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FLORIDA V. LONG: CLARIFICATION OF RETROACTIVE RELIEF IN TITLE VII PENSION CASES

Florida v. Long[1] represents the latest Supreme Court decision in a series of cases[2] brought under Title VII[3] to challenge the use of sex-based actuarial tables in pension plans. Significantly, *Long* is the first decision in which a majority of the Court clearly agreed on both the issues of liability for the payment of "unequal benefits" and implementation of retroactive relief.[4] The Court determined that *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*,[5] and not *Los Angeles Department of Water & Power v. Manhart*,[6] placed pension fund administrators on notice that unequal benefits derived from sex-based actuarial tables violate Title VII.[7] The Court also found that an order requiring increased future benefits to pre-*Norris* retirees is essentially retroactive because it "disrupt[s] past pension funding

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1. 108 S. Ct. 2354 (1988).

2. Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073 (1983) (per curiam); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

3. Title VII of the Civil Rights Acts of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982). The substantive prohibition against sex discrimination is found at 42 U.S.C. § 2000e-2(a) (1982):

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

Title VII applies to all employers in the United States with fifteen or more employees. Title VII also applies to United States citizens employed by domestic companies operating in foreign countries. J. MAMORSKY, EMPLOYEE BENEFITS LAW: ERISA AND BEYOND § 11.02 (rev. 1988).

Title VII provides that when a court finds unlawful discrimination it "may 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) (1982).

4. Justice Kennedy delivered the opinion of the Court in which Chief Justice Rehnquist and Justice's White, O'Connor, and Scalia joined. *Norris* was also an unequal benefits case which ostensibly decided the same issues as the *Long* Court. However, the *Norris* Court was "closely divided" in a confusing per curiam decision. *Long*, 108 S. Ct. at 2361. The *Manhart* court expressly limited its holding to unequal contribution cases. *See Manhart*, 435 U.S. at 717-18.

In an unequal benefits case, the plaintiff's periodic benefits are less than those of some other group, even though the same contributions to the pension fund were made for each employee. In an unequal contribution case, plaintiffs receive the same periodic benefits as everyone else, but must contribute more of their pay to the fund than another group.

5. 463 U.S. 1073 (1983) (per curiam).

6. 435 U.S. 702 (1978).

7. Florida v. Long, 108 S. Ct. 2354, 2359-61 (1988).

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assumptions."[8] Finally, turning to the facts of the case, the Court denied retroactive relief to the plaintiff, finding that the financial and legal consequences for the employer would be inequitable.[9] *Long*'s significance for state and local pension plans is best highlighted by a discussion of the *Manhart-Norris* line of cases.

In *Manhart*, the employer made equal periodic payments to retired employees yet required female employees to make larger contributions to its pension fund than male employees. Based on mortality tables, the employer determined that women, as a class, live longer than men and therefore the average total cost of a female's pension benefits is greater. To counteract this difference, the employer required female employees to make contributions that were 14.84% greater than those required by male employees, thereby reducing the female employees' take-home pay by a proportionate amount.[10] The plan itself was an employer-administered,[11] contributory,[12] defined contribution plan[13] in which yearly contributions are fixed but the retiree's periodic benefit is not calculated until retirement.[14]

The Court determined that the primary purpose of Title VII is to protect individuals, not a stereotypical class. Therefore, even though women

8. *Id.* at 2364.

9. *Id.* Generally, Title VII cases employ a presumption in favor of retroactive relief. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (Title VII case awarding back pay). However, the Court has carved out a group of cases in which the *Albemarle* presumption does not apply. Title VII pension cases fall within this group. *See, e.g., Manhart*, 435 U.S. at 723 (lower court erred in granting retroactive relief).

10. 435 U.S. at 704-05.

11. *Id.* at 705. Many employers have pension plans which are administered by a third party insurance company. Because the Title VII prohibition against sex discrimination only applies in the employer-employee context, this distinction is important. *See infra* note 34 and accompanying text.

12. 435 U.S. at 705. A contributory plan is one that provides for employee contributions in addition to the employer's contributions. A noncontributory plan is one in which all contributions are made by the employer. G. BOREN, QUALIFIED DEFERRED COMPENSATION PLANS; § 1:13 (1983 & Supp. 1988); Hager & Zimpleman, *The* Norris *Decision, Its Implications and Application*, 32 DRAKE L. REV. 913, 919 n.38 (1982-83).

13. A defined contribution plan is one in which employer contributions are allocated to individual accounts for each participating employee. Each employee's benefit is determined solely on his account balance at retirement. G. BOREN, *supra* note 12, § 1:16, at 33; J. MAMORSKY, *supra* note 3, § 8.03, at 8-6; Hager & Zimpleman, *supra* note 12, at 916 n.14, 934.

14. By contrast, *Long* involved defined benefit plans. A defined benefit plan is one that provides benefits according to a predetermined formula. Employer contributions are computed each year based upon an actuarial estimate of how much must be contributed over the working years of all employees in order to fund their expected benefits. Employer contributions are not allocated to individual employee accounts. *See* G. BOREN, *supra* note 12, § 1:16, at 33; J. MAMORSKY, *supra* note 3, §§ 1.03, 8.03, at 1-9, 8-6.

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as a class live longer than men, to require female employees to make larger contributions to the pension fund than males violates Title VII because some women will live shorter lives than the average man.[15]

The Court noted, however, that it did not intend to "revolutionize the insurance and pension industries" and expressly limited its holding to "unequal contributions to an employer-operated pension fund."[16] Furthermore, the Court created what later became known as the "open market" exception by leaving open the possibility that employers could comply with Title VII when the sex-differentiated benefits are created in the marketplace.[17] Finally, the Court limited the award to prospective relief because prior to *Manhart* employers could have assumed that use of sex-based actuarial tables was lawful because[18] retroactive relief was unnecessary to enforce Title VII,[19] and because the economic impact visited on insurance and pension plans as a result of retroactive relief could be drastic.[20]

Manhart's express limitations and caveats left many unanswered questions regarding the use of sex-based actuarial tables in retirement plans.[21] As one court observed, "the courts have been baffled by the problem that *Manhart* presented."[22] The issues left unanswered included: whether Title VII prohibits unequal benefit payments when contributions are equal;[23] whether the McCarran-Ferguson Act[24] exempts certain types of

15. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978).

16. *Id.* at 717.

17. *Id.* at 717-18. More specifically, the Court stated that, "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 benefit which his or her accumulated contributions could command in the open market." *Id.* (footnote omitted). See also Hager & Zimpleman, *supra* note 12, at 922-23, for further discussion of the open market exception.

18. *Manhart*, 435 U.S. at 720.

19. *Id.* at 720-21.

20. *Id.* at 721.

21. J. MAMORSKY, *supra* note 3, § 11.03[3][a]; G. BOREN, *supra* note 12, § 5:22.

22. Sobel v. Yeshiva Univ., 566 F. Supp. 1166, 1190 (S.D.N.Y. 1983). The *Sobel* court noted that private insurance companies are unwilling to pay women the same monthly benefit for the same premium as men "because they know that sound actuarial principles require a real and substantial distinction." *Id.* However, the court further noted that *Manhart* had been interpreted by some courts as prohibiting any sex-based differences in employer-provided group insurance. *Id.* at 1190-92.

23. This is the specific issue decided five years later in *Norris*. Post-*Manhart* and pre-*Norris* cases varied widely on this issue. *See, e.g.*, Peters v. Wayne State Univ., 691 F.2d 235, 241 (6th Cir. 1982) (plan relying on sex-based tables and providing unequal benefit payments but equal actuarial value of total expected payments did not violate Title VII); *Sobel*, 566 F. Supp. at 1192 (relying on Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982) to find the use of sex-based

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funds from Title VII requirements;[25] whether *Manhart* applies to defined benefit plans;[26] whether employers can offer different retirement options, some of which use sex-based actuarial tables and some of which do not;[27] and the proper use of retroactive relief.[28]

The Supreme Court answered many of these questions five years later in *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*,[29] the first unequal benefits case heard by the Court. In *Norris*, the employer administered an employee-funded defined contribution plan. Several insurance companies were selected by the employer to participate in the plan, most offering at least three payment options. The most popular options were lifetime annuities providing monthly payments on the basis of sex-differentiated mortality tables.[30] As a result, women who contributed the same amount as simi-

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actuarial tables violated Title VII, but expressing doubts about the long-term validity of the *Spirt* decision); Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054, 1061 (2d Cir. 1982) (unequal benefits derived from sex-based actuarial tables prohibited by *Manhart*); EEOC v. Colby College, 589 F.2d 1139, 1146 (1st Cir. 1978) (Coffin, J., concurring) ("not sure that *Manhart* held that an employer could never offer a benefit plan using sex-based tables"). *See also* G. BOREN, *supra* note 12, § 5:22; Hager & Zimpleman, *supra* note 12, at 914 (*Manhart* created "confusion and ambiguity").

24. 15 U.S.C. §§ 1011-1015 (1982). The McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supercede 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." 15 U.S.C. § 1012(b) (1982).

25. *See, e.g.*, J. MAMORSKY, *supra* note 3, § 11.03[3][a] (annuity company assuming risk of mortality not exempt from Title VII under McCarran-Ferguson Act); Hager & Zimpleman, *supra* note 12, at 928-29 (for purposes of McCarran-Ferguson Act, insurance involves investment risk-taking and, hence, more companies may be exempt); Casenote, *Sex Discrimination—Pensions—The Court Takes a Stand*, Arizona v. Norris, 30 WAYNE L. REV. 1329, 1342 (1984) (Congress left regulation of insurance to states under McCarran-Ferguson Act).

26. The plan in *Manhart* was a defined contribution plan. *See supra* notes 13-14.

27. The Court also decided this issue in *Norris*. 463 U.S. at 1081-82. *See also* J. MAMORSKY, *supra* note 3, § 11.03[3][a].

28. Although the Court ostensibly decided this issue in *Norris*, the holdings were confusing to lower courts. *See, e.g.*, Long v. Florida, 805 F.2d 1542, 1551 (11th Cir. 1986) (denial of rehearing) (retirees were entitled to retroactive relief dating to *Manhart*); Spirt v. Teachers Ins. & Annuity Ass'n, 735 F.2d 23, 28 (2d Cir. 1984) (awarding retroactive relief after *Norris*); Graham v. State of N.Y., Dept. of Civil Serv., 664 F. Supp. 166, 168 (S.D.N.Y. 1987) (*Manhart* put the plan's administrators on notice and, therefore, retroactive relief is appropriate); J. MAMORSKY, *supra* note 3, § 11.03[3][a] (only prospective relief is appropriate after *Norris*); Casenote, *supra* note 25, at 1347 ("grave consequences of retroactive relief" outweigh benefits of such relief).

29. 463 U.S. 1073 (1983) (per curiam).

30. *Id.* at 1076-77. The other payment options, e.g., a lump sum payment or periodic payments of a fixed sum for a fixed period, did not take sex into account but were less attractive from tax and risk standpoints. *Id.*

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larly situated men received lower monthly payments.[31]

The *Norris* Court held that "the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage."[32] In short, the Court extended the rationale of *Manhart*—an unequal contribution case—to *Norris*. In a three-step rationale, the Court rejected the employer's attempts to distinguish its plan from the plan in *Manhart*.

The Court first found irrelevant the fact that some of the payment options were nondiscriminatory: "[a]n employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis."[33] The Court then rejected any distinction on the basis of the third party insurers' participation in the plan, because the employer handpicked the companies and entered into contracts with each participant. Having done so, reasoned the Court, the employer was responsible for any discriminatory provisions in the contracts.[34] Finally, the Court rejected any reliance on the McCarran-Ferguson Act as an exemption for the employer's conduct, because plaintiffs were challenging an "employment practice" and not "the business of insurance."[35]

As in *Manhart*, the Court in *Norris* ordered only prospective relief.[36] The District Court ordered that future annuity payments to female retirees be made equal to payments received by similarly situated men.[37] The Court emphasized in a footnote that such relief is "fundamentally retroactive in nature" because annuity payments are funded by the employee's past contributions.[38] Furthermore, the Court noted that "the State of Arizona would be required to fund retroactively the deficiency in past contributions made by its women retirees" in order to comply with the

31. *Id.* at 1077.

32. *Id.* at 1081. Justice Marshall authored the liability portion of the opinion and was joined by Justices Brennan, White, Stevens, and O'Connor (the "swing vote").

33. *Id.* at 1081 n.10.

34. *Id.* at 1088-91.

35. *Id.* at 1087 n.17.

36. *Id.* at 1105-07. On the relief issue, Justice Powell authored the Court's opinion, joined by Chief Justice Burger, and Justices Blackmun, Rehnquist, and O'Connor. Justice Powell, joined by Chief Justice Burger and Justices Blackmun and Rehnquist, dissented from the finding of liability under the statute. *Id.* at 1095-05. Justice O'Connor, whose swing vote created the majority on both the liability and relief issues, wrote a concurring opinion which clarified her position. *Id.* at 1107-09 (liability), 1109-11 (relief).

37. *Id.* at 1105.

38. *Id.* at 1105 n.10.

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District Court's order.[39] Given the devastating financial impact such an order would impose on the state, the Court denied retroactive relief.[40]

Norris clearly decided the liability issue and held that paying "a retired woman lower monthly benefits than a man who deferred the same amount of compensation" discriminates on the basis of sex and therefore violates Title VII.[41] However, even though many courts and commentators believed that *Norris* decided the retroactivity issue,[42] lower courts continued to exhibit some confusion.[43]

Florida v. Long[44] ties up many, if not all, of the loose ends left in *Norris'* wake. The Florida system challenged in *Long* was a noncontributory, defined benefit pension plan which guarantees a minimum level of benefits upon retirement.[45] Retirees may choose either a single life payment plan, with monthly benefits based on the employee's average monthly compensation and years of service, or one of three joint annuities based on the employee's life expectancy. The single life plan pays equal benefits to similarly situated men and women. Prior to *Norris*, however, the present values of the joint annuities were derived from sex-based actuarial tables.[46] Because women, on average, live longer than men, the present value of their annuities and, therefore, the monthly payments, were greater than those received by similarly situated men. As a result of this disparity, a class of pre-*Norris* male retirees, who chose an-

39. *Id.*

40. *Id.* at 1106. Justice O'Connor, concurring, offered a clearer explanation of the appropriate relief:

> I would require employers to ensure that benefits derived from contributions collected after the effective date of our judgment be calculated without regard to the sex of the employee. For contributions collected before the effective date of our judgment, however, I would allow employers and participatory insurers to calculate the resulting benefits as they have in the past.

Id. at 1111.

41. *Id.* at 1079.

42. Probe v. State Teachers' Retirement Sys., 780 F.2d 776, 783 (9th Cir. 1986) (no retroactive relief awarded); Retired Public Employees' Ass'n v. State of Cal., 799 F.2d 511, 516 (9th Cir. 1986) (no retroactive relief to *Manhart* allowed).

43. *See supra* note 28. "Moreover, since the Supreme Court's decision in *Norris*, the courts have continued to struggle with the issue of retroactivity. . . ." J. MAMORSKY, *supra* note 3, at 11-33.

44. 108 S. Ct. 2354 (1988).

45. *Id.* at 2357.

46. *Id.* at 2358. In fact, the Florida Constitution requires the state to fund the system on a "sound actuarial basis." FLA. CONST. art. X, § 14. Because real differences exist between women and men in terms of life expectancy, sex-based actuarial tables are unquestionably sound. *See* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707-08 (1977).

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nuity options, challenged the system under Title VII. The district court granted the plaintiffs' motion for summary judgment and awarded retroactive relief. The Eleventh Circuit affirmed.[47]

In reversing the Eleventh Circuit, the Supreme Court focused on two retroactivity issues. Specifically, whether *Manhart* or *Norris* apprised employers of the illegality of unequal benefits for male and female retirees, and whether the plaintiffs were entitled to an increase in future benefits.[48] In the process, the Court applied a tripartite analysis, based on the criteria identified in *Chevron Oil Co. v. Hudson*,[49] to determine whether retroactive relief should be awarded.

First, the Court considered "whether *Manhart* clearly defined the employer's obligations under Title VII with respect to benefit payments."[50] The Court found that, although its decision in *Manhart* may have "suggested the potential application of Title VII to unequal payments," the majority carefully limited its holding to unequal contributions.[51] The Court also noted that *Manhart* left the open market exception issue unanswered and that courts and commentators differed over the scope of *Manhart*.[52] The Court concluded that not until *Norris* did the Court clearly extend the nondiscrimination principle to unequal benefits. Therefore, Florida could well have assumed that its pension plan was legal in the post-*Manhart*, pre-*Norris* period.[53] The Court held "that *Norris*, and not *Manhart*, provides the appropriate date for determining liability and relief."[54]

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47. *Long*, 108 S. Ct. at 2358-59. The award featured two elements: the retroactive "topping up" of the males' retirement benefits prior to *Norris* and an increase in future monthly benefits. *Id.* These increases "compensate [ ] for the difference between the benefits male retirees did receive and the benefits they would have received if the Florida System had used unisex mortality tables. . . ." *Id.* at 2358 n.2.

48. *Id.* at 2357-58.

49. 404 U.S. 97, 106-07 (1971) (non-Title VII suit).

50. *Long*, 108 S. Ct. at 2359.

51. *Id.* at 2360.

52. *Id.* See *supra* note 17 and accompanying text for discussion of the open market exception. See also *supra* notes 22-28 and accompanying text for a discussion of the conflicting views of the *Manhart* decision.

53. *Long*, 108 S. Ct. at 2360-61. The partial dissent, written by Justice Blackmun (Justices Brennan and Marshall, joining) disagrees with the majority's restrictive reading of *Manhart*. Blackmun argues that *Manhart* laid down a general principle, i.e., that use of sex-based actuarial tables in a pension plan violates Title VII, and that no real distinction exists between unequal contribution and unequal benefits cases. *Id.* at 2366. Apparently, the dissent would argue that a limited holding does not restrict the underlying principle of law, whereas the majority views the holding and principle of law as coextensive.

54. *Id.* at 2362.

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In its discussion of the second *Chevron* criterion, whether retroactive awards are necessary to further the purposes of Title VII and to ensure compliance,[55] the Court noted that Florida immediately switched to unisex tables after *Norris*. Moreover, there was no evidence that employers in general had not complied with Title VII as interpreted in *Manhart* and *Norris*.[56] Therefore, a retroactive award would not serve any deterrent function. The third *Chevron* criterion focuses on whether retroactive liability will produce inequitable results for states, employers, retirees, and pension funds.[57] On this count, the Court emphasized that retroactive awards "would impose financial costs that would threaten the security of both the funds and their beneficiaries."[58] Because Florida lacked notice, until *Norris*, that its system was unlawful, the Court felt that such a financial burden would be inequitable. Consequently, the Court held retroactive relief to be inappropriate for a class of male employees retiring pre-*Norris*.[59]

The *Long* Court is correct because it recognized that, although *Manhart* could be expanded to apply to payments of unequal benefits, the *Manhart* holding was expressly limited to unequal contributions. This limitation led to confusion among courts and commentators as to the exact requirements of *Manhart*.

In the second part of its opinion, the Court considered implementation of its nonretroactivity determination.[60] The Court found that the first component of the district court's award—compensatory back payments for the post-*Manhart*, pre-*Norris* period—was clearly retroactive in nature and, therefore, disallowed. More importantly, the Court rejected the lower courts' characterization of the second component—increased future benefits—as prospective.[61] The Court held that future "topping up" is fundamentally retroactive because it "disrupt[s] past pension funding assumptions" and contributions by the employer.[62] The Court expressed concern that the increased benefits might cause a deficiency in the pension fund, requiring additional contributions by the state or forcing the plan to violate its minimum benefit guarantee to other retirees.

55. *Id.* at 2362.
56. *Id.*
57. *Id.*
58. *Id.* at 2363.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 2364.

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As a result, the Court refused to allow the increase in future benefits.[63]

The Court's reasoning with respect to the retroactivity issue is also correct because it recognizes the "essential assumptions of an actuarially funded pension plan."[64] The Court accounted for the peculiar nature and rules of pension plans.[65] While the Court did not specifically address ERISA's full funding requirements,[66] ERISA further supports the Court's analysis of the impact a retroactive award would have on pension plans.[67] In addition, many state constitutions and statutes place certain restrictions and demands on pension plans.[68] The Court correctly recognized the severe impact that a retroactive award would have on pension plans,[69] combined this impact with the uncertainty left by *Manhart*,[70] and used its equitable power to deny any retroactive relief.[71]

Justice Blackmun, concurring in part and dissenting in part, agreed with the majority that the district court's order was retroactive.[72] Despite this agreement, he concluded that the "unlawfulness of Florida's pension plan was 'clearly foreshadowed' by [the Court's] decision in

63. *Id.*

64. *Id.*

65. For example, in a defined benefit plan, the employee's retirement benefit is calculated according to a predetermined formula. The employer's yearly contribution is the amount needed to provide this benefit. The yearly employer contribution is calculated based on actuarial assumptions about future earnings of the fund, mortality, wage and salary scales, and turnover, age and sex of the employees. G. BOREN, *supra* note 12, §§ 1:16 & 8:02. J. MAMORSKY, *supra* note 3, § 8.03, at 8-6. *See also* Hager & Zimpleman, *supra* note 12, at 934. Increasing male or female benefits would clearly require a retroactive adjustment of this formula.

66. The Employee Retirement Income Security Act of 1974 (ERISA) imposes substantive requirements on pension plans administered by employers. These substantive requirements apply whether or not the plan is qualified under the Internal Revenue Code for tax purposes. ERISA §§ 101-306 (29 U.S.C. §§ 1021-1086 (1982)). These same substantive provisions also include minimum vesting schedules, minimum participation requirements, and minimum funding requirements.

67. ERISA prescribes that each year an employer must contribute, at a minimum, the present value of the pension liability accruing from an employee's current service ("normal cost") plus an amount to amortize other costs. These other costs include losses resulting from changes in actuarial assumptions. ERISA § 302 (29 U.S.C. § 1082 (1982)); *see* G. BOREN, *supra* note 12, § 9:01; J. MAMORSKY, *supra* note 3, § 8.04. A change from sex-based to sex-neutral actuarial tables is an unanticipated change in actuarial assumptions that creates the need for additional funding. The result is a necessity for retroactive funding.

68. For example, Florida's constitution requires the state to collect contributions sufficient to fund its retirement plan on a "sound actuarial basis." FLA. CONST. art. X, § 14.

69. The Court in *Norris* noted that its holding applies to all employer-sponsored pension plans and an award of retroactive relief would cost from $817 to $1,260 million annually for the next 15 to 30 years. *Norris*, 463 U.S. at 1106.

70. *See supra* note 21-28 and accompanying text.

71. 108 S. Ct. at 2364.

72. *Id.* at 2365 n.2.

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Manhart, and did not depend on a 'new principle of law' announced in *Norris*;" therefore, retroactive liability would be equitable.[73] However, Blackmun chose to ignore the fact that *Manhart* was viewed by courts and commentators as merely raising the issue rather than actually deciding the issue.[74]

Justice Stevens, in a separate dissent, concluded that pre-*Manhart* retirees were entitled to unisex-based pension payments from the effective date of *Manhart*.[75] Stevens compared a pension case to a salary case and concluded that they are indistinguishable: "each month's disparate retirement check constitutes a separate violation" of Title VII.[76] Stevens ignored the Court's conclusions in both *Manhart* and *Norris* that the presumption in favor of retroactive liability can be overcome.[77] More importantly, Stevens failed to appreciate the distinctions between actuarially funded pension plans which are presently funded in order to pay estimated future benefits,[78] and payments of salaries which are paid and accrued in the same period.[79]

Florida v. Long clarifies what constitutes "retroactive relief" in the context of pension plans and further clarifies when and how relief is to be implemented in pension plan suits. The majority clearly understood the economics of an actuarially funded pension system and the devastating impact an award of retroactive relief would have on the nation's funds. The Court, in a well reasoned opinion, reached an acceptable conclusion and provided needed predictability in the law of Title VII pension cases.

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73. *Id.* at 2368.
74. *See supra* note 23 and accompanying text.
75. *Long*, 108 S. Ct. at 2368.
76. *Id.*
77. *See Manhart*, 435 U.S. at 723; *Norris*, 463 U.S. at 1105-07.
78. *See supra* notes 14, 65 and 67.
79. As one commentator noted, "Justice Stevens misunderstood the economics of pension benefits and exhibited considerable naiveté." Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. CHI. L. REV. 489, 542 (1982).

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