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THE EXTENSION OF TITLE VII
TO PENSION PLANS—CITY OF LOS ANGELES
DEPT. OF WATER AND POWER V. MANHART

It is an unlawful employment practice to discriminate against any individual with respect to employment benefits because of his or her sex.\(^1\) A particular problem arises, however, when it is unclear whether the discrimination is based on sex per se or on a sex unique\(^2\) characteristic.

Traditionally, claims of discrimination based on sex have been brought under the equal protection clause of the fourteenth amendment.\(^3\) Yet, in 1974, the Supreme Court limited the scope of such claims in *Geduldig v. Aiello*,\(^4\) when it held that a state disability plan which excluded pregnancy related disabilities was not an unlawful denial of equal protection. In response to limitations on fourteenth amendment claims, plaintiffs began to seek redress from unlawful employment discrimination under Title VII of the Civil Rights Act of 1964.\(^5\) Title VII is advantageous because it clearly articulates the standards used to evaluate employment practices as well as provides a statutory basis for awarding retroactive relief.\(^6\) Recently, how-

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   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. . . .


2. A sex unique characteristic is one which is particular to one sex and not the other. The ability to bear children and the fact that women as a group live longer than men are examples of such characteristics.

3. U.S. CONST. amend. XIV, § 1 provides:
   
   No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

   See, e.g., Kahn v. Shevin, 416 U.S. 351 (1974) (classification "widow" had a fair and substantial relation to the object of the Florida property tax exemption legislation); Reed v. Reed, 404 U.S. 71 (1971) (Fourteenth Amendment mandates that a classification based on sex must rest on a fair and substantial relation to the legislation). See also Frontiero v. Richardson, 411 U.S. 677 (1973) (statutory scheme which acted to discriminate against females and which was predicated upon administrative efficiency violates the due process clause of the fifth amendment).


5. See International Bd. of Teamsters v. United States, 431 U.S. 324, 349 (1977) (holding that seniority system perpetuating effects of past racial and ethnic discrimination was a *prima facie* violation of Title VII); Albemarle Paper Co. v. Moody, 422 U.S. 405, 436 (1975) (holding that once employer proves that preemployment tests were job related, complainant must show that other tests would better perform this function in order to present evidence that employer was using the tests as a pretext for discrimination); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that pre-employment intelligence test was discriminatory in operation).

6. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). *Albemarle* involved a class action on the part of black employees against their employer for discrimination with respect to the
ever, the Supreme Court limited the use of Title VII with respect to sex discrimination. For example, the Court held in General Electric Company v. Gilbert that exclusion of pregnancy from a disability benefits plan did not violate the statute. Although plaintiffs continue to bring claims of sex discrimination under Title VII, factually similar cases must be carefully distinguished from Gilbert in order to prove that such discrimination does indeed exist.

The most recent Supreme Court decision regarding employment discrimination under Title VII is City of Los Angeles Department of Water & Power v. Manhart. As in Geduldig and Gilbert, Manhart involves differentials in benefits based on a sex unique characteristic. For the first time, however, the Supreme Court dealt with the issue of whether an employer can lawfully charge individual women more for benefits because women as a class live longer than men. Significantly, the Court decided that a factor which is true for women as a group, but that cannot be individually measured, cannot be used to differentiate between men and women in terms of employment benefits. In doing so, it introduced a new test for sex discrimination, and left the precedential value of previous case law questionable. In addition, the decision in Manhart extends Title VII employment limitations to certain kinds of employee pension plans.

This Note will first analyze the Court's decision and discuss the impact on future Title VII claims with respect to the Equal Pay Act. It will then examine the legal standards to be used in measuring sex discrimination and explore the availability of retroactive relief. Lastly, it will further discuss the impact of both the decision and proposed Labor Department regulations on the insurance industry.

plant's seniority system and its program of employment testing. The Supreme Court held that where an employee has been deprived of certain employment opportunities because an employer has unlawfully discriminated against him, back pay should be denied only for reasons that do not frustrate the statutory purpose of Title VII. Id. at 422-23.

7. General Electric Co. v. Gilbert, 429 U.S. 125 (1976). See also Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). In Nashville, the Supreme Court held that the employer's policy of denying accumulated seniority to female employees returning from pregnancy leave constituted an unlawful employment practice, but the policy of not awarding sick leave pay to pregnant employees did not violate Title VII without showing that the practice was a mere pretext designed to effect invidious discrimination against members of one sex.


9. Id. at 1373-74. Sex based mortality tables, which are derived from actual mortality figures, demonstrate that the average woman lives approximately five years longer than the average man. See Treas. Reg. § 1.72-9 (1960) (value of joint and survivor annuity for man of 65 is same as value for woman of 70). Life expectancy tables of the National Center for Health Statistics, United States Department of Health, Education, and Welfare show that at 60 years of age women are expected to live 4.8 years longer than men. AMERICAN COUNCIL ON LIFE INSURANCE FACT BOOK 90 (1976).
The Los Angeles Department of Water and Power required female employees to make larger monthly contributions than male employees to its pension fund, based upon the fact that women as a class live longer than men. Because pension contributions were withheld from paychecks, female employees took home less pay than male employees earning the same salary. Upon retirement, men and women of the same age, seniority and salary received equal monthly benefits, despite the disparity in contribution rates.

In 1973, the female employees, on behalf of a class of women employed or formerly employed by the Department, brought suit to remedy this disparity. The district court, in granting the plaintiff’s summary judgment, held that the contribution differential violated section 703(a)(1) of Title VII, and ordered all excess contributions made by the affected employees to be refunded. The Ninth Circuit affirmed. In a majority opinion written by Justice Stevens, the Supreme Court affirmed the lower court’s decision that the contribution differential violated section 703(a)(1), but vacated the judgment of the court of appeals awarding retroactive relief.

The Department’s position was that the difference in take-home pay was offset by the difference in the value of the benefits ultimately received. Basing the contribution rule on a study of mortality tables and its own experience, the Department estimated that its 2,000 female employees would, on the average, live a few years longer than its 10,000 male employees. There-

10. Female employee contributions were 14.84% higher than the contributions of comparable male employees. 435 U.S. at 705.
11. See note 9 supra.
12. The opinion illustrates the significance of this disparity by viewing the record of one woman whose contributions to the fund amounted to $18,171.40, while a similarly situated male would have contributed only $12,843.53. 435 U.S. at 705 n.5.
13. In addition to five individual plaintiffs, respondents included the plaintiffs’ union, the International Brotherhood of Electrical Workers, Local Union No. 18.
14. While this action was pending, the California Legislature enacted a law prohibiting certain municipal agencies from requiring greater pension fund contributions from female employees than from male employees. Therefore, the Department amended its plan, effective January 1, 1975. See CAL. GOVT. CODE § 7500 (West Cum. Supp. 1977).
15. See note 1 supra.
17. Manhart v. City of Los Angeles Department of Water and Power, 553 F.2d 581 (1976). Two weeks after the decision of the court of appeals, the Supreme Court decided Gilbert. In response to a petition for rehearing, a majority of the panel concluded that its original decision did not conflict with the Gilbert decision. Id. at 592 (1977).
18. Justices Stewart, White and Powell joined in all four parts of the decision. Justice Marshall joined in all of the decision but Part IV. Chief Justice Burger, and Justices Blackmun and Rehnquist, joined in Part IV.
19. In addition to the Department itself, the petitioners included members of the Board of Commissioners of the Department and members of the plan’s Board of Administration.
fore, it reasoned, the average retired female employee would receive more benefits from the pension fund. Moreover, the Department argued, in the long run the cost of a pension for the average female would be greater than that for the average male.20

THE DECISION

In Manhart, the Supreme Court refused to apply a group stereotype, albeit an accurate stereotype,21 to individual members of that group.22 The Court acknowledged that stereotypes may be true with respect to the group in general, noting that the generalization that women as a group live longer than men is statistically valid.23 However, it also noted that there was no assurance individual women employees would actually fit the generalization, since some individual women would live longer than the average man and some would not. A problem arose therefore, because a group characteristic such as longevity cannot be predicted on an individual basis.24

Emphasizing the word “individual” in the statutory language,25 the Manhart Court construed the statute’s focus to preclude treatment of individuals as part of a group.26 Therefore, the Court found even an accurate generalization about a group was an insufficient reason for discriminating against individuals to whom the generalization did not always apply.27

20. 435 U.S. at 705. The Department argued that if females did not contribute more to the pension fund than males, in actuality, male employees would be subsidizing female employees. Id. at 708. Actually, the issue of subsidy is doubtful because, as the Court points out, the Department’s plan also provides for survivors’ benefits, id. at 709 n.14, and, since women are expected to live longer than men, whatever coverage men lose for themselves, they gain in coverage for their wives.
21. See note 9 supra.
22. 435 U.S. at 708. The language of the opinion indicates that by stereotype the Court means a generalization that has been applied to women as a class. Id. at 707.
23. See note 9 supra.
24. 435 U.S. at 708.
25. Id. The Court stated that the statute’s focus on the individual is unambiguous, and precludes treatment of individuals as simply components of a particular class. Id.
26. There was no reason to believe that Congress meant discrimination to mean anything different in insurance capacity. Id. at 710. Although the Court did deal with the impact of awarding backpay, it made little reference to the impact the decision itself would have on the insurance industry. See notes 89-111 and accompanying text infra.
27. 435 U.S. at 708. The idea that attributing group statistics to individuals in itself is unlawful is not new. In Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975), the Court concluded that under the equal protection clause, even assumptions borne out by statistics cannot justifiably be used as a basis for classification. In Weinberger, a widower sued for survivor social security benefits, trying to overcome the assumption that men rather than women generally support the family. See COMMENT, Title VII Ban on Sex Discrimination Extended to Use of Sex Segregated Mortality Tables for Determining Employee Contributions to Pension Plan, 12 SUF-FOLK L. REV. 156 (1978); COMMENT, Title VII—Employee Retirement Plans—Unequal Contribution Requirements as Constituting Unlawful Discrimination on the Basis of Sex, 11 LOY. L.A. L. REV. 223 (1977).
The Court realized that the life expectancy of any individual is based upon a number of factors, sex being only one of them. Because the Department stated that it relied on longevity rather than sex as the basis for its contribution rates, it contended that the practice qualified as an exception to the Equal Pay Act. This Act requires employers to pay members of both sexes the same wages for equivalent work. The Court, however, made a blanket statement that this alleged exception to the Equal Pay Act did not apply, because there was no evidence to show that sex was not the only factor on which the actuarial distinction was based. In other words, the Court could find no evidence in the record that the Department used any factor other than sex in calculating the employee contribution rates.

28. Both the Massachusetts and the New York legislatures have used a similar analysis to pass laws banning life insurance rates for blacks. The higher rates had been justified by the fact that black people, as a group, do not live as long as white people. For an historical explanation of how the insurance industry has dealt with race and mortality, see generally M. JAMES, THE METROPOLITAN LIFE—A STUDY IN BUSINESS GROWTH 338-39 (1947). In 1973, the life expectancy of a white baby was 72.2 years and the life expectancy of a non-white baby was 65.9 years. See VITAL STATISTICS OF THE UNITED STATES [1973] PUBLIC HEALTH SERVICE, IIA, Table 5-3.

29. 435 U.S. at 712.

30. The Bennett amendment, which is incorporated into Title VII, states that a compensation differential based on sex would not be unlawful if it was authorized by the Equal Pay Act. 42 U.S.C. § 2000e-2(h). The Act states that employees who are of the opposite sex, but are placed in identical employment circumstances, can receive different pay only where payment is made pursuant to (a) a seniority system; (b) a merit system; (c) a system which measures earning by quantity or quality of production; or (d) a differential based on any other factor other than sex. The department argues that its pension plan is in the realm of the fourth exception. See 29 U.S.C. § 209 (1975). 435 U.S. at 712.

31. The Court rejected the Department's argument that the following dialogue between Senators Randolph and Humphrey during the Senate debates on the Civil Rights Act was persuasive evidence in showing Congressional intent regarding pension plans. The Court simply stated that the Senator's single comment could not change the effect of the language of the statute.

MR. RANDOLPH. Mr. President. I wish to ask of the Senator from Minnesota [Mr. Humphrey], who is the effective manager of the pending bill, a clarifying question on the provisions of Title VII. I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing. Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law?

MR. HUMPHREY. Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it.

110 CONG. REC. 13663-13664 (1964).

32. 435 U.S. at 712.
The Court devoted little analysis to the issue involving the Equal Pay Act. Although it mentioned that any individual's life expectancy is based on many factors, including one's sex, it did not address the question of whether sex can be considered as a relevant factor when evaluating longevity. Consequently, it is now unclear whether a pension plan basing its contributions on longevity, and considering several factors including sex, which affect longevity, would be unlawful under Title VII.

The Court in a footnote took notice of the fact that there are conflicting administrative rules regarding the "factor other than sex" exception to the Equal Pay Act. It noted that the Wage and Hour Administrator, charged with enforcing the Equal Pay Act, stated in one section of the regulation that either equal employer contributions or equal benefits would be satisfactory (this section will hereinafter be referred to as the either-or rule). At the same time, the Administrator stated in another section that a wage differential based on variances in the average costs of employing men and women was not based on a "factor other than sex" (this section will hereinafter be referred to as the difference in cost rule). The Court found that the latter statement had more "power to persuade" than the former. Case law suggests, however, that before a finding of such persuasion can be made, a court must evaluate the thoroughness evident in the agency's consideration, the validity of its reasoning and its consistency with earlier and later pronouncements. Although the Manhart Court failed to discuss these factors, it presumably used these standards when evaluating the either-or and the difference in cost rules. Accordingly, the Court's cursory review of the Wage and Hour Administrator's reasoning suggests that the either-or rule is no longer good law or needs substantial revision.

33. It appears that the Court was unwilling to evaluate the issue of longevity in general. If annuity costs were truly based upon longevity then many factors other than sex would be considered, such as health, family history and personal habits. See generally R. Retherford, The Changing Sex Differential in Mortality 71-82 (1975). Retherford deals extensively with the effect of cigarette smoking on the mortality rates of both men and women.

34. 435 U.S. at 712.
35. Id. at 714 n.26.
36. 29 C.F.R. § 800.116(d) (1978). This section will be hereinafter referred to as the either-or rule.
37. 29 C.F.R. § 800.151 (1978). This section will be hereinafter referred to as the difference in cost rule.
39. These standards were spelled out by the Court in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
40. The Court notes the Administrator's reasons for the second rule, 435 U.S. at 714 n.26.
41. The "either-or rule," 29 C.F.R. § 800.116(d) (1976) is dealt with more extensively in the "Proposed Amendment" section of this note. See notes 112-122 and accompanying text infra.
B. Retreat from Gilbert

The Manhart Court felt compelled to distinguish this decision from General Electric Company v. Gilbert. Both cases involved women being treated differently with respect to employment benefits because of a characteristic unique to women. In Gilbert, however, the Court found no Title VII violation, reasoning that excluding pregnancy coverage was merely excluding a benefit and consequently was not discriminatory against women per se. The fact that women live longer is, like pregnancy, a sex unique characteristic. Therefore, Manhart and Gilbert are to a considerable extent factually similar.

The Manhart Court distinguished Gilbert by using the Geduldig test of whether the practice divided employees into exclusively male and female groups. In Gilbert, the two groups were pregnant women and non-pregnant persons. The Court noted that the latter group was obviously not exclusively male or female and, therefore, did not meet the Geduldig test. The Manhart Court, however, held that since the pension plan required a greater contribution from an exclusively female group, and the remaining employees made up an exclusively male group, Gilbert could not be controlling.

42. 435 U.S. at 715.
44. 435 U.S. at 715. In Geduldig, the Court noted:
   The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.
45. 435 U.S. at 715. In his concurring opinion to Manhart, Justice Blackmun takes issue with the distinction the Court has made between Gilbert and Manhart. He states: "The Court's distinction between the present case and General Electric—seems to me to be just too easy. . . . For me, it does not serve to distinguish the case on any principled basis." Id. at 725. Justice Blackmun also points out that Justice Stevens, in his dissent in Gilbert, strongly protected the very distinction he makes in the Manhart opinion.
   It is not accurate to describe the program as dividing 'potential recipients into two groups—pregnant women and non-pregnant persons,' . . . The classification is between persons who face a risk of pregnancy and those who do not.
429 U.S. at 161-62 n.5. The Gilbert decision itself has been sharply criticized by commentators. See Note, Sex Discrimination—Distinction Between Title VII and Equal Protection, 31 Rutgers L. Rev. 91 (1978) (Gilbert limits Title VII contrary to Congressional intent; moreover the EEOC guidelines are the best solution to the pregnancy issue); Note, Discrimination Under Title VII of the Civil Rights Act of 1964, 13 Wake Forest L. Rev. 813 (1977) (Gilbert should be interpreted very narrowly and will not extend beyond the specific fact situation. Equalization of employment will continue to be the purpose of Title VII.); Note, Pregnancy Disability Benefits, 91 Harv. L. Rev. 341 (1977) (criticized Rehnquist's analysis and sets forth three methods for assessing the impact of a disability plan).
Justice Blackmun, in his concurring opinion in *Manhart*, noted that the rationale behind the *Manhart* decision differed from that of *Gilbert* which made recognition of the *Gilbert* precedent questionable. Also, Congress recently passed legislation which effectively overruled *Gilbert* by requiring the term "because of sex" to include pregnancy for all employment related purposes. Thus, *Manhart* and this new law have in effect nullified the substantive precedent of *Gilbert*. The standards set forth in *Gilbert* to be used in evaluating Title VII claims, however, are still relevant.

The standard used by the *Manhart* Court to distinguish *Gilbert*, moreover, can still be applied in the future to factually similar Title VII claims. The *Manhart* Court implied that all that is necessary to distinguish a discriminatory practice involving a sex unique characteristic from a non-discriminatory practice is a finding that the practice divides employees into exclusively male and female groups. If this is the standard to be used in distinguishing future Title VII claims, then any practice which conceivably could involve a group that includes both sexes would likely not be considered discriminatory.

C. A New Test for Sex Discrimination

The correct standard to be used in deciding whether a particular practice constitutes sex discrimination is not clear. In *Griggs v. Duke Power Company*, a landmark Title VII case, the Court emphasized that Congress

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46. 435 U.S. at 725. Justice Blackmun challenges the Court to "meet the posture of the earlier cases head-on and not by thin rationalization that seeks to distinguish but fails in its quest. Id." 47. Pub. L. No. 95-555 (10/31/78) [hereinafter cited as S.995] states in part:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs. . . .

The Senate report accompanying the proposed legislation declared that the purpose of the bill is to make clear that discrimination based on pregnancy is indeed discrimination based on sex. The Committee introducing the bill adopted Justice Brennan's and Justice Stevens' dissents in *Gilbert* and noted that the two dissenting opinions correctly "expressed the principle and meaning of Title VII." S. Rep. No. 331, 95th Cong., 1st Sess. 2 (1977).

48. At least one court has decided a case on grounds similar to *Manhart* and inconsistent with *Gilbert*. In Henderson v. Oregon, 405 F. Supp. 1271 (1975), employees challenged the state's use of two sets of life expectancy tables, one for men and one for women, in calculating annuity benefits for retired state employees. The court found that the practice violated Title VII. In deciding the question of whether to compare the benefits men and women receive as a class or to compare benefits of individuals, the court found the analysis of the court of appeals in *Manhart* persuasive. The court agreed with the reasoning and the result in *Manhart*, and found them applicable to this case. Id. at 1274-75.

49. See Note, *Nashville Gas Co. v. Satty: The Demise of the Discriminatory Effect Test*, 27 DePaul L. Rev. 1301 (1978) (analyzes the basis for the Nashville decision with respect to tests used in previous Title VII claims.)

intended the Civil Rights Act to focus on the consequences of employment practices, rather than on the motivation behind such practices. The Court affirmed this discriminatory effect standard in recent decisions, finding employment practices to be unlawful whenever as a consequence of the practice at issue unfair discrimination has resulted. Although these cases involved claims under the same section of Title VII, the implication of the Court’s language regarding both Title VII and the Civil Rights Act in general is that this standard is applicable to all discriminatory practice claims.

In *Gilbert*, the Court introduced an alternative standard to be used in claims brought under section 703(a)(1) of the Civil Rights Act. This standard adopted the equal protection approach, requiring the employee to show that an employment practice was a "pretext designed to effectuate invidious discrimination." However, the language of both the plurality and concurring opinions in *Gilbert* suggested that the "pretext" test was not the only test to be used. Consequently, the discriminatory effect test remained as a valid alternative.

More recently, in *Nashville Gas Company v. Satty*, the Supreme Court used the discriminatory effect test to find an employee seniority system violative of Title VII. In the second part of its opinion, the Court required an employee sick leave plan to meet a "pretext" standard. To confuse matters further, the Court phrased the test with the words "only if" a pre-

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52. § 703(a)(2) provides:
   It shall be an unlawful employment practice for an employer … to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


55. Justice Rehnquist, in his plurality opinion in *Gilbert*, stated that past Supreme Court cases have recognized that a prima facie violation of Title VII can be established in some circumstances upon proof that the effect of an otherwise facially neutral plan … is to discriminate. General Electric Co. v. Gilbert, 429 U.S. at 136-37. Justice Stewart in his concurring opinion stated that he did not understand the *Gilbert* opinion to change the significance of proving a discriminatory effect in a Title VII case. *Id.* at 146 (Stewart, J., concurring).

56. Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). In *Nashville*, employees challenged employer’s practice of denying accumulated seniority to female employees returning from pregnancy leave. Employees also challenged exclusion of pregnancy-related absences from a sick leave plan and argued that since the employer’s seniority plan violated Title VII, this itself is sufficient evidence to demonstrate that the exclusion of pregnancy from the sick leave plan meets the "mere pretext" test. *Id.* at 144.

57. *Id.*
text designed to effectuate invidious discrimination is found. The words "only if" imply that every claim under section 703(a)(1) must meet this standard.

Manhart does little to clarify what standards or tests should be used in evaluating employment practices in terms of Title VII. The majority did not apply either the discriminatory effect test or the pretext test to the section 703(a)(1) claim. After analyzing the pension fund contribution system in light of both the purpose of the statute and the stereotype imposed on the women employees, the Court simply concluded that the employer's practice violated Title VII. Then, it surreptitiously introduced a new test. Such a practice, the majority stated, did not pass the test of whether the practice involved "treatment of a person in a manner which but for the person's sex would be different." It is impossible to tell from the Court's brief mention of the but for test whether this was intended to be a new standard by which to measure all or some claims of discrimination raised under Title VII. Furthermore, it is not clear whether the standard applies only as a prima facie test or as a general standard of review for all claims of employment discrimination. Finally, the unclear status of the tests used in the previous Title VII cases leaves the law in this area in a state of uncertainty.

D. Denial of Retroactive Relief

Although it recognized both the presumption toward back pay and the district court's ability to award this relief, the Supreme Court reversed the award of such retroactive relief in Manhart. The Court offered two main reasons for this decision. First, it recognized that a conscientious administrator of the pension fund may have assumed that the Department's plan was

58. Here the court stated that: "Only if a plaintiff through the presentation of other evidence can demonstrate that exclusion of pregnancy from the compensated conditions is a mere pretext designed to effect an invidious discrimination against the members of one sex or the other does Title VII apply." 434 U.S. at 144.
59. 435 U.S. at 711.
60. Id. (emphasis added) Justice Stevens has taken this "but for" test from his own dissenting opinion from a 1971 Seventh Circuit case. See Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1205 (7th Cir. 1971) (Stevens, J., dissenting). In Sprogis, the plaintiff claimed that employer's "no marriage" rule discriminated on basis of sex?
62. 435 U.S. at 719. Title VII states that a court that finds unlawful discrimination: "May enjoin (the discrimination) and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g) (1964 & Supp. IV 1974).
lawful, because the courts had not ruled previously on the question, and the relevant administrative agencies had conflicting views.64 Second, the Court felt that, because changes in the rules affecting insurance and pension plans often have a great impact on the economy, to add the additional burden of retroactive liability could be both devastating to the fund in question and harmful to the nation generally.65

The Court reasoned that the Department’s failure to change the unlawful practice more quickly is justified by the confusion which resulted from the varied opinions of several administrative agencies.66 As was noted previously, the Wage and Hour Administrator has issued conflicting rules on the subject.67 The Equal Employment Opportunity Commission (EEOC), however, simply requires the benefits received to be equal benefits.68 Two other agencies with responsibility for equal opportunity in employment, the Office of Federal Contract Compliance and the Department of Health, Education and Welfare (HEW), adhered to the Wage and Hour Administrator’s position.69 There was no question, therefore, that the law in this area needed clarification.70

The Court’s approach focused on the employer and whether back pay was necessary as a vindictive measure. It stated: “[t]here is no reason to believe that the threat of a back pay award is needed to cause other administrators to amend their practices to conform to this decision.” 71 Yet, the central purpose of Title VII is “making persons whole for injuries suffered through past discrimination.” 72 Furthermore, the Court previously held that the good faith of the employer is not a defense to Title VII or a reason to excuse the employer from being accountable for past wrongs.73 Indeed, the pur-

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64. 435 U.S. at 720 n.37.
65. 435 U.S. at 721-23.
66. According to the district court, the department was put on notice of unlawful practices in 1972 when the E.E.O.C. issued an interpretation casting doubt on some varieties of pension fund discrimination. See 37 Fed. Reg. 6835-37 (1972). Therefore, in determining the amount of back pay, the district court held the Department responsible beginning April 5, 1972. 387 F. Supp. 980 (1975).
67. See notes 35-41 and accompanying text supra.
68. 29 C.F.R. § 1604.9 (e) & (f) (1976).
69. 41 C.F.R. § 60.20.3(c) Office of Federal Contract Compliance; 45 C.F.R § 86.56(b)(2) (1976) Health, Education, and Welfare.
70. Although it is certain that the law was in need of clarification, the Supreme Court decided to excuse the Department from paying back pay, without knowing whether the Department made an effort to find out whether or not its plan was legal. 435 U.S. at 730 (Marshall, J., dissenting).
71. 435 U.S. at 720-21.
72. Albemarle Paper Co. v. Moody, 422 U.S. at 421.
73. Id. at 422. Other courts have awarded back pay under Title VII. See Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006-7 (9th Cir. 1972) (female employee was entitled to receive back pay for extra hour per day which male employees but not female employees were permitted to work. Back pay began from the date of the district court decision invalidating state maximum hours law. The court used a balancing test: the merit of the plaintiff’s claim and the public policy behind it must be balanced against the hardship on a good-faith employer.) Robin-
The purpose of Title VII has never been to punish employers, and whether back pay is awarded should not depend upon the sincerity of the employer, but on the injury of the employee. By focusing on the employer's good faith, however, the Manhart Court failed to award each employee the salary she lost as a result of an unlawful employment practice. In order to make each employee "whole" from past discrimination, retroactive relief in the form of back pay should have been awarded.74

The Court's second major reason for denying back pay was the impact that changing the law concerning pension plans will have on the economy.75 There is no doubt that the impact of the Manhart decision on pension plans will be great,76 and that in some cases retroactive liability could have a drastic effect on a pension fund.77 The language of the Court to an extent implies that awarding relief in this particular situation could be devastating to all pension funds in the industry.78 The statute, however, clearly states that a back pay award may be granted when appropriate.79 Since the Court has a decision to make in each particular set of circumstances, every pension fund will not suffer as a result of an award in any particular case.80 Perhaps most

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74. The framers of Title VII stated that they were using § 10(c) of the NLRA as a model. 49 Stat. 454, as amended, 29 U.S.C. § 160(c) (1964). 110 Cong. Rec. 6549 (1964) (remarks of Senator Humphrey). Section 10(c) provides that when the Labor Board has found an unfair labor practice, it shall issue an order requiring the employer to reinstate the employees with or without back pay. In earlier versions of the Title VII provision on remedies, it was stated that a court "may" issue injunctions, but "shall" order appropriate affirmative action. This section was removed by Substitute Amendment No. 656, 110 Cong. Rec. 12814, 12819 (1964). The framers regarded this as merely a "minor language change," id. at 12723-12724 (remarks of Senator Humphrey). The Court in Albemarle stated that they could find no legislative intent to retreat from the NLRA model or to denigrate in any way the status of back pay relief. 422 U.S. at 419 n.11. Furthermore, in passing the Equal Employment Opportunity Act of 1972, Congress considered several bills to limit the judicial power to award back pay. These limiting efforts were rejected. 118 Cong. Rec. 7168 (1972).

75. 453 U.S. at 721.
76. See notes 89-111 and accompanying text infra.
77. 453 U.S. at 721.
78. Id. at 721-23.
80. Justice Marshall in his dissenting opinion stated: "If a 'devastating' award were made in some future case, this Court would have ample opportunity to strike it down at that time." 453 U.S. at 731-32. (Marshall, J., dissenting).
important is the fact that nowhere in its briefs did the Department assert that economic devastation would indeed result if it were required to comply with a back pay award. The Department presented no evidence that the relatively small award\(^{81}\) would in any way be devastating. Without such evidence,\(^{82}\) the Court based its decision to deny back pay relief on an unsupported rationale.

Finally, in his dissenting opinion,\(^{83}\) Justice Marshall suggested that the Supreme Court improperly reversed the district court’s finding. The Court stated that it overturned the district court’s opinion because the lower court gave *insufficient attention*\(^ {84}\) to the nature of remedies under Title VII. Justice Marshall points out that while the proper test to be used in reversing a district court opinion is the “clearly erroneous” standard,\(^ {85}\) the Court based its ruling on “insufficient attention.” Furthermore, the Court did not follow its own reasoning in *Albemarle Paper Company v. Moody*, in which it found that the task of finding facts and applying the law is best left to the district court.\(^ {86}\)

*Albemarle* and *Manhart* are contradictory holdings. In *Albemarle*, the Supreme Court stated that a “clearly erroneous” test should be used to determine whether the district court erred in denying back pay, but in *Manhart* the Court simply reversed the district court’s award based upon a standard of “insufficient attention.” Not only did the Court not distinguish *Manhart* from *Albemarle*, but it made a point of stating that *Albemarle* is still a good precedent.\(^ {87}\) Consequently, it will be difficult for lower courts to determine when back pay is appropriate and under what circumstances a district court opinion regarding back pay may be overruled.\(^ {88}\)

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\(^{81}\) The amount involved in 15% of the contributions made by a minority (2,000 female as opposed to 10,000 male employees) of the Department’s employees for a 33 month period. 553 F.2d at 592. *See also* Monell v. Dept. of Social Services, 98 S.Ct. 2018 (1978) (landmark Supreme Court decision where the Court overruled Monroe v. Pape, 365 U.S. 167 (1961)), in holding that local government officials and/or local independent school boards are “persons” within the meaning of 42 U.S.C. § 1983 when equitable relief is sought against them in their official capacities. The Court awarded back pay in this situation despite the well-known financial status of the City of New York. Monroe held that municipal corporations were not within the purview of § 1983.

\(^{82}\) In its petition for certiorari, the Department itself contemplated that the money for the award would come from city revenues, Petitioner’s Brief for certiorari at 30-31. The Department therefore would pay for this Title VII award in the same way that it would have to pay any ordinary back pay award arising from discriminatory practices.

\(^{83}\) 453 U.S. at 728 (Marshall, J., dissenting).

\(^{84}\) 453 U.S. at 719 (emphasis added).

\(^{85}\) The source of the “clearly erroneous” rule is *Fed. R. Civ. P.* 52(a). In *Albemarle Paper Co. v. Moody*, 422 U.S. at 424, the Court applies the rule to Title VII.

\(^{86}\) *Id.* at 415-18.

\(^{87}\) 453 U.S. at 723.

\(^{88}\) For example: after *Manhart* it is questionable whether back pay should be granted only when the decision will have little or no effect on the economy. Furthermore, it is questionable whether back pay should be granted only when the administrative guidelines were perfectly
IMPACT

A. Legal Impact

The legal impact of Manhart is great, particularly with respect to the related issues the Court did not deal with. The Court's holding that an individual woman cannot be penalized because women as a group live longer than men, indicates that the Court supports a strong presumption toward fairness to the individual under Title VII. It would seem to follow that in the future, when a group characteristic cannot be predicted on an individual basis, Title VII will be interpreted in favor of the individual. The decision leaves open the question of whether sex can ever be used as a factor in determining longevity for employment benefits purposes. Future claims in which employees had made unequal contributions based on differences in longevity, where the longevity determination was based upon several factors including sex, may or may not result in a Title VII violation.

Although Gilbert has been overruled by legislation, the standard the Court used to distinguish Manhart from Gilbert likewise will have an impact on future claims. It appears possible that factually similar circumstances could give rise to a Title VII violation if the groups involved are made up of men or women exclusively. Furthermore, it is unclear what test will be used to evaluate claims of employment discrimination. While both the "discriminatory effect" test and the "mere pretext" test are still viable, Justice Stevens has introduced a "but for" test as well. Thus, the Court has not conclusively determined which, if any, of these tests will be used as standards in deciding future Title VII claims.

Finally, by refusing to award retroactive relief, the Court has limited the statutory presumption in favor of such relief. It is quite possible that it will be more difficult for claimants to receive a retroactive award despite the fact that the stated purpose of Title VII is to make employees whole. Moreover, it appears that the Court has established a kind of balancing test, where a significant impact on the industry involved could be found to outweigh the plaintiffs' rightful claim to retroactive relief. Whether this test will be used in future claims remains to be seen.

B. Impact on the Insurance Industry

In order to fully understand the impact of the Manhart decision on the pension plan industry, it is important to understand the distinctions between types of pension plans. Pension plans can be divided into two main types: 1)
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defined benefit plans; and 2) defined contribution plans. The two types of plans are very different in design, philosophy and the manner in which they take into account a person's sex.

The more traditional plan is the defined benefit plan, in which a defined amount of monthly pension is received by each employee upon retirement. Providing an appropriate monthly benefit to the individual is the employer's objective. The amount of benefit is usually formulated in view of the employee's salary and years of service. The employer generally bears the entire cost of the plan as well as the entire risk of changes in cost. Although in some such plans, the employee contributes a specific amount of his or her salary to the pension plan fund, the entire risk is still borne by the employer. Therefore, equal cost per employee is not an objective of this type of plan, because it will cost the employer different amounts to provide a pension for different employees.

A plan in which the employer allocates a fixed contribution to an individual account for each employee's benefit is called a defined contribution plan. The amount of contribution is generally based upon a percentage of salary, independent of age and sex. The employee bears the risks in changes in costs and benefits under this type of plan. The fund is usually invested by the employer, and the return on that investment will determine the amount of individual benefits. At the time of retirement, benefits are distributed to employees either in a lump sum or, if the employee so elects, the amount of benefits may be used to purchase an annuity. If an annuity is purchased from a financial institution (usually an insurance company), the age and sex of the employee will affect the amount of monthly payment because Title VII does not require such institutions to eliminate these factors in determining rates. Title VII can only require employers to treat the sexes equally.

The Los Angeles Department of Water and Power provided a defined benefit plan for its employees. The Department's plan was somewhat un-
usual though, in that it required a contribution from each employee.\textsuperscript{97} If construed narrowly, the \textit{Manhart} rule only applies to the small group of defined benefit plans which require employee contributions and require a greater contribution from women than from men with comparable salaries. These plans are now required to be amended in such a way that men and women with the same salaries contribute equal amounts.\textsuperscript{98} Most commentators feel that initially the \textit{Manhart} rule will directly affect very few plans, because at least in the private sector there are few plans which operate in this manner.\textsuperscript{99} It is possible, however, that some government plans will have to be adjusted.\textsuperscript{100}

If the \textit{Manhart} decision is construed to prohibit sex differentials in any pension plans, then many other adjustments will have to be made. Under defined contribution plans, employees may elect either to receive their share of the fund in a lump sum or to apply their account balance to purchase annuities. Since annuities with equal rates for both sexes do not currently exist in the market,\textsuperscript{101} and if unequal monthly annuity payments are no longer permitted, it is possible that employers will eliminate the annuity option completely and force employees to take lump sum payments.\textsuperscript{102} Thus, employees would be deprived of any choice in this regard.

Changes in defined benefit plans would be less dramatic. In order to eliminate all sex differentials in defined benefit plans, unisex actuary tables must be used to determine equivalent amounts of contribution.\textsuperscript{103} A number of such plans have voluntarily adopted unisex tables, and the transition can be a fairly easy one within the appropriate amount of time.\textsuperscript{104} The question then becomes: should the \textit{Manhart} case serve as notice to administrators of pension funds to begin instituting these changes?


\textsuperscript{99} \textit{See note} 97 \textit{supra}.


\textsuperscript{101} Title VII has no effect on sex discrimination in pension plans or insurance policies purchased commercially. Title VII only mandates the relationship between employees and employers. Therefore, the \textit{Manhart} decision only requires changes in pension plans that are part of employment benefits.

\textsuperscript{102} Grubbs, \textit{supra} note 89, at 7.

\textsuperscript{103} As one article pointed out:

The only risk free policy for plan administrators is to eliminate use of gender based actuarial tables for all purposes other than cost calculations, while raising the level of payment of accrued benefits to the level of the previously favored sex. However, it is too early to conclude that this course of conduct is an absolute requirement of the law.


\textsuperscript{104} Grubbs, \textit{supra} note 89, at 7.
In assessing just how far the Manhart decision reaches, it is important to consider certain aspects of the pension industry that are not discussed in the Manhart opinion. The Court noted that the employer contributed an amount equal to 110% of all employee contributions.105 This means that employer contributions for female employees were greater than those for male employees.106 Yet, the Court did not hold this practice to be unlawful under Title VII. Therefore, it is possible that the law will allow employers to make unequal contributions as long as they result in equal benefits.107 Furthermore, the Court stated 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 individual, upon retirement, purchase the largest benefit which his or her accumulated contributions could command on the open market,108 a common practice in defined contribution plans.

The alternative, of course, is for employers to purchase annuities for their employees and absorb the expense of providing equal benefits.109 If employers choose not to absorb this expense, then they may be forced to act as the Court seems to suggest and will simply send their employees out to purchase their own annuities. As a result, employees will meet the same sex discrimination in the open market as they did in their jobs.110 Consequently, without parallel legislation which calls for similar changes in pension plans between employees and/or employers and institutional third parties, the Manhart decision will do little to remove sex discrimination in pension plans. Employers who do not wish to provide equal benefits will be able to simply force employees to purchase unequal benefits on the open market.111

105. 453 U.S. at 705 n.4.
106. See note 96 supra.
107. See notes 35-41 and accompanying text supra.
108. 453 U.S. at 717.
109. Since insurance companies are not required to equalize prices for annuities for men and women, employers will be required to spend more for annuities for female employees than for male employees. Because Manhart holds that employers cannot require female employees to contribute more than males, the added cost must be absorbed by the employer.
110. See note 101 supra.
111. A very broad extension of Manhart, into the life insurance area, would potentially limit sex discrimination toward males. Most life insurance policies are more expensive for males than for females, since men as a group have a shorter life span, they will pay fewer premiums. A logical but far-reaching, extension of Manhart, might be that requiring male employees to pay more than female employees for an employer sponsored life insurance policy that is worth the same amount to all employees, is unlawful under Title VII. Few commentators have dealt with this, however, because the area of life insurance is vastly different from the area of pension plans.
The principles of ‘Manhart’ have already been extended by the Department of Labor in a proposed amendment to the interpretive bulletin of the Equal Pay Act.\textsuperscript{112} The interpretive bulletin presently provides that the Equal Pay Act is not violated where the plan provides \textit{either} equal benefits to both men and women \textit{or} when both men and women and/or the employer make equal contributions.\textsuperscript{113} The Administrator has proposed that this interpretation be replaced with one that clearly states that employee benefits are “wages” within the meaning of the Equal Pay Act and a differential in benefits based upon sex does not comply with the Act, regardless of whether the employer has made equal contributions. In addition, the amendment incorporates the ‘Manhart’ holding that employees of one sex cannot be required to make greater contributions from their wages in order to receive equal benefits.\textsuperscript{114}

\begin{itemize}
\item \textsuperscript{112} Proposed Regulations by the Labor Department Wage and Hour Division and Office of Federal Contract Compliance on Equal Benefits for Men and Women. 43 Fed. Reg. 38029, 38057 (Aug. 25, 1978) (to be codified in 29 C.F.R. § 800.116(d) and 800.151).
\item \textsuperscript{113} Noted previously as the “either-or” rule. See notes 35-41 and accompanying text supra.
\item \textsuperscript{114} The text of the proposed amendments appears as follows:
\begin{itemize}
\item § 800.116(d) Equality and inequality of pay in particular situations: (d) Employee benefits. Employee benefits are “wages” within the meaning of the act. A differential in benefits based upon differences between the cost to the employer of providing benefits to women as a group and the cost of providing benefits to men as a group does not qualify as a differential based on a “factor other than sex” within the meaning of section 6(d)(1)(iv) of the act. Such a differential therefore violates the equal pay requirements of the act. Similarly, the act is violated if employees of one sex are required to make greater contributions from their wages than are employees of the opposite sex in order to receive equal benefits. Los Angeles Dept. of Water & Power v. Manhart, 46 U.S.L.W. 4347 (April 25, 1978). See also § 800.151 of this chapter. . . .
\end{itemize}
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It is further proposed to amend 29 C.F.R. § 800.110 as follows:

\begin{itemize}
\item § 800.110 Meaning of “wages”
Wages paid to an employee generally includes all payments made to or on behalf of the employee as remuneration for employment. The term “wages” used in section 6(d)(1) of the act (the purpose of which is to assure men and women equal remuneration for equal work) will therefore include payments which may not be counted under section 3(m) of the act toward the minimum wage (the purpose of which is to assure employees a minimum amount of remuneration unconditionally available in cash or in board, lodging or similar facilities). Similarly, the provisions of section 7(e) of the act under which some such payments may be excluded in computing an employee’s “regular rate” of pay for purposes of section 7 do not authorize the exclusion of any such remuneration from the “wages” of an employee in applying section 6(d) of the act. Thus, vacation and holiday pay, and premium payments for work on Saturdays, Sundays, holidays, regular days of rest, or other days or hours in excess or outside of the employee’s regular days or hours of work are remuneration for employment and therefore wage payments that must be considered in applying the equal pay provisions of the act, even though not a part of the employee’s “regular rate.” On the other hand, payments made by an employer to an employee which do not constitute remuneration for employment are not “wages” to be compared for equal pay purposes under section 6(d) of the act. Examples are such
The Department of Labor has used Manhart as a basis for ending the confusion over the either-or rule, finally declaring it an incorrect interpretation of the Equal Pay Act. In amending its regulations, the Department of Labor agreed with the Supreme Court's comment that the difference in cost rule was more persuasive. The major reason given by the Department of Labor for the amendment was that the either-or rule ignored the basic premise that the Equal Pay Act requires workers to receive equal "wages" for equal work. Therefore, the Department reasoned that if employer contributions were wages, they should be equal; if employee benefits were wages, they too should be equal; and if both were wages, both should be equal. Thus, it determined that a rule which states that, if one is equal the other need not be, contradicts the basic requirement of the Equal Pay Act.

If the proposed amendment is made final, all employers will be required to amend employee pension plans to comply with the new equal benefit rule. Whereas the Manhart decision, if construed narrowly, only applies to a small number of existing plans, the proposed Department of Labor amendment will extend the basic principles of Manhart to all employer pension plans. The equal benefits rule, however, is still limited to employer/employee arrangements and has no effect on pension plans which are purchased by employees from third parties. If employers find that it is too expensive to provide equal benefits, they may simply elect to give the employees their accrued balance as a retirement benefit and allow them to purchase their own benefit plan. Consequently, males and females of the same age and salary will receive equal funds from their employers at retirement, but because Manhart will not apply they will not be able to purchase equal retirement plans from insurance companies.
CONCLUSION

Although the *Manhart* opinion upholds a continuing presumption of fairness to the individual under Title VII, the status of sex as a factor in determining longevity is still unclear. Neither has the Court eliminated any of the confusion caused by previous decisions dealing with the appropriate standard to be used in measuring sex discrimination in employment practices. Further, the presumption toward retroactive relief under Title VII has seemingly been weakened in situations where the decision may have a significant impact on the industry involved. Finally, without parallel legislation that extends to pension plans which employers and employees purchase from insurance companies, neither the *Manhart* holding nor the proposed Department of Labor amendments will completely erase the unequal treatment of the sexes in this area.

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