<sup>38</sup> He then applied the same principles to the facts of *Norris*, and found the Arizona plan to be discriminatory on its face.

In so holding, the majority rejected Arizona’s argument that the plan did not discriminate on the basis of sex because similarly situated men and women would obtain annuity policies at retirement with equal present actuarial values.<sup>39</sup> Justice Marshall exposed the underlying fallacy of such an argument to be the mistaken assumption that Title VII permits the use of a sex-based classification in predicting longevity. Without use of the sex-based classification in the first place, there would be no basis for postulating the actuarial equivalence.<sup>40</sup> Consistent

38. *Id.*

39. Present actuarial value is determined by multiplying the monthly value of the annuity by the life-expectancy (from an actuarial table) of the beneficiary. See *Norris*, 103 S.Ct. at 3497 n.11. For example, *Norris*, with a life expectancy of 79 years, would receive a total of \$53,890.93 paid out as \$320.11/month over her expected life span of 14 years after her retirement at age 65. A man would also receive a total of \$53,890.93, but he would be paid \$354.06 per month over his expected life span of 12.7 years after his retirement at age 65. See Joint Stipulated Statement of Facts, Joint Appendix at 12, *Norris*.

40. 103 S.Ct. at 3498. Actuarial “equality” by definition depends upon the classifications used to determine values. As explained in Brilmayer, Hekeler, Laycock, & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 512 (1980), it is circular to use the expectancies generated by a predictor to justify using that predictor. This may be illustrated by a simple example.

Consider the life expectancy of a newborn black male in South Carolina. Prediction of his life expectancy may or may not take into account his sex, race, and residence. If he is classified as a non-white male from South Carolina, his life expectancy is 58.33 years. If he is classified simply as a resident of the United States, his life expectancy is 70.75 years. The other possibilities range in between; he may be a non-white South Carolinian [62.64], a male South Carolinian [63.85], a non-white male American [60.98], a male American [67.04], a non-white American [64.95], or a South Carolinian [67.96]. He has eight different life expectancies—and just on the basis of the three predictors introduced so far. Thus, the argument that sex-based actuarial tables are not discriminatory because they are “true” proves far too much, since it is virtually certain that every person covered can point to characteristics which actuarially demand lower (and higher) benefits simultaneously.

Moreover, there is substantial debate over whether sex constitutes a valid proxy for longevity. Compare *id.* at 539-59; Brilmayer, Laycock, & Sullivan, *The Efficient Use of Group Averages as Non-discrimination: A Rejoinder to Professor Benston*, 50 U. CHI. L. REV. 222, 236-47 (1983); with Benston, *Discrimination and Economic Efficiency in Employee Fringe Benefits: A Clarification of Issues and a Response to Professors Brilmayer, Laycock, and Sullivan*, 50 U. CHI. L. REV. 250, 271-73 (1983); Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. CHI. L. REV. 489, 512-532 (1982). The continuing validity of the Court’s decision in *Norris*, does not depend on the outcome of this debate, however. The Court held that “[t]he use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables reflect an accurate predic-

tion of the longevity of women as a class, for under the statute ‘[e]ven a true generalization about [a] class’ cannot justify class-based treatment.” 103 S.Ct. at 3498.

with its decision in *Connecticut v. Teal*, in which the Court rejected the so-called “bottom line” defense,<sup>41</sup> the majority in *Norris* refused to accept Justice Powell’s dissenting view that a neutral overall impact on the group justifies a policy that discriminates against individuals.<sup>42</sup>

In exposing the fallacy of the actuarial equivalence argument, Justice Marshall relied upon *Manhart*’s analogy to the use of race-based actuarial tables. The Court observed in *Manhart* that Title VII could not reasonably be construed to permit such a racial classification, even though actuarial studies could unquestionably identify differences in life expectancy based on race as well as sex.<sup>43</sup> In *Norris*, Justice Marshall reiterated the principle that under Title VII, a “distinction based on sex stands on the same footing as a distinction based on race unless it falls within one of a few narrow exceptions that are plainly inapplicable here.”<sup>44</sup>

In deeming any exceptions inapplicable, the majority’s decision, consistent with its prior decisions, identified and rejected the applicable defenses to cases of

tion of the longevity of women as a class, for under the statute ‘[e]ven a true generalization about [a] class’ cannot justify class-based treatment.” 103 S.Ct. at 3498.

41. In *Connecticut v. Teal*, 457 U.S. 440, 445-56 (1982), the Court held 5-4 (Justice’s Powell, Rehnquist, O’Connor and Chief Justice Burger, dissenting) that Title VII provides a cause of action to an individual denied promotion because of an employment test that has a discriminatory impact on a racial group even if the class of which he is a member has not been disproportionately denied promotion.

42. For a discussion of the *Norris* majority opinion as a rejection of Justice Powell’s attempt to import equal protection standards into Title VII jurisprudence, see *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 4, 252-56 (1983) (“By refusing to accept justifications that are characteristic of equal protection jurisprudence, the Court reiterated its determination to prohibit facial discrimination in Title VII cases.”).

43. 435 U.S. at 709. See *supra* note 32.

44. 103 S. Ct. at 3498. Some of Arizona’s supporting *amici* argued in *Norris* that race should be treated differently from sex for annuity purposes. Title VII forbids such a distinction. In 1972, Congress reaffirmed the remedial goals of both the race and sex discrimination provisions when it added enforcement provisions and expanded Title VII coverage to include state and local government employees. See 42 U.S.C. § 2000e(a) and (f)(1982). In explaining the necessity for the 1972 Amendments, the House Committee on Education and Labor observed that “discrimination against women continues to be widespread and is regarded by many as morally or physiologically justifiable.” H.R. REP. NO. 238, 92d Cong., 2d Sess. (1971) reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2141. The Committee then specifically rejected the notion that sex discrimination is less serious than other forms of employment discrimination:

This Committee believes that women’s rights are not judicial diversions. *Discrimination against women is no less serious than other forms of prohibited employment practices* and is to be accorded the same degree of social concern given to any type of unlawful discrimination [emphasis added].

*Id.*

facial sex-based classifications and overt compensation discrimination. The Court briskly rejected the exception for bona fide occupational qualifications (BFOQ)<sup>45</sup> "because the terms of a retirement plan have nothing to do with occupational qualifications." It also rejected the "any other factor than sex" exception recognized in the Bennett Amendment,<sup>46</sup> for the same reason it was inapplicable in *Manhart*: a scheme that uses sex to predict longevity is based on sex; it is not based on "any other factor than sex."<sup>47</sup> Thus, the Court rejected any applicable defense to a facial showing of sex discrimination.

Significantly, the Court also reaffirmed its holding in *Manhart* "that the greater cost of providing retirement benefits for women as a class cannot justify differential treatment based on sex."<sup>48</sup> The court noted that the post-*Manhart* enactment of the Pregnancy Discrimination Act of 1978 (PDA), in which Congress amended Title VII to establish that "the terms 'because of sex' or on the 'basis

of sex' include . . . pregnancy, childbirth, or related medical conditions,"<sup>49</sup> buttresses its prior holding. In enacting the PDA, Congress was aware that requiring employers to cover pregnancy on the same basis "as other disabilities would add approximately \$200 million to their total cost, but concluded that the PDA was necessary to clarify the original intent of Title VII."<sup>50</sup>

After concluding that Arizona would have violated Title VII if it had run the entire plan itself, the majority turned to the second part of its analysis on the liability issue: is the employer's conduct "beyond the reach of the statute because it is the companies chosen by [the employer] to participate in the plan that calculate and pay the retirement benefits?"<sup>51</sup> Under Arizona's view, it acted as a mere "passive conduit" transmitting employee funds to employee-selected investment vehicles, and bore no legal responsibility for the differential in payments ultimately received by its female employees. Arizona thus attempted to shift responsibility to the life insurance companies which it chose as funding media for its deferred compensation plan.<sup>52</sup>

In *Manhart*, the Court had noted that Title VII "primarily govern[s] the relationship between employees and their employer, not between employees and third parties."<sup>53</sup> Relying upon this limitation on the reach of Title VII, and the so called "open market" exception recognized in *Manhart*,<sup>54</sup> Arizona argued in *Norris* that it could not be held liable for the practices of insurance companies. The State maintained that the array of annuities offered by the companies participating in the plan merely reflected what was then available on the open market. The State also argued that the availability of a lump sum payment upon retirement, which could be used to purchase annuities on the open market, also brought its plan within *Manhart's* "open market exception." The majority dismissed these arguments, and emphasized that an employer which offers one fringe benefit on a discriminatory basis, even if through a third party, cannot escape liability because other benefits are offered

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45. 42 U.S.C. § 2000e-2(e). The BFOQ defense, an extremely narrow exception, is applicable in cases challenging the use of overt sex-based classifications in hiring and certain employment practices, and by its terms is not available as a justification for discriminatory compensation practices. Under the BFOQ defense, the employer must prove that there is a factual basis for believing that "all or substantially all women would be unable to perform safely and efficiently the duties of the job involved," or that "the essence of the business operation would be undermined by not hiring members of one sex exclusively." *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977); see also *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

46. The Bennett Amendment, found in Section 703 (h) of Title VII, 42 U.S.C. § 2000e-2(h), provides that Title VII does not prohibit an employer from differentiating 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 Equal Pay Act]. The Court has construed the Bennett Amendment as incorporating the four affirmative defenses of the Equal Pay Act into Titles VII. See *County of Washington v. Gunther*, 452 U.S. 161 (1981).

The Equal Pay Act, 29 U.S.C. § 206(d)(1976), provides in pertinent part as follows:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

47. 103 S. Ct. at 3498, n.13.

48. See 103 S. Ct. at 3498, n.14.

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49. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, (codified at 42 U.S.C. § 2000e(k)).

50. 103 S. Ct. at 3499, n.14. See *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, \_\_\_\_\_ U.S. \_\_\_\_\_, 103 S. Ct. 2622 (1983).

51. 103 S. Ct. at 3499.

52. 103 S. Ct. at 3499-3501.

53. 435 U.S. at 718 n.33.

54. As the Court observed in *Manhart*, 435 U.S. at 717-18, Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefits which his or her accumulated contribution could command in the open market.

on a non-discriminatory basis. Moreover, the majority emphasized that the marketplace could not define the lawfulness of an employer's fringe benefit plan. The Court stated:

It would be inconsistent with the broad remedial purposes of Title VII to hold that an employer who adopts a discriminatory fringe benefit plan can avoid liability on the ground that he (sic) could not find a third party willing to treat his employees on a nondiscriminatory basis. An employer who confronts such a situation must either supply the fringe benefit himself, without the assistance of any third party or not provide it at all.<sup>55</sup> (Footnotes omitted.)

Thus, the Court concluded that because the retirement benefits clearly constituted an aspect of the employment relationship, it made no difference that the employer engaged third parties to provide the particular benefit rather than directly providing for the benefits itself. The employer must be held fully responsible under Title VII for its discriminatory fringe-benefit programs.

In his dissent, Justice Powell relied on the McCarran-Ferguson Act.<sup>56</sup> The majority also addressed the argument that the State's plan was exempted from the reach of Title VII by the McCarran-Ferguson Act, although the argument had been abandoned by Arizona after its rejection below by the Ninth Circuit. In a footnote added "to lay the matter to rest," Justice Marshall explained that by its own terms, the McCarran-Ferguson Act applies only to the business of insurance and has no application to employment practices.<sup>57</sup>

Justice Marshall first pointed out that no insurance company had been joined as a defendant, and that the Court's judgment would not preclude any insurance company from offering sex-based annuity benefits.<sup>58</sup> He

then observed that the State itself was not engaged in the business of insurance because it had not underwritten any risks.<sup>59</sup> Accordingly, application of Title VII would not supersede the application of any state law regulating "the business of insurance." Because that conclusion disposed of the issue, the Court did not decide whether "Title VII specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act.<sup>60</sup> To summarize, the majority rejected Justice Powell's conclusion that the McCarran-Ferguson Act precludes application of Title VII where state insurance laws permit insurance companies to sell sex-distinct annuities to employee benefit plans.<sup>61</sup>

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therefore be distinguished from the independent third party insurance companies participating in the plan at issue in *Norris*. See also *Hannah v. New York State Teachers' Retirement Sys.*, 26 Fair Empl. Prac. Cas. (BNA) 527, 532 (S.D.N.Y. 1981).

59. For cases defining the "business of insurance" under the McCarran-Ferguson Act as involving some investment risk-taking, see *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979); *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959).

The Court's conclusion in *Norris*, that the state in providing an employee benefit plan was not engaged in the "business of insurance," is also fully consistent with the federal regulatory scheme, applied to most employee pension benefit plans in the private sector, which was created by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 (19 ). Under ERISA, an employer's choice of an insurance contract as a funding mechanism for its employee benefit plan does not alter its identity as an employee benefit plan subject to the Act's requirements. See 29 U.S.C. § 1002(1) (definition of employee welfare benefit plan); § 1002(2) (definition of employee pension benefit plan). Moreover, in the so-called "deemer clause," ERISA, 29 U.S.C. § 1144(B)( ), provides that employee benefit plans are not the "business of insurance" for purposes of state regulations. Consistent with the "deemer clause," ERISA establishes the regulation of employee pension benefit plans "as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981); see also *Shaw v. Delta Air Lines*, 103 S.Ct. 2890, (1983) (state law prohibiting pregnancy discrimination is preempted with respect to ERISA covered benefit plans only insofar as it prohibits practices that are lawful under Title VII). Although ERISA contains no non-discrimination provision, Congress understood and intended in enacting ERISA that Title VII's non-discrimination requirements applied, and would continue to apply to employee pension plans. See *Legislative History of the Employment Income Security Act at 1862, 3518-19* (1976).

60. See the excellent discussion of McCarran-Ferguson Act issue in *Spirit v. TIAA*, 691 F.2d at 1063-1066; see also *Women in City Gov't United v. City of New York*, 515 F. Supp. at 302-06.

61. Virtually all states permit insurance companies to sell sex-distinct annuity policies. In April 1983, Montana enacted the first state statute, H.B. No. 358, effective in 1985, which would prohibit the sale of such sex-based policies. Under the new Montana law, it will be an "unlawful discriminatory practice for any financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits." See Act of Apr. 15, 1983, ch. 531, 1983 Mont. Laws 1220 (to be codified at MONT. CODE ANN. tit. 49, ch. 2, pt. 3)

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55. 103 S. Ct. 3502.

56. § 2(b), 15 U.S.C. § 1012(b)(1982). The McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, unless such Act specifically relates to the business of insurance. . . ."

57. 103 S. Ct. at 3500 n.17.

58. In litigation involving sex distinct retirement benefits provided through the Teachers Insurance and Annuity Association and College Retirement Equities Fund (TIAA-CREF), an insurance company created as an educational service organizing for the purpose of providing annuity benefits for college and university employees, TIAA-CREF has been joined as a co-defendant in lawsuits against colleges and universities as an "employer" or agent of an employer within the meaning of Title VII. See *Spirit v. TIAA*, 691 F.2d at 1063 (TIAA-CREF held to be an employer for the purposes of Title VII); but see *Peters v. Wayne State Univ.*, 476 F. Supp. 1343, 1351 (E.D. Mich. 1979) (TIAA-CREF held an employer), *rev'd*, 691 F.2d at 238 (TIAA-CREF held not to be an employer under Title VII). TIAA-CREF can

## 2. Relief

Writing for a different majority on the issue of relief, Justice Powell held that the retroactive portion of the relief ordered by the district court was "unprecedented

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(eff. Oct. 1, 1985). Bills have been introduced in the 1985 Montana legislative session to substantially amend or repeal the statute. In addition, five states, Michigan, Massachusetts, North Carolina, Hawaii, and Pennsylvania, specifically prohibit (by statute or regulation) sex discrimination in rates or premiums for auto insurance. *See generally*, R. Austin, *The Insurance Classification Controversy*, 131 U. PA. L. REV. 517, 528-33 (1983); Note, *A Step Toward Insurance Equity: Arizona Governing Committee v. Norris*, 7 HARV. WOMEN'S L. J. 251, 263 (1984).

As noted in Justice Powell's opinion, 103 S.Ct. at 3506 n. 3, at the time of the *Norris* decision, California required the use of differentials based on the sex of the individual insured in the sale of ordinary life insurance and individual life annuities where they are "substantially supported by valid pertinent data segregated by sex." *See CAL. INS. CODE § 790.03(f)* (West Supp. 1985). That provision was amended with regard to employment-related policies in September 1983, however, to comport with the Court's decision in *Norris*, S.B. No. 960, Section 2, Stat. 1983, Ch. 1261. Section 790.03(f) now provides that "sex-based differentials in rates or dividends or benefits, or any combination thereof, shall not be required for . . . any contract of life insurance or life annuity issued pursuant to arrangements which may be considered terms, conditions, or privileges of employment as such terms are used in Title VII of the Civil Rights Act of 1964, as amended."

Proposed federal legislation which would ban discrimination based on race, religion, national origin, or sex in the writing or selling of insurance has been under consideration for several sessions. *See Note, Ending Sex Discrimination in Insurance: The Nondiscrimination in Insurance Act*, II J. LEGIS 457 (1984). There is no question that Congress may enact laws regulating the business of insurance as a regulation of Commerce. *See United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533 (1944). If enacted, insurance companies would be prohibited from selling policies with sex-differentiated rates or benefits.

The Nondiscrimination in Insurance Act (H.R. 100, 98th Cong., 1st Sess.) introduced by Representative Dingell and numerous co-sponsors, was reported out of subcommittee without amendment, on April 20, 1983. The Fair Insurance Practices Act (S. 372, 98th Cong., 1st Sess. (1983)), virtually identical to H.R. 100, was introduced by Senators Hatfield, Packwood, and Hollings, and referred to the Committee on Commerce, Science, and Transportation, chaired by Senator Packwood. The same bill had been reported favorably by the Commerce Committee just before the 97th Congress, 2nd Sess. adjourned in 1982 (then known as S. 2204). *See S. REP. NO. 671*, 97th Cong., 2nd Sess. (1982). The Commerce Committee held hearings on S. 372 in the Spring of 1983. A compromise version of the bill was close to resolution, but progress halted when the insurance industry representatives reversed their position, pulled out of all negotiations, and mounted a well-financed campaign against legislation. *See, e.g., The Committee: The Battle Over Unisex Insurance*, Washington Post, July 18, 1983, at A-1. The following year, H.R. 100 was amended beyond recognition by the full House Committee on Energy and Commerce. As amended, the bill lost the support of women's groups and civil rights organizations, and no further action was taken during the remainder of the 98th Congress. Supporters of the legislation plan to renew their efforts in the 99th Congress. *See Gray & Shtasel, Insurers Are Surviving Without Sex*, 71 A.B.A.J. 89-91 (Feb. 1985).

In the meantime, non-employment related sex-based insurance purchased on the open market can only be challenged under existing

and manifestly unjust."<sup>62</sup> Although the district court had not ordered back payments, the Supreme Court viewed a portion of the future benefit payments as fundamentally retroactive in nature because they were based on contributions made prior to the court's decision.<sup>63</sup> Under Arizona's deferred compensation plan, annuity payments to retirees were based entirely on the employee's past contributions and any return earned on those contributions. As Justice Powell noted, in order to provide all women (present and future retirees) with the higher level of benefits, Arizona would be required to fund retroactively any deficiency in past contributions made by its women retirees.<sup>64</sup>

In reaching the decision that the relief granted by the Court should be prospective only, Justice Powell acknowledged that retroactive relief is normally appropriate in the typical Title VII case. Nevertheless, he rejected such relief in this case, relying on the following two factors, first applied in *Manhart*: 1) that the employer may well have assumed the pension plan was lawful; and 2) that imposing such unanticipated costs on the plan could jeopardize its solvency and the employees' benefits. First, Justice Powell concluded that Arizona reasonably could have assumed, based on *Manhart's* explicit "open

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non-Title VII theories. *See, e.g., Manufacturers Hanover Trust Co. v. United States*, 576 F. Supp. 837 (S.D.N.Y. 1983) (appeal pending) (use of sex-based actuarial tables by IRS for valuation purposes prohibited under Fifth Amendment); *Hartford Accident and Indemnity Co. v. Insurance Comm'r*, 65 Pa. Commw. 249, 442 A.2d 382 (1982), *aff'd*, \_\_\_\_\_ A.2d. \_\_\_\_\_ (1984) (insurance commissioner correctly ruled that sex-based auto insurance rates constitute "unfair discrimination" among policy-holders in view of public policy against sex discrimination expressed by state ERA); *National Org. for Women v. Mutual of Omaha Ins. Co.*, Civil Action No. 84 (D.C. Superior Court) (case filed in August 1984, challenging sex-based health insurance rates as a violation of District of Columbia public accommodations law, D.C. Code § 1-2501 *et seq.*); *but cf., Life Ins. Co. of North America v. Reinhardt*, 591 F.2d 499 (9th Cir. 1979), *on remand*, 485 F. Supp. 56 (N.D. Cal. 1979) (state action not established in Fourteenth Amendment claim brought under 42 U.S.C. § 1983); *Murphy v. Harleysville Mutual Ins. Co.*, 282 Pa. Super 244, 442 A.2d 1097 (1980), *cert denied*, 454 U.S. 896 (1981) (state action not established for auto insurance company's rate structure). *See generally*, Comment, *Insurance as a Public Accommodation: Challenging Gender-Based Actuarial Tables at the State Level*, 15 COL. HUM. RTS. L. REV. 227 (1984).

62. 103 S. Ct. at 3509.

63. Justice Marshall, dissenting in part, agreed with Justice Powell that when a court "directs a change in benefits based on contributions made before the court's order, the court is awarding relief which is fundamentally retroactive in nature." That is the case, Justice Marshall pointed out, because the retirement benefits under Arizona's plan "represent a return on contributions made during the employee's working years and which were intended to fund the benefits without any additional contributions from any source after retirement." 103 S. Ct. at 3503.

64. 103 S. Ct. at 3509-10, n.10.

market” limitation, that “it would be lawful to make available to its employees annuities offered by insurance companies on the open market.”<sup>65</sup> Second, he concluded that the “devastating” cost of complying with an unanticipated retroactive order would fall on the state of Arizona, and presumably other state and local governments, at “a time when many states and local governments are struggling to meet substantial fiscal deficits.” In sum, Justice Powell could find “no justification for this Court, particularly in view of the question left open in *Manhart*, to impose this magnitude of burden retroactively on the public.”<sup>66</sup> The Court accordingly held that only benefits derived from contributions collected after the effective date of the *Norris* judgment, August 3, 1983, need be calculated without regard to the sex of the employee.

The practical effect of the Court’s decision for members of the certified class in *Norris* can be outlined as follows: 1) retirees—women who retired prior to the effective date of the Court’s judgment will receive the lower sex-based benefits for the rest of their lives; 2) present employees—employees who retire sometime after August 1, 1983 will receive a combination of sex-based benefits (derived from their pre-*Norris* contributions) and sex-neutral benefits (derived from their post-*Norris* contributions);<sup>67</sup> 3) future employees—only those women retiring sometime in the distant future, whose benefits are based entirely on contributions made after August 1, 1983, will receive the full benefit of the Court’s ruling.

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65. 103 S. Ct. at 3510.

66. *Id.* Most private pension plans must comply with federally-mandated pension plan funding requirements under the Employment Retirement Income Security Act of 1974 (ERISA), which was enacted to protect employees’ retirement benefit expectations. 29 U.S.C. § 1081-86. See *supra* note 57. Plans made available to state and local government employees, on the other hand, are exempt from ERISA’s requirements. See 29 U.S.C. § 1002 (32), 1003(b)(1). Some state and local governmental plans are not even fully funded, and pay retirement benefits through periodic appropriations. In enacting ERISA, Congress determined that it would not attempt the restructuring of state and local governmental plans through federal regulation. See discussion of governmental plan exception in ERISA legislative history, H.R. REP. NO. 533, 93rd Cong., 2d Sess. reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639-48; H. R. REP. NO. 807, 93rd Cong., 2d Sess reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4670-4756.

67. In fact, actions subsequently taken by Arizona have resulted in equalized benefits for present as well as future employees. As noted by Justice Powell, Arizona discontinued the life annuity option after the district court ruled it violated Title VII. 103 S. Ct. at 3495 n.4. After the Supreme Court’s decision in *Norris*, however, Arizona reinstated the life annuity option retroactive to the date of the district court’s decision. In addition, the state adopted a non-discriminatory life annuity option for all contributions made after August 1, 1983.

In her concurring opinion, Justice O’Connor reached the same result, but applied a slightly different analysis. She examined three criteria for determining when to apply a decision of statutory interpretation prospectively: 1) whether the decision established a new principle of law, either by overruling past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed; 2) whether retroactivity will further or retard the operation of the statute; and 3) whether retroactive application would impose inequitable results.<sup>68</sup> In Justice O’Connor’s view, the third criterion was determinative and compelled a prospective decision under the circumstances of the case. The first two criteria, under her analysis, would have permitted, but did not require, retroactive application.

In examining the equities,<sup>69</sup> Justice O’Connor emphasized that “[m]any working men and women have based their retirement decisions on expectations of a certain stream of income during retirement,” and that “[t]hese decisions depend on the existence of adequate reserves to fund these pensions.” If a fund cannot meet its obligations, “[t]he harm would fall in large part on innocent third parties.”<sup>70</sup> Thus, Justice O’Connor based her decision for prospective relief on the “real danger of bankrupting pension funds.”

In contrast, dissenting Justices Marshall, Brennan, White, and Stevens emphasized that one of the main purposes of Title VII is “to make persons whole for injuries suffered on account of unlawful employment discrimination.”<sup>71</sup> With regard to benefits attributable to contributions made after *Manhart*, these Justices found “no special circumstances justifying denial of retroactive relief.”<sup>72</sup> In addition, the dissenters concluded that benefits based on contributions made prior to *Manhart*

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Because *Norris* transferred her contributions originally invested in a Lincoln National Life Insurance Company fixed life annuity to another company after August 1, 1983, she will retire with benefits totally equal to her male counterparts. Letter from Amy Gittler, counsel for plaintiffs in *Norris*, dated February 28, 1984 (on file with *Women’s Rights Law Reporter*). See also discussion *infra* notes 98-103 and accompanying text regarding conversion theories.

68. 103 S. Ct. at 3512, relying on the criteria set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

69. A court that finds unlawful discrimination under Title VII “[m]ay enjoin [the discrimination] . . . and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . with or without back pay . . . or any other equitable relief as the court deems appropriate.” 42 U.S.C. 2000e-5(g). See generally *Manhart*, 435 U.S. at 718-23; *Albemarle Paper Co. v. Moody*, 442 U.S. 405 (1975).

70. 103 S.Ct. at 3512, quoting *Manhart*, 435 U.S. at 722-23.

71. 103 S.Ct. at 3502, quoting *Albemarle Paper Co. v. Moody*, 442 U.S. at 418.

72. 103 S.Ct. at 3503.

should be equalized if the employer could have used sex-neutral tables after the previous decision without violating any contract provisions. They would have had the district court consider on remand whether "some or all of the male participants in the plan who had not retired at the time *Manhart* was decided had any contractual right to a particular level of benefits that would have been impaired by the application of sex-neutral tables to their pre-*Manhart* contributions."<sup>73</sup>

### III. EMPLOYEE PENSION AND ANNUITY PLANS — RECOGNIZING EMPLOYER NON-COMPLIANCE

A basic familiarity with pension and retirement plans makes it much easier to uncover employer non-compliance with *Norris*. In general, pension plans can be divided into two broad categories: 1) defined benefit plans and 2) defined contribution plans.<sup>74</sup> Although typical trouble spots for sex differentials depend on the basic type of plan, the problem comes from the same

source: the use of sex-based mortality tables to calculate the actuarial value of an amount accumulated or received by employees under the plan.

#### A. Defined Benefit Plans

Defined benefits plans provide for payment of specified amount of benefits upon retirement, typically based upon a wage and length of service formula. A commonly used formula for computing the amount of an employee's pension benefits multiplies a percentage of pay over the last five years of work by the number of years the employee has been covered. Other common formulas apply a flat dollar amount for each year covered by the plan, or pay retirees a specified flat percentage of their earnings, regardless of their length of service.

Employee and employer contribution rates, on the other hand, are actuarially determined, based on predicted benefits payable in the future. Actuarial valuations used to determine contribution rates depend upon estimates of myriad cost factors, including 1) the characteristics of a plan population; 2) interest rate assumptions, and 3) expenses.<sup>75</sup> The plan population and its characteristics are determined by the flow of participants into and out of the plan (new employees, retirements, terminations, death, and disability). Traditional plan population cost factors include the number of participants and beneficiaries, the male and female mix, the attained age distribution, the distribution by years of service, and the level and distributions of salaries (if the benefits of the plan are related to compensation).<sup>76</sup>

Interest rate assumptions used in the actuarial valuation formula greatly affect estimates of plan costs and liabilities because of the long time span between benefit accruals and payments. As a generalization, it has been observed that a change of 1% in the interest rate assumption alters the long-run cost estimate of a typical plan by about 25%.<sup>77</sup> For this reason, it is common practice to use an interest rate assumption lower than the expected long-term rate of return, leading to overstatement of the expected cost of the plan.<sup>78</sup> Thus, the interest assumption used by a plan significantly affects the actuarial valuation (more so than the sex mix of the plan population), and the corresponding funding requirements for the plan.

The pension plan at issue in *Manhart* was a defined benefit plan. In defined benefit plans, the trouble spots for sex discrimination are found at the pay-in stage in

73. 103 S.Ct. at 3504.

74. See generally, e.g., U.S. DEPARTMENT OF LABOR, COST STUDY OF THE IMPACT OF AN EQUAL BENEFITS RULE ON PENSION BENEFITS (Jan. 1983) [hereinafter cited as U.S. DEPT. OF LABOR, COST STUDY]; A. MUNNELL, THE ECONOMICS OF PRIVATE PENSIONS (1982) at App. B; E. ALLEN, E. J. MELONE & J. ROSENBLUM, PENSION PLANNING: PENSIONS, PROFITS-SHARING AND OTHER DEFERRED COMPENSATION PLANS 20-65 (3d ed. 1976); D. MCGILL, *Actuarial Cost Factors* in FUNDAMENTALS OF PRIVATE PENSIONS 305-31 (3d ed. 1975).

The majority of covered workers are in defined benefit plans. According to the U.S. Department of Labor, approximately 65% of the 42.5 million active private pension plan participants in 1977 were covered by defined benefit plans; the remaining 35% were covered by defined contribution plans. U.S. DEPT. OF LABOR, COST STUDY, *supra*, at 8-9. The majority of plans, however, are structured as defined contribution plans. Defined contribution plans accounted for 71% of the estimated 451,761 private pension plans in operation in 1977, while 29% were defined benefit plans.

Despite their greater number, defined contribution plans tend to be smaller in size, and the vast majority are supplemental in nature. Only about three million workers have them as their primary plan. *Id.* at 9. A substantial number of college and university employees have as their primary plan a defined contribution plan provided through TIAA-CREF (Teachers Insurance and Annuity Association and College Retirement Equities Fund), which covers over 700,000 participants in over 3500 institutions nationwide. See 1981 TIAA-CREF Annual Report at 5. In the public sector, only 2% of the state and local employees are covered exclusively by defined contribution plans.

Approximately 16% of covered state and local workers are in combination plans having both defined contribution and defined benefit features. U.S. DEPT. OF LABOR, COST STUDY, *supra* note 74 at 56 n. 47. The rest are defined benefit plans. The Department of Labor estimates that as many as two-fifths of covered employees may participate in more than one employee retirement plan. Typically, such employees would be covered by a basic defined plan plus a supplemental defined contribution plan, such as a profit sharing or deferred compensation plan. *Id.* at 9 n. 5.

75. See D. MCGILL, *Actuarial Cost Factors* in FUNDAMENTALS OF PRIVATE PENSIONS 305-31 (1975).

76. *Id.* at 307-08.

77. *Id.* at 324.

78. *Id.* at 325.

employee contribution rates and in the pay-out stage where optional benefits are based on the actuarial value of the normal benefits.<sup>79</sup> Discriminatory contribution rates have largely been eliminated in the wake of *Manhart*. However, discriminatory pay-out options remain a problem in numerous plans. In defined benefit plans, normal benefits are computed according to sex-neutral formulas as described above. Similarly situated men and women choosing a "normal benefit" receive equal amounts. Similarly situated men and women choosing an optional benefit, however, receive sex-differentiated benefits if the conversion is made with sex-based actuarial tables. Under typical alternative pay-out options, *i.e.*, early retirement options, lump sum payments or joint and survivor benefits, the use of sex-based actuarial tables results in individual men receiving lower benefits than similarly situated women.

For example, if an identically situated male and female were to retire at age sixty-five with a yearly "normal" retirement benefit of \$5,000, the respective present actuarial values of their benefits, based on sex-based mortality tables predicting eighteen or more years of life for the average man, and twenty-two for the average woman, would be \$90,000 for the man ( $\$5,000 \times 18 = \$90,000$ ) and \$110,000 for the woman ( $\$5,000 \times 22 = \$110,000$ ). The same present actuarial values would apply in computing lump sum payments (\$90,000 and \$110,000) or for calculating joint and survivor options, where the retired employee receives a specified periodic amount for life, and the surviving spouse thereafter receives a periodic benefit for his or her life.<sup>80</sup> The actuarial equivalent for early retirement for each at age sixty-two, still based on sex-based mortality tables, would then be \$4,285 for the man ( $\$90,000 \div 21 [18 + 3] = \$4,285$ ), and \$4,400 for the woman ( $\$110,000 \div 25 [22 + 3] = \$4,400$ ). If a merged mortality table were used for both sexes, the present actuarial value of the man's and

woman's retirement at age sixty-five would be equal (*i.e.*,  $\$5,000 \times 20 \text{ years} = \$100,000$ ), and similarly, the actuarial equivalent for early retirement at age sixty-two would yield equal payments ( $\$100,000 \div 23 = \$4,348$ ).<sup>81</sup>

Fifty-five percent of private defined benefit plans in fact do not use sex-based mortality tables to establish sex-differentiated optional benefit levels, according to a U.S. Department of Labor survey, reported early in 1983,<sup>82</sup> and at least 30% of state and local workers were covered by plans which provide sex-neutral joint and survivor options.<sup>83</sup> For example, railroad retirement plans already provide survivor and all other benefits on a sex-neutral basis.<sup>84</sup> Numerous large private defined benefit plans have long offered sex-neutral joint and survivor options, including, among others, General Electric, IBM, General Motors and plans covering the Steelworkers and the United Auto Workers.<sup>85</sup>

## B. Defined Contribution Plans

Defined contribution plans, the type of plan at issue in *Norris*, provide for contributions of a specified amount each year on behalf of each employee. Future benefit levels are not fixed, but depend on the amount of accumulated funds at retirement (contributions and net investment returns) allocated to individual accounts. The amounts to be paid out in lifetime periodic benefits are actuarially determined.

Under a typical contribution plan, the employer or employee, or both, may make periodic contributions equal to a specified percentage of the employee's salary. The employer generally sends the contributions to an in-

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81. The example given is for illustrative purposes only and omits the role of interest in calculating present value. See Brief *Amici Curiae* of American Civil Liberties Union and American Association of University Professors at 20 n.9, *Manhart*.

Plans requiring women to retire earlier than men, or blacks earlier than whites, have been held unlawful under Title VII. *Peters v. Missouri Pacific R.R.*, 483 F.2d 490 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973)(race); *Bartmess v. Drewrys, U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971)(sex); *Fillinger v. East Ohio Gas Co.*, 4 Fair Empl. Prac. Cas. (BNA) 73 (N.D. Ohio 1971)(sex). In addition, plans paying lower monthly benefits to male early-retirees have been found unlawful under Title VII. *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976); *Rosen v. Public Service Electric & Gas Co.*, 477 F.2d 90 (3d Cir. 1973); *Fitzpatrick v. Bitzer*, 390 F. Supp. 287 (D. Conn. 1974), *rev'd on other grounds*, 519 F.2d 559 (2d Cir. 1975)(failure to award attorney's fees), *aff'd in part, rev'd in part on other grounds*, 427 U.S. 445 (1976)(failure to award back pay).

82. U.S. DEPT. OF LABOR, COST STUDY, *supra* note 74 at 13.

83. *See id.* DEPT. at 81 n. 68.

84. U.S. DEPT. OF LABOR, COST IMPACT FOR DEFINED CONTRIBUTION PLANS OF OFCCP'S PROPOSED REGULATION REGARDING SEX DISTINCTIONS IN FRINGE BENEFITS app. 2 (draft 1982).

85. *Id.* at app. 5.

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79. Normal benefits are those benefits automatically provided under the plan.

80. Joint and survivor annuity periodic payments also tend to be smaller for individual men than for similarly situated women based on the actuarial determination that men are more likely to be survived by their wives than vice versa. Smaller payments for men choosing the joint and survivor option are exacerbated by the assumption that the man's spouse is likely to outlive him not only because of her sex but also because it is likely that she is younger than her husband. ERISA requires covered pension plans to provide employees with a joint and survivor pay-out option. Currently, approximately 35% of married men in defined benefit plans select the joint and survivor option. See U.S. Dept. of Labor, COST STUDY, *supra* note 74 at 78. In contrast, lump sum pay-out options are not required by ERISA and are relatively rare in defined benefit plans. They accounted for about 2% of male recipients who retired in 1978.



insurance company which enters into a group annuity contract with the employer or an individual annuity contract with the employee. When the worker retires, his or her benefit is equal to the fixed or variable annuity that can be purchased with the accumulated contributions plus investment earnings. In pricing annuities, insurance companies typically use the factors of age, sex and an interest rate assumption. As in actuarial valuations in defined benefit plans, the interest rate assumption has a significant impact on cost estimates in defined contribution plans, and constitutes a much more important pricing factor than the sex of the annuitant. As a safety margin, advance guaranteed rates are based on a conservatively low rate of interest. The safety margins are required because insurers cannot accurately predict the future investment return at the time they receive the deferred annuity premiums. Benefits may in fact be based on interest rates in effect at retirement, if more favorable than the guaranteed rates. The Lincoln National annuity option selected by Nathalie Norris, for example, guaranteed Norris a monthly annuity benefit of \$320.11 based upon 3.5% interest. (The monthly guaranteed amount would have been \$354.06 if Norris had been male.) The Lincoln National contract provided that a participant's annuity would be based on rates in effect at retirement, if more favorable than the advance guaranteed rates. Assuming Lincoln National based its actual annuity premium rates on 7.5% interest, Norris' monthly annuity would be approximately \$443 or about 38% more than the \$320.11 annuity under guaranteed rates.<sup>86</sup>

In defined contribution plans, trouble spots for sex discrimination are found at the payout stage for all lifetime annuity benefit options. If sex-based actuarial tables are used, a woman choosing a single life annuity would receive lower periodic benefits than a similarly situated man. Because the money accumulated in her individual account at retirement would be equal to that of her male counterpart, however, choice of a lump sum payment would result in equal amounts for the man and woman. (Lump sum payments do not pose problems in this context because they are not actuarially determined in defined contribution plans.) Use of sex-based actuarial tables has historically been more prevalent in defined contribution plans than in defined benefit plans. The U.S. Department of Labor reported in 1983 that 74% of participants in defined contribution plans, compared to 45% in defined benefit plans, were subject to sex-based computation of periodic annuity benefits.<sup>87</sup>

### C. Obtaining Information About An Employer's Pension Plan

ERISA provides employees in the private sector with rights of access to information about their employee pension benefit plan. Employers are required, under ERISA, to give employees a summary plan description, which is usually provided in booklet form. Employees may also examine the more complete pension plan documents or contact the plan administrator for more information.<sup>88</sup>

In defined contribution plans, employees should examine the contract documents for use of sex-based actuarial factors to compute life annuity benefit amounts. These are easily detected if the documents specify sex-differentiated benefits. If sex-based classifications do not appear on the face of the plan, there is usually a statement that benefits are calculated according to a specified mortality table.<sup>89</sup>

In defined benefit plans, use of sex-based actuarial factors are sometimes more difficult to spot unless the summary plan description give sex-differentiated examples of optional benefit amounts. Nevertheless, under Revenue Ruling 79-90, the Internal Revenue Service now requires qualified defined benefit pension plans<sup>90</sup> to specify the actuarial assumptions used to compute the amounts of optional forms of retirement benefits.<sup>91</sup> This

88. See generally 29 U.S.C. § 1022, 1024(b)(2)(1984).

89. See *supra* note 32.

90. Pension plans that meet certain participation and vesting standards designated in the Internal Revenue Code are referred to as qualified plans, and receive certain tax advantages not available to nonqualified plans. Employer contributions to qualified plans are deductible by the employer when made, but not taxed to the employee until benefits are distributed from the plan at retirement. A. MUNNELL, *THE ECONOMICS OF PRIVATE PENSIONS*, at 215-16.

91. See Rev. Rul. 79-90, 1979-1 C.B. 155. Under Revenue Ruling 79-90, defined benefit plans that provide optional forms of retirement benefits that are actuarial equivalent to the normal retirement benefit must specify the actuarial assumptions used to compute the optional benefits. This requirement derives from Treasury Regulation §1.401-1(b)(i)(1984) which requires defined benefit plans to provide "definitely determinable" benefits. Plans in effect on March 12, 1979 were not required to specify their actuarial assumptions until January 1, 1984.

The question of whether any change in specified assumptions by plan amendment would violate the Internal Revenue Code's prohibition against amendments that cause a reduction in accrued benefits was considered in Revenue Ruling 81-12, 1981-1 C.B. 228. A supplemental ruling which addressed the relationship between Revenue Ruling 79-90 and the anti-cutback rule in Internal Revenue Code Section 411(d)(6)(1984). Revenue Ruling 81-12 outlines changes in actuarial factors that indirectly affect accrued benefits, and describes two methods that may be used to avoid a decrease in accrued benefits where a plan amendment makes such a change.

According to the IRS, where a plan had "not yet specified actuarial assumptions for optional benefits under Revenue Ruling 79-90 or Revenue Ruling 81-12, it would be able to go to unisex tables without violating the benefit accrual provisions of the code 'as long

86. See Brief of Eight Individual Actuaries as *Amici Curiae* in *Norris* at 9-13.

87. U.S. DEPT. OF LABOR, *COST STUDY*, *supra*, note 74 at 10.

will make it easier to spot sex discrimination in qualified defined benefit plans. Fortunately, many plans voluntarily converted to sex-neutral actuarial factors in the process of complying with the new IRS requirements.<sup>92</sup>

#### IV. REMEDYING EMPLOYER NON-COMPLIANCE

*Manhart* and *Norris* require trial courts to use equitable principles in determining the scope of relief granted in pension discrimination cases. Consistent with its remedial holdings in other Title VII cases, the Court in *Manhart* and *Norris* reaffirmed the principle that relief should be fashioned in each Title VII case with due regard for the particular facts and circumstances presented, but with added "equitable sensitivity" to the potential impact of a retroactive remedy in the context of pension cases.

The Court in both *Manhart* and *Norris* recognized that in Title VII actions, there is a "presumption in favor of retroactive liability" which "can seldom be overcome."<sup>93</sup> In enacting Title VII, Congress intended to give courts wide discretion in exercising their equitable powers to fashion the most complete relief possible, including "make-whole remedies" designed to restore plaintiffs "to a position where they would have been were

it not for the unlawful discrimination."<sup>94</sup> In pension cases, the presumption in favor of retroactive relief can be overcome under *Manhart* and *Norris* if 1) the employer had reason to believe its plan was lawful, and 2) retroactive relief would impose costs which would endanger the solvency of the plan, thereby jeopardizing the expectations of employees to their retirement benefits.

Under these guidelines, the scope of relief that can be obtained depends upon the facts and circumstances of each case.<sup>95</sup> Accordingly, the employer's plan should be closely scrutinized for the following factors: 1) whether the relief requested would in fact be "retroactive;" 2) whether the employer could have reasonably believed its conduct was lawful in light of *Manhart*, *i.e.*, whether the plan offered a sex-neutral lump sum payment or was funded through an independent third party insurance company which offered annuities available on the open market; and 3) what impact the requested relief would have on the solvency of the plan and on the expectations of its participants.

*Spirt v. TIAA-CREF*, recently decided by the Second Circuit, and several other cases now pending on remand from the Supreme Court for further consideration in light of *Norris* raise these post-*Norris* relief issues.<sup>96</sup> In *Spirt*, the Second Circuit reinstated its pre-*Norris* judgment, with one minor modification, and ordered that retirement benefits be equalized for all persons retiring after May 1, 1980.<sup>97</sup> Although characterizing its decision as awarding "retroactive relief," the Second Circuit distinguished the TIAA-CREF plan from the plan involved in *Norris* based on 1) the absence in *Spirt* of additional financial burdens imposed on the employer by the relief order and 2) the fact that the participants in the TIAA-CREF plan had no expectation of a "certain stream of income" at retirement. The *Spirt* decision provides valuable guidance with regard to the scope of relief permissible in post-*Norris* cases with distinguishable fact patterns.

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as the assumptions stated in the plans do not change." Issues with regard to plans that already specified sex-based assumptions for optional benefits have been under IRS study. See *IRS Will Provide Guidance For Pension Plans to Comply With Court Ruling in Norris Case*, DAILY LABOR REP. (BNA), No 190, at A-10-11 (Sept. 29, 1983); cf. Block & Cogan, *Pension Strategies After Norris* 10 J. PENS. PLAN. & COMPL. 131, 138-40 (1984); Ryan & Rock, *Post-Norris Ambiguities: Unanswered Questions for Women and the Pension Industry*, 17 AKRON L. REV. 171, 190 (1983) [hereinafter cited as Ryan & Rock].

92. As noted in Hager & Zimpleman, *The Norris Decision, Its Implications and Application*, 32 DRAKE L. REV. 913, 937-38 (1982-83), the defined benefit plan sponsor must decide whether to apply the principles of *Norris* to all benefits accrued to date. The authors point out that as a practical matter, "splitting the accruals into pre- and post-August 1, 1983 accruals and using different factors for each may be unnecessarily complicated in view of the employer's cost." *Id.* at 938. See also survey results discussed in note 5, *supra*; but see Ryan & Rock, *supra* note 91, at 190. Similarly, many defined contribution plans have complied with *Norris* by adopting unisex factors for account balances arising from contributions before August 1, 1983. According to the Buck Consultants, Inc. survey referenced in footnote 5, of those surveyed defined contribution plans adopting unisex factors to comply with *Norris*, "70 percent will apply unisex factors to participants' total account balances, and 19 percent will apply the factors for future contributions only, while 11 percent of the plans had not yet decided which approach to take." Firms Plan to Switch to Unisex Plans in Response to *Norris*, Buck Survey Says, 10 PENS. REP. (BNA) 1688 (Nov. 7, 1983).

93. *Manhart*, 435 U.S. at 719, *Norris*, 103 S. Ct. at 3502.

94. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1972)(quoting 118 CONG. REC. 7168 (1972)).

95. Cf. *Manhart*, 435 U.S. at 722 n.42; Ryan & Rock, *supra* note 91, at 177-83.

96. See *Spirt v. TIAA-CREF*, 691 F.2d 1054 (2d Cir. 1982), *cert. granted and remanded*, 103 S. Ct. 3566 (1983), *modified and aff'd*, 735 F.2d 23 (2d Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_ (1984), and cases pending on remand cited *supra* note 6. See also *EEOC v. TIAA*, 84 Civ. 9294 (RJW)(S.D.N.Y.)(complaint filed Dec. 27, 1984).

97. The Second Circuit modified its prior decision in "one minor respect" as follows:

We still consider the likelihood that TIAA will fail to earn 2-1/2% on its investment to be an insignificant

### A. Retroactivity

As previously discussed,<sup>98</sup> the Supreme Court held that when a court "directs a change in benefits based on contributions made before the court's order, the court is awarding relief that is fundamentally retroactive in nature."<sup>99</sup> Plans should be closely examined, however, to determine whether any applicable conversion provisions transform past contributions into new contributions for purposes of benefit computations. In addition, employer's actions should be scrutinized for any exercise of discretionary authority during the post-*Norris* (or post-*Manhart*) period to specify sex-based benefits computations. For defined benefit plans, it should be determined whether the plan sponsor has made a post-*Norris* decision to comply with Revenue Ruling 79-90 by specifying sex-based rather than sex-neutral actuarial factors used to compute optional benefits.<sup>100</sup> A post-*Norris* decision to specify sex-based actuarial factors when the plan sponsor had the discretion to specify sex-neutral factors may also transform past contributions into new contributions. In sum, for both types of plans, it should be determined whether 1) plan participants receive post-*Norris* sex-based discretionary distributions or benefit increases, and 2) when and how retirement benefit amounts are "settled" for retirees.

For example, the defined contribution plan at issue in *Spirt*, has automatic conversion provisions which arguably transform prior accumulations into a new, lump-sum contribution at retirement. Upon retirement, a paid-up TIAA plan will automatically be provided at a new, advantageous rate if the single premium annuity available at retirement provides higher benefits than those guaranteed under the paid-up plan. At retirement, the TIAA participant surrenders to TIAA his or her deferred annuity contract. For more than 99 per cent of participants, the accumulation in the TIAA account is then used as a single lump sum to buy an annuity from TIAA

that will provide benefits at the higher single premium annuity rate.<sup>101</sup> The variable annuity offered by TIAA's companion organization, CREF, contains analogous conversion provisions.<sup>102</sup>

There is no question that all post-*Norris* (and in some cases, post-*Manhart*) contributions must be used to purchase sex-neutral benefits. The issue raised by the above-described facts in *Spirt* is whether accumulated contributions which are converted to a lump sum premium for immediate annuities ought to be considered new or old contributions. A compelling argument can be made, and was made by the EEOC and other parties in *Spirt* on remand, that such provisions convert the accumulations into new contributions. Although the Second Circuit's decision in *Spirt* did not adopt this argument as the basis for its decision on remand, such an approach could have provided a justifiable alternative basis for the court's reinstatement of its pre-*Norris* judgment. A similar argument can be made for certain optional benefit conversions in defined benefit plans.<sup>103</sup>

### B. Reasonable Belief that the Pension Plan Was Lawful

In rejecting retroactive relief in *Manhart*, the Court emphasized that it was announcing a new rule of law, and that conscientious and intelligent administrators of pension funds may well have assumed that their plans were entirely lawful because "the courts had been silent on the question, and the administrative agencies had conflicting views."<sup>104</sup> In *Norris*, Justice Powell refused to apply the Court's decision retroactively in part because under *Manhart*'s explicit "open market" limitation, "an employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market."<sup>105</sup>

*Manhart* put employers on notice that employer actions vis-a-vis retirement benefits must be sex-neutral. Accordingly, employer-operated plans should be required to equalize retroactively to at least April 1978, the date of

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risk. However, since *Norris* appears to foreclose any possibility of the retroactive imposition of added financial burdens upon employers or plans, we will direct the District Court to modify its judgment to provide that unisex tables need not be used in calculating the portion of benefits attributable to pre-judgment contributions to whatever extent may be necessary in any year to ensure that the use of such tables will not impose added financial burdens upon the employer or TIAA beyond those resulting from the obligation to pay benefits reflecting a 2-1/2% return on investment.

*Spirt*, 735 F.2d at 29.

98. See *supra* note 63 and accompanying text.

99. 103 S. Ct. at 3503.

100. See *supra* note 91 and accompanying text.

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101. See Brief for Appellant Equal Employment Opportunity Commission at 21-24, *Spirt*.

102. *Id.* at 15-20. Each contribution to CREF purchases accumulation units representing the participant's proportionate share in CREF. At the time the participant retires, the current value of all or part of the accumulation units can be used to purchase an immediate life annuity from TIAA. The transfer is treated like a new TIAA premium. Alternatively, the value of the accumulation may be used to purchase annuity units in CREF (a variable annuity which does not guarantee any fixed dollar amount of annuity payments). The accumulation then serves as a purchase price for a CREF immediate annuity.

103. See *supra* note 91 and accompanying text.

104. 435 U.S. at 720.

105. 103 S. Ct. at 3510 (Powell, J., dissenting in part and concurring in part).

the *Manhart* decision. Equalization retroactive to the EEOC equal benefits guideline adopted in 1972 may be appropriate for those employer-operated plans with both unequal contribution rates and unequal benefits.<sup>106</sup> Such plans would have been in violation of both the Department of Labor's "either-or" rule and the EEOC's equal benefits rule.<sup>107</sup> In addition, retroactive relief may be appropriate in those plans where the insurer itself acted as an employer within the meaning of Title VII, and should have known prior to *Norris* that its policies were unlawful.<sup>108</sup>

### C. Financial Impact on Pension Plans and Participants

In rejecting retroactive relief in *Manhart* and *Norris*, Justice Powell also emphasized the devastating financial impact a retroactive order could have on the reserves of pension plans, and on state and local governments. Justice O'Connor observed that requiring employers to "disburse greater annuity benefits than the collected contributions can support would jeopardize the entire fund" and that employees make retirement decisions based on "expectations of a certain stream of income during retirement."<sup>109</sup>

None of these considerations apply when retroactive relief could be obtained without changing the total anticipated obligations of the pension fund and without diminishing the amount of benefits guaranteed to the participants. In fact, numerous major pension plans are currently overfunded, with substantially more assets than needed to pay currently guaranteed benefits.<sup>110</sup> In *Spirit*

v. *TIAA-CREF*, for example, the Second Circuit concluded in its pre-*Norris* decision on relief that equalization of benefits for employees retiring after the date of the court's order could be calculated "so as not to change the total anticipated obligations of the funds."<sup>111</sup> With regard to TIAA, such relief could be achieved without reducing guaranteed benefits by redistributing excess investment return amounts paid in the form of discretionary dividends.<sup>112</sup> Readjustment of CREF benefits for persons retiring after the date of the court's order posed no problem for the court because no reserves are established by CREF. As a variable annuity, CREF provides no guarantee of any fixed dollar payment.

In its post-*Norris* decision, the Second Circuit reached the same result after "careful consideration of the majority opinion in *Norris* on the issue of relief."<sup>113</sup> The court of appeals first emphasized that the "[p]remise of *Norris* ruling against retroactivity—that equalization of women's benefits requires the employer or the plan to pay out extra sums of money—is inapplicable to the case before us."<sup>114</sup> The relief ordered in *Spirit* would not jeopardize any expectation of a "determinable benefit" by imposing added financial burdens on the plan. The court next acknowledged that the retroactive aspect of the judgment would have an adverse economic impact on male retirees *as a class* because men would receive fewer dollars than the amounts they would have received if gender-neutral tables were used. However, the use of unisex tables would have no consequence for 60% of the individual male participants who chose joint and survivor options. For the remaining 40% of the men, use of unisex tables would mean a reduction of between 1% and 8% of the benefits they would have received. Although "somewhat uncertain as to the meaning of the *Norris* decision"<sup>115</sup> because of the majority's failure in *Norris* to comment on the dissent's preferred resolution of the case, the Second Circuit observed that "it is difficult to imagine why Justice Powell's opinion was so emphatic in cautioning against the imposition of financial burdens on employers and plans if in *Norris* it was contractually possible to make retroactive use of unisex tables and thereby equalize benefits without imposing any financial

106. See *Women in City Gov't. United v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981)(relief issues pending).

107. 29 C.F.R. § 800.116(d); 29 C.F.R. § 1604.9(f); see generally Note, *Title VII and TIAA-CREF*, 47 ALB. L. REV. 1230, 1261-64 (1983).

108. See *Spirit v. TIAA*, 691 F.2d at 1067-68.

109. 463 S.Ct. at, 103 S.Ct. at 3512 (O'Connor, J. concurring).

110. Instead of distributing excess assets to employees, some employers have recaptured pension plan assets for their own purposes. In hearings before the House Select Committee on Aging on pension asset "raids" by employers, the committee expressed concern over an unprecedented wave of pension plan terminations involving reversions of excess plan assets. The Pension Benefit Guaranty Corporation furnished data to the committee indicating that since 1980, 104 U.S. companies have recaptured in excess of \$443 million from the termination of 114 defined benefit pension plans. Additional information raised the committee's projected total of plan asset reversions to over \$1.7 billion, "designed for no other apparent purpose than to enable plan sponsors or their officials to strip long-established and well-financed plans of so-called 'surplus' assets. . ." See *Letter of Edward R. Roybal, Chairman of House Select Committee on Aging to Raymond J. Donovan, Secretary, U.S. Dept. of Labor*, (Nov. 3, 1983) 10 PENS. REP. BNA No. 470, at 1736 (Nov. 14, 1983). See also *Terminating Pension Plans*, *N.Y. Times*, July 10, 1984, at D2,

cols. 1-3 ("... a combination of factors—among them, the 1982-1983 stock run-up, high interest rates, and conservative accounting procedures that value pension assets below their current market value—has left most major pension funds with substantially more assets than needed to pay employees' current benefits.")

111. *Spirit v. TIAA*, 691 F.2d at 1068.

112. *Id.*

113. *Spirit v. TIAA-CREF*, 735 F.2d at 27.

114. *Id.* at 26.

115. *Id.* at 28.

burdens on the employer or the plan."<sup>116</sup> The court then concluded that it saw nothing in *Norris* that "proscribes retroactive provisions simply because unspecified benefit levels for some male annuitants will be slightly lower than whatever they would have been under gender-distinct tables."<sup>117</sup> The court reinstated its pre-*Norris* judgment 1) enjoining the university after June 1980 from contributing to a sex-based retirement plan and 2) enjoining CREF and TIAA from using such tables to calculate annuity benefits for persons retiring after May 1, 1980.<sup>118</sup>

In sum, the *Spirit* decision provides a reasoned basis for distinguishing the *Norris* situation, where the state government would have been obligated to appropriate additional funds to equalize benefits, from those funded plans where monies may be redistributed without reducing any participants' contractually guaranteed or determinable benefits. The *Spirit* rationale applies to any funded plan where conservative interest rates have been used to determine the amount of guaranteed benefits, and where the benefits actually paid exceed the guaranteed amounts.

#### D. Scope of Relief

The scope of relief which may be obtained in pension discrimination cases must be analyzed with the fac-

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116. *Id.*

117. *Id.*

118. *Spirit v. TIAA-CREF* involved only deferred annuitants, *i.e.* those in the pay-in stage of the plan, and did not include any person who had retired prior to the effective date of the district court's judgment, May 1, 1980. The EEOC has subsequently filed an action against TIAA seeking relief for those persons retiring prior to May 1980. See *EEOC v. TIAA*, Civ. Action No. (RJW) (S.D.N.Y. 1984).

119. Consistent with the equitable principles outlined in *Norris*, post-*Manhart* or post-*Norris* discretionary increases to retirees should be made on a sex-neutral basis. Many pension plans have made benefit increases to retirees over the last ten years. In a recent study, *Inflation and Pension Benefits*, of a random sample of defined benefit private pension plans, the North Carolina State University for the Department of Labor concluded that substantial benefit increases were paid to retirees in defined benefit plans during the period 1973-1979, especially among larger pension plans. The mean pension benefit for persons already retired in 1973 increased from \$2,128 in 1973 to \$2,638 in 1979, an increase of 24%. The annual rate of increase during the period ranged from 2.9 to 4.5%. See *Retiree Benefits Unable to Keep Pace With Inflation in 1970's, Study Finds*, DAILY LAB. REP. (BNA) No.24 at A-5-6 (Feb. 6, 1984). A November 1981 research survey of 95 companies entitled *Pension Increases For Retired Employees* by Towers, Perrin, Forster & Crosby found that most pension increases (83%) were funded through the qualified plan. Only 3% of the companies reported having automatic, annual increase provisions, and these provisions limit increases in any one year to 3% or 4%. Median increases for representative pensioners who retired January 1, 1975 ranged between 12% and 19%. The top 10% of the survey group increased pensions by 30% or more since 1975. *Id.* at 2-3.

tors described above, and also according to the employee's status as a retiree, present employee, or new employee.

#### 1. Retirees

Whether relief can be obtained for retirees will depend upon the date of retirement, when computations for determining the amount of benefits to be received by the retiree are made, and whether the retiree receives increases in benefits or discretionary dividends.

For example, if an employee retires after the effective date of the *Norris* decision and the employer then purchases a sex-based single premium immediate annuity for that employee, full relief should be obtainable. The single premium annuity would be purchased by a post-*Norris* contribution. Relief should also be sought where post-*Norris* (or post-*Manhart*) dividends or other non-guaranteed benefits are paid to retirees, whether they retired before or after *Norris*. On the other hand, if the employee retired before the date of the *Manhart* decision, and the full amount to be received at retirement was contractually determined at that time, and no increases or dividends have been distributed by the plan during retirement, it will be virtually impossible to obtain relief. Other possibilities lie between these extremes. Post-*Norris* discretionary increases to retirees should be made on a sex-neutral basis.<sup>119</sup> In addition, it is possible that relief for post-*Manhart* retirees may be obtained for that portion of benefits attributable to post-*Manhart* contributions if the employer could not reasonably have believed the sex-based plan was lawful, and for benefits based on pre-*Manhart* and pre-*Norris* contributions under the conversion<sup>120</sup> and cost<sup>121</sup> theories outlined above.

#### 2. Present employees

Whether full relief for present employees may be obtained depends on when the contributions are made and when the computations for determining the amount of benefits to be received upon retirement are finally made. Benefits based on post-*Norris* (and possibly post-*Manhart*) contributions must be equalized. Whether relief can be obtained for pre-*Norris* or pre-*Manhart* contributions depends on the resolution of the issues discussed above.<sup>122</sup> Some pension and annuity experts

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120. See *supra* notes 98-103 and accompanying text.

121. See *supra* notes 109-118 and accompanying text.

122. See *supra* discussion accompanying notes 98-118. In *Spirit v. TIAA-CREF*, *supra* note 96, for example, the Second Circuit granted full relief for all present employees. Upon retirement, equal benefits must be paid, including those benefits based on contributions made

have predicted that it may be "unnecessarily complex" to split pre- and post-*Norris* contributions, implying that it may be more economical for employers to simply make plans uniformly sex-neutral.<sup>123</sup>

The issue of whether equalization of benefits means paying the benefits at the more favorable rate, "topping up," or paying them at a level determined by a weighted average, "mid-pointing," was not explicitly resolved by the Court in *Norris*. In *Manhart*, the Supreme Court sustained the lower court's injunction prohibiting the employer from charging women the formerly applicable higher contribution rates,<sup>124</sup> thereby tacitly approving a

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prior to *Norris* and *Manhart*. The *Spirit* judgment and order, entered by the district court in December 1984, contains compliance provisions agreed upon by the parties in a negotiated settlement of previously unresolved relief issues. The compliance provisions require TIAA-CREF to apply a sex-neutral TIAA dividend formula for all persons retiring after the implementation date of January 1, 1985. (The "dividend formula" is used to compute total TIAA benefits for virtually all retirees except in the very unlikely eventuality that total earnings would fall below a certain minimum level, in which case the original guarantees would apply.) TIAA-CREF is also required to compute on a sex-neutral basis the number of CREF annuity units for all CREF annuities issued after May 1, 1980. For those persons who retired with "less favored" TIAA or CREF sex-based benefits between the effective date of the original district court judgment, May 1, 1980, and the implementation date of January 1, 1985, "topping up" is required. The agreement provides that the "aggregate of any such underpayments, without interest, will be paid by TIAA and/or CREF to each annuitant under such less favored annuity on January 1, 1985 or as soon as practicable thereafter." The agreement applies quite broadly to all payout annuities issued on or after May 1, 1980 arising from "deferred annuity maturities," including tax deferred annuities and supplemental retirement annuities, single premium immediate annuities, CREF transfers to TIAA (and TIAA life insurance proceeds transferred to CREF), Group Annuity transfers, pre-retirement deaths under deferred annuities, and from deaths, matured endowments and cash surrenders under TIAA life insurance contracts. See *Spirit v. TIAA-CREF*, 74 Civ. 1674 (RJW), Judgment and Order (Dec. 5, 1984).

In *Women in City Gov't. United v. City of New York*, the parties recently agreed to a proposed partial settlement of relief issues which will provide equal benefits to all class members who were active members of the New York City Retirement System as of July 31, 1983. The relief provided under the consent decree includes equalization of all retirement allowances and death benefits applicable to the settling class plaintiffs with those of similarly situated males from the date of each such plaintiff's retirement, with interest. The agreement also provides that such equalization will be accomplished at levels at least as favorable as the most favorable level currently available to settling class plaintiffs or similarly situated males, *i.e.* "topping up" to the male level. See *Women in City Gov't United v. City of New York*, 75 Civ. 2868 (MJL), Proposed Consent Decree (Feb. 13, 1985). Relief issues involving retirees have not yet been resolved, although they were under negotiation in mid-February 1985.

123. See Hager & Zippelman, *The Norris Decision, Its Implications and Applications*, 32 DRAKE L. REV. 913, 937 (1982-83) [hereinafter cited as Hager & Zippelman].

124. *Los Angeles Dept. of Water & Power v. Manhart*, 553 F.2d 581, 583 (9th Cir. 1976), *vacated on other grounds*, 435 U.S. 702, *on remand*, 577 F.2d 98 (9th Cir. 1978).

"topping up" remedy. The four dissenters in the *Norris* decision on relief explicitly approved a "topping up" remedy by stating that "there is no unfairness in requiring [Arizona] to pay retired female employees whatever the sum is necessary each month to bring them up to the benefit level that they would have enjoyed had their post-*Manhart* contribution been treated in the same way as those of similarly situated male employees."<sup>125</sup> In the majority's decision on relief, Justice Powell does not explicitly indicate the proper method of equalization. However, because relief was limited to prospective equalization in large part due to the asserted high cost of a "topping up" retroactive remedy, the majority's decision contains the implicit assumption that "topping up" would have been the applicable remedy.<sup>126</sup> Only Justice O'Connor rejected "topping up" and adopted "mid-pointing" as the appropriate method of equalization.<sup>127</sup>

Where retroactive relief is applicable, and where employees have a protectable guarantee of a particular level of benefits, the "topping up" method of equalization may be the mandatory remedy.<sup>128</sup> In some cases, however, "mid-pointing" may result in benefits at the same level, or higher, than guaranteed levels. This can occur where favorable investment experience permits the plan to make discretionary distributions in excess of the interest rate assumed or specified in the guaranteed benefit computation formula. It should be noted that the Equal Pay Act forbids employers from remedying equal pay violations by reducing the wage rate of any employee. Although the same rule should also apply to Title VII, and may be incorporated through operation of the Bennett Amendment, the Supreme Court has not yet resolved the application of the rule in the pension context. Practitioners should therefore consider including Equal Pay Act claims in addition to Title VII claims when challenging sex discrimination in pension plans.<sup>129</sup>

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125. 103 S.Ct. at 3503.

126. 103 S.Ct. at 3510 n.11; see *Spirit v. TIAA*, 735 F.2d 23, 26.

127. 103 S.Ct. at 3512 n.4.

128. See discussion of *Spirit* and *Women in City Gov't United*, *supra* note 117.

129. See *supra* note 46. However, in her concurring opinion in *Norris*, Justice O'Connor, 103 S.Ct. at 3512 n. 4, questioned the application of the Equal Pay Act proviso to pension discrimination claims. Nevertheless, as noted in Block & Cogan, *Pension Strategies After Norris*, 10 J. PENS. PLAN. & COMP. at 147, because "there is uncertainty as to whether the Equal Pay Act prohibits the reduction in benefits of the favored class in order to bring a plan into compliance with the Act," the topping up approach "has the salutary effect of eliminating the danger of a retroactive award being imposed against an employer." *But see* Ryan & Rock, *supra* note 91, at 183-91 (relies on Department of Labor Cost Study (see *supra* note 74) to compare costs of "topping up" and "midpointing," but fails to consider distribution of excess plan assets, in arguing against retroactive equalization of benefits).

### 3. *New employees*

All benefits based on post-*Norris* contributions must be equalized, and therefore new employees must receive sex-neutral benefits at retirement.

## V. CONCLUSION

*Norris* demarcated employer liability under Title VII for payment of sex-differentiated pension benefits. Although *Norris* applied equitable factors in denying retroactive relief, it remains to be decided by the Court whether such relief is an appropriate remedy in factually distinguishable pension discrimination cases. The Second Circuit has decided in *Spirit v. TIAA-CREF* that retroactive relief may be appropriate where such relief poses no financial burden on the employer or plan, and where it would not jeopardize any expectation of retirees to a determinable benefit. Accordingly, in determining the scope of relief obtainable, pension plans should be

scrutinized closely for distinguishing features so that the most complete and appropriate remedies may be aggressively sought under the principles established in *Norris*.

The reasoning of the *Norris* decision logically extends to a range of employee fringe benefits, such as life insurance, medical coverage and disability insurance plans. Therefore, the analysis applied in *Norris* would also prohibit any employer-sponsored fringe benefit which makes sex-differentiated payments based on sex-differentiated actuarial data.<sup>130</sup> Because the impact of *Norris* is limited to employer-sponsored pension and insurance plans, however, progress in the passing of legislation designed to prohibit sex-differentiation in open market insurance plans remains vitally important as a means of ensuring economic equality for women.<sup>131</sup>

130. Hager & Zimbleman, *supra* note 118, at 941-42.

131. *See supra* note 61.

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