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Recent Decisions

CIVIL RIGHTS—CIVIL RIGHTS ACT OF 1964—TITLE VII—SEX DISCRIMINATION—EMPLOYEE PENSION PLANS—The United States Supreme Court has held that an employer cannot offer a privately run pension annuity plan which at retirement pays women a smaller monthly annuity than men, where women and men contribute equally to the plan.

Arizona Governing Committee For Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 103 S. Ct. 3492 (1983).

A voluntary pension plan for employees of the state of Arizona was established by the state in 1974 in order to give the employees the option to postpone payment of a portion of wages until retirement.[1] A state-created governing committee accepted bids on the plan from private insurance companies and subsequently selected several of the companies to participate.[2] Employees opting to join the plan were only allowed to choose from the insurance companies pre-selected by the state and also were required to choose from among three standard retirement pay-out options,[3] the most attractive of which was the option where the employee would receive monthly annuity payments for the remainder of the employee's life after retirement.[4] One of the factors used in determining the pay-

1. Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 103 S. Ct. 3492, 3494 (1983). The relevant Arizona statutory sections created a governing committee to administer the plan, and enumerated the rights and duties of the committee members and plan participants and the mechanisms of the plan. *See* ARIZ. REV. STAT. ANN. §§ 38-871 to 874 (1974 & Supp. 1983).

2. 103 S. Ct. at 3494.

3. *Id.* The two less attractive options were: (1) a single lump-sum payment upon retirement, and (2) periodic payments of a fixed sum for a fixed period of time. The employee was not bound by his or her pre-retirement decision as to the plans, but could opt for a different form of pay-out upon retirement. *Id.*

4. *Id.* The annuity option was popular because of the unattractive features of the other plans. The lump-sum payment required the employee to pay tax on the total amount in the year of receipt. *Id.* The fixed income for a fixed period of time option relieved the tax problem, but did not guarantee an income for the remainder of the employee's life if the employee incorrectly speculated as to his or her life expectancy. *Id.* at 3505 (Powell, J., dissenting in part and concurring in part).

out of the deferred compensation to employees who selected this option was the employee's sex.[5] All of the insurance companies chosen by the state used some form of gender-based mortality table which would pay men a larger monthly annuity than women who deferred the same amount.[6] This dissimilar treatment of the sexes stemmed from the fact that women as a class live longer than men.[7]

Respondent Nathalie Norris was employed by the Arizona Department of Economic Security, and she decided to join the state's pension plan.[8] Pursuant to that decision, she requested on May 3, 1975, that the standard contribution to the fund be invested in the Lincoln National Life Insurance Company's fixed annuity contract.[9] Soon afterward, the state began to withhold $199.50 from her monthly salary.[10]

After pursuing all administrative options without success, on April 25, 1978, Norris filed an action in the United States District Court for the District of Arizona against the state of Arizona, the governing committee, and several committee members, alleging that administration of the annuity plan was a violation of Title VII of the Civil Rights Act of 1964,[11] as the plan discriminated based upon the sex of the individual.[12] The district court granted Norris' requests for certification of a class, and summary judgment in

5. 103 S. Ct. at 3494-95. The other factors involved were the amount of wages deferred by the employee (plus interest) and the age at which the employee retired. *Id.* Justice Marshall mentioned some other factors having an effect on life expectancy that were excluded from consideration of the annuity amount, e.g., smoking and drinking habits, weight, medical history and family history. *Id.*

6. *Id.* at 3495. Justice Marshall noted that not all insurance companies participating in the plan used the same method of sex classification. Most of the companies used separate tables for men and women based on life expectancy while one company used a single mortality table for men, and treated women as if they were men six years younger, with a younger man's life expectancy. *Id.* at 3495 n.2.

7. *Id.* at 3495.

8. *Id.*

9. *Id.*

10. *Id.*

11. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1976) provides in part that:

> 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.

Id.

12. 103 S. Ct. at 3495.

favor of the class was ordered on March 12, 1980.[13] The United States Court of Appeals for the Ninth Circuit affirmed the decision.[14] The Supreme Court of the United States granted certiorari,[15] and in a per curiam ruling held that the scheme violated Title VII of the Civil Rights Act of 1964, and that all contributions to retirement benefits made after the decision be determined on a sex-neutral basis, thereby disallowing retroactive relief.[16]

Justice Marshall, in the portions of his lead opinion that attracted a majority,[17] first addressed the issue of whether there would have been a violation of Title VII if the state had run the plan internally without any private company intervention.[18] Justice Marshall began with a consideration of a case in which that very issue was presented, *City of Los Angeles Department of Water v. Manhart*.[19] He explained that in *Manhart* the Court held an employer in violation of Title VII when the employer required its female employees to make a larger pay-in to a pension fund that was employer-operated, only to receive the same monthly benefits as male employees upon retirement.[20] Following the *Manhart*

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13. *See* Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 486 F. Supp. 645 (D. Ariz. 1980). The class certified consisted of all female employees of the state of Arizona who had enrolled in the pension plan, or would do so in the future. *Id.* at 645-46.

14. Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 671 F.2d 330 (9th Cir. 1982).

15. 103 S. Ct. 205 (1982).

16. 103 S. Ct. at 3492.

17. Justice Marshall was joined in Parts I, II and III of his opinion by Justices Brennan, White, Stevens, and O'Connor. Justice Powell, dissenting in part and concurring in part, was joined by Chief Justice Burger and Justices Blackmun and Rehnquist as to Parts I, II, and III of his opinion and by Justice O'Connor as to Part III. *Id.* at 3504 (Powell, J., dissenting in part and concurring in part).

18. *Id.* at 3496.

19. 435 U.S. 702 (1978).

20. 103 S. Ct. at 3494. *See* 435 U.S. at 717. Justice Stevens, writing for the Court in *Manhart*, stated the proposition that although women as a class do live longer than men as a class, the unambiguous focus of Title VII is on the individual and not the class, and rejected the proposal that longevity, and not sex, was the controlling basis for the difference in contribution. *Id.* at 707-08, and 712-13.

The consideration by the *Manhart* Court of whether or not a factor other than sex (*i.e.*, longevity) was a reason for the different treatment was necessary because of the Bennett Amendment, which states in part:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

42 U.S.C. § 2000e-2(h) (1976). The provision referred to in the Bennett Amendment is the Equal Pay Act, 29 U.S.C. § 206(d) (1976), which provides, *inter alia*, that wages of men and women can be unequal if the inequality is based upon "a differential based on any other

Court's reasoning, Justice Marshall declared that the sex-classification of employees is as much a violation of Title VII at the pay-out stage of a pension plan as it is at the pay-in stage.[21] With the timing argument met, Justice Marshall next concluded that the sex discrimination issue was essentially the same as in *Manhart:* although there is actuarial evidence that women as a class live longer than men, in keeping with the tenets of Title VII, there was no justification for different treatment of individual men and individual women.[22] Justice Marshall also found that the voluntary aspect of the Arizona plan did not warrant a different result from that of *Manhart,* since Title VII deals with employment discrimination in absolute terms, and does not make the discriminatory act less severe simply because the employee can avoid it by choice.[23]

Noting that the state of Arizona would have violated Title VII if it had administered the plan itself, Justice Marshall next considered the critical issue of whether or not the calculation and payment of the benefits by the private insurance companies as opposed to the employer-operated system of *Manhart,* created a valid distinction that would absolve petitioners of a *Manhart*-type violation.[24] He reached the conclusion that the state was liable, since even though the plan involved the possible selection of a private sexually discriminatory open market entity, the employer was ultimately responsible for all aspects of the employment situa-

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factor other than sex" provided that the cure under the Act does not reduce the wage rate of employees. The *Manhart* Court, as noted above, did not feel that a factor other than sex was the controlling factor and rejected the argument. 435 U.S. at 712-13. In *Norris,* Justice Marshall reached the same conclusion based upon the *Manhart* Court's rationale. 103 S. Ct. at 3496-97.

21. 103 S. Ct. at 3497. Justice Marshall pointed out that the lower federal courts are in accord with this interpretation with the exception of the Sixth Circuit which held *contra* in Peters v. Wayne State, 691 F.2d 235 (6th Cir. 1981), *vacated,* 103 S. Ct. 3566 (1983). 103 S. Ct. at 3497 & n.9.

22. 103 S. Ct. at 3497-98. The *Manhart* Court supported its argument against sex classifications in this area by noting that racial as well as sexual classifications affect longevity but that the policy of Title VII is to eliminate the race factor in employment practices. 435 U.S. at 708-09. *See* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971). In the present case Justice Marshall reiterated the fact that sex and race classifications in employment practices are unlawful except under the bona fide occupational qualifications exception, 42 U.S.C. § 2000e-2(e) (1976), which was irrelevant to the issue at hand. 103 S. Ct. at 3498 & n.13.

23. 103 S.Ct. at 3497 n.10. Similarly, Justice Marshall did not find a relevant departure from *Manhart* because of the two other available options of the Arizona plan, as those non-discriminatory options do not make the annuity option fringe benefit any less discriminatory. *Id.*

24. *Id.* at 3499.

tion.[25] Justice Marshall deemed irrelevant the fact that there may not have been any non-discriminatory insurance plans available on the open market because the choice of insurance companies was limited to those companies pre-selected by the state, and those companies did indeed discriminate based upon sex.[26] Justice Marshall also set out the three options that, in light of the Court's decision, are available to an employer who wants an employee pension plan for the employer's workforce. He explained that an employer could alternatively: (1) bring in a third party insurer who does not discriminate; (2) run the plan internally without discriminating; or (3) if the previous two options are impractical or impossible, simply do without a pension plan.[27]

The final section of Justice Marshall's opinion, which did not command a majority, dealt with the retroactivity of relief.[28] Justice Marshall believed that the pension benefits paid to women after the *Manhart* decision should be adjusted to reflect the broader scope of the *Norris* majority.[29] Justice Marshall felt that the district court should have investigated further into whether or not sex-neutral tables could have been applied to the pre-*Manhart* contributions of female employees without violating the male employees' contractual rights to a particular level of contribution and fashioned relief accordingly.[30] Justice Marshall also relied upon *Albemarle Paper Co. v. Moody*,[31] wherein it was held that since the purpose of Title VII is to make those persons discriminated against whole, there is a presumption toward retroactive liability.[32] Justice Marshall concluded that there are no special circumstances that justify disregarding the *Albemarle* presumption, as applied to the period of time after the *Manhart* decision, a case which, according to Justice Marshall, "clearly foreshadowed" the *Norris* disposition.[33]

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25. *Id.* at 3501.

26. *Id.* This state action was distinguished by Justice Marshall from a plan wherein an employer distributes the past contributions to participants in a lump-sum. *Id.* In *Manhart*, Justice Stevens stated that the Court's holding did not reach a situation wherein an employer would set aside accumulated contributions and let the participants buy benefits on the open market, free of employer supervision. 435 U.S. at 717-18.

27. 103 S. Ct. at 3502.

28. *Id.*

29. *Id.* at 3503-04.

30. *Id.*

31. 422 U.S. 405, 421 (1976).

32. 103 S. Ct. at 3502.

33. *Id.* at 3503. The *Manhart* Court noted that the *Albemarle* presumption is strong, but that the district court should have duly considered the equities involved in levying Title

In his dissenting opinion, Justice Powell criticized the reasoning of the lead opinion on the Title VII issue.[34] He indicated that the opinion, contrary to the dictates of *Manhart*,[35] was detrimental to the operation of insurance and pension plans, and had the potential to revolutionize the present insurance industry.

Justice Powell stated that, unlike the plan in *Manhart*, the Arizona plan was not employer-operated, and that a ruling similar to *Manhart* in the present case would expand Title VII's regulatory reach into the business of insurance, thereby working drastic changes in the field.[36] Regulation of the insurance industry was believed by Justice Powell to be the domain of the states, and he relied upon the McCarran-Ferguson Act[37] to support his contention that Title VII was being improperly expanded by the lead opinion.[38] Justice Powell also refuted the lead opinion's reliance on the Title VII focus on the individual (as opposed to the class) as

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VII relief. 435 U.S. at 719. The *Manhart* Court concluded that problems involved in the overhaul of a pension plan coupled with the lack of a clear tendency in the law at the time toward the Court's holding justified the allotment of prospective relief only. 435 U.S. at 720-23. *See infra* note 43 and accompanying text.

34. Justice Powell was joined by Chief Justice Burger and Justices Blackmun and Rehnquist as to Parts I and II, dissenting in part, and by the Chief Justice, Justices Blackmun, Rehnquist and O'Connor as to Part III, concurring in part. 103 S. Ct. at 3504 (Powell, J., dissenting in part and concurring in part).

35. *Id.* at 3305 (Powell, J., dissenting in part and concurring in part).

36. *Id.* at 3506 (Powell, J., dissenting in part and concurring in part). Justice Stevens, delivering the opinion of the Court in *Manhart*, stated that the Title VII violation involved therein should not lead to an upheaval of the insurance industry, but that the only issue in the case was the validity of the employer-operated pension plan under Title VII. 435 U.S. at 717. Justice Powell, dissenting in the instant case, stressed the fact that the *Manhart* majority limited the reach of its decision to pension funds that are employer-operated. 103 S. Ct. at 3506 (Powell, J., dissenting in part and concurring in part).

37. 15 U.S.C. §§ 1011-1015 (1982). The Act states that the insurance industry is to be regulated by the states in the absence of an Act of Congress specifically relating to the business of insurance and that silence by Congress does not impair the states' regulatory domain. *Id.* §§ 1011-1012.

38. 103 S. Ct. at 3507-08 (Powell, J., dissenting in part and concurring in part). Justice Powell attempted to support his argument through an extensive analysis of the McCarran-Ferguson Act, and a comment made by Senator Hubert H. Humphrey during the Senate debates on the Act to the effect that Title VII is not a prohibition of unequal treatment of the sexes in an industrial-benefit plan. 103 S. Ct. at 3506-07 nn.5 & 6 (Powell, J., dissenting in part and concurring in part).

In writing for the majority, Justice Marshall felt no need to consider the McCarran-Ferguson Act's effect on the *Norris* litigation since the petitioners failed to raise the matter in their brief. 103 S. Ct. at 3500 n.17. He nonetheless met Justice Powell's argument by asserting that there was no attempt in the instant case to regulate the insurance industry, but rather that the only issue was the conduct of an employer that constituted an unfair employment practice under Title VII and, as such, was outside the scope of the McCarran-Ferguson Act which deals only with "the business of insurance." *Id.*

having little relevance to the insurance industry.[39] He maintained that since it is impossible for insurers to operate in terms of individual life expectancies they must instead determine easily manageable class-based criteria, including legitimate sex-based classifications.[40] Justice Powell stated that such classifications, when based upon objective actuarial experience, reflected by sex-based mortality tables, are not inherently discriminatory in the sense of the word as it is used in Title VII.[41]

In the final section of his opinion, which attracted a majority, Justice Powell addressed the grant of retroactive relief by the district court upon the finding of the Title VII violation.[42] For the reasons espoused in *Manhart*,[43] Justice Powell contended that only a prospective remedy was proper in the present situation, especially in light of the extreme financial hardship that would undoubtedly result if retroactive relief were granted.[44]

Justice O'Connor, who, with her concurring opinion, cast the deciding vote on the issues, held with the lead opinion as to the employment discrimination issue under Title VII and with Justice

39. 103 S. Ct. at 3508-09 (Powell, J., dissenting in part and concurring in part).

40. *Id.* Justice Powell noted that the very inability to predict the length of one individual life was why insurance and life annuities exist. *Id.* at 3508 (Powell, J., dissenting in part and concurring in part).

41. *Id.* at 3509 (Powell, J., dissenting in part and concurring in part). Justice Powell stated that the Title VII meaning of the word "discrimination" is "disparate treatment on the basis of race or sex that intentionally or arbitrarily affects an individual." *Id.* at 3509 (Powell, J., dissenting in part and concurring in part). Justice Blackmun stated in his *Manhart* concurrence that "there is nothing arbitrary, irrational, or discriminatory about recognizing the objective and accepted . . . disparity in female-male life expectancies in computing rates for retirement plans." 435 U.S. at 724 (Blackmun, J., concurring in part). Noting Justice Blackmun's analysis, Justice Powell concluded that since sex-based mortality tables are objective and reliable they are therefore non-discriminatory. 103 S. Ct. at 3509 (Powell, J., dissenting in part and concurring in part).

42. 103 S. Ct. at 3509-10 (Powell, J., dissenting in part and concurring in part).

43. 435 U.S. at 719. In *anhart*, the Court stated that in Title VII cases, retroactive relief is usually proper under the *Albemarle* decision, 422 U.S. 405 (1975), but since the *Manhart* holding was not foreshadowed and also because of the likely disruptive effect on the pension plans, the relief was denied. 435 U.S. at 719. The *Manhart* Court felt that even the most diligent pension administrators would have been unlikely to have foreseen the Court's barring of the sex-based annuity plans. *Id.* at 719-20.

44. 103 S. Ct. at 3510 (Powell, J., dissenting in part and concurring in part). Justice Powell stated that retroactive relief would result in a cost to employer-sponsored pension plans of between $817 million and $1260 million a year for the next 15 to 20 years. *Id. See,* United States Department of Labor, Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits 32 (1983). 103 S. Ct. at 3510 (Powell, J., dissenting in part and concurring in part). Justice Powell also noted that insurers of pension plans must closely allocate risk, and that an unforeseen change in the law that the present decision mandates could result in insolvency for insurers and the pension funds insured by them. *Id.*

Powell's opinion as to the retroactivity issue.[45] Justice O'Connor felt that the employment discrimination issue before the Court was a narrow one, and that the Court's only duty was to determine the 88th Congress' intent in making Title VII law.[46] She explained that the issues of the wisdom of the statute, the statute's constitutionality,[47] and the validity of removal of all sex classifications from insurance plans were not before the Court.[48] Addressing this narrow Title VII consideration, Justice O'Connor argued that the *Manhart* decision expressly permitted the setting aside of equal retirement benefits to be later used in lump-sum to purchase an annuity program on the open market, thereby treating all employees the same.[49] Justice O'Connor stated, however, that in the present case—where the employer, doing more than setting aside funds, offered a plan to be organized by various third-party insurance companies with sexually discriminatory policies—there was a situation in which the plan was a Title VII "privilege of employment" and hence, any discrimination was a violation of that provision.[50] Thus, Justice O'Connor joined Justice Marshall's lead opinion on the discrimination issue.[51]

As to the retroactivity issue, Justice O'Connor maintained that the resulting inequities flowing from a retroactive application compelled prospective relief.[52] Justice O'Connor cited the three criteria stated by the Court in *Chevron Oil v. Huson*,[53] to determine whether or not a decision involving statutory interpretation should be applied prospectively.[54] She explained that the Court's decision would be so applied if: (1) the interpretation stated a new principal of law; (2) retroactive application would retard the operation of the statute; or (3) retroactive application would impose inequitable results.[55] Justice O'Connor based her prospectivity vote on the third criterion because of the reliance on which participants in pension

45. *Id.* at 3511-12 (O'Connor, J., concurring).

46. *Id.* at 3511 (O'Connor, J., concurring).

47. *Id.* In a footnote, Justice Marshall noted that a fourteenth amendment claim by respondents was rejected by the district court and was not raised as a cross-appeal from that ruling. 103 S. Ct. at 3495 n.4. *See* 486 F. Supp. 645, 651 (1980).

48. 103 S. Ct. at 3511 (O'Connor, J., concurring).

49. *Id. See Manhart*, 435 U.S. at 717-18.

50. 103 S. Ct. at 3511 (O'Connor, J., concurring).

51. *Id.*

52. *Id.* at 3512 (O'Connor, J., concurring).

53. 404 U.S. 97, 105-09 (1971).

54. 103 S. Ct. at 3512 (O'Connor, J., concurring).

55. *Id.*

plans have placed on the plans in making retirement decisions.[56] Those pension plans could conceivably be destroyed by a retroactive application of the present decision, which would leave innocent workers unjustly damaged, according to Justice O'Connor.[57] Thus, with Justice O'Connor's concurring vote, the decision was made prospective only.[58]

The introduction of the sex discrimination ban into Title VII by the 88th Congress was surrounded by some confusion,[59] and hence there is little to be gained from an examination of legislative intent as to specific sexually discriminatory employment practices.[60] As a result of the minimal legislative guidelines, the narrow issue of sex discrimination in employee pension plans spawned extensive scholarly speculation and proposals, before any Supreme Court disposition, as to how the issue should be handled upon eventual challenges.[61]

The first Supreme Court case to address the issue, the *Manhart* decision,[62] involved a factual situation that did not require the Court to make a broad decision. The issue in *Manhart* was limited to whether a reqnirement that men and women make unequal *contributions* to an *employer-operated* pension plan was lawful under Title VII.[63] As Judge Aldrich of the First Circuit Court of Appeals noted in reversing and remanding a pre-*Manhart* district court decision,[64] the intervening *Manhart* decision involved a situation

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56. *Id.*

57. *Id.*

58. *Id.* at 3512-13 (O'Connor, J., concurring).

59. For the view that opponents of Title VII proposed that the sex discrimination issue be included in the Act in an attempt to make it less likely to pass, *see Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1167 (1971) [hereinafter cited as *Developments*]. For a comprehensive argument *contra, see* Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth,* 19 DUQ. L. REV. 453, 454 (1981), where the author maintains that the sex factor was included in the Act to protect women from discrimination in the same manner and degree as those persons discriminated against because of race or national origin, with the sole exception of the Title VII bona fide occupational qualifications which are a limiting factor to certain types of sex classification. *See* 42 U.S.C. § 2000e-2(e) (1976).

60. *See Developments, supra* note 59, at 1167.

61. *See* Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited,* 49 U. CHI. L. REV. 489, 491 & n.10 (1982) (citing much of the important pre-*Manhart* commentary).

62. 435 U.S. 702 (1978).

63. *Id.* at 717.

64. EEOC v. Colby College, 439 F. Supp. 631 (D. Me. 1977). The district court distinguished the *Manhart* cases (which had been granted certiorari by the Supreme Court at the time) by noting, *inter alia,* that *Colby College* involved unequal benefits and equal contribu-

where the most obvious disparity of treatment was present: women had more money withheld and therefore less take-home pay, than did similarly situated men.[65] The specific nature of the Supreme Court's ruling in *Manhart*, which did not extend to the legality of unequal benefits based on sex nor to the effect of a plan not operated by employers, anticipated further resolution of the open questions, and thus the commentators were again very active.[66]

Since *Manhart* was the primary precedent relied upon by the *Norris* majority on the Title VII issue,[67] the scope of the former decision should be examined carefully to discover the significance of *Norris*. Justice Stevens, writing for the *Manhart* Court, was quite specific in setting forth the holding, stating that, "we do not suggest that [Title VII] was intended to revolutionize the insur-

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tions, the converse of the *Manhart* situation. *Id.* at 637-38.

65. EEOC v. Colby College, 589 F.2d 1139, 1143 (1st Cir. 1978). By way of dictum, Judge Aldrich, writing for the appeals court, noted that in light of the Supreme Court's narrow holding in *Manhart*, the district court on remand would have to face problems that were not present in *Manhart*. Expanding on this point, Judge Aldrich was wary of the subsidy of women as a class by men as a class that would result from unisex actuarial tables because women, who as a class live longer, will get more benefits in the long run. It appeared to Judge Aldrich that the subsidy would be based on sex. *Id.* at 1144-45. Further, he noted that if some plans allow women to surrender the annuity for a lump sum, an inequality would result because of the practical short-circuiting of the actuarial prediction through the conversion. *Id.* at 1146. It is notable that the *Norris* plans allowed for such conversion to lump-sum. *See* 103 S. Ct. at 3494. Chief Judge Coffin, concurring in *Colby College*, criticized Judge Aldrich's commentary as going beyond the facts of the case, and furthermore stated that he did not necessarily share the Judge's views of the *Manhart* implications. 589 F.2d at 1146 (Coffin, C.J., concurring).

66. *See* Benston, *supra* note 61, at 491-92 & nn.13-15, which contains a collection of relevant law review commentary.

67. Two years before the landmark *Manhart* decision relied upon in *Norris*, the Supreme Court had confronted a similar Title VII problem in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), a case which was relied upon by the appellant, Los Angeles Department of Water and Power, in the *Manhart* case. A divided Court in *Gilbert* held that the exclusion of pregnancy from an employer's disability insurance plan was not a violation of Title VII. *Id.* at 145-46. As noted by the *Manhart* Court, there were two groups involved in the *Gilbert* situation which were determined to be pregnant women and nonpregnant persons, the latter group obviously consisting of both women and men. 435 U.S. at 715.

In distinguishing the *Gilbert* decision, the *Manhart* Court noted this factor of treating only *pregnant* women differently and concluded that whereas the *Gilbert* plan discriminated based on a physical disability, the *Manhart* plan discriminated on the basis of sex only. *Id.* Any problems with this distinction were mooted as a practical matter by Congress' enactment of the Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (1978), which amended Title VII to the effect that "the terms 'because of sex' or 'on the basis of sex' include . . . because of or on the basis of pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e(k) (Supp. V 1981). *See, e.g.*, 435 U.S. at 723-25 (Blackmun, J., concurring in part and concurring in the judgment). This statutory development was examined at some length and deemed consistent with *Manhart* by Justice Marshall in *Norris*. *See* 103 S. Ct. at 3498 n.14.

ance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund."[68] Nothing was said about pension funds which are not operated by employers or which issue unequal benefits. The Court also left open the possibility of employers setting aside the accumulated employee contributions in lump sum form at retirement, each individual participant then investing his or her share on the open market.[69] Clearly, the *Manhart* case set the stage for further development of the issue involved.

In the period between *Manhart* and *Norris*, the lower federal courts dealt with several cases involving non-mandatory, defined-contribution[70] employee pension plans run by private insurers.[71] As there was a lack of uniformity in these decisions, the time was apparently ripe for the Supreme Court to settle the matter by a review of the *Norris* case. As the *Norris* Court was confronted with a

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68. 435 U.S. at 717. *See supra* note 36 and accompanying text.

69. *Id.* at 717-18. The Court then made a statement which, along with an explanatory footnote, caused some controversy over what might lie ahead. The statement was that the Court's decision did not "call into question the insurance industry practice of considering the composition of an employer's workforce in determining the probable cost of a retirement or benefit plan." *Id.* at 718. The footnote construed Title VII and the Equal Pay Act to the effect that there was no prohibition on determination of the funding requirements by looking at the workforce composition. *Id.* n.34.

According to one article, this construction of Title VII could lead to employers having a disincentive to hire women, if it is known that in so doing, the pension costs of the employers' businesses will rise. Bernstein & Williams, *Sex Discrimination in Pensions: Manhart's Holding v. Manhart's Dictum*, 78 COLUM. L. REV. 1241 *passim* (1978).

70. Defined contribution plans, also called "money purchase" plans, are those in which the pay-in amount to the pension fund is equal for men and women, while the benefit payment will be greater for similarly situated men than for women. Key, *Sex-based Pension Plans in Perspective: City of Los Angeles Department of Water and Power v. Manhart*, 2 HARV. WOMEN'S L.J. 1, 13-14 (1978). The Arizona plan prohibited by *Norris* was of this type. 103 S. Ct. at 3497. Conversely, defined benefit plans, also called "formula benefit" plans are those in which men and women receive equal benefits after unequal contributions. Key, *supra*, at 15. It was this type of plan that was banned in *Manhart*. 435 U.S. at 717.

71. Some of the major cases dealt with annuity plans run for private and public educational institutions and foundations by the Teachers Insurance and Annuity Association (TIAA) and its companion organization, College Retirement Equities Fund (CREF), both non-profit life insurance companies. *See* Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982) (affirming the district court's decision which held that TIAA/CREF was subject to Title VII and in violation thereof); Peters v. Wayne State Univ., 691 F.2d 235 (6th Cir. 1981) (reversing a decision against the defendants Wayne State University and TIAA/CREF and holding that there was no Title VII violation since the plan was not employer-operated, the actuarial value of the benefits to similarly situated men and women was equal, and the plan had defined contributions for men and women); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978) (reversing the district court's dismissal of the suit and remanding for a trial on the merits in light of *Manhart*).

situation distinct from *Manhart* in the aforementioned respects,[72] the goal in *Norris* was obviously to determine whether the different factors involved in the case compelled a result different from the *Manhart* ruling.

Justice Marshall, writing for the *Norris* plurality on the Title VII issue, appeared to realize that there would be a strong reaction to extending *Manhart* to reach the *Norris* situation, and posited the various options available, including the possibility that an employer wishing to have an employee pension plan would have to forego such a fringe benefit if it were impracticable or impossible to operate the plan in a non-discriminatory manner.[73] As Justice Powell despairingly pointed out in his dissent, in the *Norris* scenario, Arizona took the latter option and discontinued the annuity feature of the plan after the adverse appeals court decision.[74] This action meant that a state employee who now seeks annuity benefits must withdraw his or her accumulated savings from the state fund, pay tax on that amount, and then invest it on the open market with a private insurer who probably uses sex-based mortality tables, an effect that Justice Powell found rather self-defeating, a recurring complaint in his *Norris* dissent.[75]

The *Norris* decision had as its foundation the lead opinion's broad Title VII ruling which was the statute's policy as interpreted in *Manhart:* that employers must treat employees as individuals and not as members of sex- or race-based classes.[76] It was the extension of that worthy policy into all cases of blatant sexual classifications that Justice Powell rejected, by stating that in an area of such established, customary procedures as the insurance industry, such an extension is not justified.[77]

The different views of the case seem to reflect the balancing of the interests of policy and practicality. The interest of practicality swayed Justice O'Connor to the prospectivity of relief side, based upon the gross burdens that would possibly deter or cripple the pension industry if retroactive relief were granted.[78] The policy of Title VII, however, was not contravened by this recognition of the

72. *See supra* notes 24-27 and accompanying text.
73. *See supra* note 27 and accompanying text.
74. 103 S. Ct. at 3506 n.4 (Powell, J., dissenting in part and concurring in part) (*citing* Transcript of Oral Argument at 8, *Norris*).
75. *Id.*
76. 435 U.S. at 708. *See supra* note 22 and accompanying text.
77. 103 S. Ct. at 3508-09 (Powell, J., dissenting in part and concurring in part).
78. *Id.* at 3512 (O'Connor, J., concurring). *See supra* notes 52-57 and accompanying text.

practicality issue as to the type of relief to be granted. The results of the decision were merely limited to a ban on future discriminatory plans, as opposed to past discriminations, while the wrongness of all of these types of discriminatory plans, in theory, was positively asserted.

It follows that the next matters which must be considered in analyzing *Norris* are the implications of the decision on employers desiring to offer annuity plans, and insurance companies that provide such plans to employers. Clearly, benefits derived from employee contributions will now have to be determined on a sex-neutral basis.[79] In a defined-contribution plan, such as the one involved in *Norris*, the problem of equalization of benefits can be resolved by having the employer (or private insurer) "top up" the female benefits after the effective date of *Norris* by applying male mortality tables to all employees, or by setting up a longevity table that reflects the total work force governed by a given plan.[80] In employer-operated plans, it has been theorized that there will be a disincentive to hire women and thereby add to the total longevity of the workforce, which would result in increased labor costs to the employer.[81] If the second option—that of a completely unisex workforce table—is selected, an employer may be faced with the male employees choosing to take their contributions in a lump-sum, with the result that the members of the annuity fund would be primarily female, which would again result in higher costs to the employer because of greater female longevity.[82]

As to private insurers, the requirements of *Norris* will necessitate their issuance of a unisex pension plan which, as already mentioned, would have dubious appeal to men, who could leave the plan and get higher benefits by investing their individual lump-

79. *See* 103 S. Ct. at 3512 (O'Connor, J., concurring).

80. *Id.* at 3512 n.4 (O'Connor, J., concurring). Justice O'Connor stated that the portion of the Equal Pay Act which disallows reducing any employee's wage rate as a cure to an Act violation would not mean that employers *must* use male mortality tables and "top up" benefits to the female workers, rather than apply a single adjusted unisex table. She felt that the applicability of the Act was questionable here because it speaks only to wages, and even if the Act is relevant, it should not be applied to contravene a pension plan's purpose of calculating benefits based on workforce composition. *Id.*

81. *See, e.g.*, Benston, *supra* note 61, at 532-36. *Contra* Key, *supra* note 70, at 17-18 (setting forth empirical reasons why such disincentives are unlikely to be a significant factor in employer hiring decisions). *Cf.* EEOC v. Colby College, 589 F.2d 1145, 1146 (1st Cir. 1978).

82. *See* Prestley, *The Graying of America, Employee Legal Benefits Problems,* 16 FORUM 1113, 1124-25 (1980-81).

sums in a private plan.[83] The passage of time will determine whether or not the changes wrought by *Norris* will have an extraordinary effect on the insurance industry and the individual preferences of male employees as to adverse selection of non-employer-operated plans, and whether or not *Norris* will result in employer disincentive to hire women.

In *Manhart,* Justice Stevens stated that he did not intend to revolutionize the insurance industry.[84] The absence of retroactive relief in both the *Manhart* and *Norris* decisions was presumably in furtherance of that end. *Norris,* however, in expanding the reach of *Manhart* into employer-offered nonmandatory defined-contribution plans run by private companies will undoubtedly change the way even more employers and insurers plan pensions, and could be a sign of a trend toward a total re-working of all sex-based insurance tables, despite the present validity of the McCarran-Ferguson Act. Whether the actual *Norris* expansion was for valid policy reasons or was merely carrying good legislation too far may depend upon one's point of view,[85] but it is difficult to dispute the notion that some type of "revolution" will result in the insurance industry based upon the Court's application of Title VII in *Norris.*

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83. *See id.*
84. 435 U.S. at 717.
85. 103 S. Ct. at 3509 (Powell, J., dissenting in part and concurring in part).