IV. EMPLOYMENT DISCRIMINATION

NORRIS V. ARIZONA GOVERNING COMMITTEE: TITLE VII'S APPLICABILITY TO ARIZONA'S DEFERRED COMPENSATION PLAN

Title VII of the Civil Rights Act of 1964 (Title VII)[1] prohibits an employer from discriminating against any individual on the basis of sex.[2] The United States Supreme Court held, in *City of Los Angeles v. Manhart*,[3] that employer-sponsored pension benefits based on sex-segregated actuarial tables violated Title VII.[4] In *Norris v. Arizona Governing Committee*,[5] the Ninth Circuit applied the *Manhart* decision to invalidate an Arizona plan for providing certain retirement benefits to state employees.

Nathalie Norris is employed by the state of Arizona and participates in the state's Deferred Compensation Plan (Plan).[6] The Plan was adopted pursuant to a statute authorizing the Arizona Governing Committee (Governing Committee) to "investigate and approve tax deferred compensation and annuity programs which give employees of the state income tax benefits."[7] The Governing Committee selected several companies as funding

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1. 42 U.S.C. § 2000e (1976).

2. *Id.* § 2000e-2(a)(1) provides in part:

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

3. 435 U.S. 702 (1978).

4. *Id.* at 716.

5. 671 F.2d 330, 336 (9th Cir.), *cert. granted*, 103 S. Ct. 205 (1982). The questions presented to the United States Supreme Court, on which it granted certiorari, were: whether the State of Arizona violated Title VII by contracting with independent insurance companies which used sex-based actuarial tables, even though employees could elect a nondiscriminatory option, all available insurance companies used such tables, and Arizona had no discriminatory intent; and whether the federal court abused its discretion in ordering Arizona to equalize annuity payments, where the state legislature had provided that the state was to make no contribution and where the state was not responsible for the establishment of the sex-based actuarial tables. Petition for Writ of Certiorari at i-ii.

6. Norris v. Arizona Governing Comm., 486 F. Supp. 645, 647 (D. Ariz. 1980), *aff'd*, 671 F.2d 330 (9th Cir.), *cert. granted*, 103 S. Ct. 205 (1982). See ARIZ. REV. STAT. ANN. §§ 38-871 to -874 (1974 & Supp. 1982-83), which establishes the state's tax deferred annuity and deferred compensation programs.

7. ARIZ. REV. STAT. ANN. § 38-871(B)(1) (Supp. 1982-83). The Governing Committee consists of seven members:

1. Three employees of the state appointed by the governor.
2. The director of the state personnel commission.
3. The superintendent of the state banking department.
4. The assistant director of the department of administration for the division of finance.
5. The attorney general.

Id. § 38-871(A). The Governing Committee may "enter into agreements with life insurance companies authorized to do business in this state and with bank trustees or custodians and investment counseling firms registered with the securities exchange commission." *Id.* § 38-871(B)(2). For the

media, including life insurance companies offering annuity contracts.[8] Participation in the Plan is voluntary,[9] and the Plan is financed totally through employee payroll deductions,[10] "without cost or contribution from the state."[11] Employees are offered three options as to their receipt of their deferred income on retirement: (1) the lump-sum option, which allows withdrawal at once of the total accumulated amount, (2) the periodic payment option, which provides for receipt of a fixed sum for a fixed period of time, and (3) the life annuity contract, which provides a monthly payment for life.[12] In computing the amount payable monthly under the life annuity plan, all insurance companies selected by the Governing Committee used sex-segregated actuarial tables.[13]

Norris filed a class suit in the United States District Court in Arizona, alleging that the Plan violated Title VII.[14] The suit challenged the Plan's life annuity option, contending that because similarly situated male and female employees made equal contributions to the Plan and females received smaller monthly payments than males upon retirement,[15] the Plan discriminated on the basis of sex and therefore violated Title VII.[16] The district court stated that any discrimination with respect to "compensation, conditions of employment, or privileges of employment" solely on the basis of sex is a violation of Title VII.[17] The court found the Plan to be discriminatory and in violation of Title VII.[18] The Ninth Circuit Court of Appeals affirmed.[19]

Although *Norris* was not the first case to consider the discriminatory effect of the use of sex-segregated actuarial tables in computing employee

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administrative rules and regulations of the Governing Committee, see ARIZ. ADMIN. COMP. R. 2-9-101 to -102 (1980).

8. *Norris*, 486 F. Supp. at 648.

9. ARIZ. REV. STAT. ANN. § 38-872(A) (1974), which provides: "State employees *may* participate in tax deferred annuity and deferred compensation programs established pursuant to the provisions of § 38-871." (Emphasis added.)

10. *Id.* § 38-873, which provides in part: "The department of administration division of finance shall initiate payroll salary reductions or deductions for the plans adopted pursuant to § 38-871."

11. *Id.* § 38-871(C)(1) (Supp. 1982-83), which provides in part: "any such plans approved shall operate without cost or contribution from the state except for the incidental expense of administering the payroll salary deduction or reduction and remittance thereof to the trustee or custodian of the plan or plans." Benefits provided under the Plan are in addition and supplemental to benefits provided under any other state law, including the Arizona State Retirement System, which is partially funded through state contributions. *Id.* § 38-874(A) (1974).

12. *Norris*, 671 F.2d at 332. Only the life annuity contract was in question. *Id.* It, however, accounted for a substantial portion of the Plan participants. As of August 18, 1978, the Plan had 1,675 participants, of whom 681 were women. 486 F. Supp. at 647. Of these, 572 had selected an annuity option. *Id.*

13. 671 F.2d at 332.

14. 486 F. Supp. at 647.

15. Assuming that the deferred amount remained constant to age 65, women in plaintiff's position would receive a monthly annuity payment of $320.11 for life, while men would receive a monthly payment of $354.07. *Id.* at 648.

16. *Id.* at 647.

17. *Id.* at 652. The district court granted summary judgment to plaintiff and her class and issued a permanent injunction against defendants' use of sex-segregated actuarial tables and an order directing the defendants to equalize payments to male and female retirees. *Id.*

18. *Id.*

19. 671 F.2d at 332.

benefits,[20] it is unique in two important respects. First, the particular type of plan at issue, a deferred compensation plan, had not been questioned before.[21] Second, the Plan was found discriminatory even though it offered nondiscriminatory options.[22] This Casenote will discuss these distinctions in evaluating the *Norris* decision's place in the developing body of Title VII law. It will examine first the context in which *Norris* appeared by assessing the United States Supreme Court's application of Title VII to employee benefit plans in *Manhart*. Next, the Ninth Circuit's extension of *Manhart* to a voluntary, third-party operated deferred compensation plan will be discussed. This Casenote will then analyze the *Norris* court's ruling that the existence of nondiscriminatory options in the Plan did not relieve the employer of his responsibility under Title VII. Finally, this Casenote will examine the significance of the court's order that the state equalize payments to all retirees.

Manhart: *The Extension of Title VII to Employee Benefit Plans*

Under Title VII, it is unlawful for an employer to discriminate against any individual on the basis of sex with respect to "compensation, terms, conditions, or privileges of employment."[23] *Manhart*, the first disparate treatment decision involving an employee pension plan,[24] addressed two components of this prohibition that have particular relevance to subsequent decisions, including *Norris*: the particular classifications based on sex that constitute discrimination, and the amenities of employment that are covered.[25]

Before *Manhart*, it had been established that the use of mere stereotyped impressions about the characteristics of males and females as a basis

20. See City of Los Angeles v. Manhart, 435 U.S. 702 (1978), where the United States Supreme Court found that an employer-sponsored pension plan which required larger monthly contributions from female than from male employees on the basis of life expectancies derived from sex-segregated actuarial tables violated Title VII. *Id.* at 717.

21. Prior to *Norris*, only pension plans had been challenged. *See, e.g.*, Equal Employment Opportunity Comm'n v. Colby College, 589 F.2d 1139 (1st Cir. 1978) (compulsory pension plan operated by a nonprofit annuity and life insurance corporation); Women in City Gov't United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981) (compulsory retirement plan administered by a municipal retirement system pursuant to statute); Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298 (S.D.N.Y. 1979) (compulsory retirement plan operated by two nonprofit life insurance and annuity corporations), *aff'd*, 691 F.2d 1054 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791).

Norris involved a deferred compensation plan, which had two components not addressed in prior litigation: voluntary participation and employee-only contribution. 671 F.2d at 332. Although participation in the retirement plan in Peters v. Wayne State Univ., 476 F. Supp. 1343 (E.D. Mich. 1979), *rev'd on other issues*, 691 F.2d 235 (6th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794), was voluntary, the court did not address this component of the plan. *Id.* at 1347.

22. *See supra* note 12 and accompanying text.

23. 42 U.S.C. § 2000e-2(a)(1) (1976).

24. In Title VII law, two theories form the basis for most analysis: disparate treatment and disparate impact. *See* Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 508-09 (1980) [hereinafter cited as Brilmayer]. The essence of a disparate treatment case is that individual characteristics are ignored, and the individual is treated on the basis of group affiliation. *Id.* at 509. Disparate impact results when a permissible criterion has an unequal impact on a particular group. *Id.*

25. 435 U.S. at 707-18.

for employment decisions violated Title VII.[26] The *Manhart* Court addressed the more complex question involved when differential treatment is predicated, not on a "mere stereotype," but on a statistically verifiable sex-based difference, such as life expectancy.[27] The question posed in *Manhart* was whether Title VII was violated even though the statistical generalization was verifiable. The United States Supreme Court held that it was.[28]

In *Manhart*, a compulsory employer-sponsored pension plan required higher contributions from female than from male employees.[29] This feature of the plan resulted from the use of sex-segregated actuarial tables, similar to those used in *Norris*, showing that females, on the average, lived longer than males.[30] In concluding that this type of plan violated Title VII, the Court held that "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[31]

Thus, in *Manhart*, the standard of individual treatment came into di-

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26. Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.) (no-marriage rule for stewardesses violated Title VII because it was based "solely" on a sexual stereotype), *cert. denied*, 404 U.S. 991 (1971). *See also* Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981) (foreign businessmen's preference for doing business with males is not a permissible justification for denying women certain employment positions); Rodriguez v. Board of Educ., 620 F.2d 362, 366 (2d Cir. 1980) (relegation of female elementary school teachers to lower grade levels was intolerable sex stereotyping).

27. Since 1920, when the United States Bureau of the Census began reporting life expectancy data, the life expectancy for women has been higher than for men. U.S. BUREAU OF THE CENSUS, 1981 STATISTICAL ABSTRACT OF THE UNITED STATES 69 (102d ed. 1981). Based on 1979 data, women live 77.8 years, while men live 69.9 years. *Id.* But see Brilmayer, *supra* note 24, at 530-33, 539-59, where the stability and uniformity of the association between sex and mortality indicated by these statistics are questioned. Brilmayer contends that the present difference may be explained more accurately by environmental and behavioral factors that are undergoing rapid change than by reference to sex alone. *Id.* at 540.

28. 435 U.S. at 711.

29. *Id.* at 705. The plan in *Manhart* was a defined benefit plan, where male and female employees received equal benefits upon retirement. *Id.* The greater average cost of a female's pension was compensated for by requiring female employees to make a larger contribution to the plan during their pre-retirement years. *Id.* The actual monthly contribution was 14.84% higher for females than for comparable male employees. *Id.* The result, since employee contributions were withheld from paychecks, was that a female employee earning the same salary as a male received less take-home pay. *Id.*

Decisions after *Manhart* applied it to the other general category of retirement plans—defined contribution plans. *See, e.g.*, Equal Employment Opportunity Comm'n v. Colby College, 589 F.2d 1139, 1144 (1st Cir. 1978); Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1307 (S.D.N.Y. 1979), *aff'd*, 691 F.2d 1054 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791). In this type of plan, of which *Norris* is representative, the contributions made by comparable male and female employees are equal. The disparity appears in lower monthly benefits paid out to female retirees. Norris v. Arizona Governing Comm., 486 F. Supp. 645, 649 (D. Ariz. 1980), *aff'd*, 671 F.2d 330 (9th Cir.), *cert. granted*, 103 S. Ct. 205 (1982); Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1307 (S.D.N.Y. 1979), *aff'd*, 691 F.2d 1054 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791).

30. *Manhart*, 435 U.S. at 705.

31. *Id.* at 708. In support of its ruling, the Court relied on what it perceived to be the purpose of Title VII: "The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *Id.* The Court further reasoned that "[a]n employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act." *Id.* at 711.

rect conflict with the insurance principles involved in the challenged pension plan.[32] The tradition in insurance is to analyze risks and compute costs and benefits in terms of generalizations.[33] In such a system, completely individualized treatment is precluded by the need to provide protection against risk in an economically feasible fashion.[34] To achieve this, risks are pooled, the better risks subsidizing the poorer ones, with the result that individuals are discriminated against.[35] While recognizing the problem of reconciling this risk-pooling concept with the Title VII standard, the Court refused to retreat from the individual standard, ruling that Title VII did not contemplate a "special definition of discrimination in the context of employee group insurance coverage."[36] The Court held, however, that all classifications which an insurance company might choose are not prohibited—only those that result in " 'treatment of a person in a manner which but for that person's sex would be different.' "[37]

Manhart is significant also for its direct application of Title VII to a pension plan, one of the "terms, conditions, or privileges" to which Title VII refers. The *Manhart* Court appeared, however, to limit the scope of its holding: "All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund."[38] Precisely what limitations, if any, the Court intended to place on the applicability of *Manhart* to other types of employer-sponsored benefit plans is unclear.

Lower court decisions in the years intervening between *Manhart* and *Norris* have added some clarity on certain issues. Employers who do not actually "operate" the fund but contract with private annuity associations or insurance companies are not relieved of liability for Title VII violations.[39] Moreover, the courts have also established that the distinction be-

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32. *See, e.g.*, Brilmayer, *supra* note 24, at 508; *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 299, 302 (1978).

33. *The Supreme Court, 1977 Term, supra* note 32. *See also* Amicus Curiae Brief of American Council of Life Insurance on behalf of Defendants-Appellants at 6-8, Norris v. Arizona Governing Comm., 671 F.2d 330 (9th Cir.), *cert. granted*, 103 S. Ct. 205 (1982).

34. *The Supreme Court, 1977 Term, supra* note 32. *See generally* R. MEHR & E. CAMMACK, PRINCIPLES OF INSURANCE 32-37 (6th ed. 1976) (discussing risk principles and criteria for insurable risks).

35. *The Supreme Court, 1977 Term, supra* note 32. *See generally* R. MEHR & E. CAMMACK, *supra* note 34, at 600-03 (explaining rate-making principles in insurance pricing).

36. *Manhart*, 435 U.S. at 710.

37. *Id.* at 711 (footnote omitted) (quoting *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170 (1971)).

38. *Id.* at 717.

39. Equal Employment Opportunity Comm'n v. Colby College, 589 F.2d 1139, 1141 (1st Cir. 1978) (college that required participation in a plan administered by a nonprofit life insurance company and established eligibility and contribution formulas was subject to Title VII); Hannahs v. New York State Teachers' Retirement Sys., 26 Empl. Prac. Dec. (CCH) ¶ 32,037 (S.D.N.Y. 1981) (school system which required participation in a plan administered by a public pension corporation was subject to Title VII even though it made equal contributions for men and women); Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979) (university, which was "plaintiff's employer in the usual sense," was subject to Title VII even though it had delegated its responsibility for and control over the employee annuity plans to non-profit insurance corporations), *aff'd*, 691 F.2d 1054 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791).

tween a defined benefit plan, as found in *Manhart*,[40] and a defined contribution plan, as found in *Norris*,[41] is without significance; both types of plans are covered equally.[42] In *Norris*, however, the court was faced with a plan which raised other issues, and, in addressing them, it expanded further the principles established in *Manhart*.

The Norris *Plan: Deferred Compensation as an Optional Benefit Provided by a Third-Party Insurer*

As an elective plan funded solely through employee payroll deductions,[43] the deferred compensation plan[44] in *Norris* is significantly different from the plan in *Manhart*. The *Manhart* pension plan was compulsory and employer-operated;[45] the *Norris* plan is voluntary and operated by private insurance companies.[46]

Alleged discriminatory action by an employer is the foundation for a claim under Title VII.[47] Employer involvement characterized the plan in *Manhart*; it was operated by the employer and partially funded by the employer.[48] In the cases that followed, however, most of the plans were operated by third-party insurers designated by the employer.[49] None of these cases limited the applicability of Title VII to employer-operated

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40. 435 U.S. at 705. *See supra* note 29.

41. 486 F. Supp. at 649. *See supra* note 29.

42. *See* Equal Employment Opportunity Comm'n v. Colby College, 589 F.2d 1139, 1144 (1st Cir. 1978) (in focusing on the individual, there is no distinction between requiring higher premium payments and paying out smaller benefits when both are based on class characteristics); Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1307 (S.D.N.Y. 1979) (both contributions and benefits are "compensation" within the meaning of Title VII), *aff'd*, 691 F.2d 1054 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791). *See supra* note 29 and accompanying text.

43. *See also supra* notes 9-10 and accompanying text.

44. A deferred compensation plan permits employees who elect to participate to lower their effective tax rate by deferring to subsequent tax years receipt of money already earned. M. CANAN, QUALIFIED RETIREMENT PLANS § 1.6, at 12-13 (1977).

45. 435 U.S. at 704-05.

46. 671 F.2d at 332-33.

47. *See supra* note 2 and accompanying text.

48. 435 U.S. at 705. One court noted that *Manhart* was really the "easy" case, presenting the "fewest difficulties, and the most conspicuous discrimination." Equal Employment Opportunity Comm'n v. Colby College, 589 F.2d 1139, 1143 (1st Cir. 1978).

49. Equal Employment Opportunity Comm'n v. Colby College, 589 F.2d 1139, 1140-41 (1st Cir. 1978); Peters v. Wayne State Univ., 476 F. Supp. 1343, 1346 (E.D. Mich. 1979), *rev'd on other issues*, 691 F.2d 235 (6th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794); Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1300 (S.D.N.Y. 1979), *aff'd*, 691 F.2d 1054 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791). The retirement plans in one case, Women in City Gov't United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981), were employer-operated. *Id.* at 297. *See supra* note 39 and accompanying text.

funds,[50] and the court in *Norris* followed this reasoning.[51]

The Governing Committee had argued that *Manhart* was limited to employer-operated funds.[52] The *Norris* court found *Manhart* did not support such a limitation.[53] The *Manhart* Court had ruled that Title VII applies to " 'any agent' of a covered employer."[54] It had further reasoned that discrimination occurred because women were treated as a class rather than as individuals.[55] This reasoning, the *Norris* court determined, was no less persuasive where a third party was designated as the employer's agent to operate the plan.[56] In both cases, the result was the same: women were discriminated against impermissibly.[57]

The *Norris* court also refused to distinguish *Norris* from other post-*Manhart* cases, ruling that any distinction between the *Norris* plan and the plans examined in earlier cases was "illusory."[58] The Governing Committee had contended that the employer in the earlier cases played a more active role than Arizona in administering the plans.[59] The court ruled, however, that Arizona's adoption of the Plan constituted "active participation without which the challenged plan could not operate."[60] Other courts had articulated this "active participation" test in finding employer responsibility sufficient to invoke Title VII,[61] and the *Norris* court applied it here to the same effect.[62]

Although the Ninth Circuit declined to distinguish *Manhart* on the basis of plan operation, it could have done so on the basis of the *Norris* plan's voluntariness. Because the challenged plan in *Manhart* was compulsory, the United States Supreme Court did not address the voluntari-

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50. Equal Employment Opportunity Comm'n v. Colby College, 589 F.2d 1139, 1141 (1st Cir. 1978) (college was responsible where separate annuity association paid pension benefits but college required participation and established premium payment formula); Peters v. Wayne State Univ., 476 F. Supp. 1343, 1350 (E.D. Mich. 1979) (university was not, by making equal contributions, acting independently of insurer and was liable), *rev'd on other issues*, 691 F.2d 235 (6th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794); Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979) (university, which adopted compulsory retirement plans, controlled an aspect of the individual's employment and was liable), *aff'd*, 691 F.2d 1054 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791). *But see* Sobel v. Yeshiva Univ., 477 F. Supp. 1161, 1166 (S.D.N.Y. 1979) (the question of *Manhart*'s applicability to a plan funded through a private insurance company was difficult, precluding decision on motion for summary judgment).

51. 671 F.2d at 334.

52. *Id.* In support of its contention, the Governing Committee cited the statement in *Manhart* that "[a]ll that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund." *Id.* at 335. *See supra* note 38 and accompanying text.

53. 671 F.2d at 335.

54. 435 U.S. at 718 n.33. The Court also held: "[w]e do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells." *Id.* This passage was relied upon by the *Norris* court. *See* 671 F.2d at 334.

55. *See* 435 U.S. at 711; *see also supra* note 31 and accompanying text.

56. 671 F.2d at 334.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Equal Employment Opportunity Comm'n v. Colby College, 589 F.2d 1139, 1141 (1st Cir. 1978); Sobel v. Yeshiva Univ., 477 F. Supp. 1161, 1166 n.4 (S.D.N.Y. 1979); Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1308-09 n.16 (S.D.N.Y. 1979), *aff'd*, 691 F.2d 1054 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791).

62. 671 F.2d at 334.

ness issue. Indeed, before *Norris*, Title VII had been applied to a voluntary plan in only one case decided under *Manhart*.[63] The Ninth Circuit's extension of the *Manhart* ruling to voluntary plans in *Norris*, however, is consistent with the general intent and application of Title VII.[64]

The *Norris* court ruled that a voluntary benefit is a " 'privilege' of employment and a 'fringe benefit.' "[65] By labeling the Plan a "privilege" of employment, the court subjected it to Title VII coverage.[66] "Privilege" is precisely defined in neither the statute nor the case law construing it; it is commonly understood, however, that all benefits and privileges which arise out of or are incidental to employment are covered by Title VII.[67] Participation in Arizona's deferred compensation plan undoubtedly is a privilege incidental to employment; only state employees may participate.[68] In addition, it is a "fringe benefit" and as such is in a class of benefits that had been recognized as subject to Title VII requirements several years before the United States Supreme Court decided the issue in *Manhart*.[69] Title VII therefore applies to the *Norris* plan, the Ninth Cir-

63. Peters v. Wayne State Univ., 476 F. Supp. 1343 (E.D. Mich. 1979), *rev'd on other issues*, 691 F.2d 235 (6th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794). The *Peters* court mentions the voluntary component of the retirement plan only in its recitation of the facts. *Id.* at 1347. In holding that the university's use of sex-segregated life expectancy tables violated Title VII, the court found no significant distinction between the defined benefit plan in *Manhart* and the defined contribution plan before it. *Id.* at 1351. In fact, it cited this as the "only difference" between the two cases. *Id.* at 1350. One other court, however, acknowledged that the *compulsory* nature of the challenged plan was significant. Hannahs v. New York State Teachers' Retirement Sys., 26 Empl. Prac. Dec. (CCH) ¶ 32,037 (S.D.N.Y. 1981). In holding that the third-party insurance plan provided in *Hannahs* was subject to Title VII sanctions, the court relied on the compulsory plan membership as evidence of the insurer's control over the employees' retirement benefits. *Id. See supra* note 21 and accompanying text.

64. *See, e.g.*, Hart v. J.T. Baker Chem. Corp., 598 F.2d 829, 831 (3d Cir. 1979) (broad remedial legislation such as Title VII is entitled to liberal construction); Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234, 238 (5th Cir.) (intent of Title VII is to define discrimination "in the broadest possible terms"), *cert. denied*, 406 U.S. 957 (1971); Sale v. Waverly-Shell Rock Bd. of Educ., 390 F. Supp. 784 (D. Iowa 1975) (Title VII should be liberally construed and its scope not narrowly confined); *see also* Bernstein, *Title VII and the Problem of Sex Classifications in Pension Plans*, 74 COLUM. L. REV. 1203, 1215 (1974).

65. 671 F.2d at 333.

66. *Id.; see supra* note 2 and accompanying text.

67. *See, e.g.*, Rodriguez v. Board of Educ., 620 F.2d 363, 366 (2d Cir. 1980) (involuntary transfer of teacher resulted in a radical change in the nature of her work and therefore illegally interfered with a condition or privilege of employment); United Transp. Union Local 974 v. Norfolk & W. Ry., 532 F.2d 336, 340 (4th Cir. 1975) (opportunities for work and promotion are among the "terms and conditions" of employment), *cert. denied*, 425 U.S. 934 (1976); Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234, 238 (5th Cir.) (creation of a working environment free of discrimination is encompassed by "terms, conditions, or privileges" of employment), *cert. denied*, 406 U.S. 957 (1971). *But see* Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1367 (S.D.N.Y. 1975) (employee's eviction from employer-owned building *not* protected because her residence in the building was not "incidental to her employment").

68. ARIZ. REV. STAT. ANN. § 38-872(A) (1974).

69. Gilbert v. General Elec. Co., 519 F.2d 661, 663 (4th Cir. 1975) (employer's disability plan), *rev'd on other grounds*, 429 U.S. 125 (1976); Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90, 95 (3d Cir. 1972) (employer's pension plan); Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1189 (7th Cir.) (employer's retirement plan), *cert. denied*, 404 U.S. 939 (1971).

The complete list of fringe benefits subject to Title VII is enumerated in the Equal Employment Opportunity Commission's Guidelines. GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, EQUAL EMPLOYMENT OPPORTUNITY COMM'N, 29 C.F.R. § 1604.9(a), (b) (1981). These guidelines are recognized as authoritative in the Ninth Circuit, Hutchinson v. Lake Oswego School Dist. No.

cuit ruled, even though employees are not required to participate.[70]

While the Ninth Circuit ruled on the applicability of Title VII to a voluntary plan,[71] the district court addressed the violation of Title VII by a voluntary plan.[72] The district court reasoned that it would be "unrealistic and illogical" to propose that any discriminatory effect could be overlooked simply because women could choose not to participate.[73] If women chose not to participate, they would be denied the "clear financial benefit" the deferred compensation plan was intended to provide.[74] The resultant difference in value received by men and women would be prohibited by Title VII under a previous Ninth Circuit ruling.[75] The district court held that the determinative factor in finding a Title VII violation is not whether participation is voluntary or mandatory, but whether participation may result in "a financial benefit . . . to the members of one sex and not the other."[76] The Ninth Circuit affirmed the district court.[77] Under the Ninth Circuit's ruling, therefore, voluntariness will neither exempt a plan from Title VII coverage[78] nor constitute a defense to a claimed violation.[79]

Nondiscriminatory Options: No Recompense for Other Discriminatory Actions

The *Norris* court found that the existence of nondiscriminatory options did not legitimize a discriminatory option.[80] The Governing Committee had argued that the Plan's lump sum option fell within an exception created by *Manhart*.[81] In *Manhart*, after finding the Los Angeles pension plan discriminatory, the United States Supreme Court stated in dictum: "[n]othing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated

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7, 519 F.2d 961, 965 (9th Cir. 1975), *cert. denied*, 429 U.S. 1037 (1977), and are, in general terms, entitled to "great deference," Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971).

70. 671 F.2d at 333.

71. *Id.*

72. 486 F. Supp. at 649.

73. *Id.*

74. *See id.*

75. deLaurier v. San Diego Unified School Dist., 588 F.2d 674, 677 (9th Cir. 1978) (mandatory maternity leave was a restriction of employment opportunities, which violated Title VII because it resulted in "opportunities or benefits . . . less valuable or more restricted" to one sex).

76. 486 F. Supp. at 649. The *Manhart* Court ruled that the appropriate test is whether a person is treated " 'in a manner which but for that person's sex would be different.' " 435 U.S. at 711.

77. 671 F.2d at 332.

78. *Id.* at 333.

79. *See* 486 F. Supp. at 649.

80. 671 F.2d at 336. "In this case, it is undeniable that the lump sum option treats men and women the same. But Arizona has also offered a benefit which favors men . . . . It has cited nothing that indicates that the availability of nondiscriminatory options legitimizes a discriminatory option." *Id.* at 335. The plan considered in *Norris* contained three options: (1) lump-sum withdrawal, (2) periodic payments, and (3) life annuity contract. *Id.* at 332. *See supra* note 12 and accompanying text.

81. 671 F.2d at 335. This argument provoked the only dissent, a single sentence: "I believe that Arizona's voluntary Deferred Compensation Plan falls clearly within the *Manhart* open market exception." 671 F.2d at 336 (Nielsen, J., dissenting).

contributions could command in the open market."[82]

The Governing Committee had argued that the lump-sum option under the *Norris* plan provided Plan participants with precisely what the United States Supreme Court referred to in *Manhart*.[83] The district court decided, however, that the Plan did not authorize purchase on the open market.[84] The Ninth Circuit affirmed this ruling, holding that the open market exception did not apply because "Arizona did not offer equal benefits to men and women and let them purchase the best option they could on the open market."[85]

In finding the *Manhart* exception inapplicable, the *Norris* court focused on the distinction, implicit in the "open market" exception, between permissible (third party) and impermissible (employer) acts of discrimination under Title VII.[86] Even though an employer must offer equal benefits and is liable under Title VII even when the benefits are provided by an insurer, he is not responsible for discrimination by the insurer which occurs in the marketplace.[87] The Governing Committee attempted to extend this reasoning, arguing that because the Plan merely reflected the limits of the marketplace, it was not discriminatory.[88] The court ruled that Title VII had never been construed to allow a discriminatory employment practice simply because it reflected the market.[89] While Arizona might have escaped liability under Title VII by assuming a passive role and simply refusing to provide a nondiscriminatory plan, this had not occurred.[90] Instead, Arizona affirmatively offered a plan which, in reflecting the market, discriminated against women.[91] Title VII regulates this affirmative act by

82. 435 U.S. at 717-18 (footnote omitted). This dictum has not been ignored; rather, it has been attacked by critics. One commentator expresses concern that the Court "may have taken with one hand what it gave with the other" and that it may have created a motive for intensified discrimination against women. Gold, *Of Giving and Taking: Applications and Implications of City of Los Angeles, Department of Water and Power v. Manhart*, 65 VA. L. REV. 663, 663 (1979). The exception also has been criticized for injecting inconsistency into the Court's reasoning. It is argued that the ease with which this makes it possible for employers to avoid Title VII runs counter to the Court's strong support for the right of individual women to equal treatment. ter Horst, Manhart *and Its Impact on Employer-Sponsored Group Pension Plans*, 14-15 (Dec. 20, 1978) (unpublished manuscript on file with *Arizona Law Review*).

83. 671 F.2d at 335.

84. 486 F. Supp. at 650. "To the contrary, the employee must select an option offered by one of the funding media approved by the State." *Id.*

85. 671 F.2d at 336.

86. *Id.* at 335.

87. *Id.* The distinction between employers and insurers is not always as precise as it may seem. Two courts have determined that third-party insurers could be liable equally with employers on the basis of a construction of the term "employer" which encompasses persons who "control some aspect of an individual's compensation, terms, conditions, or privileges of employment." Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979) (a nonprofit corporation whose sole purpose is to provide benefits to employees of educational institutions is an employer under Title VII), *aff'd*, 691 F.2d 1054 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791); Hannahs v. New York State Teachers' Retirement Sys., 26 Empl. Prac. Dec. (CCH) ¶ 32,037 (S.D.N.Y. 1981) (a public pension corporation established to provide retirement benefits to school districts exercised sufficient control to be subject to Title VII).

88. 671 F.2d at 335.

89. *Id.*

90. *Id.*

91. *Id.*

the employer; it does not apply to transactions in the marketplace between employees and third parties.[92] This is what the *Manhart* "open market" dictum addressed, nothing more.[93]

If, then, the "open market" exception did not legitimize Arizona's plan, the question becomes more sharply focused on the effect, if any, of the availability of nondiscriminatory options on Title VII compliance. Other courts have faced this issue, ruling in one case that compliance with Title VII by one portion of a plan would not exempt other portions,[94] and in another case that the mere existence of options did not guarantee that a plan would meet constitutional standards.[95] Moreover, it has been held that the fact that women might, in some instances, derive greater benefits than men is not a defense to a prima facie violation of Title VII.[96] The concurring opinion in *Equal Employment Opportunity Commission v. Colby College*,[97] however, posed the possibility of a system permissible under *Manhart* which would provide a package of optional though unequal benefits based on sex-segregated actuarial tables.[98] That *Manhart* did not necessarily preclude such a possibility is almost certain from its words of apparent limitation on its holding.[99]

The *Norris* court, in enjoining the use of sex-segregated actuarial tables, has effectively nullified the possibility of any such combination being acceptable under Title VII in the Ninth Circuit.[100] Under *Norris*, all options made available by an employer must provide equal benefits to men

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92. *Id.* at 333.

93. *Id.* at 335. "In other words, the open market exception in *Manhart* says the employer must not discriminate against women, but the employer is not responsible for discrimination against women by third parties." *Id.*

94. Shaw v. International Ass'n of Machinists & Aerospace Workers, 24 Fair Empl. Prac. Cas. (BNA) 995, 997 (C.D. Cal. 1980) (contention that Title VII was not violated because males could select a plan providing for sex-equal contributions and benefits rather than a discriminatory joint and survivor annuity plan was "devoid of logic").

95. Reilly v. Robertson, 360 N.E.2d 171, 177-78 (Ind.) (uneven distribution of benefits in one option of a state retirement plan found to violate both state and federal equal protection guarantees), *cert. denied*, 434 U.S. 825 (1977).

96. Women in City Gov't United v. City of New York, 515 F. Supp. 295, 301-02 (S.D.N.Y. 1981) (a system providing a number of options violated Title VII because sex was the basis for contribution and benefit differentials).

97. 589 F.2d 1139 (1st Cir. 1978).

98. Chief Judge Coffin stated:

> The plan that is before us, as I see it, fails because it is as if a company paid its male and female employees equal salaries, but in the form of chits that could be redeemed only in a particular store which, the company knew, would give to one sex more for the same number of chits than to the other sex. That company could hardly claim that it was not discriminating between men and women. So here. Perhaps, however, once they turn their attention to the problem, the parties could work out a system permissible under *Manhart* that would eliminate the chit-like nature of the contributions through a set of genuine employee options or other features. If so, perhaps the system could legally include unequal, actuarially sound, pension and life insurance benefits for participating men and women.

Id. at 1146 (Coffin, C.J., concurring). *But see* Women in City Gov't United v. City of New York, 515 F. Supp. 295, 301-02 (S.D.N.Y. 1981) (a system providing a number of options which, taken together, did not prefer one sex over the other still violated Title VII because differences were not based on any factor other than sex).

99. 435 U.S. at 717; *see supra* note 38 and accompanying text.

100. *See* 671 F.2d at 335. See also Retired Pub. Employees' Ass'n. v. California, 677 F.2d 733 (9th Cir. 1982), where the Ninth Circuit invalidated a plan which provided more favorable benefits to women retiring before age 60 and to men retiring after age 60. *Id.* at 735.

and women; no other plan is permissible.[101]

Equalization of Payments: An Appropriate Remedy

No court prior to *Norris* had ordered an employer, who heretofore had contributed nothing to a plan, to make payments in order to comply with Title VII.[102] The Governing Committee, however, was ordered to equalize prospective[103] payments to female employees who had already retired.[104] The Governing Committee argued that the district court abused its discretion in making such an award, in view of the taxpayers' expression that the Plan operate without cost to the state.[105] The Ninth Circuit rejected this argument.[106] Payment of damages from a state's treasury for a Title VII violation has been explicitly authorized by the United States Supreme Court,[107] and the fact that Arizona had conceived the Plan's operation to be "without cost or contribution from the state" was of no relevance.[108] To hold otherwise, the *Norris* court reasoned, would allow a state to insulate itself from damages under Title VII or title 42, section 1983 of the United States Code,[109] simply by arguing that it did not intend to burden its taxpayers.[110] The circumstances here were not substantially different from those in *Manhart* and the cases construing it, which allowed recovery,[111] and the Ninth Circuit determined that even a clear expression

101. 671 F.2d at 336.

102. In all the previous plans challenged under *Manhart*, employers contributed to the plans. Equal Employment Opportunity Comm'n v. Colby College, 589 F.2d 1139, 1143 (1st Cir. 1978); Peters v. Wayne State Univ., 476 F. Supp. 1343, 1348 (E.D. Mich. 1979), *rev'd on other issues*, 691 F.2d 235 (6th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794); Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1300 (S.D.N.Y. 1979), *aff'd*, 691 F.2d 1054 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791).

103. 671 F.2d at 336. *Manhart* addresses the issue of whether relief should be retroactive or prospective. 435 U.S. at 718. Noting the presumption in favor of retroactive relief in Title VII cases, Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court in *Manhart* nevertheless ordered only prospective application. *Id.* at 719. The Court sought, not to dilute the force of *Albemarle*, but only to recognize that "[r]etroactive liability could be devastating for a pension fund." 435 U.S. at 722. *Norris* followed this precedent. 671 F.2d at 335-36. *See also* Retired Pub. Employees' Ass'n v. California, 677 F.2d 733, 738 (9th Cir. 1982) (pension plan participants retiring after Title VII became effective as to public employees were entitled to prospective equalization of benefits).

104. 671 F.2d at 335. Plaintiff is not herself a retiree. 486 F. Supp. at 647. However, plaintiff's class contained 10 women who had retired as of August 18, 1978. *Id.* Of these, four had elected to receive a life annuity. *Id.*

105. 671 F.2d at 335-36. See ARIZ. REV. STAT. ANN. § 38-871(C)(1) (Supp. 1982-83), which provides in part: "[t]he governing committee shall . . . operate without cost or contribution from the state."

106. 671 F.2d at 336.

107. In Fitzpatrick v. Bitzer, 426 U.S. 445, 456-57 (1976), the Court held that the eleventh amendment did not bar an award of backpay in a Title VII suit brought by state employees. Unlike the *Norris* plan, in *Fitzpatrick* the state had appropriated state funds for a retirement benefit plan but had paid benefits in a discriminatory manner. 390 F. Supp. 278, 287, 289 (D. Conn. 1974), *rev'd*, 427 U.S. 445 (1976).

108. 671 F.2d at 336; *see* ARIZ. REV. STAT. ANN. § 38-871(C)(1) (Supp. 1982-83), providing that the Plan was to operate free of cost to the state.

109. 42 U.S.C. § 1983 (1976 & Supp. IV 1980), providing for a civil action against any person who, "under color of" law, violates any citizen's rights.

110. 671 F.2d at 336.

111. *Manhart*, 435 U.S. 702 (1978) (equal pension benefits, women paid higher contribution); Equal Employment Opportunity Comm'n v. Colby College, 589 F.2d 1139 (1st Cir. 1978) (equal mandatory pension contribution, women received smaller annuity payments); Women in City

of state legislative intent to the contrary was not persuasive.[112]

Although the court did not address the means by which the ordered equalization of payments was to occur, it was implicit in its order that women's benefits would be raised to a level equal to benefits received by men.[113] Arizona did not have the option of lowering payments to men; such a reduction in compensation is prohibited by the Equal Pay Act.[114] Therefore, Arizona could choose either to maintain the Plan at its own expense[115] or to incur aditional costs. It chose the latter; the life annuity option is no longer available to either male or female employees.[116]

Conclusion

In *Norris v. Arizona Governing Committee*, the Ninth Circuit addressed the questions whether Title VII applied to an employer-sponsored deferred compensation plan and, if so, whether the plan, which contained both discriminatory and nondiscriminatory options, violated Title VII. The Ninth Circuit held that Title VII was applicable and that the plan violated it by permitting smaller monthly payments to female employees than to comparable male employees. While adhering to the holding of the United States Supreme Court in *City of Los Angeles v. Manhart*, the Ninth Circuit extended *Manhart*'s reach in *Norris*. Under the Ninth Circuit's ruling, voluntariness does not distinguish one employee benefit plan from another. Where a plan is provided by an employer, employee choice is irrelevant in defending claims of Title VII violations. Even where an employer has made no contribution to the plan and has contracted with private companies for its operation, he will be liable for equalizing prospective payments to plan participants. Finally, employers cannot shield themselves from a Title VII violation by offsetting a discriminatory plan with other nondiscriminatory options. To survive scrutiny under Title VII in the Ninth Circuit, *all* options made available to employees by an employer must be nondiscriminatory.

The extent of *Norris*' impact will be seen as different plans and plan provisions are challenged in the courts. Employer willingness to absorb

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Gov't United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981) (women not only paid in more but also received generally unequal monthly annuity payments); Spirt v. Teacher Ins. & Annuity Ass'n, 475 F. Supp. 1298 (S.D.N.Y. 1979) (mandatory retirement plan, women contributed equally but received smaller monthly annuity payments), *aff'd*, 691 F.2d 1054 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791).

112. 671 F.2d at 335-36.

113. "[T]he fact that Arizona did not want to pay for the plan does not insulate it from making payments to equalize the treatment received by women." *Id.* at 336.

114. 29 U.S.C. § 206(d) (1976). "*Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not . . . reduce the wage rate of any employee." *Id.* § 206(d)(1). The Equal Pay Act was incorporated into Title VII by the Bennett Amendment, which extends the pertinent portions of the Act to all forms of "compensation" covered by Title VII. 42 U.S.C. § 2000e-2(h) (1976). The Court recognized in *Manhart* that pension benefits and the contributions that maintain them are within the meaning of "compensation" under Title VII. 435 U.S. at 712 n.23.

115. Cost to the employer is no defense to a Title VII violation. *See Manhart*, 435 U.S. at 115, 717 n.32.

116. *See* Brief of Petitioners on Writ of Certiorari to the Ninth Circuit at 7, *Norris v. Arizona Governing Comm.*, 103 S. Ct. 205 (1982).

any added costs of providing equal benefits to male and female employees will determine to some extent the future availability of such benefits. Where costs appear too great, employers may simply choose to delete the offending plan from the employee benefits package. The risk that such a price may be paid by all employees is one of the costs of achieving equal treatment in the workplace for women and men.

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