IMPLEMENTING EQUALITY IN EMPLOYEE PENSION PLANS UNDER TITLE VII: *ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS v. NORRIS*

Title VII of the Civil Rights Act of 1964[1] prohibits[2] employers[3] from discriminating[4] against individuals[5] on the basis of sex. The courts' interpretation of the Act in fringe benefit cases[6] involving disability benefits, pension or retirement programs, and insurance plans has gen-

1. 42 U.S.C. §§ 2000e-17 (1982) (as amended).

2. *Id.* § 2000e-2(a)(1). Title VII proscribes employers from failing or refusing "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.*

3. *Id.* § 2000e(b). This section defines an employer as "a person engaged in 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 year, and any agent of such a person." *Id. See* C. SULLIVAN, M. ZIMMER, & R. RICHARDS, FEDERAL STATUTORY LAW 92-93 (1980) [hereinafter cited as SULLIVAN] (stating that the scope of the terms "person" in § 2000e(a), "commerce" in § 2000e(h), and "industry affecting commerce" in § 2000e(h) indicates that Congress intended "employer" to be a broadly inclusive term).

4. Sexually discriminatory employment practices have been common. *See* Muller v. Oregon, 208 U.S. 412, 422-23 (1908) (the Supreme Court upheld a maximum working hour law for women stating that sex is a valid basis for classification). Statistics highlight such practices. Employers systematically pay women less than similarly situated men, with marked wage gaps in certain occupations. For example, in 1973, full-time female sales workers earned 37.8% of the wages male sales workers received. A. CAHN, WOMEN IN THE U.S. LABOR FORCE 29 (1979). Likewise, women in general suffer a higher rate of unemployment than men: in 1968, 2.9% of the male work force was unemployed compared with 4.8% of the female work force. In 1976, the rate was 6.2% to 8.2%, respectively. *Id.* at 30.

5. *See supra* note 2. The word "individual" appears three times in 42 U.S.C. § 2000e-2(a) (1982).

6. *See* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (the first major Supreme Court sex discrimination case involving fringe benefits). *See infra* notes 47-58 and accompanying text for a discussion of the case.

erated much controversy.[7] Such cases are of significant import[8] to employers who must reconcile non-discriminatory practices and economic limitations.[9] In *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*[10] the Supreme Court ruled that the State of Arizona violated Title VII by offering its employees annuity programs conducted by independent insurance companies that use sex-based mortality tables.[11]

Norris, a state employee,[12] voluntarily[13] enrolled in Arizona's pen-

7. *See* Brilmayer, Hekelen, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980) [hereinafter cited as Brilmayer] (arguing that Title VII forbids the use of sex-based tables for calculating employee fringe benefit plans); Freed & Polsby, *Privacy, Efficiency and the Equality of Men and Woman: A Revisionist View of Sex Discrimination in Employment*, 1981 AM. B. FOUND. RESEARCH J. 585 (positing that "efficiency" requires the use of sex-segregated tables in determining employee benefits); Gold, *Equality of Opportunity in Retirement Funds*, 9 LOY. L.A.L. REV. 596 (1976) (determining that Title VII requires equality at the pay-in and pay-out stages of benefit plans); Kimball, *Reverse Sex Discrimination:* Manhart, 1979 AM. B. FOUND. RESEARCH J. 83 (arguing that Title VII only bars discrimination between the sexes rather than discrimination against individuals on the basis of sex); Laycock & Sullivan, *Sex Discrimination as "Actuarial Equality:" A Rejoinder to Kimball*, 1981 AM. B. FOUND. RESEARCH J. 221 (insisting that Title VII forbids disparate treatment of individuals on the basis of sex); Lines, *Sex-Based Fringe Benefits—Annuities and Life Insurance*, 16 J. FAM. L. 489 (1978) (concluding that Title VII prohibits the use of sex-based tables but that Congress rather than the courts should resolve this dilemma); Note, *Equal Protection, Title VII and Sex-Based Mortality Tables*, 13 TULSA L.J. 338 [hereinafter cited as Note, *Equal Protection*] (arguing that Title VII requires contributions to, and benefits from, retirement funds to be equal); Note, *Sex Discrimination in Employee Fringe Benefits*, 17 WM. & MARY L. REV. 109 (1975) [hereinafter cited as Note, *Sex Discrimination*] (emphasizing that employers need clear guidelines for interpreting Title VII).

8. *See generally* EQUAL EMPLOYMENT POLICY FOR WOMEN 111 (R. Ratner ed. 1980) [hereinafter cited as EQUAL EMPLOYMENT POLICY] (because Title VII remedies are mainly prospective and do not include penalties, employers have little incentive to eliminate discriminatory practices before being sued). *But see* SULLIVAN, *supra* note 3, at 515 (noting that courts grant back pay when the central purposes of Title VII's remedial scheme, eradicating discrimination and making persons whole, are frustrated and these instances encompass the majority of cases).

9. *See infra* note 38 and accompanying text.

10. 103 S. Ct. 3492 (1983).

11. A mortality table is a means of ascertaining the probable number of years a person of a given age and normal health will live. A sex-based mortality table assumes that women will live longer than similarly situated men. For a discussion of sex-based mortality tables, see Note, *Equal Protection*, *supra* note 7, at 339-41.

12. 103 S. Ct. 3492, 3495 (1983). Norris worked for the Arizona Department of Economic Security. *Id.*

13. *Id.* at 3494. In 1974, Arizona offered its employees the opportunity to enroll in a deferred compensation plan permitting them to postpone receiving a part of their

sion plan[14] and elected to receive monthly annuity payments[15] from a company selected by the state.[16] Like all Arizona insurance companies,[17] this company used sex-based mortality tables to determine monthly benefits under the annuity option. Women as a class live longer than men[18] and thus Norris and other female state employees received less per month than did male co-workers.[19] Norris brought a class action[20] challenging the state's use of pension plans using gender-based mortality tables. The Supreme Court, affirming the holdings of the district court[21] and the court of appeals,[22] held that Arizona's use of such plans constituted a discriminatory employment practice[23] in

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wages until retirement. Employees could then avoid paying income tax on the part deferred until retirement when they received those accounts and any earnings on them. *Id.*

14. *Id.*

15. *Id.* The companies selected to participate in the plan offered three basic retirement options: a single payment upon retirement, periodic payments of a fixed sum for a fixed period, or monthly annuity payments for the remainder of the employee's life. The Court notes that employees preferred the third option because the first required that taxes be paid on the entire sum in one year and the second required employees to speculate as to how long they would live. *Id.*

16. *Id.* The employer, the State of Arizona, chose several companies to participate in its plan after inviting private companies to submit bids outlining the investment opportunities that they were willing to offer state employees. *Id.*

17. *Id.* at 3505-06. The vast majority of private insurance companies in the United States use sex-based mortality tables. *Id.*

18. *Id.* at 3495. Critics, however, have challenged the accuracy of this proposition. *See, e.g.*, Brilmayer, *supra* note 7, at 534-59 (challenging, in a demographic analysis, the widely accepted view that the relationship between sex and mortality is constant).

19. 103 S. Ct. at 3495. The Court notes that under the sex-based mortality tables used by the companies Arizona selected, a man received larger monthly payments than a women who deferred the same sum and retired at the same age. Sex-based tables assume that any given woman will live longer and thus will have to be insured for a longer period of time than a similarly situated man. Because of these assumptions, employers adopting such tables charge women more money than men or give women fewer benefits than men for the same amount of money. *Id. See infra* note 77.

20. Norris and other state employees brought a class action against the state, the Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, and several individual Committee members. 103 S. Ct. at 3495. The plaintiff class consists of all female employees who are enrolled in the plan or will enroll in the plan in the future. *Id.* at 3493.

21. 486 F. Supp. 645 (D. Ariz. 1980).

22. 671 F.2d 330 (9th Cir. 1982).

23. 103 S. Ct. at 3502-05. The Supreme Court also held that relief was to be prospective rather than retroactive. In Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982), *vacated*, 103 S. Ct. 3565 (1983), *on remand*, 735 F.2d 23 (2d Cir.),

violation of Title VII.

Legislative guidelines for interpreting Title VII's ban on gender discrimination are virtually non-existent.[24] Although the Act's language[25] explicitly forbids sexual as well as racial discrimination, Congress did not intend the Act to eradicate sexual discrimination totally. Title VII's allowance of gender discrimination based on bona fide occupational qualifications[26] confirms this. The last minute addition of the word "sex" to Title VII[27] as well as the sparsity of debate on the subject[28] strongly suggest that members of Congress were uncertain

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cert. denied, 105 S. Ct. 247 (1984), the court held that the Supreme Court's refusal to award retroactive relief in *Norris* did not apply. The *Spirt* court argued that *Norris* did not prohibit a retroactive award if *unspecified* benefit levels for some male annuitants would simply be *slightly* lower due to the ban on gender specific tables. *See infra* notes 59 & 78.

24. Early drafts of the Kennedy Administration's civil rights bill did not include an employment discrimination section. In the 1963 Judiciary Committee Report to the House of Representatives, Title VII prohibited employment discrimination based on race, color, religion, and national origin, but failed to outlaw discrimination based on sex. H.R. REP. NO. 914, 88th Cong., 1st Sess. 612 (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2355. The House added the term "sex" after the word "religion" two days before it sent the bill to the Senate. 110 CONG. REC. 2577, 2584 (1964). The Senate debates lasted for 83 days but members barely mentioned the "sex" clause. *See* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 882-83 (1967). Thus, neither committee hearings nor reports reveal Congress' intent when it added the word "sex" to the bill. *See* Note, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implications for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 457-67 (1981).

25. *See supra* note 2.

26. The bona fide occupational qualifications ("bfoq") exception states that discrimination shall not be unlawful "in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000-2(e) (1982). The Equal Employment Opportunity Commission (EEOC) guidelines on the term "sex" note that the "bfoq" exception does not sanction discrimination based on sexual stereotypes or assumptions. 29 C.F.R. § 1604.2(a) (1984). Similarly, the Bennett Amendment, 42 U.S.C. § 2000e-2(h) (1982), illustrates Title VII's limited protection. The Bennett Amendment directly incorporated a provision of the 1963 Equal Pay Act, 29 U.S.C. § 206(d)(1) (1982), into Title VII. The Amendment provides that Title VII does not prohibit an employer from "differentiat[ing] upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by [the Equal Pay Act]." 42 U.S.C. § 2000e-2(h) (1982). The Equal Pay Act permits an employer to pay men and women different wages for the same work if the differential is based "on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv) (1982).

27. *See supra* note 24.

28. *Id.*

if not indifferent as to the practical effects of a law prohibiting sex discrimination in employment. Members of Congress failed to decide whether the gender discrimination ban implied any of the following possibilities: 1) A ban only on irrational sex discrimination based on popular stereotypes unsupported by empirical data; 2) a prohibition of sex discrimination based on empirical data indicating actual differences between the sexes when such discrimination is not sound economically; or 3) a ban on profitable gender discrimination resulting from founded differences between the sexes.[29]

The Equal Employment Opportunity Commission (EEOC), the primary agency responsible for enforcing Title VII,[30] provided some direction for interpreting Title VII. By 1970, the Commission had outlawed pension plans that based retirement age on sex and allocated benefits to a deceased male worker's wife but not to a deceased female worker's husband.[31] In 1972, the EEOC rejected its 1964 "either/or

29. *See* Miller, *supra* note 24, at 883 (suggesting that "it is not unfair to label the sex discrimination amendment an 'orphan' [as] only a handful of Congressmen actually supported both the addition of sex to Title VII, and the bill as so amended"); Developments in the Law, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971) (stating that "[t]he passage of the [sex discrimination] amendment and its subsequent enactment into law, came without even a minimum of Congressional investigation . . ."); Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778, 791 (1964) (noting that "the inclusion of the term 'sex' in the bill was promoted by forces that were not primarily concerned with equality for women as a class"). *Contra* Note, *supra* note 24, at 453-66 (arguing that Congress strongly believed that sex discrimination was wrong). The lack of an AFL-CIO type of lobbying movement, rather than lack of interest or an attempt to defeat Title VII, explains Congressional silence. *See* Note, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 677 [hereinafter cited as Note, *An Attempt to Interpret Title VII*] (positing that "[d]espite the speedy House approval and initial support by opponents of the bill as a whole, Title VII's sex discrimination provisions were the product of serious legislative purpose").

30. Title VII created the EEOC to interpret and to aid in enforcing its ban on employment discrimination. P.L. No. 88-352, tit. VII, § 705(g), 78 Stat. 758-59 (1964) (prior to 1972 amendment) (codified as amended at 42 U.S.C. § 2000e-4(g) (1982)). The EEOC did not have legally binding power, however, until the Equal Employment Opportunity Act of 1972 granted it enforcement power. *See* H.R. REP. NO. 238, 92nd Cong., 2nd Sess. 1005 (1972); Hart & Sape, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

31. *See* 33 F.R. 3344 (1968) (EEOC stated that it would decide on a case by case basis whether "other differences [in pension benefits] based on sex, such as differences in benefits for survivors" violate Title VII). Administrative cases decided under these regulations which rule that basing retirement age on gender is discriminatory include EEOC Dec. No. 70-45 (July 19, 1969), *reprinted in* EEOC Dec. (CCH) ¶ 6041 (1973); EEOC Dec. No. 70-75 (Aug. 13, 1969), *reprinted in* EEOC Dec. (CCH) ¶ 6049 (1973);

approach"[32] which enabled employers to satisfy Title VII *either* by exacting equal contributions at the pay-in stage of a pension plan *or* by providing equal periodic retirement benefits for women and men at the pay-out stage.[33] In 1972, the EEOC declared unequal fringe benefits to be an unlawful employment practice,[34] labeled retirement benefits as fringe benefits,[35] and negated unequal cost as a defense to gender-based pension classifications.[36] Nevertheless, many administrative agencies[37] enforcing Title VII refused to adopt the EEOC's recommendations[38] and thereby undermined the clarity and direction the Commission had furnished.

Thus, courts received minimal guidance for implementing Title VII in fringe benefit cases. In 1968, a federal court of appeals first mentioned Title VII's effect on pension plans,[39] dicta in *Gruenwald v. Gardner*[40] stated that variations in retirement benefits based on gender

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EEOC Case No. YNY9-034 (June 16, 1969), *reprinted in* EEOC Dec. (CCH) ¶ 6050 (1973). Cases decided under these regulations, which rule that giving benefits to a deceased male worker's wife but not to a deceased female worker's husband is discriminatory, include EEOC Dec. No. 70-513 (Feb. 4, 1970), *reprinted in* EEOC Dec. (CCH) ¶ 614 (1973); Fillinger v. Eastern Ohio Gas Co., 4 Fair Empl. Prac. Cas. 73 (N.D. Ohio 1971).

32. *See* Sher, *Sex Discrimination in Retirement Programs*, 16 FORUM 1174, 1176 (1981).

33. Prior to 1972, employers who exacted equal contributions from employees but then provided greater monthly benefits for men than women based on gender mortality tables satisfied Title VII. Similarly, employers requiring women to contribute more per month than similarly situated men complied with Title VII if they then provided equal benefits for men and women. *Id.* at 1175.

34. 29 C.F.R. § 1604.9(b) (1984).

35. *Id.* § 1604.9(a).

36. *Id.* § 1604.9(e).

37. In addition to the EEOC, four other administrative agencies enforced Title VII: the National Labor Relations Board (NLRB), the Fair Employment Practices Commission (FEPC), the President's Committee on Equal Employment Opportunity, and the Community Relations Service. Comment, *Enforcement of Fair Employment under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 438 (1965).

38. Sher, *supra* note 32, at 1177.

39. Note, *Sex Discrimination and Sex-Based Mortality Tables*, 53 B.U.L. REV. 624, 626 (1973).

40. 390 F.2d 591 (2d Cir.), *cert. denied sub nom.* Gruenwald v. Cohen, 393 U.S. 982 (1968). *Gruenwald* dealt with Social Security benefits and Title VII in relation to insurance plans. The court held that the more favorable treatment that women receive in computing social security benefits fails to constitute invidious discrimination. The court also found no violations of the due process or equal protection clauses of the Constitution. 390 F.2d at 592-93.

did not violate Title VII.[41] After 1970, courts generally deferred to the EEOC's guidelines[42] and repeatedly held that retirement plans are a "condition of employment"[43] and thus are subject to Title VII's discrimination prohibitions. Courts also held that both voluntary and obligatory pension plans stipulating different retirement ages for men and women[44] violated Title VII. The language in these opinions consistently emphasized the broad reach of Title VII's ban on sex discrimination in employment.[45]

Cases involving disability benefits in relation to pregnancy[46] coun-

41. 390 F.2d at 593.

42. Sher, *supra* note 32, at 1176.

43. *See, e.g.*, Chastang v. Flynn & Emrich Co., 541 F.2d 1040, 1042 (4th Cir. 1976) ("It is well settled that retirement benefits are within the 'compensation, terms, conditions, or privileges of employment' covered . . . by Title VII."). *See also* Peters v. Missouri-Pac. R.R., 483 F.2d 490, 492 n.3 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973); Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90, 95 (3d Cir. 1973); Bartmers v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

44. *See, e.g.*, Stuppiello v. ITT Avionics Div., 575 F.2d 430 (3d Cir. 1978) (an employer violated Title VII by permitting women to retire at an earlier age with better benefits than men with the same service); Chastang v. Flynn & Emrich Co., 541 F.2d 1040 (4th Cir. 1976) (a retirement plan giving early male retirees less in their vested interests in retirement funds than similarly situated female retirees violated Title VII); Peters v. Missouri-Pac. R.R., 483 F.2d 490 (5th Cir.) (employer's plan establishing different retirement ages for male and female employees violated Title VII), *cert. denied*, 414 U.S. 1002 (1973); Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90 (3d Cir. 1973) (struck down a plan treating men and women differently with respect to retirement age); Ugiansky v. Flynn & Emrich Co., 337 F. Supp. 807 (D. Md. 1972) (court rejected employer's motion to dismiss upon finding that his plan enabled women to retire at an earlier age with greater benefits than men); Mixson v. Southern Bell Tel. & Tel. Co., 334 F. Supp. 525 (N.D. Ga. 1971) (a widow of a deceased employee had a cause of action against an employer who fixed a pension retirement age at 60 for men and at 55 for women).

45. *See* Chastang v. Flynn & Emrich Co., 541 F.2d 1040, 1043 (4th Cir. 1976) (the court should deal similarly with discrimination concerning conditions of employment and employment opportunity discrimination); Peters v. Missouri-Pac. R.R., 483 F.2d 490, 496 (5th Cir.) (gender discrimination is impermissible unless business necessities so dictate), *cert. denied*, 414 U.S. 1002 (1973); Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90, 95 (3d Cir. 1973) (retirement plans violate Title VII because they "differentiate between men and women solely on the basis of sex . . ."); Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1189 (7th Cir.) (classification of employees on the basis of sex is per se contrary to the intent of Title VII), *cert. denied*, 404 U.S. 939 (1971).

46. *See generally* Recent Case, *Employment Discrimination—When Does Discrimination Against Pregnant Employees Violate Title VII?*, 24 LOY. L. REV. 290 (1978) (discussing cases relating to treatment of pregnant women under Title VII that exemplify the Court's unwillingness to hold that employers must treat pregnant employees exactly the same as employees with all other disabilities); Note, *The 1978 Pregnancy Discrimination Act: A Problem of Interpretation*, 58 WASH. U.L.Q. 607 (1980) (discussing

tered judicial recognition of and concern for pension issues. In *General Electric Co. v. Gilbert*,[47] the Court held that the exclusion of pregnancy from coverage under a disability benefits plan was not sex discrimination.[48] The Court noted that the plan did not facially[49] discriminate against women, for it only denied coverage to pregnant women, rather than all women. Plaintiffs failed to demonstrate that the disability benefits plan was worth more to men than to women[50] and hence failed to

whether an employer who discharges a pregnant employee because of a policy of little or no sick leave for any disabled employees, pregnant or not pregnant, thereby discriminates against the employee because of her pregnancy).

47. 429 U.S. 125 (1976).

48. *Id.* at 135. The *Gilbert* Court used a constitutional equal protection approach in analyzing the validity of the employee disability-benefit plan, noting that the Court's concern in equal protection cases is similar to Congress' concern when it enacted Title VII. *Id.* at 133. Some commentators have contended that Title VII provides pregnant women with greater protection against discrimination than the equal protection clause does. *See* Thomas, *Differential Treatment of Pregnancy in Employee Disability Benefit Programs: Title VII and Equal Protection Clause Analysis*, 60 OR. L. REV. 249 (1981) (the author compares the protection against pregnancy classifications offered by the equal protection clause and by Title VII and concludes that classifications acceptable under the equal protection clause may be discriminatory under Title VII); Note, *Equal Protection*, *supra* note 7, at 339 (arguing that Title VII, unlike the equal protection clause, requires employers to provide equal benefits and contributions in employee pension plans).

After the *Gilbert* decision, members of Congress introduced bills to overturn the Court's interpretation of Title VII concerning disability benefits for pregnant employees. This resulted in the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1982). This Act amended Title VII so that the ban on sex discrimination included pregnancy related conditions or claims. It effectively overruled *Gilbert*. One year prior to the enactment of the Amendment, Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), also limited *Gilbert*. *Satty* involved a company policy of requiring pregnant employees to take leaves of absence and denying them their accumulated seniority upon their return. The Court ruled that the policy violated Title VII because the company failed to show that the policy was due to business necessity. *Id.* at 143.

49. 429 U.S. at 138. The Court notes that as in Geduldig v. Aiello, 417 U.S. 484 (1974), the exclusion of pregnancy from coverage under a state plan was not "in itself" discrimination based on sex. 429 U.S. at 135. The Court states that the insurance "package" at issue here covers exactly the same categories of risk for male and female employees and so is facially nondiscriminatory in the sense that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at 138 (quoting *Geduldig*, 417 U.S. at 496-97).

50. 429 U.S. at 138-39. The Court refers to the Plan as an "insurance package which covers some risks, but excludes others. . . ." *Id.* at 138. The package covers exactly the same categories of risk for all General Electric employees. The Court states that although women disabled as a result of pregnancy do not receive benefits, a "gender-based discriminatory effect" does not result simply because the employer's disability-benefits plan is less than all-inclusive. *Id.* at 138-39.

show any gender-based discriminatory effect in the scheme.[51]

The Supreme Court restricted *Gilbert's* potential impact on pension plans in *Los Angeles Department of Water & Power v. Manhart*.[52] In *Manhart*, the Court invalidated a pension plan that was based on sex-segregated mortality tables and that required women to make greater contributions during their working years to receive the same benefits as men upon retirement.[53] The *Manhart* Court insisted that Title VII's

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51. Justice Brennan, with whom Justice Marshall concurred, dissented. *Id.* at 140-60. Justice Stevens dissented separately. *Id.* at 160-62. Justice Brennan's dissent insisted that the plan was unlawful on its face and in effect in view of the defendant's historical record of discrimination and the broad social objectives behind Title VII. *Id.* at 148-60. It points out that the majority ignored the district court's finding that the defendants historically and intentionally discriminated against women. It stated that common sense mandated the conclusion that a classification revolving around pregnancy is gender-related. *Id.* Justice Brennan's dissent further noted that the disability program had three effects: it covered all disabilities that afflicted both sexes; it covered all male-specific disabilities; it covered all female-specific disabilities except for the most prevalent, pregnancy. The Brennan dissent stated that the majority only focused on the first effect—the equal inclusion of mutual risk—and thus easily found no discriminatory effects. *Id.* at 155. Justice Stevens' dissent focused on the lesser burden of proof plaintiffs have under Title VII than under the equal protection clause. *Id.* at 161-62. Justice Stevens also noted that "by definition," *id.* at 161, pregnancy discrimination is sex-based discrimination, "for it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.* at 162.

52. 435 U.S. 702 (1978). For a discussion of the propriety of using sex-based generalizations in pension plans, see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 315-16 (1976) (questioning the *Manhart* district court's reliance on Phillips v. Martin Marietta Co., 400 U.S. 542 (1971); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1973), and Rosenfeld v. Southern Pac. Co., 444 F.2d 1291 (9th Cir. 1971), to support the emphasis on the individual); Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits*, 49 U. CHI. L. REV. 489 (1982) (arguing that applying one standard to persons unequally situated may be as discriminatory as applying unequal standards to persons equally situated, and thus employee pension plans using unisex mortality tables violate Title VII); Bernstein & Williams, *Sex Discrimination in Pensions:* Manhart's *Dictum*, 78 COLUM. L. REV. 1241 (1978) (supporting *Manhart's* holding); Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs*, 74 COLUM. L. REV. 1203 (1974) (criticizing the use of sex-based tables because they tend to be inaccurate and to ignore the day-to-day needs of working women).

53. 435 U.S. at 717. Two earlier cases addressed the use of gender-based mortality tables in pension plans: Henderson v. Oregon, 405 F. Supp. 1271 (D. Or. 1975) (first case to deal with sex-based mortality tables in a Title VII context, was docketed on appeal and then decided by *Manhart*), and Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171 (employers violated the equal protection clause by providing greater monthly annuities to men than women due to the use of gender-based mortality tables), *cert. denied*, 434 U.S. 825 (1977).

focus is on the "individual."[54] Although most women outlive men, the Court stated that employers may not use this class generalization to discriminate against individual women who die earlier than they are supposed to, according to the standard mortality tables.[55] The Court ruled that *Gilbert* was not controlling because in *Gilbert* the classification was between "pregnant women and nonpregnant persons,"[56] and "nonpregnant persons" included both men and women. In *Manhart*, the classification was between men and women.[57] The Court concluded by limiting its holding to the facts of the case and by cautioning that it did not intend to "revolutionize" the insurance and pension industries.[58]

Chief Justice Burger dissented, stating that longevity rather than gender was the basis for the differentiated contributions.[59] According to the dissent, because women live longer than men, it is appropriate that they pay in more money because they will eventually receive a greater number of annuity payments than men. Therefore, the dissent stated that the pension plan in *Manhart*, like the benefits plan in *Gilbert*, did not contain an overt classification and thus did not facially discriminate against women.[60]

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54. 435 U.S. at 708.

55. *Id.* at 707-08.

56. *Id.* at 715.

57. *Id.* at 715-16.

58. *Id.* at 717-18. The Court notes that nothing in its 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 on the open market," because Title VII only applies to employment situations and does not affect independent insurers. *See supra* note 2.

59. 435 U.S. at 725-28 (Burger, C.J., dissenting). Longevity is defined as the length of a life span. Chief Justice Burger and Justice Rehnquist state that the employer's practice fell under the exemption provided by the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982), incorporated into Title VII by the Bennett Amendment, 42 U.S.C. § 2000e-2(h) (1982). *See supra* note 26. Under this exemption, an employer cannot discriminate between employees on the basis of sex by paying one sex more money than the other except where a payment is made pursuant to "a differential based on any other factor other than sex. . . ." *Id.* § 2000e-2(h). The dissent suggests that the "factor other than sex" is longevity. 435 U.S. at 727.

Justice Marshall also dissented with respect to the relief granted by the majority. *Id.* at 728-33 (Marshall, J., dissenting). The Court declined to permit a retroactive monetary recovery. Although a presumption in favor of retroactive relief exists when a Title VII violation occurs, Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court felt that the grave consequences of such relief as well as the employer's good faith indicated retroactive relief was inappropriate. 435 U.S. at 719-23.

60. 435 U.S. at 725-28.

Several lower courts[61] extended *Manhart's* holding to pension plans based on sex-segregated mortality tables in which male and female employees paid equal contributions but received unequal benefits.[62] Unlike *Manhart*, which dealt with employer operated plans,[63] these cases also involved plans offered through private insurance companies. Nevertheless, the courts adhered to *Manhart's* emphasis on the individual and held that employers could not require men and women to contribute equally while paying women lower monthly benefits.[64]

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61. Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982) (university professor successfully argued that her employer's retirement plan, which provided a smaller monthly benefit for women than for similarly situated men even though women and men made equal contributions, violated Title VII), *vacated*, 103 S. Ct. 3565 (1983), *on remand*, 735 F.2d 23 (2d Cir.), *cert. denied*, 105 S. Ct. 247 (1984); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978) (university employee sued Colby College (her employer), Teacher Insurance Annuity Association (TIAA) (a nonprofit, legal reserve nationwide life insurance company), and College Retirement Equities Fund (CREF) (a company similar to TIAA), for violating Title VII by providing unequal pension benefits for women and men); Sobel v. Yeshiva Univ., 566 F. Supp. 1166 (S.D.N.Y. 1983) (university that contracted with Prudential Life Insurance Company of America to operate a pension program unlawfully discriminated against female employees because women and men did not receive equal benefits); Women in City Gov't United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981) (female city service employees who were compulsory members of the New York City Employees' Retirement System sued the city and the System for using sex-based tables to compute retirement benefits); Hannahs v. Teachers' Retirement Sys., 26 FEP Cases 527 (S.D.N.Y. 1981) (local school board and New York State Teachers' Retirement System unlawfully discriminated by using sex-based tables under which women received less per month than men).

62. In *Manhart*, the Los Angeles Department of Water and Power required that female employees make larger pension contributions than their male counterparts to receive equal benefits. 435 U.S. at 704-05. In the cases presently discussed, these insurers required equal contributions from all employees, but paid women lower monthly benefits.

63. *See supra* note 58 and accompanying text. In *Manhart*, the employer (the city) directly operated retirement, disability, and death benefit programs for its employees. The city decided to use sex-based mortality tables after studying mortality tables and its prior experience with benefit plans. 435 U.S. at 705.

In most of the cases listed *supra* note 61, the employers did not decide to employ sex-based mortality tables. Instead, they opted to delegate their responsibility to provide retirement benefits to third party insurers that used sex-based tables. The courts systematically rejected the employers' argument that independent third parties, not covered by Title VII, were liable for the violation. Although the third parties obviously were not the employee's employers, they were agents of the employers. Hence, the employers violated Title VII through their agents. *Spirt*, 691 F.2d at 1063; *Colby College*, 589 F.2d at 1141; *Sobel*, 566 F. Supp. at 1189-92; *Women in City Gov't United*, 515 F. Supp. at 297; *Hannahs*, 26 FEP Cases at 532.

64. *Spirt*, 691 F.2d at 1056; *Women in City Gov't United*, 515 F. Supp. at 301.

In *Peters v. Wayne State University*,[65] the Sixth Circuit, unlike the other circuits, rejected *Manhart's* holding and analysis in favor of the disparate treatment[66] and disparate impact tests.[67] Under the pension plan in *Peters*, women contributed equal amounts but received lower monthly benefits.[68] Emphasizing dicta in *Manhart* concerning the narrowness of its holding as well as its deference to insurance companies,[69] *Peters* applied *Gilbert's* overall worth test:[70] a discriminatory classification did not exist because, in the long run, the plan was not monetarily worth more to men than to women.[71]

In *Arizona Governing Committee for Tax-Deferred Annuity and Deferred Compensation Plans v. Norris*,[72] the Supreme Court adopted the approach followed by the majority of lower courts and recommended by the EEOC.[73] Like *Manhart*, *Norris* focused on the rights of individuals under Title VII and repudiated the use of class generalizations to

65. 476 F. Supp. 1343 (E.D. Mich. 1979), *rev'd*, 691 F.2d 235 (6th Cir. 1982), *vacated*, 103 S. Ct. 3566 (1983).

66. 691 F.2d at 239. A disparate treatment analysis involves determining whether an intent to discriminate is present. Disparate treatment occurs when a employer bases employment decisions on an impermissible criterion, such as sex. *Id.*

67. *Id.* at 239-40. A disparate impact analysis determines whether or not a class is actually burdened. A disparate impact occurs when an employer's facially neutral policy burdens one class more than another. *Id.* at 239.

68. *Id.* at 240-41.

69. *Id. Peters* states that the Supreme Court expressly limited *Manhart's* holding: "All that is at issue today is a requirement that men and women make *unequal contributions* to an *employer-operated* pension fund." *Id.* at 240 (quoting 435 U.S. 702, 717 (1978)) (emphasis in original). The Sixth Circuit also asserted that factual differences between *Peters* and *Manhart* made the cases reconcilable. First, *Manhart* involved women contributing more to the pension plans to receive equal benefits and *Peters* involved women contributing equal amounts to receive lower monthly benefits. Second, in *Manhart* the employer operated the pension plan and in *Peters* an independent party operated the pension plan. *Id.*

70. *See Gilbert*, 429 U.S. at 138 ("As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits.").

71. 691 F.2d at 240-41. *See supra* text accompanying notes 50-51.

72. 103 S. Ct. 3492 (1983).

73. *See supra* notes 30-38 and accompanying text. *See* EQUAL EMPLOYMENT POLICY, *supra* note 8, at 110 (stating that the *Manhart* Court failed to determine whether courts had to follow the 1972 EEOC guidelines because the plaintiffs failed to argue this point. Those guidelines required employers to provide equal periodic benefits for men and women at the payout stage.). *See supra* notes 32-34 and accompanying text.

justify treating men and women differently.[74] *Norris*, in fact, interpreted Title VII even more broadly than *Manhart* did. In contrast to *Manhart's* recognition of current insurance industry practices,[75] the Court stated that even though all annuities immediately available on the open market may be based on sex-segregated mortality tables, insurance company practices were no defense to the state's actions.[76] The Court noted that because the state chose the companies to participate in the plan and the employees could obtain retirement benefits only from one of these companies, the state was legally responsible for the companies' discrimnatory terms.[77]

The *Norris* dissent[78] reiterated *Manhart's* narrow holding and dicta concerning deference to traditional insurance company practices.[79] The dissent claimed that the majority unjustifiably extended *Manhart's* holding to a different factual situation[80] and, in effect, was revolutionizing the insurance industry.[81] In addition, the dissent rejected the majority's emphasis on the word "individual" in Title VII, insisting that

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74. 103 S. Ct. at 3498. The Court stated that what it said in *Manhart* concerning Title VII's disregard for class generalizations bore repeating. *Id. See supra* notes 54-55 and accompanying text.

The *Norris* Court stated that since "it would be unlawful to use race-based actuarial tables, it must also be unlawful to use sex-based tables" because under Title VII, sexual classifications are treated the same as racial classifications unless the classification falls within a few narrow exceptions. 103 S. Ct. at 3498.

75. *See supra* note 58 and accompanying text.

76. 103 S. Ct. at 3500-01.

77. *Id.* The state offered the annuities as part of its own deferred compensation plan. *Id.*

78. *Id.* at 3504-10 (Powell, J., dissenting). Justices Powell, Blackmun and Rehnquist and Chief Justice Burger dissented from the majority's holding. *Id.* Justice O'Connor concurred in the majority's judgment, and joined the dissenting Justices to deny the retroactive relief awarded by the district court and make the relief prospective. *Id.* at 3410-13 (O'Connor, J., concurring). The Court ruled that "benefits derived from contributions collected after the effective date of our judgment [must] be calculated without regard to the sex of the employee." *Id.* at 3512.

79. *See supra* note 58 and accompanying text.

80. 103 St. Ct. at 3497. *Manhart* involved unequal contributions while *Norris* dealt with unequal benefits. The *Norris* Court declared 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." *Id.*

81. *Id.* at 3506-08. The dissent argues that insurance carriers will pass on the cost of equalizing benefits. Also, the dissenters contended that the McCarran-Ferguson Act, 15 U.S.C. § 1011 (1982), delegated responsibility for regulating the insurance industry to the states. The dissent stated that the majority is unjustified in assuming that when Congress enacted Title VII, it intended to alter longstanding acturial methods and thus,

the Act's key language was the term "discriminate."[82] Title VII's goal was to prevent employers from discriminating against women as a group, rather than to insure that employers treat similarly situated women and men identically, as the majority had posited.[83]

The *Norris* Court defined the abstract concept of sexual equality[84] in fringe benefit cases. The Court had to reconcile a woman's desire to receive monthly pension benefits[85] equal to those of a similarly situated male worker with the traditional insurance practice[86] of focusing on the group[87] and calculating annuities using sex-based mortality tables.[88] Generally, women live longer than men and thus make higher demands on pension reserves than men do. If Norris dies before her male counterpart, however, she will have received less of her pension than he had received because of these lower monthly payments. In effect, individual women who fail to reach their life expectancy are short-changed.

A narrow reading[89] of *Norris* suggests that Title VII prohibits classifications based solely on gender even though they are based on empirical and verifiable differences between the sexes. If a court finds, however, that an employer's classifications are not based explicitly on

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Title VII's language does not support this preemption of state jurisdiction. 103 S. Ct. at 3506-08.

The dissent fails to mention that Title VII applies only to employment situations and that the *Norris* holding therefore may not affect independent insurers operating on the open market.

82. *Id.* at 3509. After pointing out that it is impossible to determine how long an individual will live and thus exactly how much it will cost to insure that person, the dissent concludes that the majority's focus on the word "individual" is meaningless in the insurance context. *Id.*

83. *Id.*

84. *See* Rutherglen, *Sexual Equality in Fringe Benefit Plans*, 65 VA. L. REV. 199, 256 (1979) (in which the phrase "implementing the abstract concept of equality" appears).

85. *See supra* notes 10-23 and accompanying text.

86. *See* Benston, *supra* note 52, at 496-501. The author discusses general insurance concepts.

87. *See* Note, *supra* note 39, at 625-28. The author explains that insurance companies work with "groups" due to the impossibility of determining when a given person will die. *Id.*

88. *See supra* text accompanying note 18. The traditional insurance company practice of using sex-based mortality tables is derived from the generally accepted notion that women as a group live longer then men. *See supra* note 19.

89. For a summary of the courts' basic approach to definitions of discrimination, see SULLIVAN, *supra* note 3, at 3-15.

gender, but are merely gender-related, the employer has not violated Title VII. The result under the narrow reading therefore depends on how a court interprets the classification. A broad reading[90] of *Norris* suggests that Title VII proscribes both explicit gender classifications and gender-related classifications. For instance, a disability plan excluding breast cancer from coverage might be permissible under the narrow reading because it is not based explicitly on sex. Under the broad reading, however, this component of the plan would be illegal because it is a gender-related criterion, as breast cancer predominately afflicts women.

The Court's language and reasoning[91] fail to support the narrow reading. The Court refused to find that the pension classification was based on longevity, an objective factor.[92] By requiring employers to treat employees as individuals[93] rather than as class members, the Court held that Title VII requires equal[94] and integral[95] treatment of women and men; employers must not only institute facially nondiscriminatory practices[96] but they must insure that each woman is treated the same as her male counterpart.[97] Equal employment conditions and opportunities do not exist if courts sustain gender-related classifications such as the one in *Gilbert*.[98] *Gilbert* required only nominal equality rather than actual equality and enabled employers to circumvent Title VII's ban on gender discrimination by using neutral word choices.[99] *Norris*, like *Manhart*, broadly defines sexual discrimi-

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90. *Id.*

91. *See supra* notes 72-83 and accompanying text.

92. *Norris* and *Manhart* both rejected the argument that longevity rather than sex was the proxy for pension benefit amounts. *Norris*, 103 S. Ct. at 3497; *Manhart*, 435 U.S. at 712-13. The dissent accepted this argument. *See supra* note 59 and accompanying text.

93. *See supra* note 74 and accompanying text.

94. *See supra* note 2. Title VII's language prohibits overtly or invidiously unequal treatment of women and men. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

95. Integral equality refers to equality that is not merely facial. Title VII protects against both overt and more subtle forms of discrimination. *See* Brilmayer, *supra* note 7, at 521; Gold, *supra* note 7, at 636; Laycock & Sullivan, *supra* note 7, at 223.

96. *See supra* note 94.

97. *See supra* note 95.

98. 429 U.S. 125 (1976). *See supra* notes 47-51 and accompanying text.

99 *See supra* notes 47-58. The employee disability plan in *Gilbert* covered all disabilities afflicting both men and women and all uniquely male disabilities. It excluded pregnancy, a uniquely female disability. 429 U.S. at 155 (Brennan, J., dissenting). The

nation in employment. Semantic arguments that Title VII outlaws discrimination between the sexes rather than discrimination against a person on the basis of sex[100] will no longer work.

Norris' complete rejection of gender discrimination in fringe benefit plans will have widespread social implications.[101] By determining that sex can be neither a determinant nor a subtle advantage or disadvantage,[102] *Norris* will change working conditions for women. *Norris* simultaneously prohibits the use of sex-based mortality tables and rejects many harmful but prevalent stereotypes.[103] For example, *Norris* rejects the myth that women always have someone to provide for them and have less of a need for pension income than men.[104] *Norris*, moreover, lessens the wide gap between Title VII's promise and the socioeconomic reality confronting women.[105] Prohibiting discrimination in fringe benefits is crucial because such plans constitute a significant portion of employee incomes. Finally, *Norris* assures female workers that employers can no longer assert a cost defense to justify discriminatory pension practices.[106]

In addition to having a significant impact on the female workforce,

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Gilbert Court accepted the employer's argument that the classification in question was neutral—a classification of "pregnant women and nonpregnant persons"—rather than a sex-based, male-female classification. *Id.* at 135 (quoting Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974)).

100. Kimball, *supra* note 7, at 103-04 (stating that when the word "discrimination" is used with the word "between," it has a value-neutral meaning, but when it is used with the word "against," it has an invidious connotation).

101. *See* Lines, *supra* note 7, at 490-91 (positing that the *Manhart* decision would greatly affect programs such as the Teachers Insurance Annuity Association and the College Retirement Equities Fund (TIAA/CREF) that serve college teachers in every state and some secondary school teachers). *See also* Sher, *supra* note 32, at 1182 (the author predicts that insurance companies' use of age in determining benefits will be a controversial topic). *But see supra* notes 3 & 64 (commenting on the limits of Title VII's protection).

102. *See* A. CAHN, *supra* note 4, at xiv-xxxii (introduction by Joan Huber arguing that technological changes have made it possible for society to accept women as part of the work force).

103. *Id.* at 21 (describing the pervasive impact of female stereotypes portrayed by the media).

104. *See* Gold, *supra* note 7, at 618 (insisting that women need money as much as men do).

105. A. CAHN, *supra* note 4, at 61 (contrasts Title VII's theory with reality).

106. *See* 29 C.F.R. § 1604.9(e) (1984) (EEOC regulation states that the cost of providing benefits is no defense to a change of sex discrimination).

Norris also will affect the insurance industry.[107] *Norris* is a setback for insurance companies dealing with employers. The Court shows little deference toward traditional insurance company practices and in effect encourages employers to refuse to do business with companies failing to use unisex tables.[108] *Norris* insists that the long-term social benefits resulting from integral and equal employment practices outweigh the inconvenience and disruption that insurance companies will experience.[109]

The role of subsidization is critical in examining the effect of the Court's attitude toward the insurance industry. Insurance companies argue that the use of unisex mortality tables is actually male subsidization of female workers:[110] men and women will pay the same prices, but women as a group will receive more.[111] One challenge to this argu-

107 At least one insurer with nearly one million annuity owners has already switched to a gender neutral method of payment computation. *See* Teachers Insurance and Annuity Association/College Retirement Equities Fund (TIAA/CREF), Press Release (Oct. 9, 1984) [hereinafter cited as TIAA Press Release]. After the Supreme Court declined to review a Second Circuit Court of Appeals decision requiring the insurer to stop using sex-based mortality tables to determine "annuity benefits for persons retiring after May 1, 1980," Spirt v. Teachers Ins. & Annuity Ass'n, 735 F.2d 23, 25 (2d Cir. 1984), the insurer (TIAA/CREF) switched to unisex mortality tables. TIAA Press Release, *supra*. The court of appeals concluded that *Norris* was no bar to retroactive relief to female annuitants in this instance, 735 F.2d at 27, because the switch to unisex mortality tables would impose no additional cost on the employer or insurer. *Id.* at 25. The court ruled that the likelihood that payments to male annuitants would decrease also was no bar to retroactive relief, because the male annuitants had no expectation that their payments would be any given amount after retirement. Under the annuity plan in *Spirt*, annuitants received payments based on the return of the plan's investments, rather than on the amount of the annuitant's salary before retirement. *Id.* at 27-28. In its press release, TIAA/CREF noted that the change would have "little or no effect on most people receiving annuity income under joint, or two-life, payment methods." TIAA Press Release, *supra*. Men receiving payments under a one life payment method would receive reduced benefits, while women receiving payments under the same payment method would receive increased benefits. TIAA/CREF stated that the change in benefit calculations would have "no effect on [the] financial soundness of TIAA-CREF." *Id.*

108. 103 S. Ct. at 3497.

109. *See* Note, *supra* note 39, at 650-55 (balances the overall social benefits from using unisex insurance tables against the economic costs of their use).

110. *See* Note, *Equal Protection*, *supra* note 7, at 360-61 (in discussing the male annuitant's belief that he is subsidizing women if contributions and benefits are equal, the author notes that employees should view an annuity as a monthly payment for as many months as one lives instead of as a lump sum depending on how long one lives).

111. *See* Lines, *supra* note 7, at 518 (stating that employers did not begin using sex-based tables because of a benevolent concern about the different economic situations facing men and women, but instead from a sense of equality between the sexes—that is,

ment is the recent demographic studies indicating that the relationship between sex and mortality is neither constant nor uniform.[112] A second reply is that the costs of pension or retirement funds should be spread more evenly than they presently are.[113] In *Henderson v. Oregon*,[114] the court noted that most women and men—eighty-four percent—die at the same age. Thus, if it is unfair for men to "help" women, it is also unjust for the eighty-four percent of the women who die at the same age as men do to "help" their counterparts.[115] Prior to *Norris*, insurance companies penalized all female employees and rewarded all male employees even though most women and men die at the same age. *Norris* justly requires that men and women share the cost of pensions for those women who outlive men.[116]

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that the average woman should receive the same amount in pension benefits during her lifetime as the average man).

112. *See supra* note 18.

113. *See* Gold, *supra* note 7, at 622-23. Unisex mortality tables charge all employees equal contributions at the rate set by male mortality tables and then charge the employer for any shortcomings. Gold believes that *all* employees should pay for the shortcoming in equal shares. *Id.*

114. 405 F. Supp. 1271 (D. Or. 1975).

115. *See* Gold, *supra* note 7, at 626 (arguing that the 84% of women who do not outlive men deserve as much protection as men from the cost of insuring those women who do outlive men).

116. *Id.* Gold posits that the result in *Norris* is fair because if women alone pay for the cost of payments to those 16% of women who do outlive men, the burden per person is at least twice as much as it would be if all employees were to share the cost. *Id.*