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I. INTRODUCTION

An employer who maintains a retirement fund for the benefit of his employees must face, in one way or another, the problem of paying the cost of retirement benefits. Such benefits are typically paid in equal monthly installments until the retiree dies.[1] In the past, many employers were content to make these payments from current revenues. Other employers, more concerned about the welfare of their employees after the business closed, created trust funds to meet retirement costs; they retained actuaries, who predicted future costs and determined the amount which had to be raised and invested in order to meet those costs.

Since the Employee Retirement Income Security Act of 1974[2] has taken effect, all retirement plans must secure actuarial advice and establish funding programs to meet the cost of future retirement benefits.[3] Money for this purpose is generally raised by regular contributions to the retirement fund from two sources: the employer, who takes money from revenues to make "employer contributions," and the employee, who, by having money withheld from his pay check, makes "employee contributions."

Historically, retirement funds have distinguished between male and female employee-beneficiaries. This distinction is generally made either by requiring that females make higher contributions than their male counterparts,[4] in order to receive equal periodic benefits upon retirement, or by requiring that females make equal contributions,

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1. There are other options, of course. For example, a retiree may elect a joint annuity with his spouse, so that benefits (reduced to reflect two life interests) continue as long as either of the spouses is alive. Also the retirement allowance may be distributed as a single lump sum benefit when the employee retires. All such options are actuarial equivalents; that is, they result in the same cost to the retirement fund. Therefore, for purposes of this discussion, it is immaterial which option a retiree chooses.

2. 29 U.S.C. § 1001 (Supp. IV 1974) [hereinafter referred to as ERISA].

3. *See id.* §§ 1023, 1082-85.

4. "Counterparts" are a male and a female who enter the service of an employer on the same date and at the same age and have identical employment histories.

causing them to receive lower periodic benefits. The rationale for this practice is based upon separate, sex-based mortality tables which show that women outlive men, and thus women will draw benefits for a longer period of time.[5] If equal contributions were accepted from counterparts, and equal periodic benefits were paid to them, the female would receive more for her money or, expressed differently, the male would be subsidizing the cost of the female's benefits. Because of female longevity, retirement funds have been effectively split into two separate funds, one for men and another for women, with each fund being self-sustaining. If the female fund is to pay the same periodic benefits as the male fund, more must be collected in contributions from women because more will be paid out; or, if contributions to the two funds are equal, the female fund must pay out lower periodic benefits.[6] This practice reflects the belief (reminiscent of the separate-but-equal philosophy) that equal opportunities are offered only if no money contributed by or on behalf of persons of one sex is used to help pay for benefits received by persons of the other sex.[7]

Recently, this separate funding practice has come under attack. In *Manhart v. City of Los Angeles, Department of Water and Power*[8] a federal district court held that an employer and its retirement fund which paid equal periodic benefits to counterparts after retirement, but which required females to make higher contributions to the fund than

5. These tables reveal that a woman retiree who dies when the sum of the ages at death divided by the number of deaths for her sex (that is, the "average woman") is likely to be age 84, while the "average man" will be age 79. See Henderson v. Oregon, 405 F. Supp. 1271 (D. Ore. 1975).

6. To illustrate, if equal periodic benefits are $2.00 per year, funded half by employer contributions and half by employee contributions, the average woman will draw $38.00 in benefits over her 19-year life-span, while the average man will draw only $28.00 over his 14 years. The woman would be required to contribute $19.00 to the female fund during her working years, and the man would be required to contribute $14.00 to the male fund. Or, if contributions are kept equal, and the counterparts each contribute $14.00, the woman would receive $1.47 per year in benefits, and the man would receive $2.00 per year. This illustration ignores any growth in the retirement fund due to interest and appreciation of capital.

7. Because the retirement funds are not literally split in two, it may be more accurate to conceptualize the rationale for their practice as a belief that equal opportunities are offered if the average woman receives a sum of benefits which bears the same ratio to her contributions as the ratio of benefits to contributions of the average man. Using the figures in note 6 *supra*, the ratio of benefits to contributions where periodic benefits are equal is: (male) $28:$14 = 2:1 and (female) $38:$19 = 2:1; where contributions are equal, the ratio is (male and female) $28:$14 = 2:1.

8. 387 F. Supp. 980 (C.D. Cal. 1975).

males during their working years, were guilty of an unlawful employment practice under section 703(a)(1)[9] of the Civil Rights Act of 1964,[10] as amended by the Equal Employment Opportunity Act of 1972 (Title VII or the Act).[11] The court reached this conclusion on a motion for preliminary injunction brought by the plaintiffs, a class of female employees of the defendant employer; it issued the injunction[12] and subsequently granted the plaintiffs' motion for summary judgment. Similarly, in *Henderson v. Oregon*,[13] another federal district court declared that it was an unlawful employment practice for an employer's retirement fund to pay a lower monthly retirement benefit to a woman than to her male counterpart.[14] These cases, on appeal to the Court of Appeals for the Ninth Circuit, and others like them are progressing through the courts.[15] It is appropriate, therefore, to consider whether Title VII, calling for equal employment opportunities, requires that male and female counterparts make equal contributions to their retirement fund and receive equal periodic benefits from it.

The first step in the analysis will be to determine whether Title VII applies to retirement funds. The second step will be to study the reasoning of the courts which have held that the Act prohibits retirement funds from exacting higher contributions from, or paying lower periodic benefits to, a female as compared to her male counterpart. The theory of these cases is that the characteristics of a class may not be applied to individual members of the class. But this theory is unsatisfactory because it is neither supported by authorities, nor does it decide the real issues involved in the retirement fund problem. An alternative theory will be suggested, grounded on the notion of equality of employment opportunities. This theory is generally applicable to cases of sex discrimination, but its application to the

9. Section 703(a)(1) provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise 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; . . .

42 U.S.C. § 2000e-2(a)(1) (1970).

10. Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 253.

11. Act of March 24, 1972, Pub. L. No. 92-261, 86 Stat. 103.

12. 387 F. Supp. at 984.

13. 405 F. Supp. 1271 (D. Ore. 1975).

14. *Id.* at 1275.

15. Smith v. County of Los Angeles, # 74-253-DWW (C.D. Cal. 1974); Spirit v. Teachers Ins. & Annuity Corp., # 14-1654-RJW (S.D.N.Y. 1974); Reilly v. Robertson, # 4098 (Ind. 1974).

retirement fund context poses two questions: What is the proper definition of the employment opportunity? What is the proper class to bear the cost of that opportunity?

The third step in the analysis will be to evaluate various legal arguments which may be raised as defenses to present employment practices. The final step in the analysis will be to examine the remedies that courts have fashioned and to determine whether they have made whole the victims of unlawful retirement fund practices.

II. Does Title VII Apply to Retirement Funds?

The threshold question in the retirement fund problem is whether Title VII applies to retirement funds. Five federal circuit courts of appeals[16] and several district courts[17] have held that the Act applies to retirement funds. The earliest and most comprehensive consideration of the question appears in *Bartmess v. Drewrys, U.S.A., Inc.*[18] There the plaintiff complained that the retirement plan maintained by her employer and her union allowed men to work until age 65, but required women to retire at age 62. The defendants contended, *inter alia*,[19] that the Act does not apply to retirement funds. The court gave considerable attention to this argument, particularly because the defendants were able to cite a letter from Senator Humphrey,[20] who was a

16. Chastang v. Flynn & Emrich, 12 F.E.P. 1533 (4th Cir. 1976); Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir.), *cert. granted,* 96 S. Ct. 36 (1975); Peters v. Missouri-Pacific R.R., 483 F.2d 490 (5th Cir.), *cert. denied,* 414 U.S. 1002 (1973); Rosen v. Public Service Elec. & Gas Co., 477 F.2d 90 (3d Cir. 1973); Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), *cert. denied,* 404 U.S. 939 (1971).

17. Fitzpatrick v. Bitzer, 390 F. Supp. 278 (D. Conn. 1974), *remanded on other grounds,* 519 F.2d 559 (2d Cir. 1975), *rev'd on other grounds,* 44 U.S.L.W. 5120 (June 28, 1976); Fillinger v. Fast Ohio Gas Co., 4 FEP 73 (N.D. Ohio, 1971).

18. 444 F.2d 1186 (7th Cir.), *cert. denied,* 404 U.S. 939 (1971).

19. The defendants made two other contentions in their answer. First, they argued that the filing of the complaint with the Equal Employment Opportunity Commission was premature since it was filed before the plaintiff was actually forced to retire. The court disposed of this timeliness argument by holding that the plaintiff had properly complained of the defendants' maintaining a discriminatory retirement plan, which was a continuing violation of the Act, rather than complaining of her discharge only. Second, the defendants contended that the applicable EEOC guidelines on retirement funds, which prohibit different retirement ages for men and women, were arbitrary and capricious. The court gave short shrift to the contention, finding it to be without merit. The guidelines were then found in 29 C.F.R. § 1604.31(a) (1971), *as amended* 29 C.F.R. § 1604.9(f) (1975).

20. Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1189 (7th Cir.), *cert. denied,* 404 U.S. 939 (1971).

leading figure in the management of the Civil Rights Act of 1964.[21] This letter, which was written sometime after the bill was enacted, stated that the Act was not meant to impair existing pension and benefit structures.[22] The court responded to Senator Humphrey's letter and indicated that the Act does apply to retirement funds. An examination of the *Bartmess* opinion will serve as a framework for a review of the rationale on which the courts in general have relied in applying the Act to retirement funds.

Hubert Humphrey played a key role in the Senate formulation of the bill which eventually became Title VII.[23] In a letter Senator Humphrey stated that the Act was, in part, designed to improve the employment status of women and that " 'it would be a gross distortion of the provisions of Title VII to apply this language in a manner which impaired existing pension, retirement, or benefit programs.' "[24]

Confronted with this expression of "legislative intent," the *Bartmess* court offered three responses. First, it noted that the letter was of little help in determining the legislative history of the Act because it was written some time after the bill was enacted.[25] It appears, however, that the court was unaware that Senator Humphrey had expressed the same belief before the bill became law. In a colloquy on the floor of the Senate, Senator Randolph mentioned to Senator Humphrey that the Social Security system treats men and women differently in some respects and asked whether similar differences in industrial benefit plans could continue under the bill. Senator Humphrey answered affirmatively.[26] Although this exchange took place after the Senate had voted favorably on the Bennett Amendment,[27] which excluded from the reach of Title VII any practice authorized under the Equal Pay Act of 1963,[28] it did precede final action in the Senate approving the entire bill. It seems improper, therefore, to dismiss Senator Humphrey's views as untimely.

Second, the court believed that the debates in Congress neither supported nor refuted any legislative intent. In reaching this conclusion,

21. Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 253.

22. *See* text accompanying note 24 *infra.*

23. 110 CONG. REC. 13663 (1964) (remarks of Senator Randolph).

24. This excerpt from Senator Humphrey's letter is taken from Rosen v. Public Service Elec. & Gas Co., 328 F. Supp. 454, 463 (D.N.J. 1970), *aff'd,* 477 F.2d 90 (3d Cir. 1973). The letter itself was presented to the *Rosen* court.

25. 444 F.2d at 1190.

26. 110 CONG. REC. 13663-64 (1964) (remarks of Senator Randolph).

27. Act of July 2, 1964, Pub. L. No. 88-352, § 703(h), 78 Stat. 257 (codified at 42 U.S.C. § 2000e-2(h) (1970)).

28. Act of June 10, 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1970)).

the court relied on an opinion of the district court in *Rosen v. Public Service Electric & Gas Co.*,[29] where the legislative history of the Act was examined and it was determined that the ban on sex discrimination was added by the House of Representatives, without benefit of committee hearings, by a Southern Congressman who evidently hoped thereby to sabotage the bill.[30] The *Rosen* court could point to no mention of the reasons which moved Congress to include "sex" in the Act. Thus, the *Bartmess* court was correct when it stated that the debates neither support nor refute Senator Humphrey's belief, just as a denial of *certiorari* neither approves nor disapproves the decision of a lower court.[31] But such legislative history as does exist—namely, the Randolph-Humphrey exchange—is, in Senator Humphrey's characteristic argot, "unmistakably clear,"[32] and like the decision which does not warrant *certiorari*, it stands as authority in the field. Great cases have turned on a single line of legislative history,[33] and if Senator Humphrey's remark correctly expressed the intent of Congress, the issue need not have been raised again. Yet it must be noted that, by the time the sex provision was added to the bill, Congress had little time for further discussion.[34]

The *Bartmess* court's third response to Senator Humphrey's letter was that, "absent some strong indication of legislative intent to the contrary, we must read the words of the statute with their commonly accepted meanings."[35] Apparently, the court did not consider Senator Humphrey's letter a strong indication of legislative intent, and how it would have regarded the Senator's comments in the *Congressional Record*[36] is a matter of conjecture. Nevertheless, the principle is sound that a court should adhere to the accepted meanings of words in a statute; for, tax laws notwithstanding, legislators speak the same language as the rest of us. Retirement funds contain "terms, conditions, or privileges of employment" as those words are ordinarily used. Given the strong public policy of protecting retirement benefits, it may fairly be argued that if Congress had intended to exclude retirement plans from the scope of

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29. 328 F. Supp. 454 (D.N.J. 1970), *aff'd*, 477 F.2d 90 (3d Cir. 1973).

30. *Id.* at 462-63 n.4.

31. Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1190; Agoston v. Commonwealth of Pa., 340 U.S. 844 (1950).

32. 110 CONG. REC. 13664 (1964) (remarks of Senator Humphrey).

33. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). *Bell* is discussed in Comment, *Will the Real Managerial Employees Please Stand Up?*, 9 LOY. L.A.L. REV. 92 (1975).

34. *See* Diaz v. Pan American World Airways, 442 F.2d 385, 386 (5th Cir. 1971).

35. 444 F.2d at 1190.

36. *See* notes 26 & 32 *supra* and accompanying text.

Title VII, it would have done so in explicit terms.[37] While there are exemptions from the coverage of the Act[38] none appears applicable to retirement plans.[39] If such an exemption had been intended, yet inadvertently omitted, the opportunity to clarify the meaning of the Act came in 1972 when Congress revised Title VII.[40] At that time, it did not add an exemption for retirement funds. Since *Bartmess* and several district court cases already had been decided,[41] Congress had reason to know that the courts were applying Title VII to retirement plans. The only reasonable conclusion is that Congress did not share Senator Humphrey's belief about the scope of the Act.[42]

Having grappled with Senator Humphrey's letter, the *Bartmess* court established, at most, that Congress did not intend to *exclude* retirement funds from the reach of Title VII, but it remained for the court to suggest affirmative reasons for applying the Act to retirement funds. It of-

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37. Indeed, it did just that in the Age Discrimination Act of 1967, 29 U.S.C. § 623 (1970). In that act, Congress used language identical to that of Title VII in defining the coverage of the bill (*compare* 29 U.S.C. §§ 623(a)(1), (2) (1970) *with* 42 U.S.C. § 2000e-2(a)(1) (1970) *and* 42 U.S.C. § 2000e-2(a)(2) (Supp. II 1972), but added an express exemption for retirement plans. 29 U.S.C. § 623(f)(2) (1970). Without this exemption, Congress surely foresaw that the language of sections 623(a)(1) and (2), which was plainly incorporated into the Age Discrimination Act from sections 703(a) (1) and (2) of Title VII (42 U.S.C. § 2000e-2(a)(1) (1970); 42 U.S.C. § 2000e-2(a) (2) (Supp. II 1972)), would have been given its ordinary meaning and would have included retirement plans.

38. 42 U.S.C. § 2000e-1 (Supp. II 1972) (religious exemption); *id.* § 2000e-2(1) (1970) (BFOQ); *id.* § 2000e-2(e)(2) (religious and educational institutions); *id.* § 2000e-2(h) (seniority or merit systems; professional development ability tests; difference in compensation sanctioned by Equal Pay Act of 1963). For a discussion of the religious exemption from Title VII *see* Comment, *Title VII's Exemption for Religious Institutions: Constitutionally Required or Constitutionally Forbidden?*, 9 LOY. L.A.L. REV. 124 (1975).

39. It cannot be denied, however, that Congress might have overlooked the retirement problem when debating Title VII, while that problem could hardly have been avoided when debating the Age Discrimination Act. Yet, if Congress did overlook the effect of Title VII on retirement funds, so much the more reason to revert to the ordinary meaning of the language in the Act.

40. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, *amending* 42 U.S.C. §§ 2000e, *et seq.* (1970).

41. *See* cases cited in note 17 *supra.*

42. This conclusion is strengthened by the following sentence from the report of the Conference Committee of the House and Senate on the 1972 revisions:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

SENATE COMM. ON LABOR AND PUBLIC WELFARE, SUBCOMM. ON LABOR, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, 1174 (1972) [hereinafter cited as LEGISLATIVE HISTORY].

fered four such reasons. The first is that section 9(a) of the National Labor Relations Act[43] provides that a bargaining representative is the exclusive agent for collective bargaining in respect to "rates of pay, wages, hours of employment, and other conditions of employment," and this section has been held to include retirement benefits.[44] Section 703(a)(1) of the Act outlaws discrimination in "compensation, terms, conditions, and privileges of employment." Apparently, because of the similarity of language in the two labor acts, the court concluded that retirement funds are conditions of employment under Title VII.[45]

This conclusion seems correct. It is probable that Congress had section 9(a) in mind as it drafted section 703(a)(1), for when it created a structure for handling charges of unlawful employment practices under Title VII, it chose as a model the structure it had previously created for handling charges of unfair labor practices under the National Labor Relations Act.[46] The Equal Employment Opportunity Commission (EEOC)[47] is plainly patterned after the National Labor Relations Board,[48] and it is a reasonable inference that other sections of the National Labor Relations Act were also before Congress.[49] In addition, the language of section 703(a)(1) carries, in ordinary usage, a broader meaning than the language of section 9(a),[50] and it would be anomalous if Congress intended the broader phrase to exclude retirement funds while it intended the narrower phrase to include them.

Considerations of policy also support the *Bartmess* court's conclusion that retirement benefits fall within the scope of section 703(a)(1). From the viewpoint of an individual worker, who has struggled for many years to reach retirement, he believes he has earned his pension. Indeed, under most public and many private plans, he has earned at least a portion of his pension because he has made contributions to the

43. 29 U.S.C. § 159(a) (1970).

44. Inland Steel v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). *See* 29 U.S.C. § 158(a)(5) (1970).

45. 444 F.2d at 1189.

46. *Compare* 42 U.S.C. § 2000e-3 (1970) *with* 29 U.S.C. § 158(a)(4) (1970).

47. *See* 42 U.S.C. § 2000e-4 (1970).

48. *See* 29 U.S.C. § 153(a) (1970). This is parallel to 42 U.S.C. § 2000e-4 (1970).

49. The Supreme Court made such an inference when it found that the backpay provision of Title VII was "expressly modeled on the backpay provision of the National Labor Relations Act." Albermarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975).

50. A comparison of the two sections illustrates this. Thus, while section 703(a)(1) (42 U.S.C. § 2000e-2(a)(1) (1970)) uses the terms "compensation," "conditions," and "terms . . . or privileges of employment," section 9(a) uses the terms "rates of pay" and "wages," "other conditions," and "hours of employment." 29 U.S.C. § 159(a) (1970).

fund from his wages in addition to the contributions his employer has made on his behalf. Even under plans where the employer is the sole contributor,[51] the employee still pays for his pension in the form of reduced wages; for it costs an employer nearly the same[52] whether he commits himself to an increase in retirement benefits requiring him to contribute five cents per hour to the retirement fund, or to an increase in pay requiring him to put five cents per hour more into a paycheck. Thus, if an employee wants a pension, he will see his wages accordingly reduced (or increased less). Moreover, in most cases, the individual employee has little choice as to whether his employer offers retirement benefits or, if benefits are offered, whether to participate in the plan. Indeed, in most instances, the employer or his trustee administers the plan, requiring all employees to participate. The level of contributions is established, and the employer withholds contributions from employees' wages. Thus, the employee pays for his pensions in the form of direct contributions by reduced wages, making retirement benefits a form of compensation within the meaning of section 703(a)(1) of the Act; and he has no choice over whether to join the plan, making it a condition of employment within the meaning of the same section of the Act.

From the viewpoint of the public at large, policy also mandates that retirement funds be included within Title VII's coverage. A person who retires at age 65 is likely to live another fifteen years.[53] During his working years, he has been promised a pension when he retires, and he has relied on this promise by consuming money he might otherwise have saved towards future needs. It makes more sense to ensure that the promise of a pension is kept, and that money purportedly set aside for retirement benefits is truly available for that purpose, than to force the retired worker to demand higher Social Security payments, burden his family, and eventually apply for welfare.[54]

51. For example, the majority organized labor uses this type of plan.

52. The cost is not exactly the same because many persons withdraw from retirement funds before their pensions vest. This "breakage" in defined benefit plans swells the assets of the fund and allows for increased benefits at no increased cost to the employer for those whose pensions do vest. In defined contribution plans, breakage is applied in satisfaction of the employer's obligation to contribute.

53. INFORMATION PLEASE ALMANAC 734 (1975).

54. All of these alternatives involve taking money from persons presently working in order to support retirees. Sound retirement funding takes money from working persons to fund their own retirement and takes nothing for retirees from persons still working. Through the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (Supp. IV 1974), the nation has made a substantial commitment to protecting retirement benefits.

The second reason offered in *Bartmess* for including retirement funds within the reach of the Act was that the EEOC has expressly applied the Act to them.[55] A decision of the agency charged with enforcing an act is entitled to great deference in the courts,[56] and thus reliance by the *Bartmess* court on the EEOC guideline seems well placed.[57]

The third reason offered in *Bartmess* for including retirement funds within the scope of Title VII was the language of section 703 itself, which provides, in part:

> (a) Employer practices
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> It shall be an unlawful employment practice for an employer—
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> . . . .
>
> (2) to limit, segregate, or classify his employees or applicants for employment 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.[58]

While this section may be an enigma to some scholars,[59] its meaning was clear to the *Bartmess* court; so clear, indeed, that the court merely quoted the relevant language of the statute with the brief preface, "the

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ERISA is the most recent step in protecting retirement benefits, but earlier steps manifest concern in the area. The Welfare and Pension Plans Disclosure Act, Act of Aug. 28, 1958, Pub. L. No. 85-836, § 2, 72 Stat. 997, which was repealed by ERISA, imposed reporting requirements and fiduciary-like responsibilities on trustees of labor-management trust funds.

Tax laws have also favored retirement plans. Money set aside by employers for retirement funds for themselves and their employees has long been tax deductible to the business. INT. REV. CODE OF 1954, § 404. Also, retirement benefits, being taxed in the year of receipt instead of in the year the right to them accrues, are subject to lower income tax rates.

55. 29 C.F.R. § 1604.9 (1975) reads in part:

(a) "Fringe benefits," as used herein, includes . . . retirement benefits . . . .

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

56. This principle was applied to Title VII in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

57. The courts may disagree with an agency as it applies its act to a particular case, especially if, like the EEOC, the agency's proceedings are nonadversary in nature (*See* 29 C.F.R. §§ 1601.0-.33 (1975)), but the agency is probably right when it finds that an entire area is covered, or not covered by the Act under which it operates. Agencies may misconstrue facts or misapply the law, but they are responsive to political pressure, and they are the next best institution to Congress for determining if given interests should be affected by legislation.

58. 42 U.S.C. § 2000e-2(a)(2) (Supp. II 1972).

59. *See* Berstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs,* 74 COLUM. L. REV. 1203, 1215 n.38 (1974). The article is a valuable introduction to actuarial practices employed in the use of retirement funds.

Act proscribes . . . ."[60] It is not clear whether the court used section 703(a)(2) to define the scope of the Act or to define conduct within the scope of the Act which is prohibited. If the court was defining the scope of the Act, it unfortunately failed to explain the reasoning which led it to conclude that retirement plans are "employment opportunities" or affect the "status as an employee." If it was defining conduct within the scope of the Act which is prohibited, it has done no more than repeat the language of the law and assert that it was violated. However, reflection may reveal the court's reasoning. The plaintiff in the case had been forced to retire at age 62, three years earlier than would have been the case for a male. The right to keep on working is surely an employment opportunity and being compelled to retire affects one's status as an employee. On the facts of the case, then, retirement benefits themselves were not the opportunity protected; but because the retirement plan affected the plaintiff's right to continue working, the only way to protect this right was to include the plan within the scope of the Act.

Not many other cases will fit within the framework of *Bartmess*, and thus the case stands as narrow authority for application of section 703(a)(2) to retirement funds. Yet the language of the section is broad enough to reach retirement funds. If the plain meaning of the language of the statute is any guide, it would seem that retirement benefits are employment opportunities and that contributions withheld from wages affect one's status as an employee, as those words are ordinarily used. The same considerations of policy which lead to the conclusion that section 703(a)(1) applies to retirement funds apply with equal force to section 703(a) (2).[61]

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60. 444 F.2d at 1189.

61. *See* notes 51-56 *supra* and accompanying text. Are the two sections coextensive? The fact that Congress used language in section 703(a)(2) that is different from the language employed in section 703(a)(1), when it could have as easily used identical language in both sections, leads one to conclude that the two sections were intended to have different meanings. With no sacrifice of grammar or style, section 703(a)(2) could have read:

> to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any such individual of employment opportunities or otherwise adversely affect his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

This writer, however, is aware of no case which distinguishes between them, nor is he able rationally to distinguish between them in his own mind. Rather, it seems that Congress intended to write the broadest possible language to define the reach of Title VII, and instead of choosing between two formulations, it used both. Of course, even if the two sections do apply to different conduct, it is possible that they overlap in the case

The fourth and final reason given by the *Bartmess* court for applying the Act to retirement funds was language found in *Sprogis v. United Air Lines, Inc.*,[62] which had been decided only three weeks earlier. There the court found an unlawful employment practice in an airline's policy of requiring female cabin attendants to remain unmarried, while allowing male cabin attendants to marry. The *Bartmess* court[63] seized on the following language of *Sprogis*:

> [I]n forbidding employers to discriminate against individuals because of their sex, *Congress intended to strike at the entire spectrum of disparate treatment of men and women* resulting from sex stereotypes.[64]

This assertion was used in *Bartmess* to establish the scope of the Act, and to counter the argument that the Act does not apply to retirement funds. Unfortunately, the language quoted from *Sprogis* was an explication of that case's holding that the employer's policy was discriminatory. No argument was made that the no-marriage policy applied to women was outside the scope of the Act, and thus there was no need to define the scope of the Act. Nor did any question of retirement benefits arise in *Sprogis*. Accordingly, although the language quoted may be compelling in its force, it is no help in determining whether or not retirement funds are covered by Title VII.[65]

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of retirement funds. At this point, perhaps all that can be said is that *Bartmess* is authority on its facts that retirement funds are covered by section 703(a)(2).

62. 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

63. Judge Cummings sat on both panels of the Seventh Circuit; he wrote the opinion in *Sprogis*.

64. 444 F.2d at 1189, *quoting* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (emphasis added).

65. Thus far, no distinction has been drawn between retirement plans of private and public employees. Manhart v. City of Los Angeles, Dept. of Water & Power, 387 F. Supp. 980 (C.D. Cal. 1975), and Henderson v. Oregon, 405 F. Supp. 1271 (D. Ore. 1975), are the first cases to apply Title VII to the retirement funds of public employers; all of the other cases mentioned involved private funds. Is any distinction between private and public funds appropriate? In determining whether such a distinction exists, it is important to note that before the 1972 amendments to the Act, public employers were exempted from Title VII altogether, and thus, it is not surprising that the authorities to date have reviewed situations involving only private funds. But section 701(b), 42 U.S.C. § 2000e(b) (1972), now includes public employers, and the legislative history of the 1972 amendments clearly shows that Congress intended to protect public employees as fully as private employees. Referring to Senator Ervin's attempt to strike a proposed amendment to the Act extending its coverage to public employees, Senator Javits stated:

> As recently as 1969, this was the subject of special consideration by the United States Commission on Civil Rights which held flatly—and I'll read from page 10 of the committee's report: "State and local governments have failed to assure equal job opportunity. . . ."

Of the four reasons advanced by the *Bartmess* court for applying the Act to retirement funds, the most persuasive appear to be the similar treatment of retirement funds under the National Labor Relations Act and the position of the EEOC that such funds are within the scope of the Act. Buttressing the court's conclusion are the strong policy considerations militating in favor of protecting the employee's interest in retirement programs. Thus, while the court's reference to section 703

> It is for this reason, . . . that one of the greatest reforms in this bill is its applicability to those who are engaged in State and local employment—I repeat, ten million employees, the largest single block in any one calling of all the employees, as there are now about 80 million in the entire American work force. If anybody, as a matter of morality, is entitled to equal employment opportunity, it certainly is these people; and the only way they can get it, because the authority so far as they are concerned is the State, is at the hands of the United States . . . .

LEGISLATIVE HISTORY, *supra* note 42, at 1173-74. In addition, the EEOC has ruled that retirement funds of public employers are covered by Title VII. In two decisions, 2 CCH Labor Law Rep. (Employment Practices Guide) ¶ 6431 (1974) and 2 CCH Labor Law Rep. (Employment Practices Guide) ¶ 6447 (1975), the Commission decided that public employers' practices like those in *Manhart* and *Henderson* were unlawful. These decisions are discussed more fully at notes 100-107 *infra* and accompanying text. Although the decisions do not deal expressly with the question of whether the Act applies to public employers' retirement funds, such a finding is implicit in the opinions.

With reference to *Manhart*, which arose in California, the Supreme Court of California has held that pensions paid by a public employer are vested rights, not revocable gratuities, "and . . . in a sense a part of the contract of employment itself." O'Dea v. Cook, 176 Cal. 659, 661-62 (1917). If pension rights are tantamount to a clause in the contract of employment, they must be compensation, terms, conditions, or privileges of employment, or employment opportunities as those words are used in the Act. *See* note 9 *supra*.

The power of Congress under the commerce clause to regulate retirement funds of public employers is questionable (*see* National League of Cities v. Usery, 44 U.S.L.W. 4974 (June 24, 1976)), and it may be necessary to look for other sources of constitutional authority. That Congress relied upon section five of the fourteenth amendment in extending Title VII to governmental employers was affirmed by the Supreme Court. Fitzpatrick v. Bitzer, 44 U.S.L.W. 5120 (June 28, 1976). But the Court expressly left open the question of whether "the substantive provisions of Title VII as applied here are . . . a proper exercise of congressional authority under § 5 of the Fourteenth Amendment." *Id.* at 5123 n.11. If the impact of Title VII on public retirement funds is limited to violations of the fourteenth amendment as found by the courts, plaintiffs complaining of sex discrimination face a serious obstacle: the Supreme Court has already held in Geduldig v. Aiello, 417 U.S. 484 (1974), that the fourteenth amendment is not offended by a state disability insurance program which omits benefits for women in normal pregnancy. Even though only women become pregnant, the Court found no infringement on equal protection because there was a clear connection between the costs of the disability insurance program and its coverage. Likewise, it may be argued that there is a rational connection between female longevity and sex-based mortality tables; and it is conceivable that the courts will hold it rational to allocate the cost of female longevity to the class of women alone, rather than to the class of all employees—just as they have held rational the allocation of the cost of normal pregnancy to the class of normally pregnant women alone.

(a)(2) may be of limited application and its reliance on *Sprogis* misplaced, *Bartmess* nonetheless presents a sound rationale upon which to conclude that Title VII should apply to retirement funds. The next step in the analysis is to determine whether or not the Act prohibits a fund from exacting a higher contribution from, or paying a lower benefit to, a female as compared to her male counterpart.

III. EQUAL CONTRIBUTIONS AND EQUAL BENEFITS

A. *Applying Class Characteristics to a Member of the Class*

In *Manhart v. City of Los Angeles, Department of Water and Power*[66] a retirement fund for public employees[67] was financed by a combination of both employer and employee contributions. The periodic benefits paid to counterparts upon retirement were equal, but female employee contributions were approximately 15 percent greater than those of their male counterparts. The court, in finding this practice constitutes an unlawful employment practice under the Act,[68] stated

> [t]he basic principle . . . that sexual discrimination under § 703(a)(1) exists whenever general fact characteristics of sex-defined class are automatically applied to an individual within that class.[69]

In so holding, the court relied principally on four cases: *Phillips v. Martin Marietta Corp.*,[70] *Rosenfeld v. Southern Pacific, Co.*,[71] *Sprogis v. United Air Lines, Inc.*,[72] and *Willingham v. Macon Telegraph Pub-*

66. 387 F. Supp. 980 (C.D. Cal. 1975).
67. *See* note 65 *supra.*
68. 387 F. Supp. at 983.
69. *Id.* Henderson v. Oregon, 405 F. Supp. 1271 (D. Ore. 1975), contemplated the other side of the problem. In *Henderson* there were actually two separate funds. One was financed entirely by employer contributions and, because the employer contributed more for females than it did for males, the periodic benefits were equal for counterparts; this fund was not attacked. The other fund was financed entirely by employee contributions, which were equal for counterparts, with the result that females received a monthly benefit of approximately 90 percent of the benefit paid to their male counterparts. The latter fund, of course, was challenged. *Id.* at 1273. The *Henderson* opinion relied heavily on *Manhart,* so that examination of the latter case will reveal the basis upon which the courts have prohibited retirement funds from charging a female higher contributions or paying her lower periodic benefits, than her male counterpart.
70. 400 U.S. 542 (1971).
71. 444 F.2d 1219 (9th Cir. 1971).
72. 444 F.2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971).

lishing Co.[73] An examination of these cases may cast some light, and some shadows, on the court's reasoning.

In *Phillips,* the employer refused to accept employment applications from women with pre-school age children, although it accepted applications from similarly situated men. Approximately three-fourths of the applicants were female, and about three-fourths of the new hirees were female, thus there was no evidence of discrimination against women in general. Nevertheless, in a brief per curiam opinion, the Supreme Court held that section 703(a)[74] prohibits an employer from maintaining one hiring policy for men and another for women.[75]

It is not difficult to understand why the *Manhart* court found *Phillips* to stand for the proposition that characteristics of a class may not be applied to an individual member of the class. The class consisted of women with young children; the characteristic was the conflicting responsibilities of caring for children and of employment, often resulting in higher absenteeism. When the characteristic of the class was applied to an individual member of it, each woman with young children was denied employment. But rather than using this

73. 507 F.2d 1084 (5th Cir. 1975).

74. Note that the Court did not cite subsections (1) or (2) of section 703. *See* note 61 *supra* and accompanying text.

75. Although the court did not allude to the legislative history of the sex clause in Title VII, it may be noted that Congress rejected an amendment which would have confined the reach of the sex ban to discrimination based solely on sex. 110 CONG. REC. 2728 (1964). Had such an amendment been adopted, the *Phillips* court might well have gone the other way, for the employer did not discriminate against all women (which presumably would have been discrimination based solely on sex) but only against women with young children.

Phillips is the archetype of what has been characterized as "sex plus" discrimination. *See* note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1171-72 (1971). Sex plus discrimination "usually involves the classification of employees on the basis of sex plus one other ostensibly neutral characteristic." Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1089 (5th Cir. 1975). This type of discrimination has the effect of discriminating, not against the entire class, but only against a portion of it, by means of a rule which does not affect the class of the opposite sex. Thus, in *Phillips,* the discriminatory classification was sex (female) plus a neutral characteristic (having young children). Neither element was sufficient, since men and women without young children were hired. The entire class of women was not prejudiced, but only the part of it having young children; no part of the class of men was prejudiced. *See* note 94 *infra.*

However, the retirement fund problem under discussion in this article is not an example of sex plus discrimination because all women are presumed by the retirement funds to possess the characteristic of female longevity. The funds do not add any characteristic to sex; they simply assume that one aspect of being a woman is living longer than a man. Also, the practices used do not single out any part of the class of females; rather the entire class is prejudiced.

analysis, the Supreme Court justified its holding on the ground that the plaintiff had made out a *prima facie* case of liability by showing that the employer had one employment policy for men and another for women. Significantly, the Court did not enter judgment on this showing, but remanded the case in order to allow the employer an opportunity to establish a defense under the bona fide occupational qualification clause of section 703(e).[76] Although Justice Marshall believed that such a defense could not be established,[77] the majority of the Court disagreed:

> The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the Act.[78]

Thus, the Supreme Court was prepared to allow an employer to apply a characteristic of a class to an individual member of the class, provided the employer could prove the characteristic actually existed and was demonstrably related to job performance. The *Manhart* principle is clearly contrary to the apparent views of the Court in *Phillips*.[79]

If *Phillips* is not authority for the principle enunciated in *Manhart*, it may be distinguished because the discrimination in *Phillips* applied only to some females, namely those with young children, while the discrimination in *Manhart* applied to all females. If this distinction is of any significance, then *Rosenfeld v. Southern Pacific Co.* might remain authority for the principle of *Manhart*, for the discrimination in *Rosenfeld* also applied to all women. In *Rosenfeld* the employer refused to hire any women for the position of telegrapher because the job called for lifting heavy weights, which the employer believed women could not do. It made no attempt to determine whether a particular woman could lift the necessary weight, and on these facts the Ninth Circuit held for the plaintiff. Like *Phillips*, *Rosenfeld* might be read to support the principle that facts characteristic of a class cannot be applied to an individual member of the class. Application of the characteristic (a woman's

76. 42 U.S.C. § 2000e-2(e) (1970).

77. . . . I cannot agree with the Court's indication that a "bona fide occupational qualification reasonably necessary to the normal operation of" Matin Marietta's business could be established by a showing that some women, even the vast majority, with pre-school-age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities.

400 U.S. at 544.

78. *Id.*

79. The principle of which *Manhart* relied affects the question of prima facie liability, while the Supreme Court in *Phillips* was commenting on the possible existence of an affirmative defense. Nevertheless, the Court did approve application of a class characteristic to a member of the class, undoubtedly realizing that not every woman with young children would be absent from work too often.

inability to lift heavy weights) to the individuals in the class resulted in the exclusion of all women from the position of telegrapher.

There is, however, a crucial distinction between *Manhart* and *Rosenfeld* which vitiates any support *Manhart* sought in *Rosenfeld*: a simple test can be administered to determine whether a woman can lift the necessary weight.[80] The entire thrust of *Rosenfeld* is to require individual testing to determine if a given individual possesses the undesirable characteristic.[81] No individual test, however, is possible when dealing with retirement funds because the life expectancy of a given individual cannot be predicted with the same degree of certainty that results from a test directed to determining physical attributes. It further appears that the *Rosenfeld* court questioned the validity of the characteristic itself, in that some women can in fact lift heavy weights. But in the retirement fund cases, the accuracy of the mortality tables upon which the funds is administered has not been so challenged. Thus, while *Rosenfeld* may have used language similar to that used by the court in *Manhart*,[82] *Rosenfeld* contemplated a different set of facts.

Manhart cited two other cases in support of its principle that characteristics of a class may not be applied to individual members of the class. One is *Sprogis v. United Air Lines, Inc.*,[83] in which the Seventh Circuit found an unlawful employment practice in an airline's rule prohibiting female cabin attendants from marrying but allowing male cabin attendants to marry. This case is scant authority for the *Manhart* principle because the *Sprogis* court held that the employer had failed to prove that unmarried women make better cabin attendants than married

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80. Indeed, such a test was undoubtedly administered to a male applicant who looked too frail for the job.

81. The premise of Title VII . . . is that women are now to be on equal footing with men. The footing is not equal if a male employee may be appointed to a particular position on a showing that he is physically qualified, but a female employee is denied an opportunity to demonstrate personal physical qualification. Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual incapacity. This alone accords with the Congressional purpose to eliminate subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work.

444 F.2d at 1225 (citations omitted).

82. The personnel policy of Southern Pacific here in question is based on "characteristics generally attributed to the group" of exactly the same type that the Commission has announced should not be the basis of an employment decision. 29 C.F.R. § 1604.1(a)(1)(ii). Based on the legislative intent and on the Commission's interpretation, sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception . . . . Southern Pacific has not, and could not allege such a basis here . . . .

Id. at 1224-25.

83. 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

women; therefore, since the employer failed to establish the existence of the characteristic of the class, there was no need for the court to determine if it could lawfully be applied to a particular member of the class.[84]

Finally, in *Willingham v. Macon Telegraph Publishing Co.*[85] the employer refused to hire a male because of the length of his hair, while it placed no restrictions on the length of hair of his female counterparts. A panel of the Fifth Circuit ruled this practice unlawful under Title VII, but following a rehearing the court sitting *en banc* reached the opposite conclusion.[86] The panel opinion in *Willingham*, therefore, lends no support whatever to the principle of *Manhart*.[87]

The result of this examination is that, although the principle of *Manhart* is attractive, and it may go some distance towards explaining the error in the thinking of the offending employers,[88] it lacks authorita-

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84. The dissenting opinion of Judge Stevens is now particularly pertinent:

> As I understand the majority's test, it does not focus on the impact of a rule on the employment opportunities of the members of one sex as opposed to the other; instead, the critical inquiry is whether the rule is an irrational impediment derived from a stereotyped attitude toward females. As a matter of policy, the majority's view may not only be contemporary but also wise.

444 F.2d at 1205 (Stevens, J., dissenting). Stevens also noted that "[i]t may also be unwise." *Id.* at 1205 n.21. In either event, he was "unable . . . to find any guidelines in the language of § 703(a)(1) for differentiating between irrational stereotypes and reasonable requirements." *Id.* at 1205-06. If these retirement fund cases ultimately reach the Supreme Court, at least one Justice will not likely accept the *Manhart* principle.

85. 482 F.2d 535 (5th Cir. 1973), *vacated*, 507 F.2d 1084 (5th Cir. 1975).

86. 507 F.2d 1084 (5th Cir. 1975). The District of Columbia, Eighth and Ninth Circuits are in agreement with the Fifth Circuit holding. *See* Knott v. Missouri Pac. R.R., 527 F.2d 1249 (8th Cir. 1975); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), *cert. denied*, 422 U.S. 1047 (1975); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973); Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973).

87. The *en banc* decision in *Willingham* was announced after the *Manhart* opinion was filed.

88. The employer in *Phillips* thought most women with young children would be absent from work too often because of their maternal responsibilities; the employer in *Rosenfeld* thought most women could not lift heavy weights; the employer in *Sprogis* thought unmarried women make better cabin attendants.

However, *Manhart*'s principle does not fully explain the employers' error. One further element is necessary: the employers did not consider it worth their while to determine which women would be absent too often and which would not, which women could lift heavy weights and which could not; or which married women would make good cabin attendants and which would not. The courts have insisted that employers make such individualized determinations, thus painting Title VII with a due process gloss. Of course, this approach is not applicable to retirement fund cases because individualized treatment is impossible for it cannot be determined when a given person will die.

For a suggestion that an equal protection gloss has also been added by the courts to Title VII, *see* Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1089 (5th Cir. 1975).

tive support. However, even if it is accepted as a new principle of law, there remains the question of whether the court satisfactorily decided the case.

Manhart's principle is that facts characteristic of a class may not be applied to individual members of the class. The court implicitly reasoned that the class was female employees and the characteristic was average female longevity. The application of the characteristic to an individual woman in calculating her employee contribution resulted in a determination that she will live 19 years following her retirement at age 65. The same process determined that a man will live only 14 years following his retirement, with the result that the male's contributions were lower than his female counterpart's. The court argued that because no individual's life expectancy can be known in advance and because Title VII requires that each person be treated as an individual, it is discrimination to require a female to contribute more than her counterpart. The error of this argument is that the characteristic of female longevity was not applied to any individual woman. The retirement fund did not know that Miss Jones or Mrs. Smith would live for 19 years after she retired. Rather, the fund applied a characteristic of the class *to the class as a whole.* It determined how much money in the form of contributions it needed in order to fund benefits at a certain level for the class of females, and it asked each female to pay her proportionate share, similar to an insurance program. Since it did the same for males, there were in effect two separate retirement funds. Each employee, male or female had the opportunity to participate in a self-sustaining retirement fund. The women's fund spent more money, so the women had to contribute more to it. Expressed another way, the extent to which female longevity exceeded male longevity was borne by the class of women alone, rather than being spread over the class of all employees.

If there is any unlawful discrimination in this scheme, it must be found either in the definition of the employment opportunity or in the manner in which the cost of female longevity is allocated. The relevant questions are therefore different. Is the Act satisfied if a retirement fund offers each sex the opportunity to participate in a separate self-sustaining retirement fund, or does the Act demand that counterparts pay the same amount in contributions and receive the same amount in periodic benefits? Is the Act satisfied if the cost of female longevity is spread over the class of women alone, or does the Act require that the cost be allocated to the class of all employees? The

Manhart opinion does not address these issues, and it is appropriate to consider them now.

B. *Defining Equality of Opportunity in Retirement Plans*

In determining the impact of the Act on retirement funds, the first step is to expound a theory of sex discrimination which is generally applicable to the sex cases, and the second step is to apply it to the problem at hand. The principle offered in *Manhart* was unsatisfactory since it was neither derived from the authorities nor confronted the issues before the court. However, in *Phillips*, the Supreme Court supplied a straightforward concept based on the language of the Act: "Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex."[89] In *Phillips* women with young children, equally as qualified as men with young children, were not hired although men were. Thus men with children were afforded an employment opportunity that women of like status were denied.

The theory of *Phillips* can be used to explain the leading cases on sex discrimination where it has been determined that differences in employment practices, resting on the basis of sex, constitute an unlawful employment practice.[90]

89. 400 U.S. at 544. The Court's language is drawn more from section 703(a)(2) than from section 703(a)(1).

90. In Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971), the employer refused to hire any women as telegraphers because the job called for lifting heavy weights. This difference in employment practices, resting solely on the basis of sex, was held to constitute an unlawful employment practice. *Id.* at 1227. *See also* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

In Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), male cabin attendants were allowed to marry, but female cabin attendants, equally qualified as their male counterparts, were prohibited from marrying. *Id.* at 1196-97. Similarly, in Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), the employer refused to hire any males as cabin attendants. The court found this practice unlawful because men and women were equally qualified to hold the job, but men were denied the opportunity because of their sex. In Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971), women were required to retire at age 62, but men were allowed to work until age 65. The employment opportunity was the chance to work three additional years, which was given to men but denied to women, and the defendant was liable to pay the plaintiff the salary of which she was unlawfully deprived. And in the other principal retirement case, Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90 (3d Cir. 1973), men could retire only at age 65 with 25 years of service unless they accepted reduced periodic benefits, while women could retire with full benefits at age 60 with 20 years of service. The employment opportunity was retirement at age 60 with full benefits, and the court

If persons of like qualifications must be given the same employment opportunities irrespective of their sex, the question remains how to apply this theory to the retirement fund problem. In most sex discrimination cases, men or women were denied access to an opportunity altogether. In the retirement fund cases, men and women have access to the opportunity; it is not as though the women were denied pensions. But the

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ordered that it be made available to men as well as women. Finally, in Taylor v. Goodyear Tire & Rubber Co., 6 FEP 50 (N.D. Ala. 1972), a collectively bargained sickness and accident program paid women $10.00 per month less than it paid men, which the court found to be a violation of Title VII. The defendants in *Taylor* argued that the cost of providing benefits for females exceeded the cost of benefits for males, but the court found this fact immaterial. It is the case most analogous to *Manhart* and *Henderson.*

However, the circuit courts of appeals have engrafted a qualification on the *Phillips* rule, *i.e.*, an employer may impose different employment rules upon the sexes if the distinction does not affect a significant or fundamental right. This qualification was developed in cases in which men have challenged rules enunciated by their employers, allowing women to wear their hair at any length but requiring men to keep their hair short. Knott v. Missouri Pac. R.R., 527 F.2d 1249 (8th Cir. 1975); Willingham v. Macon Tel. Pub. Co., 507 F.2d 1048 (5th Cir. 1975); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), *cert. denied,* 422 U.S. 1047 (1975); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973); Fagen v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973). The reasoning of these cases rests on a balancing between the employee's interests and the employer's policy which is challenged. Thus, since a person cannot change his race, sex, or national origin, he should never be discriminated against based on these characteristics. Although it cannot be denied that an employer has an interest in these types of employee characteristics, since his customers and other employees may react to them, the public policy of eliminating discrimination in employment outweighs the employer's interest.

Employees also have significant interests in characteristics which are not immutable. As for marital status and children, these conditions may be subject to voluntary control, but the individual's interest in regulating such personal matters outweighs the employer's interest in them. In addition, their impact on the employer's business is generally marginal, and, in those instances where they do have a noticeable effect, the specific cases can be handled individually at a cost which does not exceed the value of protecting the rights in question. Thus, a woman who is absent too often because her children are ill or whose husband pesters her supervisor may be counseled, reassigned, or terminated. Such an individualized approach is suggested in *Sprogis*:

> [T]he narrow exception in section 703(e) calls for employers to treat their employees as individuals. United's blanket prophylactic rule prohibiting marriage unjustifiably punishes a large class of prospective, otherwise qualified and competent employees where an individualized response could adequately dispose of any real employment conflicts.

444 F.2d at 1199.

But hair length is not so significant a characteristic as race, sex, or family status, and the courts have concluded that the interest of the employer in the impression that his employees make on his customers or clients is stronger than the interest of an employee in his hair style. One may wonder how the judges would have reacted to a rule which allowed whites to wear their hair in any fashion but prohibited blacks from wearing naturals.

women must make higher contributions or receive lower periodic benefits because they live longer.[91] Therefore, the issue is whether men and women are truly offered the same opportunity. The answer depends on how the opportunity is defined.[92]

The employment opportunity offered by retirement funds is defined by the funds as the total benefits received by the respective sexes as a class. Present retirement funds utilize this approach on the rationale that the funds offer equal benefits at equal cost to men and women because each sex takes out of its fund a sum of money proportionate to the amount of money it puts in or, expressed another way, the ratio of contributions to benefits is the same for each fund.

The challenge to this system is predicated on the belief that the employment opportunity should be defined in terms of the costs and benefits for each individual person, regardless of sex. It is irrelevant what the class may receive; the "average" person is a statistical abstraction, and what he pays and receives is important only to actuaries trying to explain their art to laymen. What is significant is what each individual person gives and receives.

When the standard enunciated by the Supreme Court[93] is applied to the retirement fund problem it is clear that the issue is whether equal employment opportunities are offered if separate funds are maintained for males and females, with the result that benefits received by the class of each sex are commensurate with the class's contributions—the present practice; or whether the Act requires that opportunities be measured in terms of the contributions made and benefits received by each individual female vis-à-vis her male counterpart—equal contributions from and periodic benefits to counterparts. Several reasons are offered to show that individual, not class, contributions and periodic benefits must be equal.

First, a retirement fund, like an insurance scheme, is designed to protect individual persons, not classes of persons. Not knowing when he will die, and fearing the risk of poverty in his declining years, an employee takes a legal gamble. If he outlives the average person, he wins because he receives more from the retirement fund than he contrib-

91. It is unlikely that retirement funds would argue that men and women do not possess like qualifications. A typical fund measures benefits based on years of service with the employer and the average compensation during a particular period of time. Male and female counterparts are identical in these regards.

92. The argument that Title VII applies to retirement funds also shows that retirement benefits are a significant opportunity. *See* notes 14-60 *supra* and accompanying text.

93. *See* text accompanying note 89 *supra*.

uted. If he dies before the average person, he loses in an economic sense because he receives less than he contributed. As an individual, he chooses to forego current gratification in order to receive, for himself, future protection. Of course, these facts are as true of women as they are of men. Each person, irrespective of sex, joins the retirement fund in order to pay for his or her own retirement, and not to pay for the retirement of all those who comprise his or her sexual class. Therefore, it is reasonable to define the opportunity offered by a retirement fund only in terms of individual contributions and individual benefits. Class analysis simply ignores the purpose of retirement funds.

Second, the retirement fund which benefits both sexes exists because of the success of the business in which the employees labor. The female employee contributes exactly as much to the success of the enterprise as her male counterpart. She has worked alongside of her male counterpart at the same job and for as many years as he has. Her achievements, her loyalty, her sacrifices have been the equal of his. Her rewards, too, should be the equal of his, and at the same cost to her. Only since 1965 has she been guaranteed the right to equal employment opportunities.[94] Is this guarantee so illusive, so fragile that a woman may now aspire to jobs which in the past were closed to her, but only if she will accept a lesser degree of remuneration?

Third, the needs of the female are equal to those of her male counterpart. Although generalizations may be hurled against each other,[95] no hard evidence exists to prove that men need money any more than women. Indeed, the purpose of the Equal Pay Act of 1963[96] is to guarantee that old notions about men's greater need for money cease to prejudice women in employment. Having equal needs, a woman should receive equal funds with which to meet those needs.

Fourth, contributions to a retirement fund are analogous to a tax. Taxes are levied to raise money, but a rational legislator takes into account the effect of the tax on the people who pay it; indeed, sometimes the effect is more important than the revenue. The alcoholic beverages tax not only raises money; it also discourages the use of alcohol. The income tax may raise substantial revenues, but it also redistributes wealth and encourages certain forms of spending. Like-

94. *See* notes 9-11 *supra.*

95. During his working years, a man must support his family; yet many women are rearing children with little or no help from the father. During his retirement, a man's pension must support both himself and his wife; yet women outlive their husbands and must survive on their own, and costs like rent are no greater for two than for one.

96. 29 U.S.C. § 206(d) (1970).

wise, the retirement tax on employees raises money to fund the retirement system, but it should not be ignored that, unless it falls equally on male and female counterparts, it favors men over women in their daily lives: it gives men a higher standard of living during their working years or their retirement. What conduct is affected by the extra retirement tax on women? Is there any evidence that men spend their income for better social purposes than women, which might justify men receiving a greater income?

It may be argued that the extra tax on women is necessary in order to fund the cost of female longevity, but this argument assumes that a cost must be funded in the same manner as it is measured, which is not the case. It is possible to determine the cost of male and female longevity separately, by use of sex-segregated mortality tables, and yet to spread that cost evenly over the class of all employees. The manner in which this may be accomplished is discussed below, and as indicated there, if an extra retirement tax is necessary to pay for female longevity, it may be assessed equally to males and females alike, without endangering the funding of the retirement plan.[97]

Fifth, if a man and a woman of the same age retire on the same date, each having earned the right to the same level of retirement benefits—assume fraternal twins who are perfect counterparts in their employment—and if they die on the same date, the man will have paid less money in contributions or will have received more money in benefits than the woman. For the accident of his birth, the man receives a higher payroll or retirement check each month, and his female counterpart will never catch up. If this happenstance were an occasional aberration, it might be overlooked, but it occurs in *five cases out of every six*; for 84 percent of female retirees die in the same year as male retirees.[98] Class analysis obscures this astonishing fact, but it must not be ignored. Unless individual contributions and periodic benefits are equal, five women out of six pay more in contributions or receive less in benefits than their male counterparts.

Sixth, the language of the Act supports the view that the employment opportunity should be based on equal contributions from and payments to *individuals*. For example, consider the case of an applicant for promotion who sues his employer on the ground that he was denied promotion because of his race or religion or national origin. Suppose the employer offers the following defense: he has equal

97. *See* text following note 121 *infra*.
98. Henderson v. Oregon, 405 F. Supp. at 1275, n.5.

numbers of employees who belong to the plaintiff's class and to the majority class; the total remuneration paid to the two classes is equal; and the number of persons holding the job which the plaintiff seeks is the same in the two classes. Has the employer stated a defense under Title VII? Clearly, he has not, for the Act is not satisfied by numbers. Classes are not guaranteed equal employment opportunities; individuals are. Had Congress intended to create a fourth estate and protect it, section 703(a)(1) might have read, "to fail or refuse to hire or to discharge members of a protected class in greater numbers than members of other classes." But the Act does not so read. Instead, section 703(a) (1) reads, "to fail or refuse to hire or to discharge *any individual,* or otherwise to discriminate against *any individual* . . . ." The same focus on the individual appears in section 703(a) (2) as well: "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive *any individual* of employment opportunities . . . ." To an individual, it matters not that his class is treated the same as another class; it matters only that he was not the victim of discrimination because of membership in his class. If our applicant can prove that he was the most qualified person for the promotion, but was denied it because of his membership in a protected class, he will prevail against his employer's statistics.[99] Likewise, it matters not to a female employee that her class is in the same position as the class of male employees; it matters only that, because of her membership in the class of females, she pays higher contributions or receives lower benefits than her male counterpart.

Finally, support for the view that individual, not class, characteristics control can be found in two decisions rendered by the EEOC. In one,[100] female employees of a public employer were charged higher contributions to the retirement fund than their male counterparts, although counterparts were paid equal periodic benefits. The EEOC found this violated the Act, which requires equality of opportunity be afforded individuals and not classes. The Commission stated:

> A pension of X dollars per month paid to both males and females will probably result in a larger "average total payment" to females than to males (because it is likely that the females will on the average live longer). It might therefore be argued that, with equal monthly pensions, the "benefits to the sexes" are *not* the same. Title VII is not,

99. *See, e.g.,* Patterson v. American Tobacco, 12 F.E.P. 314, 328 n.18 (4th Cir. 1976).
100. 2 CCH EEOC Decisions (Employment Practices Guide) ¶ 6447 (1975).

however, concerned with whether benefits to each sex group *as a class* are equal—Title VII looks to *individual* benefits.[101]

In the second case,[102] the charging party was a public employee contributing to a fund to which her employer would make an additional contribution when she retired, and the combined contributions would be used to purchase an annuity. Because sex-segregated mortality tables were used to compute her life expectancy, she could expect to receive substantially less each month from her annuity than her male counterpart. The Commission found this practice to be a violation of Title VII for essentially the same reason as that relied upon in *Manhart*, namely, the employer had wrongfully appealed to the average characteristics of a particular class protected by the Act.[103] In response to the employer's argument that equal monthly payments would discriminate in favor of females, since they live longer and would receive more money than males, the Commission said that no mortality table can predict when an individual person will die, but only when large numbers of persons will die,[104] and that the purpose of a mortality table is only to predict risks for a large class.[105] In other words, the Commission reasoned that, because it cannot be determined when a given person will die, it is unfair to pay a given female a lower monthly benefit on the chance that she may outlive her male counterpart.

The employer further argued that, if it switched to unisex mortality tables, which reflect deaths in the population as a whole instead of deaths for just one sex, it would charge a male more for an annuity than he could obtain for his money from a private insurance company (which uses sex-segregated tables) and, therefore, males would end up subsidiz-

101. *Id.* ¶ 6447, at 4191.

102. *Id.* ¶ 6431.

103. The Commission's decision does not indicate whether it found the characteristic to be valid or not. If the characteristic is not valid (as in Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), where the court found the employer had failed to prove that unmarried women make better cabin attendants than married women), the discussion may cease. However, in the later decision, 2 CCH EEOC Decisions (Employment Practices Guide) ¶ 6447 (1975), the Commission appears to have accepted the validity of the characteristic of female longevity. Therefore, the issue is the significance or effect of the characteristic.

104. The Commission relied on a valuable commentary, Note *Sex Discrimination and Sex-Based Mortality Tables*, 53 BOSTON U.L. REV. 624 (1973) [hereinafter cited as *Sex-Based Mortality Tables*].

105. Therefore, mortality tables are useful to determine how much money must be raised in order to fund benefits for a given class, but they do not dictate that the money must be raised from the very same class. That is, mortality tables predict risks, but they do not say how to spread those risks. *See* text following note 121 *infra*.

ing the benefits for females.[106] This argument has been widely raised by those employers using similar retirement funds. Keenly sensitive to the interests of their male beneficiaries, employers using such funds argue that men should not bear the cost of female longevity. The class of women outlives the class of men, they contend, and thus it costs more to fund benefits for the women. Women should bear this cost because it is unfair to ask men to contribute towards the cost of women's benefits. In effect, it is maintained that equalization of contributions and benefits would give women a greater employment opportunity than men.[107]

The problem with this argument is that is focuses upon the class, and not the individual. As discussed earlier, the proper approach under the Act is the individual approach.[108] Therefore this argument is not persuasive. But even if this class analysis must be used, in view of the fact that the benefits must be equalized, the issue remains which class should bear the cost: The class of all employees or that of women alone?

C. Spreading the Cost of Female Longevity

One of three means may be used to equalize contributions for male

106. It appears that the employer also argued that purchasing annuities that paid equal periodic benefits to males and females would cost it more money. The Commission responded by citing its *Guidelines on Discrimination Because of Sex,* 29 C.F.R. § 1604.9(e) (1975): "It shall not be a defense under Title VIII (sic) to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." It also cited Taylor v. Goodyear Tire & Rubber Co., 6 FEP 50 (N.D. Ala. 1972), but neither the *Guideline* nor the *Taylor* case offer any reasons for the rule. However, since its effect is to require the employer to pay the extra cost of females' benefits and the employer will take this money out of funds it might otherwise apply to employee remuneration, the effect of the rule is to spread the costs of such benefits over the class of all employees. Therefore, the discussion concerning the employer's argument on unisex tables is applicable to the *Guideline* and *Taylor,* because the effect of unisex tables is also to spread costs over the class of all employees.

107. Reverting to the illustration in note 6 *supra,* if male contributions are $14.00, and female contributions are the same, the retirement fund will have on hand (including matching employer contributions) $56.00 with which to fund benefits for the counterparts. The male will live 14 years and the female will live 19 years after retirement, so that the $56.00 in available money must be divided into 33 equal parts if the counterparts are to receive equal periodic benefits. The result is that each retiree will be paid a pension of approximately $1.70 per year. The male is subsidizing the female's benefit in that, if separate funds are maintained for each sex, he would have been paid a pension of $2.00 per year. The female is receiving the greater employment opportunity in that, while the male pays $14.00 and receives $23.80, the female pays the same $14.00 and receives $32.30.

108. See text accompanying notes 93-100 *supra.*

and female counterparts.[109] One is to use unisex mortality tables. Another is to charge all employees contributions at the rate called for by male mortality tables and to charge the employer for any predicted shortfall in funding. The third is to assess the shortfall to all employees in equal shares. All of these means have the same effect, namely, the cost of female longevity is allocated over the class of all employees.

This effect is apparent with unisex tables: rather than determining employee contributions by the average lifespan of a male or female, each employee contribution is assessed according to when the average individual will die. Female longevity is not singled out, but the cost is averaged throughout the class of all employees. The effect is the same if all employees make contributions according to male mortality tables and the employer pays the difference, for the extra employer dollars will undoubtedly come from money otherwise available for employee remuneration. With so much less in the pot to be divided into paychecks, each employee receives a little less in wages and, indirectly, contributes to the retirement fund. Of course, if the predicted shortfall is not paid by the employer, but charged equally to all employees, the cost is plainly spread throughout the whole working population. If contributions and periodic benefits for counterparts are to be equalized, therefore, the question is whether the cost of female longevity should be borne by the class of all employees, or whether that cost should remain where it is now, on the class of women alone. For several reasons the right class is the class of all employees.

Assume retirement funds had never used sex-segregated mortality tables; instead, assume they had available to them only unisex tables.[110] Would men have had any basis under Title VII for challenging retirement funds which used unisex tables? Surely not, for what in the Act

109. It is assumed that employers using retirement funds would take steps to ensure that they remain actuarily sound, that is, current funding would be adjusted to meet projected liabilities.

110. It has been suggested that retirement funds use sex-segregated mortality tables because insurance companies have traditionally kept separate statistics on men and women. They do so, first, because statistics based on sex are easy to collect. Second, with regard to annuity policies, the much stronger market between the sexes is male, and sex-segregated tables allow the companies to keep the premiums on annuity policies for males lower than unisex tables would allow. Third, with regard to life insurance policies, again the stronger market is male. Sex-segregated tables allow the companies to measure their exposure more accurately because if unisex tables were used, though most policy holders were male, the companies would be paying out greater sums than they had anticipated. The great question is whether these facts of business life should be allowed to prejudice women in their employment opportunities. *See* Note, *Sex-Based Mortality Tables, supra* note 105.

allows one to complain of being classified as a person? Unisex tables do not classify an individual "because of such individual's race, color, religion, sex, or national origin;" they do not "limit, segregate, or classify . . . in any way which would deprive . . . any individual of employment opportunities or otherwise adversely affect his status as an employee . . . ." Unisex tables ignore all such classifications, and for this reason they are a model of even-handed treatment of employees.

If unisex tables are lawful under Title VII, it follows that spreading the cost of female longevity evenly over the class of all employees (which unisex tables do) is also lawful. Other means of spreading this cost over the class of all employees should be lawful as well, so that it is equally legal to charge all employees' contributions at the rate called for by male mortality tables and to charge the employer for any predicted shortfall in funding or, instead of charging the employer, to charge the shortfall to all employees in equal shares.[111]

Assume again that unisex mortality tables were in exclusive use; assume also that the retirement funds changed, not to sex-segregated tables, but to race-segregated tables. It is well established that the nonwhite population has a shorter life expectancy than the white population.[112] Would any court uphold a practice of charging different contributions or paying different periodic benefits based on race or color? Yet its justification is exactly the same as the one for sex-segregated tables, namely that each class should pay its own way. The flaw in the justification is that it creates a class which Title VII forbids.[113]

Retirement funds reply that they do not treat women differently because of their sex but because of their longevity. There are two re-

111. This observation is particularly important in light of the problems associated with unisex tables. *See* text following note 121 *infra.*

112. INFORMATION PLEASE ALMANAC 734 (1975).

113. It has been argued by counsel for retirement funds that Congress intended to give sex a lesser degree of protection than race, but such legislative history as exists is contrary. During the debates on the Civil Rights Act of 1964, the House of Representatives rejected an amendment limiting protection of sex to discrimination based solely on sex. *See* note 74 *supra.* During the debates on the Equal Employment Opportunity Act of 1972, Senator Javits, after quoting from a report of the United States Commission on Civil Rights, stated about the Act: "Not only is this applicable to minorities; it is also applicable on the ground of sex. The committee report reflects that very clearly . . . ." LEGISLATIVE HISTORY, *supra* note 42, at 1174.

It is true that the bona fide occupational qualification exception of section 703(e) applies to sex and not to race according to its language, but one may ask whether the letter or spirit of the Act would be violated if a movie producer refused to hire anyone but a black man to portray the life of Martin Luther King.

sponses which defeat this argument. First, as noted above, Congress rejected an amendment to Title VII which would have limited its protection of sex to discrimination based solely on sex.[114] Congress realized that discrimination may be subtle and that employers must be prevented from discriminating on factors, on their face neutral, which affect one sex but not the other. Female longevity applies exclusively to women. Thus, to differentiate on the basis of longevity is tantamount to discriminating on the basis of sex.[115]

The second response to the argument that women are treated differently because of longevity, not sex, is that only the class of women—and no other class—is so honored.[116] Smokers die before non-smokers. Obese persons die before slender persons. Alcoholics die before teatotalers. These facts are not speculation. Insurance companies refuse to issue policies to such persons, or adjust the premiums, or exclude related risks from coverage. Yet retirement funds uniformly ignore use of alcohol, tobacco, and obesity. Instead, they choose the one characteristic which applies to women alone, longevity. Do they treat women differently only because of their longevity, or have they chosen longevity because it applies only to women?[117]

An additional reason for spreading the cost of female longevity over the class of all employees is that while it may be true that the statistically average woman lives about five years longer than the statistically aver-

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114. *See* note 75 *supra*.

115. Also, distinguishing Geduldig v. Aiello, 417 U.S. 484 (1974), there are no women at all who benefit on the basis of longevity.

116. That public employers use sex-segregated mortality tables, but ignore tables which show different life expectancies on account of weight, use of alcohol and tobacco, etc., leads to an equal protection argument based on the theory that sex (to the exclusion of other known factors) is an arbitrary classification under the fourteenth amendment.

117. Likewise, many costs of employment which could be attributed to one sex or the other or some other class are not now calculated or, if calculated, are not assessed against the appropriate sex. A similar type of cost allocation is used, albeit indirectly, in two areas outside the retirement picture. For example, women tend to change jobs more frequently than men, with the result that the employer incurs greater recruitment and training costs for that sex. Are its wages or retirement privileges affected because of this cost? In addition, men probably tend to suffer a higher rate of industrial accidents than women, resulting in the employer paying higher premiums for insurance (or paying larger awards) for this sex. Are its wages or retirement privileges affected? In both cases, of course, the answer is no. Many costs like these are never computed. When they are computed—surely industrial accident expenses are known to the precise dollar—they are not assessed against the class which causes them. The result is that uncomputed and unassessed costs are spread evenly over the class of all employees, since the money used to meet such costs is taken from funds otherwise available for employee remuneration. What possible justification is there for spreading these costs one way while spreading the cost of female longevity another?

age man, the probability is five out of six that retired women will die at the same age as their male counterparts. As the Court observed in *Henderson v. Oregon*:[118]

> The great majority of men and women—84 per cent—share common death ages. That is, for every woman who dies at 81 there is a corresponding man who dies at 81. The remaining 16 per cent are women who live longer than the majority and men who live shorter.[119]

Female longevity is a fact characteristic of fewer than one in six of the class of females, yet "as a result, each women is penalized because a few live longer and each man benefits because a few men die earlier."[120] This fact must be kept in mind as it is decided whether women alone, or all employees together, should bear the cost of female longevity. For if extra longevity were a characteristic of each and every woman, perhaps it would be fair to ask women alone to bear this cost; but it is a characteristic of only one woman out of six. If it is unjust for men to pay for the longevity of women, it is equally unjust for the 84 percent of women who die at the same time as their male counterparts to pay for the extra longevity of the remaining 16 percent. Because it cannot be determined which women will outlive their counterparts, the only fair approach is to allocate the cost of their benefits over the class of all employees. The 84 percent of women deserve protection as much as the men. There is no sound reason for protecting the class of men alone.

Also, while there is not any reason for protecting men from the cost of benefits for the superannuated 16 percent, there is a very good reason for asking men to share in the cost: it is the ability of the class to pay. If the cost of female longevity is charged to the class of women alone, the burden per person is at least twice as heavy as if the cost is spread over the class of all employees.[121] It is surely more equitable that each employee (who had an equal chance of being born male or female and who, at retirement, has an almost equal chance of dying in the same year as his counterpart) be asked to pay five or six percent

118. 405 F. Supp. 1271 (D. Ore. 1975).

119. *Id.* at 1275 n.5. This surprising fact, which cuts down to size the overemphasized statistic of female longevity, is drawn from a simple graph on which the numbers of male and female deaths are plotted against ages at death.

120. *See generally id.*

121. The burden is really doubled since there are more working men than working women.

more in contributions than that women alone be asked to pay 15 percent more than men.

Allocation of the cost of female longevity to the class of all employees creates two practical problems. First, if unisex mortality tables are used, the retirement fund of a predominately male work force will be overfunded, while the fund of a predominately female work force will be underfunded. Indeed, only a work force which mirrors the sex distribution of the population as a whole will be funded accurately. It cannot be gainsaid that all employees have a strong interest in properly funded retirement programs, and if appropriate adjustments cannot be made to unisex tables, they may not prove a practicable alternative. But this is not to say that the reason for using, that the cost of female longevity should be spread over the class of all employees, must be abandoned. For there is a fundamental distinction between measuring a cost and spreading that cost.

The objection to unisex tables is that they do not measure the cost of female longevity accurately enough; therefore, it may be necessary to abandon them for that purpose, but their function in spreading the cost of female longevity evenly over the class of all employees remains viable. Conversely, the objection to sex-segregated mortality tables goes solely to the way they spread the cost of female longevity; they must not be used for that purpose, but their ability to measure the cost of female longevity is beyond criticism. If unisex tables prove unadaptable for use in a given retirement fund, then sex-segregated tables may be employed to measure the costs the fund will encounter in the future. Once the costs are determined, the sex-segregated tables should be put aside, and the costs should be spread evenly over the class of all employees. Unisex tables may be used for this purpose; male tables may be used to establish a basic rate, and the employer may pay any predicted shortfall; or the shortfall may be assessed in equal shares to all employees.

The second problem is the unhappy reaction of male employees who will see their contributions increased while their benefits remain the same.[122] As a practical matter, the measure of male discomfort is

122. It is unlikely that equalization of contributions and benefits will cause a reduction in benefits since judgments in favor of women for excess contributions or deficient benefits are limited by the short limitations period of 42 U.S.C. § 2000e-5 (Supp. 1973). Retirement funds will not be called upon to pay out any large portion of their assets to

within the power of the employer to control. If female contributions are cut and male contributions are raised simultaneously, the men will grumble. On the other hand, if female contributions are first lowered to the level of their male counterparts', and later contributions for both sexes are raised equally, the season of discontent may be ameliorated—or at least placed upon men and women alike. As a legal matter, a similar problem was faced in the context of seniority rights for blacks and whites in *United States v. Bethlehem Steel*,[123] in which the court stated, "[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed."[124]

III. Defenses To Sex Discrimination In Funding Retirement Plans

Retirement funds have interposed three defenses, two based on the Act itself and one on the eleventh amendment. The first defense is that disparate levels of contributions and benefits for counterparts are a bona fide occupational qualification under section 703(e). The second defense is grounded on section 703(h), which excludes from the Act any conduct authorized under the Equal Pay Act of 1963. The third defense is that public employers are not liable to pay damages under the eleventh amendment.

A. Are Disparate Contributions and Periodic Benefits a Bona Fide Occupational Qualification?

It has been argued that disparate contributions and periodic benefits for counterparts constitute a bona fide occupational qualification (BFOQ) under section 703(e) of Title VII.[125] Further, it is contended

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their female beneficiaries, and any future increases in benefits can be gradually funded over several years.

123. 446 F.2d 652 (2d Cir. 1971).

124. *Id.* at 663.

125. Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin 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. § 2000e-2(e) (1970).

that funds cannot be administered without use of sex-segregated mortality tables and that all employees, including women, have an interest in seeing their retirement benefits accurately funded.

A close reading of section 703(e) reveals the first error in this argument, for the BFOQ exception only applies to the act of hiring; it does not reach the compensation, terms, conditions, or privileges or opportunities of employment. Congress did not inadvertently omit reference to compensation, terms, conditions, or privileges or opportunities of employment when it drafted the section. It included these words in section 703(h),[126] another exception to the coverage of the Act. The reason for this limitation on the BFOQ exception is apparent: an employer may refuse to hire someone because of valid business reasons.[127] Once a given individual is hired, the employer must treat the individual as all other employees are treated.

In addition to the plain meaning of the language of section 703(e) and the clear policy behind it, the EEOC has issued administrative guidelines regarding the BFOQ exception,[128] and those guidelines refer only to the act of hiring. The Commission has interpreted the exception narrowly, and significantly, all of the examples it gives as being outside the BFOQ exception relate to the act of hiring itself.[129] Thus, as the EEOC views the Act, disparate contributions and benefits for counterparts cannot aspire to the status of a bona fide occupational qualification.

Courts have read the BFOQ exception as narrowly as has the EEOC. For example, in *Rosenfeld v. Southern Pacific Co.*[130] the employer refused to hire a woman because the job required lifting heavy weights. The Ninth Circuit drew a distinction between lawful and unlawful use of sex-related characteristics, stating that the BFOQ exception includes

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126. *Id.* § 2000e-2(h).

127. *See* note 128 *infra.*

128. Sex as a bona fide occupational qualification.

(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. . . .

. . . .

(ii) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

29 C.F.R. § 1604.2 (1975).

129. *Id.* § 1604.2(a)(1) and (b)(1)-(5).

130. 444 F.2d 1219 (9th Cir. 1971).

"sexual characteristics of the employee [which] are crucial to the successful performance of the job, as they would be for the position of a wet-nurse," but it is illegal under the Act, and outside the scope of the BFOQ exception, to rely on "characteristics that might, to one degree or another, correlate with a particular sex."[131]

Additionally, with respect to the language of section 703(e) which allows discrimination based on BFOQ, it should be noted that disparate contributions and periodic benefits are neither related to the normal operation of the employers' business nor necessary to such operation. This standard was announced in *Diaz v. Pan American World Airways*[132] in which the employer attempted to justify its refusal to hire males for cabin attendants on the basis of the BFOQ exception:

> We begin with the proposition that use of the word "necessary" in section 703(e) requires that we apply a business *necessity* test, not a business *convenience* test. That is to say, discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring the members of one sex exclusively.[133]

The level of employee contributions to a retirement fund and the level of periodic benefits it pays seem unrelated to the diverse businesses which employers maintain. While it may be argued that contributions and benefits are important to the retirement funds themselves, it is clear that a difference in contributions or benefits is not necessary to the normal operation of the funds. For if the cost of female longevity is spread over the class of all employees, by means of unisex mortality tables or male tables with a special assessment applied equally to all employees, the funds stand in the same actuarial position they presently occupy.[134]

B. Are Disparate Contributions and Periodic Benefits Authorized by the Equal Pay Act of 1963?

A second potential obstacle to allocation of cost to the entire class of

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131. *Id.* at 1224-25.

132. 442 F.2d 385 (5th Cir. 1971).

133. *Id.* at 388.

134. For the retirement funds' counsel who forecast that equal contribution rates and equal periodic benefits would destroy the actuarial soundness of the funds, Armageddon may have come sooner than they expected. Gov. Code § 7500 became effective in California in 1975, and it requires just this kind of equality for the *Manhart* fund. CAL. GOV. CODE ANN. § 7500 (West Supp. 1976). The fund has not yet gone bankrupt and if new liabilities are foreseen by its actuaries, they can be funded easily by increasing the contribution rates for males and females equally.

employees is that section 703(h)[135] contains an exception for practices authorized under the Equal Pay Act.[136] This legislation was designed to guarantee that women doing the same work as men receive the same compensation, but it was not intended to revolutionize the labor market by eliminating higher rates of pay based on seniority, or quality or quantity of production, as is indicated by the exceptions which were written into the statute to preserve these legitimate practices.[137] While Title VII was being debated, Senator Bennett realized that its broad effect might be held to vitiate the exceptions built into the Equal Pay Act only the year before, and he introduced an amendment which incorporated into Title VII an exception for any practice allowed by the Equal Pay Act.[138] Oddly, three of the exceptions listed in the Equal Pay Act were already incorporated into the first sentence of section 703(h).[139] Thus, the only effect of the Bennett Amendment was to bring the final exception of the Equal Pay Act—"a differential based on any other factor than sex"—into Title VII.

Was Congress merely inserting into the Act a provision limiting its effect in sex cases to discrimination based solely on sex, though such an amendment had been previously rejected?[140] Or was Congress giving the Wage and Hour Administrator, who interprets the Equal Pay Act,[141] the power to make definitive rulings on sex discrimination in place of the EEOC? Whatever the intent of Congress, the Wage and Hour

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135. 42 U.S.C. § 2000e-2(h) (1970).

136. 29 U.S.C. § 206(d) (1970).

137. Those pay differentials that are authorized are based on

> (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

Id. § 206(d)(1).

138. The Bennett Amendment as enacted reads:

> It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, *as amended* 29 U.S.C. § 206 (d) [the Equal Pay Act].

139. Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h) (1970).

140. *See* note 75 *supra.*

141. *See* 29 U.S.C. § 204 (1970).

Administrator has ruled that, under the Equal Pay Act, an employer legally may make equal contributions for male and female employees to a retirement fund (resulting in different periodic benefits for counterparts) or may make different contributions for counterparts causing the fund to pay males and females the same periodic benefits.[142] Thus, because practices which are legal under the Equal Pay Act are also legal under Title VII and because the Wage and Hour Administrator has sanctioned their practices under his legislation, no violation occurs under Title VII.

This argument is inconsistent and shortsighted. First, there is a fundamental flaw in the Administrator's regulation.[143] If the money which an employer contributes to a pension fund would otherwise be available for employee remuneration,[144] then a real difference exists between the employer who makes equal contributions for counterparts (resulting in lower periodic benefits for women) and the employer who contributes more for women (resulting in equal periodic benefits). The difference is that the employer who contributes more for women takes those extra dollars from money otherwise available to pay all employees, thus effectively spreading the cost of female longevity evenly over the class of all employees; while the employer who contributes equally for counterparts places the cost of female longevity solely on the class of women (who pay for it in the form of lower periodic benefits). The Administrator's regulation approves both modes of cost spreading, yet the former method requires men to share the cost of female longevity and the latter requires women to bear it alone.

Second, the Wage and Hour Administrator has focused only on the case of *employer* contributions; he has never ruled on the case of an employer who requires his *employees* to make different contributions. Thus, the Administrator has not ruled on facts similar to those presented in the *Manhart* case. However, he has ruled on facts similar to those of *Henderson.* Both cases were based on the same principle, namely, each sex pays for its own benefits. Thus, if the Administrator is to be consistent, he must approve disparate employee contributions as

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142. 29 C.F.R. § 800.116(d) (1975).

143. 29 C.F.R. § 800.116(d) (1975).

144. This assertion becomes inaccurate to the degree that a retirement fund's future liabilities are unfunded. An employer who commits himself to a future unfunded liability is not setting off today's pay increases against today's pension contributions; rather, he is setting off tomorrow's pay increases against tomorrow's pension liabilities. This practice is increasingly uncommon. *See* notes 2-3 *supra* and accompanying text.

well as disparate employer contributions. Yet the plain result of that would be to authorize different take-home pay for male and female counterparts, which it is hard to imagine the Administrator sanctioning.[145]

Third, the reason that higher contributions are exacted from females or that they are paid lower periodic benefits is that it is more costly to sustain women than men during the period of retirement. The Wage and Hour Administrator has expressly ruled that an employer may *not* justify a wage differential on a difference in the average cost of employing persons of different sexes.[146] Thus, while the Administrator has authorized the practices used by employers in operating retirement funds, he has outlawed the motivation behind those practices, with the result that his true position is unclear.

Finally, it must be recognized that the EEOC and not the Wage and Hour Administrator, is responsible for interpreting Title VII, and the EEOC's position is both clear and consistent.[147]

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145. The Administrator appeared as amicus curiae on behalf of the *Manhart* plaintiffs before the Ninth Circuit, arguing that disparate employee contributions would not be lawful under the Equal Pay Act. This inconsistency further weakens the use of the Administrator's regulations in the retirement problem. Perhaps the most nearly cogent justification for the Administrator's positions is that the Equal Pay Act guarantees only equal pay for equal work. If counterparts receive the same take-home pay (as in *Henderson*), they have no grounds to complain under the Equal Pay Act; but if counterparts receive different take-home pay (as in *Manhart*), there is an obvious violation.

146. A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group does *not* qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility.

29 C.F.R. § 800.151 (1975) (emphasis added). The final sentence of the quotation supports this writer's emphasis on individual, rather than class, measurement of retirement costs and benefits. The Wage and Hour Administrator has recognized that it is not fair to protect males from the cost of female longevity without also protecting the 84 percent of females of whom longevity is not characteristic.

147. *See* 2 CCH EEOC Decisions (Employment Practices Guide) ¶ 6447 (1975); *id.* ¶ 6431.

C. Does the Eleventh Amendment Bar Recovery From the Retirement Fund of a Public Employer?

The eleventh amendment to the United States Constitution[148] precludes an action for money damages in federal court against an unconsenting state.[149] On this basis, public employers argue that the federal courts lack jurisdiction to enter judgments which require their retirement funds to pay any money to their employees. This argument was rejected without comment in both *Manhart* and *Henderson.*

The eleventh amendment defense has not been effective against a plaintiff seeking declaratory or injunctive relief,[150] nor has the defense been effective when the defendant was not a state itself, but a city or county or similar creation of the state.[151] Recently, the Supreme Court held in *Fitzpatrick v. Bitzer*[152] that the eleventh amendment defense is not effective in Title VII actions even where the defendant is the state itself. The Court found that Congress had the power to authorize the federal courts to award damages against a state guilty of discrimination under Title VII.[153] The Court reasoned that the 1972 amendments to Title VII, which made the Act applicable to governmental employers, were adopted pursuant to Congress's power under the fourteenth amendment and that

> the Eleventh Amendment, and the principle of state sovereignty which it embodies [citation] are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which them-

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148. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

149. Hans v. Louisiana, 134 U.S. 1 (1890).

150. The power of the federal courts to grant injunctive relief, even though obedience to the mandate may cost money from the state treasury, is well established. Edelman v. Jordan, 415 U.S. 651 (1974).

151. In Lincoln County v. Luning, 133 U.S. 529 (1890), the Supreme Court said that

> while the county is territorially a part of the State, yet politically it is also a corporation created by and with such powers as are given to it by the State. In this respect it is a part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State.

Id. at 530. *See also* Edelman v. Jordan, 415 U.S. 651 (1974); Moor v. County of Alameda, 411 U.S. 693 (1973).

152. 44 U.S.L.W. 5120 (June 28, 1976).

153. *Id.* at 5123.

> selves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. . . .[154]

Therefore, it now appears that under the reasoning of the *Fitzpatrick* case, the eleventh amendment will not provide an unconsenting state with a sovereign immunity defense to Title VII actions.

IV. Remedies

If a woman has been unlawfully required to contribute more to a retirement fund than her male counterpart, or if she has contributed equally but is unlawfully denied equal periodic benefits, or if a man has been forced to accept a lower periodic benefit upon retirement than is paid to his female counterpart, the remedy is obviously to enjoin future inequalities and to make whole the victims for their past losses. The injunction raises few problems; however, the restitution has caused problems for some plaintiffs.

The women in *Manhart* were each awarded a refund of contributions in excess of those made by their male counterparts, plus seven percent interest. Because periodic benefits were equal, the plaintiffs were made whole.

In *Rosen v. Public Service Electric & Gas Co.*,[155] in which the plaintiff complained that men who retired at age 60 were receiving reduced pensions, the Court of Appeals for the Third Circuit stated that the men must be compensated for their losses. On remand, the district court determined that the men were entitled to an increase in benefits only in proportion to the work they performed after the effective date of the Act.[156] If this judgment is upheld, it means that any man who retires after the court's injunction, requiring the defendant to offer the same opportunity to men as to women, will receive a full pension, while those

154. *Id.* (citation omitted) (footnote omitted).

155. 477 F.2d 90 (3d Cir. 1973).

156. 11 FEP 330 (D.N.J. 1975), *aff'd*, 527 F.2d 645 (3d Cir. 1976). *But see* Chastang v. Flynn & Emrich, 12 FEP 1533 (4th Cir. 1976).

who retire after the effective date of the Act but before the court issued the injunction will receive a pension increased only by the fraction of his service after the effective date of the Act. This result seems incorrect, not only for the harshness of an arbitrary line, but also for its effect, in that it will restrict the benefits for male retirees for their entire retirement period. One may wonder whether the stringent make-whole policy enunciated by the Supreme Court in *Albemarle v. Moody*,[157] does not require that the *Rosen* retirees receive the same periodic benefits as their female counterparts, provided only that the men retire after the effective date of the Act.

V. CONCLUSION

Whether females should pay equal contributions to their retirement funds and receive equal periodic benefits from them as compared to their male counterparts is, ultimately, a function of the definition of the employment opportunity offered by a retirement plan. If the opportunity is defined by classes of persons, present practices are acceptable; if by individual persons, present practices are unacceptable. The effect of a class-wide definition of the opportunity is to spread the cost of the longevity of the 16 percent of women who outlive their counterparts over the class of women alone; the effect of an individualized definition is to spread the cost of the 16 percent over the class of all employees. Equitable considerations seem to require that a woman, who has worked as diligently as her male counterpart, not receive a lower standard of living, merely because she might outlive her male counterpart. Nor does it seem right to protect all men from the cost of female longevity, without also protecting the 84 percent of women of whom this characteristic is inaccurate. Title VII demands that each person should be treated the same as every other person. Contributions to and periodic benefits from retirement funds should be equal for counterparts. The cost of human longevity should be spread evenly throughout the class of human beings. Title VII allows no other classification.

157. 422 U.S. 405 (1975).