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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16-2216

[Filed September 19, 2018]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff – Appellant,

v.

BALTIMORE COUNTY,

Defendant – Appellee,

and

BALTIMORE COUNTY FEDERATION OF PUBLIC EMPLOYEES, FMT, AFT, AFL-CIO; BALTIMORE COUNTY FEDERATION OF PUBLIC HEALTH NURSES; BALTIMORE COUNTY PROFESSIONAL FIRE FIGHTERS ASSOCIATION INTERNATIONAL ASSOCIATION FIRE FIGHTERS LOCAL 1311-AFL-CIO; BALTIMORE COUNTY LODGE NO. 4 FRATERNAL

ORDER OF POLICE INCORPORATED;)
BALTIMORE COUNTY SHERIFF'S)
OFFICE FRATERNAL ORDER OF)
POLICE/LODGE NUMBER 25;)
AMERICAN FEDERATION OF)
STATE, COUNTY, AND MUNICIPAL)
EMPLOYEES, Local #921,)
)
Defendants.)
______________________________________)

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, District Judge. (1:07-cv-02500-RDB)

Argued: October 26, 2017 Decided: September 19, 2018

Before GREGORY, Chief Judge, KEENAN, Circuit Judge, and SHEDD, Senior Circuit Judge.

Vacated and remanded by published per curiam opinion.

ARGUED: Paul D. Ramshaw, Office of General Counsel, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. James Joseph Nolan, Jr., BALTIMORE COUNTY OFFICE OF LAW, Towson, Maryland, for Appellee. ON **BRIEF:** James L. Lee, Deputy General Counsel, Jennifer S. Goldstein, Associate General Counsel, Office of General Counsel, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. Michael E. Field, County Attorney, Paul M. Mayhew, Assistant County Attorney, BALTIMORE COUNTY OFFICE OF LAW, Towson, Maryland, for Appellee.

PER CURIAM:

The Equal Employment Opportunity Commission (EEOC) appeals the order of the district court denying its request under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.,* for retroactive monetary relief from Baltimore County, Maryland (the County). For the following reasons, we vacate and remand.

I.

This case is now before us for a third time.[1] In the first appeal, we reversed a grant of summary judgment in favor of the County and remanded the case for the district court to determine whether the contribution rates of the County's age-based employee retirement benefit plan (the plan) were permissible based on financial considerations or whether they violated the ADEA. *See E.E.O.C. v. Balt. Cty.,* 385 F. App'x 322 (4th Cir. 2010). On remand, the district court concluded that the County violated the ADEA by imposing disparate plan contribution rates based on age. *See E.E.O.C. v. Balt. Cty.,* 747 F.3d 267 (4th Cir. 2014). The district court awarded partial summary judgment in

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[1] We do not recite the facts underlying the claim of age discrimination because they are not relevant to this appeal. A detailed explanation of the facts can be found in our previous opinion, *E.E.O.C. v. Balt. Cty.,* 747 F.3d 267, 270-72 (4th Cir. 2014).

favor of the EEOC on the issue of liability. *Id.* In the second appeal, we affirmed the award of summary judgment to the EEOC and remanded for consideration of damages. *See id.*

The parties later approved a strategy for the gradual equalization of contribution rates under the plan and entered into a Joint Consent Order Regarding Injunctive Relief, which the district court approved. The order did not resolve claims for monetary relief and expressly indicated that the availability of such relief would be addressed by the court at a later date.

The court ultimately denied the EEOC's motion for retroactive monetary relief, in the form of back pay, and closed the case.[2] The court concluded that it had the discretion under the enforcement provision of the ADEA, 29 U.S.C. § 626(b), to wholly deny back pay. Alternatively, the court stated that, even if back pay were a mandatory remedy, the court would deny the relief pursuant to its equitable powers because of the EEOC's years-long delay in bringing the action. The EEOC now appeals.

II.

The County argues that the district court properly exercised its discretion under the ADEA, 28 U.S.C. § 626(b), in denying the EEOC an award of back pay.[3]

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[2] The district court also denied the EEOC's motion seeking prospective monetary relief. The EEOC does not appeal this portion of the ruling.

[3] Back pay generally encompasses the compensation an employee would have received but for the employer's violation of the ADEA.

In the County's view, the ADEA grants courts broad authority "to grant such legal or equitable relief as may be appropriate," including the denial of back pay. 29 U.S.C § 626(b). In contrast, the EEOC points to the incorporation into the ADEA of certain provisions of the Fair Labor Standards Act (FLSA), which mandate that violators "shall be liable" for back pay. *See* 29 U.S.C. §§ 216(b), 626(b). In light of this language, and because back pay is a mandatory, legal remedy under the FLSA, the EEOC urges us to adopt the same interpretation of the ADEA. Accordingly, the EEOC contends that the district court lacked the discretion to decline to award back pay. We agree with the EEOC, and conclude that a retroactive monetary award of back pay under the ADEA is mandatory upon a finding of liability.

We review this issue of statutory interpretation de novo. *United States v. Ide,* 624 F.3d 666, 668 (4th Cir. 2010). "Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997). If the statute is unambiguous, "our inquiry into Congress' intent is at an end, for if the language is plain and the statutory scheme is coherent and consistent, we need not inquire further." *William v. Gonzales,* 499 F.3d 329, 333 (4th Cir. 2007).[4] "[I]n looking to the plain meaning, we must

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Palasota v. Haggar Clothing Co., 499 F.3d 474, 482-83 (5th Cir. 2007), *order clarified* (Sept. 27, 2007).

[4] We have omitted internal quotation marks, alterations, and citations here and throughout this opinion, unless otherwise noted.

consider the context in which the statutory words are used because '[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole.'" *Ayes v. U.S. Dep't of Veterans Affairs,* 473 F.3d 104, 108 (4th Cir. 2006) (quoting *United States v. Morton,* 467 U.S. 822, 828 (1984)).

With this rule in mind, we turn to the plain language of the statute. The ADEA enforcement provision reads, in relevant part:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

29 U.S.C. § 626(b). Additionally, Section 216 of the FLSA, which Congress incorporated into the ADEA's enforcement provision, provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

29 U.S.C. § 216(b).

As an initial matter, we observe that the ADEA is a remedial statute enacted "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b); *see Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1541 (3d Cir. 1997) ("It is impossible to view the ADEA as anything other than a federal remedial statute."). As a remedial statute, we employ a "standard of liberal construction [to] accomplish [Congress'] objects." *Urie v. Thompson,* 337 U.S. 163, 180 (1949).

Because Congress adopted the enforcement procedures and remedies of the FLSA into the ADEA, we construe the ADEA consistent with the cited statutory language in and judicial interpretations of the FLSA. Back pay is, and was at the time Congress passed the ADEA, a mandatory legal remedy under the FLSA. *See* 29 U.S.C. § 216(b) ("Any employer who violates the [FLSA] *shall be liable* to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation." (emphasis added)); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 711 (1945) ("[U]pon violation of [the FLSA for failure to pay overtime compensation], the employer *shall be liable* for statutory wages." (emphasis added)). And we presume that Congress was aware of judicial interpretations of the FLSA when drafting associated provisions of the ADEA. *See Santoro v. Accenture Fed. Servs., LLC,* 748 F.3d 217, 224 (4th Cir. 20 14) ("Congress is presumed to act with awareness of a judicial interpretation of a statute."). Accordingly, in enacting the ADEA, Congress would have been aware that retroactive monetary damages, such as back pay, were mandatory remedies under the FLSA, and intended to incorporate such mandatory remedies into the ADEA. *See id.*; *see also Maxfield v. Sinclair Int'l,* 766 F.2d 788, 794 (3d Cir. 1985) ("[U]nlike Title VII, backpay under the ADEA is not discretionary, since it incorporates the provision of the [FLSA], making backpay a mandatory element of damages.").

The Supreme Court has applied a similar analysis in interpreting a different portion of the ADEA. In *Lorillard v. Pons,* the Court was presented with the question whether ADEA plaintiffs were entitled to a jury trial. 434 U.S. 575, 577 (1978). In answering this question, the Court first looked to the procedural provisions of the statute and noted that Congress directed "that the ADEA be enforced in accordance with the 'powers, remedies, and procedures' of the FLSA." *Id.* at 580 (quoting 29 U.S.C. § 626(b)). Given this Congressional direction, the Court reasoned, when the ADEA adopted an FLSA provision, that ADEA provision should be interpreted the same way its FLSA counterpart traditionally had been interpreted. *Id.* at 580-82 ("[When], as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). When the ADEA was enacted, "it was well established that there was a right to a jury trial in private actions pursuant to the FLSA." *Id.* at 580. The Court thus granted the ADEA plaintiffs the right to a jury trial. *See id.* at 582-83 ("[B]y directing that actions for lost wages under the ADEA be treated as actions for unpaid minimum wages or overtime compensation under the [FLSA], Congress dictated that the jury trial right then available to enforce that FLSA liability would also be available in private actions under the ADEA.").

The legislative history of the ADEA also indicates that Congress acted with particular precision in crafting the statute. For example, Congress considered multiple options in determining how to implement the enforcement procedures and remedies of the ADEA. One option was to authorize the Secretary of Labor to issue cease-and-desist orders but not grant a private right of action. *Id.* at 578 (citing S. 830, H.R. 4221, 90th Cong., 1st Sess. (1967)). Another option was simply to adopt the normal enforcement provisions of the FLSA, permitting suits by either the Secretary of Labor or the aggrieved individual. *Id.* (citing S. 788, 90th Cong., 1st Sess. (1967)). A third option was to adopt the statutory pattern of Title VII of the Civil Rights Act of 1964 and utilize the EEOC. *Id.* Ultimately, Congress chose to treat "violations of the ADEA . . . as violations of the FLSA," and established two enforcement mechanisms–a suit by the Secretary of Labor[5] or by the individual plaintiff. *Id.* at 578-79. However, unlike the enforcement provisions of the FLSA, Congress required an individual suing under the ADEA to "give notice to the Secretary of Labor of his intention to sue" in order for the Secretary to have an opportunity "to eliminate the alleged unlawful practice through informal methods." *Id.* at 580. The right of an individual to file suit terminated if the Secretary commenced an action on his behalf. *Id.* This legislative history further suggests that Congress consciously chose to incorporate the powers, remedies, and procedures of the FLSA into the ADEA.

And finally, we disagree with the County's reliance on a trilogy of Title VII pension decisions issued by the Supreme Court: *City of L.A., Dep't of Water & Power v. Manhart,* 435 U.S. 702 (1978); *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris,* 463 U.S. 1073 (1983); and *Florida v. Long,* 487 U.S. 223 (1988). In all three instances, the Supreme Court held that retroactive monetary awards are discretionary under Title VII. The Court declined to

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[5] Enforcement authority was transferred from the Secretary of Labor to the EEOC in 1978. Reorg. Plan No. 1 of 1978, 92 Stat. 3781 (1978).

award any retroactive monetary relief based on the unique burdens that retroactive awards place on employee pension plans.

Notably, however, a back pay award under Title VII is a discretionary *equitable* remedy that a court may select in awarding relief to a plaintiff. *Lorillard,* 434 U.S. at 584 ("[T]he ADEA incorporates the FLSA provision that employers 'shall be liable' for amounts deemed unpaid minimum wages or overtime compensation, while under Title VII, the availability of backpay is a matter of equitable discretion."); *see also Albemarle Paper Co. v. Moody,* 422 U.S. 405, 410 (1975); *Curtis v. Loether,* 415 U.S. 189, 197 (1974). In contrast, as previously discussed, back pay awards under the ADEA are mandatory *legal* remedies, the amount of which is to be determined by a fact finder. *See Sailor v. Hubbell, Inc.,* 4 F.3d 323, 326 (4th Cir. 1993) (holding that the "appropriate amount of back pay" due under the ADEA is a question for the jury); *Duke v. Uniroyal Inc.,* 928 F.2d 1413, 1424-25 (4th Cir. 1991) (recognizing back pay as a legal remedy under the ADEA but characterizing an award of front pay under the ADEA as an equitable remedy left to the discretion of the court because it has a "restitutionary nature"). In light of the fundamental difference in the nature of back pay under the two statutes, we conclude that the Supreme Court's decisions in *Manhart, Norris,* and *Long* do not govern our interpretation of the ADEA.

For these reasons, we hold that retroactive monetary awards, such as the back pay sought here, are mandatory legal remedies under the ADEA upon a finding of liability.

III.

Our conclusion is not altered by the County's contention that the EEOC unduly delayed in the investigation, which delay the EEOC concedes was umeasonable. This multi-year delay caused the County to incur substantial additional back pay liability. Exercising its prosecutorial discretion, the EEOC has represented to this Court that the EEOC "will not seek monetary relief for the excessive deductions that the [C]ounty made before the [EEOC] issued its letter of determination." Op. Br. 5 n.2; *see Massachusetts v. E.P.A.,* 549 U.S. 497, 527 (2007) ("As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."). The EEOC has further represented that it has secured reasonable back pay awards from public pension plans in over thirty ADEA lawsuits and that it will do the same here. Thus, the EEOC's actions in this case do not affect our analysis here.[6]

IV.

We vacate the opinion of the district court and remand for a determination of the amount of back pay to which the affected employees are entitled under the ADEA.

VACATED AND REMANDED

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[6] In light of the EEOC's concessions and its decision not to seek back pay for the period of the delay, we need not decide whether the equitable doctrine of laches or the Supreme Court's holding in *Occidental Life Insurance Co. of California v. E.E.O.C.,* 432 U.S. 355 (1977), applies to this case.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2216
(1:07-cv-02500-RDB)

[Filed September 19, 2018]

EQUAL EMPLOYMENT	)
OPPORTUNITY COMMISSION,	)
	)
Plaintiff- Appellant,	)
	)
v.	)
	)
BALTIMORE COUNTY,	)
	)
Defendant - Appellee,	)
	)
and	)
	)
BALTIMORE COUNTY FEDERATION	)
OF PUBLIC EMPLOYEES, FMT, AFT,	)
AFL-CIO; BALTIMORE COUNTY	)
FEDERATION OF PUBLIC HEALTH	)
NURSES; BALTIMORE COUNTY	)
PROFESSIONAL FIRE FIGHTERS	)
ASSOCIATION INTERNATIONAL	)
ASSOCIATION FIRE FIGHTERS	)
LOCAL 1311-AFL-CIO; BALTIMORE	)
COUNTY LODGE NO. 4 FRATERNAL	)
ORDER OF POLICE INCORPORATED;	)
BALTIMORE COUNTY SHERIFF'S	)
OFFICE FRATERNAL ORDER OF	)
POLICE/LODGE NUMBER 25;	)
AMERICAN FEDERATION OF	)

STATE, COUNTY, AND MUNICIPAL EMPLOYEES, Local #921,)
)
)
Defendants.)
)

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is vacated. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. RDB-07-2500

[Filed August 24, 2016]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,)
)
Plaintiff,)
)
v.)
)
BALTIMORE COUNTY, *et al*.,)
)
Defendants.)
)

MEMORANDUM OPINION

In April of 1999 and January of 2000, the U.S. Equal Employment Opportunity Commission ("EEOC") issued Notices of Charge of Discrimination to Baltimore County on behalf of two Baltimore County correctional officers who alleged that Baltimore County's employee pension plan, and employee plan contribution rates, discriminated against them based on their ages. *See EEOC v. Baltimore Cty., et al.*, 747 F.3d 267, 271 (4th Cir. 2014), *cert. denied sub nom. Baltimore Cty. v. EEOC*, 135 S. Ct. 436 (2014). The County timely denied these charges and provided the

EEOC with all requested information, including its actuary's cost justification for the employee contribution rates. With no further inquiry from the EEOC, five and one half years passed until March of 2006 when the EEOC issued a notice that the County's pension plan violated the Age Discrimination in Employment Act of 1967 ("ADEA"). Another year and one half passed before the EEOC brought this action against Baltimore County ("Defendant" or the "County") in September of 2007, alleging violations of the Age Discrimination in Employment Act of 1967 ("ADEA"), *as amended*, 29 U.S.C. § 621, *et seq*. *See generally* Am. Compl., ECF No. 57. Specifically, the EEOC has alleged that "[since] at least January 1, 1996, [the] County has engaged in unlawful employment practices by requiring Wayne A. Lee, Richard J. Bosse, and a class of similarly situated [County employees at least forty years of age] to pay higher contributions than those paid by younger individuals to Defendant's pension plan," in violation of 29 U.S.C. §§ 623(a)(1) & (i)(1). *Id*. at ¶ 14.[1] Via Memorandum Opinion and Order dated October 17, 2012, Judge Benson E. Legg[2] of this Court "grant[ed] partial summary judgment in favor of the EEOC on the

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[1] The EEOC has also named six unions, representing County employees, as indispensable party defendants to this lawsuit ("Union Defendants"). *Id*. at ¶¶ 6-12.

[2] This case was reassigned to the undersigned Judge Richard D. Bennett on February 7, 2013, upon Judge Legg's retirement from this Court.

issue of liability."[3] *EEOC v. Baltimore Cty.*, No. L-07-2500, 2012 WL 5077631, at *1 (D. Md. Oct. 17, 2012). Judge Legg's ruling was subsequently affirmed by the United States Court of Appeals for the Fourth Circuit and remanded "for further proceedings to address the issue of damages." *EEOC v. Baltimore Cty., et al.*, 747 F.3d 267, 274-75 (4th Cir. 2014).

There is no dispute in this case that the Union Defendants have bargained for the County's pension plan contribution rates from the 1970s through the present and in fact "acquiesce[d]" to "or even support[ed]" those rates. Mem. Supp. EEOC Mot., p. 16, ECF No. 241-1. Additionally, as discussed *infra*, the parties and all six Union Defendants have approved a plan for the gradual equalization of contribution rates under the County's pension plan. The terms of that plan have since been incorporated into a Joint Consent Order Regarding Injunctive Relief, signed by this Court on April 26, 2016 (ECF No. 238).[4] However, the EEOC

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[3] As discussed *infra*, Judge Legg initially granted the County's Motion for Summary Judgment, but his ruling was subsequently vacated by the United States Court of Appeals for the Fourth Circuit. *See EEOC v. Baltimore Cty.*, 385 F. App'x 322, 385 (4th Cir. 2010). On remand, Judge Legg granted partial summary judgment for the EEOC on the issue of liability, but granted the County leave to file an interlocutory appeal because "the question presented [was] a novel one." Dec. 7, 2012 Letter Order, p. 4, ECF No. 206.

[4] The EEOC's Motion for Injunctive Relief (ECF No. 215) remains pending before this Court. However, the Joint Consent Order (ECF No. 238) has subsequently "resolve[d] the claims for injunctive relief sought by the EEOC." Joint Consent Order, p. 6, ECF No. 238. Accordingly, the EEOC's Motion for Injunctive Relief (ECF No. 215) is now MOOT.

contends that both retroactive and prospective monetary damages are mandatory in this case and are still necessary to compensate older County employees for the excess contributions they have previously made to the County's discriminatory pension plan and will continue to make over the next two years as the pension plan's contribution rates are gradually equalized. The County argues that neither retroactive nor prospective monetary relief is mandatory and that neither form of relief is warranted in this case.

Currently pending before this Court is the EEOC's Motion for Determination on Availability of Retroactive and Prospective Monetary Relief (ECF No. 241). The parties' submissions have been reviewed, and a hearing on the pending Motion was held before this Court on July 29, 2016. At that hearing, counsel for the EEOC acknowledged to this Court that the EEOC's delay of eight years in filing this action "trouble[d]" him. Hearing Tr., at M-72. This Court finds that the EEOC's eight-year delay in prosecuting this case and its present position on the issue of damages are more than "troubl[ing]" and are in fact untenable. Counsel for the County have represented that the County's *retroactive* liability alone could total $19 million. County Response, p. 24, ECF No. 243. The EEOC has conceded "that the amount of an award of monetary relief in this case could be substantial, that '[r]etroactive liability could be devastating for pension funds,' and that the 'harm would fall on innocent third parties,' including county tax payers, as well as current and retired employees." Mem. Supp. EEOC Mot., p. 20, ECF No. 241-1 (quoting *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 722–23 (1978)). For the reasons stated herein, the EEOC's Motion for

Determination on Availability of Retroactive and Prospective Monetary Relief (ECF No. 241) is DENIED. Neither retroactive nor prospective monetary relief is mandatory under the Age Discrimination in Employment Act ("ADEA") and, under the circumstances of this case, neither form of relief is appropriate. Even if retroactive monetary relief were mandatory, a closer question than prospective relief, this Court would still decline to award retroactive relief in this case due to the EEOC's unreasonable delay in pursuing its claims. Accordingly, neither retroactive nor prospective monetary relief is available in this case.[5] As a result of the Joint Consent Order (ECF No. 238), there are no further issues in this case. After over seventeen years, this matter is now concluded.

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[5] Also pending before this Court is the County's Motion for Leave to File Surreply (ECF No. 245). A party moving for leave to file a surreply must show a need for a surreply. *Aguilar v. LR Coin Laudromat, Inc.*, No. RDB-11-02352, 2012 WL 1569552, at *3 (D. Md. May 2, 2012). A court may permit a plaintiff to file a surreply if "a defendant raises new legal issues or new theories in its reply brief." *MTB Servs., Inc. v. Tuckman-Barbee Const. Co.*, No. RDB-12-2109, 2013 WL 1224484, *6 (D. Md. Mar. 26, 2013) (citing *TECH USA, Inc. v. Evans*, 592 F. Supp. 2d 852, 862 (D. Md. 2009)); *see also Khoury v. Meserve*, 268 F. Supp. 2d 600, 605 (D. Md. 2003). Here, the EEOC raised no new arguments in its Reply brief. In fact, the County has not claimed that the EEOC did raise new arguments in its Reply. The County contends only "that a number of EEOC's contentions in its Reply require a written response by the County." Mot. for Leave to File Surreply, p. 1, ECF No. 245. Accordingly, the County's Motion for Leave to File Surreply (ECF No. 245) is DENIED.

BACKGROUND

The facts of this case are set forth fully in *EEOC v. Baltimore Cty.*, 747 F.3d 267, 270 (4th Cir. 2014); *EEOC v. Baltimore Cty.*, No. L-07-2500, 2012 WL 5077631, at *1 (D. Md. Oct. 17, 2012); and *EEOC v. Baltimore Cty.*, 593 F. Supp. 2d 797, 799 (D. Md. 2009).

In 1945, Defendant Baltimore County ("Defendant" or the "County") established a mandatory Employee Retirement System (the "pension plan" or "ERS") for all "general" County employees, under which employees were eligible to retire and receive pension benefits at age 65, regardless of their length of employment. *EEOC v. Baltimore Cty.*, 747 F.3d 267, 270 (4th Cir. 2014). The County planned to fund half of the ERS on its own and relied on employee contributions to fund the other half. *Id*. The County required employees to contribute to the ERS over the course of their employment at contribution rates calculated by the County's actuarial firm, Buck Consultants. *Id*.

To ensure that employee contributions were sufficient to fund the Plan, Buck Consultants "based its calculations for employee contribution rates on the number of years that an employee would contribute to the plan before being eligible to retire at age 65." *Id*. "Using the retirement age of 65, Buck ultimately concluded that older employees who enrolled in the plan should contribute a higher percentage of their salaries, because their contributions would earn interest for fewer years than the younger employees' contributions." *Id*. The County adopted the Buck Consultants calculations and, accordingly, "the older that an employee was at the time of enrollment [in the

ERS], the higher the rate that the employee was required to contribute." *Id.*

The County modified the terms of the ERS several times. Most notably, in 1973 "[t]he County . . . added an alternative term of retirement eligibility that permitted general employees to retire after 30 years of service irrespective of their age."[6] *Id.* The County lowered the employee contribution rates once in 1977 "based on expected increases to the rate of return on invested contributions." *Id.* at 271. However, "[t]his reduction did not alter the fact that rates were based on an employee's age at the time of plan enrollment and were higher for older employees." *Id.*

"In 1999 and 2000, two County correctional officers, Wayne A. Lee and Richard J. Bosse, Sr., aged 51 and 64, respectively, filed charges of discrimination with the EEOC alleging that the County's plan and disparate contribution rates discriminated against them based on their ages." *Id.* The County has indicated that it "denied the charges and supplied EEOC with all the information it requested, including the cost justification from its actuary for the employee contribution rates." County Response, p. 5, ECF No. 243 (citing Joint Appendix 321-403). However, "[a]fter an unexplained hiatus of 5 and ½ years, on March 6, 2006, the EEOC issued Determination Letters finding that the County's retirement system violated the ADEA." *Id.* (citing Joint Appendix 72-75).

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[6] "Correctional officers later became eligible to retire after only 20 years of service, regardless of age, or at age 65 with 5 years of service." *Id.*

The parties were unsuccessful in reaching a conciliation agreement, and the EEOC filed the present action in 2007—eight years after the first charge of discrimination was filed.[7] *See generally* Am. Compl., ECF No. 57. The EEOC has alleged that "[since] at least January 1, 1996, [the] County has engaged in unlawful employment practices by requiring Wayne A. Lee, Richard J. Bosse, and a class of similarly situated [County employees at least forty years of age] to pay higher contributions than those paid by younger individuals to Defendant's pension plan," in violation of 29 U.S.C. §§ 623(a)(1) & (i)(1). *Id*. at ¶ 14.

On January 21, 2009, Judge Benson E. Legg[8] of this Court granted the County's Motion for Summary Judgment and ordered that this case be closed. *See EEOC v. Baltimore Cty., et al.*, 593 F. Supp. 2d 797 (D. Md. 2009). Judge Legg reasoned that "the ADEA does not prohibit employer actions when the motivating factor is something other than the employee's age." *Baltimore Cty.*, 593 F. Supp. 2d at 800 (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993)). Judge Legg concluded that the County's contribution rates did not violate the ADEA because they were "actually motivated not by age, but by the pension status—i.e. the number of years until retirement eligibility—of

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[7] The County previously asserted the defense of laches with respect to this delay in a motion to dismiss the EEOC's claims. Judge Legg of this Court held that the delay did not justify dismissal of this suit, but left open the application of laches in the damages phase of this case. *See* Mem., p. 8-9, ECF No. 78.

[8] This case was reassigned to the undersigned Judge Richard D. Bennett on February 7, 2013, upon Judge Legg's retirement from this Court.

older new-hires." *Id*. Furthermore, Judge Legg analogized the present case to the Supreme Court's decision in *Kentucky Retirement Sys. v. EEOC*, 554 U.S. 135 (2008), in which the Court held that "[w]here an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under the ADEA, must adduce sufficient evidence to show that the differential treatment was 'actually motivated' by age, not pension status." *Id*. at 801. Judge Legg held that the factors underlying the Supreme Court's decision in *Kentucky Retirement Systems* "appl[ied] equally to the instant situation," and, accordingly, concluded that the County had not violated the ADEA. *Id*. at 802.

The EEOC argued that the contribution scheme was invalid under the Supreme Court's decisions in *Ariz. Governing Comm. v. Norris*, 463 U.S. 1073 (1983) and *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978), two Supreme Court cases invalidating retirement plans under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq*., "that paid equal retirement benefits to men and women of the same age, seniority, and salary, but required female employees to make larger monthly contributions."[9] *Id*. at 802. However, Judge Legg

[9] The Supreme Court held in both *Manhart* and *Norris* that, although the pension funds at issue had violated Title VII, retroactive monetary damages would not be awarded. As discussed *infra*, the EEOC now seeks to distinguish *Manhart* and *Norris*, arguing that those cases are not persuasive on the issue of damages because they were Title VII cases as opposed to ADEA cases.

distinguished *Manhart* and *Norris* from the present case on the grounds that "those decisions involved situations where an employer facially discriminated against its employees on the basis of sex, a protected category." *Id*. "In contrast," he concluded, "Baltimore County's system is based not on age—a protected category—but on the number of years an employee has until reaching retirement age." *Id*.

The United States Court of Appeals for the Fourth Circuit subsequently vacated Judge Legg's ruling, holding that a genuine issue of material fact remained as to whether the County's "contribution rates [were] justified by permissible financial considerations." *EEOC v. Baltimore Cty.*, 385 F. App'x 322, 325 (4th Cir. 2010). The Court reasoned as follows:

> [U]nder the express terms of the ERS, two new-hires with the same number of years until retirement age, and therefore the same time value of money, can be required to pay different contributions into the ERS. For example, if a twenty-year-old new-hire and a forty-year-old new-hire enroll in the ERS as correctional officers at the same time, they have the same number of years until retirement eligibility. However, the forty-year-old must contribute 5.57% of his annual salary while the twenty-year-old need only contribute 4.42%. This disparity is not justified by the time value of money because both employees contribute for the same twenty years.

Accordingly, the Fourth Circuit remanded this case for further proceedings consistent with its opinion. *Id*. at 326. On remand, Judge Legg proceeded to grant partial summary judgment for the EEOC on the issue of liability. *EEOC v. Baltimore Cty.*, No. L-07-2500, 2012 WL 5077631, at *1 (D. Md. Oct. 17, 2012). He characterized "[t]he problem identified by the Fourth Circuit" as "an unintended consequence, resulting from the interaction of two separate and independently lawful provisions of the County Code enacted decades apart." *Baltimore Cty.*, 2012 WL 5077631 at *3. Judge Legg observed the following:

> It is clear from the record that the age-based contribution rates, when put in place in 1945 until modified in 1977, were fully justified by the time value of money rationale identified by this Court in its prior opinion. Using projected years until retirement, Buck calculated the percentage of an employee's pay that would be required to fund approximately one-half of his or her retirement benefit. Because all employees were eligible to retire at age 65, age served as a proxy for years until retirement. Thus, notwithstanding the fact that the ERS nominally based an employee's contribution rate on the age at which he or she was hired, years until retirement was the real determining factor. In 1973 the County, at no additional cost to employees, added a generous early retirement option based on years of service. Such a benefit is explicitly authorized by § 4(l) of the ADEA, which provides that no violation occurs solely because "a defined benefit plan . . . provides for . . . payments that constitute the subsidized portion of an early retirement benefit." 29 U.S.C. § 623(l)(1)(A)(ii)(I). A secondary effect of this provision, however, was to decouple an

> employee's age from his or her years until retirement. Age of retirement is no longer yoked to chronological age because some employees take early retirement while others do not. *Id*.

Judge Legg concluded that "after the County adopted the early retirement option, the different contribution rates charged to different employees are explained by age rather than pension status." *Id*. at 5. Therefore, he reasoned, "[p]ension status . . . cannot be the driving factor behind the disparate treatment, which is directly linked to an employee's age." *Id*. Judge Legg held that "because age [was] the 'but-for' cause of the disparate treatment, the ERS violated the ADEA." *Id*. (quoting *Gross v. FBL Fin. Services, Inc.*, 557 U.S. 167, 177 (2009)). However, Judge Legg granted the County leave to file an interlocutory appeal on the issue of liability, concluding that "the question presented [was] a novel one," and that "the magnitude of the effort [related to the damages phase of the case] counsel[ed] in favor of making certain that the effort is necessary before it is undertaken." Dec. 7, 2012 Letter Order, p. 4, ECF No. 206. The Fourth Circuit affirmed Judge Legg's ruling on appeal and remanded this case "for further proceedings to address the issue of damages." *EEOC v. Baltimore Cty., et al.*, 747 F.3d 267, 274-75 (4th Cir. 2014).

The parties and all six unions ("Union Defendants") representing the County employees participating in the ERS have since agreed to a Joint Consent Order (ECF No. 238), which includes a plan for equalization of pension plan contribution rates over the next two years. That Joint Consent Order, with respect to the injunctive portion of this case and the equalization of member contribution rates, has now been entered by this Court. However, the Order indicated that the "EEOC intend[ed] to seek retroactive monetary relief from the County for individuals harmed by the pension practice found to be unlawful by this Court, and also intend[ed] to seek prospective monetary relief from the County for employees who may be harmed by the phase-in of age-neutral contribution rates . . . ." Joint Consent Order, p. 6, ECF No. 238. This Court subsequently directed the parties to brief the "question of any damages to be awarded either retroactively or prospectively," and a hearing on that question was held before this Court on July 29, 2016. Letter Order, ECF No. 237.

ANALYSIS

I. <u>A Retroactive Award of Compensation for Amounts Owing is Not Mandatory Under the Age Discrimination in Employment Act ("ADEA")</u>

The Equal Employment Opportunity Commission ("EEOC") argues that this Court "must award retroactive relief to Wayne A. Lee, Richard J. Bosse, and the class of similarly situated aggrieved individuals." Mem. Supp. EEOC Mot., p. 3, ECF No. 241-1. Specifically, the EEOC requests an award of "amounts owing," *i.e.* "the amounts of contributions of employees age 40 or over, who were required to participate in [Baltimore County's Early Retirement System ("ERS")], in excess of the amounts they would have contributed if age were not a factor in employee contribution rates."[10] *Id*. at 5.

Section 626 of the Age Discrimination in Employment Act ("ADEA"), the ADEA's enforcement provision, provides the following:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or

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[10] The County defines the period of retroactive relief from 1996 to July 1, 2007, whereas the EEOC defines the period as commencing in 1996 and continuing until a judgment is issued by this Court. Additionally, the parties contest the precise calculation of "amounts owing" for violations of the ADEA. However, this issue is not presently before this Court. If this Court were to have held that retroactive relief was available, the amount of relief would have been calculated at a later time.

> enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

29 U.S.C. § 626(b). Additionally, Section 216 of the Fair Labor Standards Act ("FLSA"), incorporated into the ADEA's enforcement provision *supra*[11], provides the following:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. 29 U.S.C. § 216(b).

The EEOC contends that "[t]he [United States] Supreme Court has interpreted these provisions as depriving the courts of discretion in awarding

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[11] Sections 211(b) and 217 of the FLSA are also incorporated into the ADEA's enforcement provision *supra*. However, neither section is applicable to the EEOC's requested relief in this case. *See* 29 U.S.C. § 211(b) (empowering the United States Department of Labor to utilize state and local agency services to carry out its functions under the FLSA); 29 U.S.C. § 217 (authorizing injunctive relief to restrain FLSA violations).

compensation for monetary harm resulting from an ADEA violation." Mem. Supp. EEOC Mot., p. 3, ECF No. 241-1. The EEOC relies primarily on *Lorillard v. Pons*, 434 U.S. 575 (1978), in which the Supreme Court held that "in a private action under the ADEA a trial by jury [is] available where sought by one of the parties." *Lorillard*, 434 U.S. at 585. In reaching that conclusion, the Supreme Court in *Lorrilard* compared the plain language of the ADEA's enforcement provisions to the enforcement provisions of the FLSA, under which the "right to a jury trial in private actions" was "well established," and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.*, "which petitioner [Lorillard] maintain[ed] d[id] not provide for jury trials." *Id*. at 580-585. The Court ultimately concluded that "by directing that actions for lost wages under the ADEA be treated as actions for unpaid minimum wages or overtime compensation under the FLSA . . . Congress dictated that the jury trial right then available to enforce that FLSA liability would also be available in private actions under the ADEA." *Id*. at 582-83. Additionally, the Court observed that "[t]he word 'legal' is a term of art: [i]n cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trial." *Id*. at 583 (citing Curtis v. Loether, 415 U.S. 189, 195-96 (1974)). Accordingly, the Court inferred that "by providing specifically for 'legal' relief" under the ADEA, "Congress . . . intended that there would be a jury trial on demand to 'enforc[e] . . . liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation.' " *Id*. (quoting 29 U.S.C. § 626(b)).

The Supreme Court identified "significant differences" between "the remedial provisions" of Title VII and the ADEA. *Id*. at 584. While "Congress specifically provided for both 'legal and equitable relief' in the ADEA, "legal" relief was "not authorize[d] . . . in so many words under Title VII." *Id*. Additionally, the Court observed that "the ADEA incorporates the FLSA provision that employers 'shall be liable' for amounts deemed unpaid minimum wages or overtime compensation, while under Title VII, the availability of backpay is a matter of equitable discretion." *Id*. at 584. Finally, "rather than adopting the procedures of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedures even while adopting Title VII's substantive prohibitions." *Id*. at 584-85. Therefore, the Court concluded that "even if [Lorrilard] is correct that Congress did not intend there to be jury trials under Title VII, that fact sheds no light on congressional intent under the ADEA." *Id*. at 585.

The EEOC further contends that "[t]he Fourth Circuit has likewise ruled that monetary relief under the ADEA is a mandatory legal remedy." Mem. Supp. EEOC Mot., p. 5, ECF No. 241-1. The EEOC cites *Loveless v. John's Ford, Inc.*, 232 F. App'x 229, 239 (4th Cir. 2007) (unpublished) (per curiam) (concluding that "a liquidated damages award [w]as mandatory . . . where [the plaintiff was] a prevailing plaintiff relying on a jury finding of a willful violation of the ADEA by [his employer]."); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964 (4th Cir. 1985) ("The 'amounts owing' under the ADEA, § 626(b) [including 'job-related benefits'] are legal damages, unlike the equitable remedies directing employment, reinstatement and promotion."); and *Sailor v. Hubbell, Inc.*, 4 F.3d 323, 325–26 (4th Cir. 1993) ("[A] back pay award given under the ADEA is a legal remedy.").

Contrary to the EEOC's representations, no court has held that a retroactive award of compensation for amounts owing is mandatory under the Age Discrimination in Employment Act ("ADEA")[12]. The Fourth Circuit in *Loveless* concluded only that *liquidated damages*[13] were mandatory "in th[at] case" because a jury had determined that the plaintiff, Loveless, was discharged "on the basis of his age" and that his employer's "conduct was a *willful* violation of the ADEA." *See Loveless*, 232 F. App'x at 239-240 (emphasis added). "Liquidated damages are available under the ADEA in an amount equal to other damages where the employer is guilty of 'willful violations.' " *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 967 (4th Cir. 1985) (quoting 29 U.S.C. § 626(b)). However, the

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[12] On the contrary, at least one United States District Court has held that courts have "discretion with respect to all relief, including backpay, under 29 U.S.C. § 626(b)." *Altman v. Stevens Fashion Fabrics*, 441 F. Supp. 1318, 1322, n. 4 (N.D. Cal. 1977). The case cited by the *Altman* court for that proposition, *Morelock v. NCR Corp.*, 546 F.2d 682, 689 (6th Cir. 1976), was subsequently vacated by the United States Supreme Court in light of *Lorrilard* because it had held that no right to a jury trial existed in an ADEA action. *See Morelock*, 435 U.S. 911 (1978). However, *Lorrilard* did not hold that retroactive relief is mandatory under the ADEA.

[13] The EEOC also seeks "liquidated damages," but correctly notes that "the appropriateness of such damages cannot be determined until the factual issue of willfulness is determined by a jury." *Id*. at 4, n. 3; *see Loveless v. John's Ford, Inc.*, 232 F. App'x 229, 238 (4th Cir. 2007) ("Under the ADEA, an award of liquidated damages should only be made if a violation of the statute is found to be willful.).

Fourth Circuit in *Loveless* said nothing about whether those "other damages," including "back pay" or retroactive "amounts owing" are mandatory. At this Court's July 29, 2016 hearing, counsel for the EEOC posed the question, "[h]ow could liquidated damages be mandatory if back pay isn't?" Hearing Tr., at M-36. He argued that "[i]t doesn't make any sense logically for one to be mandatory and the other not to be," although he cited no authority in support of that position. *Id*. While the Fourth Circuit did address "amounts owing" and "back pay" in *Fariss* and *Sailor*, the Court concluded only that they were "legal," as opposed to "equitable," remedies. *See Fariss*, 769 F.2d at 964; *Sailor*, 4 F.3d at 325–26. Here, Defendant Baltimore County ("Defendant" or the "County") does not contest that the retroactive monetary relief sought by the EEOC is a "legal" remedy. *See* Cty. Response, p. 3, ECF No. 243. Rather, the County argues that the ADEA's enforcement provisions plainly grant this Court discretion to award " 'such *legal and equitable* relief *as may be appropriate*.' " *Id*. (quoting 29 U.S.C. § 626(b)) (emphasis added).[14]

Likewise, the Supreme Court's decision in *Lorrilard* does not directly support the EEOC's position. The question before the Supreme Court in *Lorrilard* was

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[14] Furthermore, none of the cases cited by the EEOC involved a situation where, as here, the parties had already reached a settlement agreement providing for injunctive relief in a manner agreeable to all parties. As discussed *supra*, the parties and all six Union Defendants have already agreed to a Joint Consent Order (ECF No. 238), which includes a plan for equalization of pension plan contribution rates over the next two years. The EEOC now seeks additional relief in the form of retroactive and prospective monetary damages.

whether a right to a jury trial existed in private actions brought under the ADEA, not whether any remedy available under the ADEA was or was not mandatory. *See Lorrilard*, 434 U.S. at 585. While the Court did contrast the ADEA's enforcement provisions with Title VII's enforcement provisions, under which "backpay is a matter of equitable discretion," the Court did not hold that a retroactive award of compensation for amounts owing is mandatory under the ADEA. *See id*. at 584. Additionally, the Court contrasted sections of the ADEA and FLSA, under which back pay is mandatory, observing the following:

> [I[n enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation. For example, in construing the enforcement sections of the FLSA, the courts had consistently declared that injunctive relief was not available in suits by private individuals but only in suits by the Secretary. *Powell v. Washington Post Co.*, 105 U.S. App. D.C. 374, 267 F.2d 651 (1959); *Roberg v. Henry Phipps Estate*, 156 F.2d 958, 963 (CA2 1946); *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37 (CA3 1943). Congress made plain its decision to follow a different course in the ADEA by expressly permitting "such . . . equitable relief as may be appropriate to effectuate the purposes of [the ADEA] including without limitation judgments compelling employment, reinstatement or promotion" "in any action brought to enforce" the Act. § 7(b), 29 U.S.C. § 626(b) (emphasis added). Similarly, while

> incorporating into the ADEA the FLSA provisions authorizing awards of liquidated damages, Congress altered the circumstances under which such awards would be available in ADEA actions by mandating that such damages be awarded only where the violation of the ADEA is willful. Finally, Congress expressly declined to incorporate into the ADEA the criminal penalties established for violations of the FLSA.

Lorillard, 434 U.S. 575, 581–82 (1978). Furthermore, the Supreme Court specifically cited the language in the ADEA's enforcement provision that the County claims grants this court discretion to award retroactive relief: "[I]n any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief *as may be appropriate* to effectuate the purposes of this chapter." *Id*. at 579, n. 5. The Supreme Court has not indicated that its holding in *Lorrilard* invalidated, or in any way interfered with, this provision.

On the contrary, several United States Circuit Courts of Appeal have subsequently confirmed that the ADEA grants courts broad discretion to award appropriate remedies for ADEA violations. The United States Court of Appeals for the Second Circuit in *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727–28 (2d Cir. 1984) observed the following:

> While the enforcement provisions of the ADEA were generally modeled after the remedies in the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 211(b), 216, and 217, which were incorporated by reference into the ADEA's § 626(b), *see*

> *Lorillard v. Pons*, 434 U.S. 575, 577–78 (1978), congress did more than merely incorporate that statute's back pay and limited injunctive remedies. It expressly authorized the district courts to grant an ADEA claimant
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> > such legal or equitable relief as may be appropriate to effectuate the purposes of [the act], including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts [owing to a person as a result of the violation of the ADEA]. 29 U.S.C. § 626(b).
>
> Guided by this broad grant of remedial authority, we have previously encouraged district judges in this circuit to fashion remedies designed to ensure that victims of age discrimination are made whole. *Geller v. Markham*, 635 F.2d 1027, 1036 (2d Cir.1980), *cert. denied*, 451 U.S. 945 (1981).

Whittlesey, 742 F.2d at 727–28. Similarly, the United States Court of Appeals for the Eleventh Circuit concluded as follows in *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988):

> Once a verdict has been rendered in favor of an ADEA plaintiff, Sec. 7(b), 29 U.S.C. Sec. 626(b), authorizes the district court to "grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act], including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts [owing a

> person as a result of the violation of the ADEA].” This is a broad grant of remedial authority. [citing *Whittlesey,* 742 F.2d at 727]. The selection of remedies is a matter of the trial court’s discretion, so long as the relief granted is consistent with the purposes of the ADEA.

Castle, 837 F.2d at 1561; *see also Leftwich v. Harris-Stowe State Coll.*, 702 F.2d 686, 693 (8th Cir. 1983) (“The ADEA provides legal and equitable remedies . . . . The Act affords the district court discretion to fashion appropriate relief, and its remedy can be set aside only if that discretion is abused); *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1448 (11th Cir. 1985) (“[T]he selection of remedies for an ADEA violation is a matter of the trial court’s discretion, so long as the relief granted is consistent with the purposes of the Act [citing *Leftwich*, 702 F.2d at 693].). The EEOC has cited no case holding that this Court lacks discretion to deny retroactive relief for amounts owing, nor has the EEOC cited any case in which a retroactive award was an appropriate remedy for a discriminatory pension plan.

The parties have only cited three cases where, like here, an employer’s pension plan was found to violate a federal anti-discrimination statute. *See Florida v. Long*, 487 U.S. 223 (1988); *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983); *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978). Although all three cases involved violations of Title VII of the Civil Rights Act of 1964, as opposed to the ADEA violation at issue here[15], their unique status as *pension plan* cases was central to those opinions. None of those cases held that retroactive monetary relief was mandatory. On the contrary, they emphasized that retroactive awards have the capacity to devastate pension systems. *See, e.g., Manhart*, 435 U.S. at 722 ("Courts have [] shown sensitivity to the special dangers of retroactive Title VII awards in this field . . . . Retroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties."); *Norris*, 463 U.S. at 1106-07 ("As in *Manhart*, holding employers liable retroactively would have devastating results . . . the cost would fall on the state of Arizona."); *Long*, 487 U.S. at 236 ("Retroactive awards, applied to every employer-operated pension plan that did not anticipate our decision, would impose financial costs that would threaten the security of both the funds and their

[15] The EEOC objects that these Title VII cases are not persuasive as to the present ADEA case because "[i]n all three cases, the Supreme Court stressed that a court had discretion not to order" retroactive relief whereas "a court has no discretion in ADEA cases to deny retroactive monetary relief." Mem. Supp. EEOC Mot., p. 9, ECF No. 241-1. However, as explained *supra*, the EEOC has failed to cite any authority holding that retroactive monetary awards are mandatory relief in ADEA cases. The Supreme Court specifically stated in *Manhart* that the rules governing pension funds "should not be applied retroactively unless the legislature has plainly commanded that result." *Manhart*, 435 U.S. at 721. Furthermore, courts have routinely applied Title VII doctrine to ADEA cases, even with respect to damages. *See, e.g., Whittlesey*, 742 F.2d at 728 ("District courts have had considerable experience with damages for future wages in . . . front pay cases under Title VII . . . . We are confident they can adapt that wisdom to the special needs of ADEA cases . . . .").

beneficiaries."). All three cases ultimately held that retroactive relief was inappropriate.[16]

No court has interpreted the enforcement provision of the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), as requiring that retroactive monetary relief be awarded for ADEA violations. The United States Supreme Court has stated that the rules governing pension funds "should not be applied retroactively unless the legislature has plainly commanded that result." *Manhart*, 435 U.S. at 721. The ADEA's enforcement provision provides that "court[s] shall have jurisdiction to grant such legal or equitable relief as may be appropriate . . . ." 29 U.S.C. § 626(b). This broad grant of authority has been repeatedly confirmed by the United States Circuit Courts of Appeal. *See, e.g., Whittlesey,* 742 F.2d at 727–28; *Castle,* 837 F.2d at 1561.

Additionally, none of the three United States Supreme Court cases to consider a retroactive monetary award where an employer's pension fund violated a federal antidiscrimination statute have held that a retroactive award was mandatory. On the contrary, all three cases have held that a retroactive monetary award was not appropriate, owing to the unique burdens that retroactive awards place on pension plans. *See Long*, 487 U.S. 223; *Norris*, 463 U.S.

[16] As discussed *infra*, counsel for the County have represented that the County's *retroactive* liability alone could be $19 million. County Response, p. 24, ECF No. 243. The EEOC concedes that a damages award would be "substantial," "could be devastating" for the pension fund, and would harm "innocent third parties . . . including county tax payers, as well as current and retired employees." Mem. Supp. EEOC Mot., p. 20, ECF No. 241-1.

1073; *Manhart*, 435 U.S. 702. For these reasons, a retroactive award of compensation for amounts owing is not mandatory under the Age Discrimination in Employment Act. However, even if retroactive relief were mandatory under the ADEA, this Court would still not award retroactive relief in this case due to the EEOC's unreasonable delay in pursuing its claims. As discussed *infra*, the doctrine of laches authorizes a court to bar a plaintiff from recovering damages where that plaintiff has unreasonably delayed prosecution of his or her claims and has prejudiced the defending party. Moreover, the United States Supreme Court has specifically held in *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 373 (1977) that federal courts have the power to "restrict or even deny backpay relief" where the EEOC has "inordinate[ly]" delayed filing the action.

II. A Prospective Award of Compensation for Amounts Owing is Not Mandatory Under the Age Discrimination in Employment Act ("ADEA")

In addition to retroactive monetary relief, the EEOC also requests that this Court "award prospective monetary relief to the class of aggrieved individuals who will continue to pay at discriminatory rates until the age-neutral rates are ultimately phased in." Mem. Supp. EEOC Mot., p. 6, ECF No. 241-1. The EEOC argues that this prospective relief "must be considered 'amounts owing' . . . and thus an element of mandatory relief."[17] *Id*.

As explained *supra*, the EEOC has failed to demonstrate that retroactive monetary relief is mandatory under the ADEA. The ADEA's enforcement provision grants this Court discretion to award "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter . . . ." 29 U.S.C. § 626(b). Courts have characterized this provision as a "broad grant of remedial authority," *Whittlesey*, 742 F.2d at 727–28, and "a matter of the trial court's discretion," *Goldstein*, 758 F.2d at 1448. As to prospective relief, the United States Court of Appeals for the Fourth Circuit has specifically concluded that "whether front pay is to be made available to a plaintiff under the ADEA is a matter left to the discretion of the trial judge who must consider a host of factors." *Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1424 (4th Cir. 1991); *see also Sailor v. Hubbell, Inc.*, 4 F.3d 323, 325–26 (4th Cir. 1993) ("[I]njunction, reinstatement, and front pay are equitable forms of relief under the ADEA."); *Loveless*, 232 F. App'x at 238 ("Whether an award of front pay should be made . . . rests squarely within the trial court's discretion"). Other United States Circuit Courts of Appeal have held the same. *See Goldstein*, 758 F.2d at 1448–49 ("an award of front pay—i.e., prospective lost earnings—*may be an appropriate remedy* in an age discrimination suit . . . .") (emphasis added); *Whittlesey*, 742 F.2d at 728 (The ADEA's "broad grant of remedial authority" . . . "*permits* a district

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[17] EEOC defines the period of prospective relief as commencing on the date of judgment and terminating on July 1, 2018. EEOC Reply, p. 2, n. 1, ECF No. 244.

court, in appropriate circumstances, to award front pay to victims of age discrimination.") (emphasis added).

The plaintiffs in *Duke v. Uniroyal, Inc*. sued their former employer, alleging that they were discharged on the basis of their age in violation of the ADEA. *Duke*, 928 F.2d at 1416. The United States District Court for the Eastern District of North Carolina "submitted to the jury the issues of whether front pay [was] to be awarded and the amount." *Id*. at 1421. Two of the plaintiffs, Duke and Fox, were awarded back pay, and "the jury made separate awards of front pay for anticipated lost income and benefits from the date of trial until retirement." *Id*. at 1423. On appeal, the United States Court of Appeals for the Fourth Circuit vacated the jury verdict with respect to front pay and remanded the case "for the court to reconsider the total equitable remedies available . . . including the possibilities of reinstatement, front pay, a combination, or, if appropriate, no remedy." *Id*. at 1424-25. The Fourth Circuit instructed the trial court to "consider a host of factors, including whether reinstatement [was] practical." *Id*. at 1424. The Court further remarked that "[t]he appropriate method for addressing the difficult question of providing a remedy which anticipates potential future losses requires an analysis of all the circumstances existing at the time of trial for the purpose of tailoring a blend of remedies that is most likely to make the plaintiff whole. The beginning point under the ADEA for preventing future loss is reinstatement." *Id*. at 1423. Although the plaintiffs in this case do not allege wrongful termination and reinstatement has not been requested, this Court has followed the Fourth Circuit's guidance *infra* by weighing the EEOC's request for prospective monetary relief against the "total equitable remedies available" and "all the circumstances existing at the time of trial." Specifically, this Court concludes that prospective relief is not appropriate in part because the Union Defendants have bargained for the County's contribution rates on behalf of County employees since the 1970s and because the EEOC, the County, and the Union Defendants have already reached a settlement in this case with respect to injunctive relief, under which contribution rates will be equalized over the next two years. Additionally, this Court has considered *infra* a "host of factors" specifically relevant to pension plan cases, identified by the Supreme Court in *Manhart*, *Norris*, and *Long*, all of which suggest that prospective relief is not warranted in this case.

The EEOC objects that the requested prospective relief is not "front pay" because it is "not a remedy for past discrimination for 'potential' loss, but rather for current, on-going age discrimination that will certainly persist until July 1, 2018, by operation of the Joint Consent Order." Mem. Supp. EEOC Mot., p. 6, ECF No. 241-1. The EEOC contends that "[t]he amounts owing between now and July 2018 are readily calculable, without need for speculation concerning lost future earnings or the possibility of windfall payments." *Id.* However, the EEOC fails to cite an authority indicating that prospective relief is mandatory, and not discretionary like front pay, simply because the amounts requested are "readily calculable" as opposed to "potential." On the contrary, front pay is not always speculative, but can be used to fill in a finite period of lost wages. The Fourth Circuit specifically observed in *Duke* that "front pay . . . can be awarded to complement a deferred order of reinstatement or to bridge a time when the court concludes the plaintiff is reasonably likely to obtain other employment . . . [i]f a plaintiff is close to retirement, front pay may be the only practical approach." *Duke*, 928 F.2d at 1424.

Furthermore, this Court has identified several authorities which suggest that "front pay" and "prospective relief" are one in the same. *See Vergès v. Va. Highlands Cmty. College*, No. 1:16CV00005, 2016 U.S. Dist. LEXIS 68546, at *6 (W.D. Va. May 25, 2016) ("Count II of the Complaint asserts a claim against Couch under 42 U.S.C. § 1983 for violation of the ADEA. Count II seeks *prospective injunctive relief* in the form of reinstatement or *front pay* in lieu of reinstatement, as well as attorneys' fees, costs, and expert witness fees.") (emphasis added); 8-103E Business Organizations with Tax Planning § 103E.09 (2015) ("*Front pay* is a *prospective monetary award* of future lost earnings that applies whenever reinstatement is inappropriate or infeasible.") (emphasis added); 7-F17 Civil Rights Actions § F17.07 (2015) ("I instruct you that if the plaintiff persuades you that the defendant has violated the ADEA you may award the plaintiff *prospective damages*, sometimes called *front pay*."). For these reasons, a prospective award of compensation for amounts owing is not mandatory under the Age Discrimination in Employment Act.

III. Neither Retroactive Nor Prospective Monetary Relief is Available in this Case

A. The Factors Identified in the United States Supreme Court's Pension Fund Cases—*Manhart*, *Norris*, and *Long*—Counsel Against a Monetary Award

As discussed *supra*, the parties have cited only three cases discussing the availability of retroactive relief where an employer's pension fund contribution scheme has been found to violate a federal anti-discrimination statute. *See Manhart*, 435 U.S. 702; *Norris*, 463 U.S. 1073; *Long*, 487 U.S. 223.[18] In all three cases, the United States Supreme Court has held that retroactive relief is not appropriate. The United States Court of Appeals for the Ninth Circuit has characterized these cases as indicating a "clear Supreme Court disapproval of retroactive relief in pension cases." *Retired Pub. Employees' Ass'n of Cal. Chapter 22 v. State of Cal.*, 799 F.2d 511, 514 (9th Cir. 1986). The parties have cited no case, nor has this Court located one, addressing the availability of *prospective relief* for the period of time during which an

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[18] The EEOC objects that all three cases involved Title VII violations, as opposed to ADEA violations. *See* Mem. Supp. EEOC Mot., p. 9, ECF No. 241-1. However, the *Manhart*, *Norris*, and *Long* opinions are more accurately classified as *pension plan* cases than Title VII cases because their holdings were based, in large part, on public policy concerns that weigh against awarding retroactive monetary relief in any pension fund case. As discussed *supra*, the EEOC has failed to cite any authority holding that this Court is prohibited from taking those important public policy concerns into account in determining the availability of retroactive and prospective relief in this ADEA case.

employee contribution equalization plan is implemented.[19] However, as discussed *supra*, this Court has *discretion* "to grant [either form of relief] as may be appropriate" to enforce the ADEA. *See* 29 U.S.C. § 626(b).

In *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), the United States Supreme Court held that the Los Angeles Department of Water and Power's requirement that female employees make larger contributions to its pension fund than male employees violated Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq. See Manhart*, 435 U.S. at 704-717. Although the Department's contribution rates were based on the simple fact that women live longer than men, the Court concluded 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 [Title VII]." *Id*. at 711.

However, the Supreme Court in *Manhart* held that an "award of retroactive relief to the entire class of female employees and retirees" was not appropriate.

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[19] As discussed *supra*, the County, the EEOC, and all six Union Defendants have agreed to a plan for the gradual equalization of employee contribution rates over the next two years. *See* Joint Consent Order Regarding Injunctive Relief, ECF No. 238. However, the EEOC has additionally requested "prospective monetary relief [for] the class of aggrieved individuals who will continue to pay at discriminatory rates until the age-neutral rates are ultimately phased in." Mem. Supp. EEOC Mot., p. 6, ECF No. 241-1.

Id. at 718-723. While the Department's contribution rates were ultimately found to violate Title VII, the Supreme Court acknowledged "that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to [the Court], may well have assumed that a program like the Department's was entirely lawful." *Id*. at 720. "The courts had been silent on the question, and the administrative agencies had conflicting views . . . [a]s commentators ha[d] noted, pension administrators could reasonably have thought it unfair-or even illegal-to make male employees shoulder more than their 'actuarial share' of the pension burden." *Id*. Accordingly, the Supreme Court interpreted the Department's failure to correct its pension fund contribution scheme as a sign "not of its recalcitrance, but of the problem's complexity." *Id*. Accordingly, the Court concluded that "[t]here [was] no reason to believe that the threat of a backpay award [was] needed to cause other administrators to amend their practices to conform to [its] decision." *Id*. at 720-721.

The Court further noted "the potential impact which changes in rules affecting insurance and pension plans may have on the economy" and observed the following:

> Fifty million Americans participate in retirement plans other than Social Security. The assets held in trust for these employees are vast and growing–more than $400 billion was reserved for retirement benefits at the end of 1976 and reserves are increasing by almost $50 billion a year. These plans, like other forms of insurance depend on the accumulation of large

> sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.

Id. at 721-22. "Although Title VII [had been] enacted in 1964 [fourteen years prior to the *Manhart* decision]," the Court was sensitive to the fact that "this [was] apparently the first litigation challenging contribution differences based on valid actuarial tables." The Court concluded as follows:

> Retroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties. If, as the courts below apparently contemplated, the plaintiffs' contributions are recovered from the pension fund, the administrators of the fund will be forced to meet unchanged obligations with diminished assets. If the reserve proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their

> own future security but also for the unanticipated reduction in the contributions of past employees.

Id. at 722-23. Accordingly, the Court held that retroactive relief was not appropriate. *Id*.

Five years later, the Supreme Court held in *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983) that the State of Arizona had violated Title VII by offering its employees the option of receiving retirement benefits from one of several companies selected by the State, all of which paid women lower monthly benefits than men who had made the same retirement contributions. *Norris*, 463 U.S. at 1075-86. However, the Court concluded that "this finding of a statutory violation provide[d] no basis for" retroactive relief, which "would be both unprecedented and manifestly unjust." *Id*. at 1105. Even though the *Manhart* decision had placed employers on notice that male-female disparities in pension fund contribution rates violate Title VII, the Court reiterated its position in *Manhart* that "a retroactive remedy would have had a potentially disruptive impact on the operation of the employer's pension plan" and concluded that the *Norris* case "present[ed] no different considerations." *Id*. at 1106.

The Court reasoned as follows:

> *Manhart* did put all employer-operated pension funds on notice that they could not "requir[e] that men and women make unequal contributions to [the] fund," . . . but it expressly confirmed that an employer could set aside equal contributions and let each retiree purchase

> whatever benefit his or her contributions could command on the "open market" . . . . Given this explicit limitation, an employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market.
>
> As in *Manhart*, holding employers liable retroactively would have devastating results. The holding applies to all employer-sponsored pension plans, and the cost of complying with the District Court's award of retroactive relief would range from $817 to $1260 million annually for the next 15 to 30 years . . . . In this case, the cost would fall on the State of Arizona. Presumably other state and local governments also would be affected directly by today's decision. Imposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits. Income, excise and property taxes are being increased. There is no justification for this Court, particularly in view of the question left open in *Manhart*, to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only. *Id.* at 1106-1107 (internal citations omitted).

In *Florida v. Long*, 487 U.S. 223 (1988) the United States Supreme Court again considered whether retroactive relief was available for beneficiaries of the State of Florida's optional employee pension plan, which was nondiscriminatory as to contributions, but had provided greater benefits to male beneficiaries than female beneficiaries prior to the Court's decision in *Norris*. *See Long*, 487 U.S. at 226-28. The Court announced the following test:

> We have identified three criteria for determining whether retroactive awards are appropriate in Title VII pension cases involving the use of sex-based actuarial tables . . . . The first is to examine whether the decision established a new principle of law, focusing, in this context, on whether *Manhart* clearly defined the employer's obligations under Title VII with respect to benefits payments. The second criterion is to test whether retroactive awards are necessary to the operation of Title VII principles by acting to deter deliberate violations or grudging compliance. The third is to ask whether retroactive liability will produce inequitable results for the States, employers, retirees, and pension funds affected by our decision.

Id. at 230. With respect to the first criteria, the Supreme Court rejected the lower court's position that the *Manhart* decision had "placed Florida on notice that optional pension plans offering sex-based benefits violated Title VII." *Id*. at 230-233. The Court concluded that its "references to *contributions*, as distinct from *benefits payments*" and recognition of "the potential for interaction between an employer-operated pension plan and pension plans available in the marketplace" in its *Manhart* opinion "left some doubt regarding [*Manhart*'s] command." *Id*. at 231. The Court indicated that it was "[n]ot until *Norris*, decided five years after *Manhart*," that they "address[ed] the matter of unequal benefits payments and the open market exception." *Id*.

at 232. "Thus, some questions left open by *Manhart* were answered in *Norris*." *Id*. at 233. The Court indicated that "[o]ur close division in the later case, however, suggests that application of the earlier law to differential benefits was far from obvious." *Id*. "In view of the substantial departure from existing practice that *Manhart* ordered," the Supreme Court concluded that "pension fund administrators could rely with reasonable assurance on its express qualifications and conclude that it was confined to cases of sex-based contributions." *Id*. Therefore, "Florida's continuance of the optional plans until the *Norris* decision d[id] not justify imposition of a retroactive award." *Id*. at 235.

Next, the Supreme Court ruled that "[t]he second and third criteria of retroactivity analysis also support[ed] [its] determination that *Norris*, and not *Manhart*, provides the appropriate date for determining liability and relief." *Id*. The Court concluded that "retroactivity [was] not required" "to further the purposes of Title VII" because "Florida acted immediately after . . . *Norris* and modified its optional pension plans to provide equal monthly benefits" and because "[t]here [was] no evidence that employers in general ha[d] not complied with the Title VII requirements . . . announced in *Manhart* and extended in *Norris*." *Id*. Finally, the Court concluded, "as in *Manhart* and *Norris*, that the imposition of retroactive liability on the States, local governments, and other employers that offered sex-based pension plans to their employees [was] inequitable." *Id*. Quoting *Manhart*, the Court observed that " 'the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result' " and "that Congress had, in fact, stressed the importance of 'making only gradual and prospective changes' in the legal rules governing pension plans." *Id*. at 236 (quoting *Manhart*, 435 U.S. at 720-23). The respondents in *Long* argued "that Florida's pension administrators had 'actual notice from internal memoranda and discussions' that the continuation of the sex-based optional pension plans after *Manhart* violated Title VII." *Id*. (citation omitted). However, the Supreme Court rejected this argument, concluding that "the question whether *Manhart* placed employers on notice of Title VII's requirements cannot turn on the internal debates of one pension fund's administrators . . . [and that] [t]he meaning and scope of a decision do not rest on the subjective interpretations of discrete, affected persons and their legal advisers." *Id*. at 237.

Like in *Manhart*, Baltimore County had reason to believe that its pension plan contribution scheme was entirely lawful prior to the determination of liability in the present case. When the County implemented its 30 year early retirement option in 1973, no one advised the County that adding that option would "decouple" the time value of money from the contribution rates, causing the scheme to violate the ADEA. In fact, Buck Consultants, the County's actuarial consultant, advised the County in 1988 that the contribution rates did not violate the ADEA. *See* Joint Appendix 17-19. Furthermore, in response to the charges of age discrimination filed against the County in 1999 and 2000, the County sought the advice of its actuary, Buck Consultants, who specifically advised the County in August of 2000 that "a bona-fide employee benefit plan does not discriminate against older employees, even if older employees must pay more for their benefit, so long as older employees do not have to bear a greater percentage of the cost of the benefit than a younger employee." *Id*. at 6-10. Therefore, like in *Manhart*, there is "no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices." *Manhart*, 435 U.S. at 720-21. While this Court ultimately held that the County's contribution rates were unlawful, the fund's administrators "did not have the benefit of the extensive briefs and arguments" presented to this Court and "may well have assumed that" their contribution scheme "was entirely lawful." *Id*. at 720.

In fact, Judge Legg of this Court initially granted summary judgment for the County on the issue of liability in this case. As discussed *supra*, Judge Legg held that the County's contribution scheme was not unlawful because "the ADEA does not prohibit employer actions when the motivating factor is something other than the employee's age." *Baltimore Cty.*, 593 F. Supp. 2d at 800. Furthermore, Judge Legg analogized the facts of this case to the Supreme Court's decision in *Kentucky Retirement Sys. v. EEOC*, 554 U.S. 135 (2008), in which the Court held that "[w]here an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on pension status, a plaintiff, to state a disparate treatment claim under the ADEA, must adduce sufficient evidence to show that the differential treatment was 'actually motivated' by age, not pension status." *Id*. at 801. While the EEOC objects that the Supreme Court's decisions in *Manhart*, *Norris*, and *Long* should have put the County on notice that its contribution scheme was discriminatory, Judge Legg of this Court also distinguished two of those cases in his initial opinion granting summary judgment for the

County. While *Manhart* and *Norris* "involved situations where an employer facially discriminated against its employees on the basis of sex," Judge Legg remarked that the "County's system [was] based not on age . . . but on the number of years an employee ha[d] until reaching retirement age." *Id*. at 802.

The issue presented in this case was a novel one[20], as evidenced by its complex history. *See Long*, 487 U.S. at 233 ("[o]ur close division . . . suggests that application of the earlier law to differential benefits was far from obvious.") *Id*. Judge Legg of this Court initially granted summary judgment for the County on the issue of liability, his judgment was vacated by the Fourth Circuit, then Judge Legg granted summary judgment for the EEOC on remand. The EEOC has failed to produce any case, prior to this one, where there was a decoupling of the time value of money concept from contribution rates as the result of the implementation of an employer-funded, early retirement option. *See Manhart*, 435 U.S. at 722 ("Although Title VII [had been] enacted in 1964 [fourteen years prior to the *Manhart* decision]," the Court was sensitive to the fact that "this [was] apparently the first litigation challenging contribution differences based on valid actuarial tables.")

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[20] In fact, counsel for the County has represented that "it was Judge Shedd, during oral argument [before] the Fourth Circuit who first raised the early retirement hypothetical that provided the sole basis for Judge Legg's subsequent decision in favor of EEOC. This argument had not been previously raised by EEOC." County Response, p. 37, ECF No. 243.

The EEOC contends that the County should have been on notice of the unlawfulness of its contribution scheme following a 1999 letter from Buck Consultants, indicating concern about the impact of new regulations on its contribution rates. *See* August 24, 1999 Letter, ECF No. 241-2. However, the stated purpose of that letter was to review recent changes in the Internal Revenue Code, "to address several lingering issues," and to provide "a summary of statutory rights." *Id*. Additionally, the letter only discussed "Other Concerns-Age" in three paragraphs, out of eight pages, and never expressly indicated that the rates were illegal or should be calculated. Furthermore, the Supreme Court expressly rejected a similar argument in *Long*. *Long*, 487 U.S. at 237 ("the question whether *Manhart* placed employers on notice of Title VII's requirements cannot turn on the internal debates of one pension fund's administrators . . . [t]he meaning and scope of a decision do not rest on the subjective interpretations of discrete, affected persons and their legal advisers.").

Finally, the Supreme Court in *Manhart*, *Norris*, and *Long* indicated that retroactive awards pose a grave threat to the security of public employer's pension funds. As noted *supra*, the United States Court of Appeals for the Ninth Circuit has characterized these cases as indicating a "clear Supreme Court disapproval of retroactive relief in pension cases." *Retired Pub. Employees' Ass'n of Cal. Chapter 22,* 799 F.2d at 514. "Retroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties." *Manhart*, 435 U.S. at 722-23. The Supreme Court in *Norris* observed that a retroactive award would place "unanticipated financial burdens" on state and local governments, causing injury to pension plan beneficiaries and even tax payers. *Norris*, 463 U.S. at 1106-07. The Court in *Long* specifically made the risk of "inequitable results for the States, employers, retirees, and pension funds affected" an element of its three-part test for determining the appropriateness of retroactive relief. *Long*, 487 U.S. at 230.

In all three pension cases, the Supreme Court declined to award retroactive relief. Here, counsel for the County have represented that "retroactive liability could be $19 million dollars, a potentially staggering financial blow to ERS and the estimated 9,500 active and 6,000 retired members of the system." County Response, p. 24, ECF No. 243. Additionally, the EEOC has acknowledged the following in its Motion: "The EEOC understands that the amount of an award of monetary relief in this case could be substantial, that '[r]etroactive liability could be devastating for pension funds,' and that the 'harm would fall on innocent third parties,' including county tax payers, as well as current and retired employees." Mem. Supp. EEOC Mot., p. 20, ECF No. 241-1 (quoting *Manhart*, 435 U.S. at 722-23). "There is no justification for this Court, particularly in view of" the novelty of the issue presented in this case, "to impose this magnitude of burden." *See Norris*, 463 U.S. at 1106-07. Accordingly, the Supreme Court's decisions in *Manhart*, *Norris*, and *Long* counsel against an award of retroactive or prospective monetary relief in this case.

B. The Union Defendants Have Bargained for the County's Pension Fund Contribution Rates Since the 1970s and Have Already Approved a Settlement Agreement in this Case

The actions of the Defendant Unions in this case further weigh in favor of denying retroactive and prospective monetary relief. There is no dispute that the Union Defendants have bargained for the County's pension plan contribution rates from the 1970s through the present and in fact "acquiesce[d]" to "or even support[ed]" those rates. Mem. Supp. EEOC Mot., p. 16, ECF No. 241-1. Additionally, the parties and all six Union Defendants have approved a plan for the gradual equalization of contribution rates under the County's pension plan. The terms of that plan have since been incorporated into a Joint Consent Order Regarding Injunctive Relief, signed by this Court on April 26, 2016 (ECF No. 238). At this Court's hearing on the pending Motion, counsel for the County noted the difficulty it faced in reaching any settlement in this case due to the negotiations that had to occur between the County and the six unions representing affected County employees. *See* Hearing Tr., at M-51. Counsel for the County also noted that "as part of a negotiation with the union, when unions give up something, they get something back, and that's how it works, and that's what took place here." *Id*. at M-55. "[T]o the extent that there was anything given up [by the unions]," counsel for the County represented that "it was recovered in other goodies, if you want to say, that were given as part of the agreement." *Id*.

The EEOC contends it is not relevant that the unions, on behalf of their County employee members, have negotiated the County's employee plan contribution rates since the 1970s and have, subsequently, entered into a settlement agreement in the present action that they represent is beneficial to their members. The EEOC relies on the United States Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), in which the Supreme Court concluded that the EEOC is "the master of its own case [and] may pursue a claim on [an] employee's behalf even after the employee has disavowed any desire to seek relief." *Waffle House*, 534 U.S. at 291. The EEOC contends that "[t]his decision makes plain that the EEOC may seek victim-specific relief for all individuals harmed by Defendant's pension plan—both retroactively and prospectively—regardless of whether the labor unions consented to the discriminatory rates, whether four of the labor unions find it acceptable that the age discriminatory rates will continue for their members until July 2018, or whether any of the labor unions believe compensation is necessary." Mem. Supp. EEOC Mot., p. 16, ECF No. 241-1.

Contrary to the EEOC's representations, the *Waffle House* case stands only for the proposition that a mandatory arbitration agreement between an employee and his employer does not restrict the EEOC from later seeking "victim specific" relief on behalf of that employee for his employer's ADA violations. *Waffle House*, 534 U.S. at 297. The *Waffle House* case involved a single employee rather than a class of union members who had benefitted from negotiated union contracts and a settlement agreement, negotiated by the unions, as we have in this case. In fact, the Supreme Court in

Waffle House specifically observed that it was "an open question whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek." *Id*. Here, County employees have benefitted from contracts negotiated each year by their unions since the 1970s. Additionally, the County correctly notes that by entering into the Joint Consent Order, "the EEOC has already accomplished the public policy goal of eliminating age discrimination in the Baltimore County pension system." *See* County Response, p. 42, ECF No. 243. The EEOC has cited no authority indicating that the Defendant Unions' actions on behalf of their employee members cannot or should not be considered by this Court in determining the availability of additional retroactive and prospective monetary relief. On the contrary, the United States Court of Appeals for the Fourth Circuit in *Duke v. Uniroyal*, discussed *supra*, has specifically indicated with respect to prospective relief that courts considering a prospective remedy should analyze "all the circumstances existing at the time of trial for the purpose of tailoring a blend of remedies" and should consider "the total equitable remedies available . . . including the possibilities of . . . a combination [or] no remedy." *Duke*, 928 F.2d at 1423-25. Here, in light of the Union Defendants' bargaining for the County's contribution rates on behalf of County employees since the 1970s and the fact that the Union Defendants have already entered into a settlement agreement in this case providing for injunctive relief, no additional monetary award—whether retroactive or prospective—is warranted.

C. The EEOC Has Unreasonably Delayed the Prosecution of this Case

Even if retroactive monetary relief were mandatory under the ADEA, this Court would still decline to award retroactive relief in this case due to the EEOC's unreasonable delay in bringing this suit. Laches is an affirmative defense to equitable claims, allowable under Rule 8(c) of the Federal Rules of Civil Procedure. *See White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990). "Laches imposes on the defendant the ultimate burden of proving '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.' " *Id*. (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)). "[W]hether laches bars an action depends upon the particular circumstances of the case . . . the equitable balancing of a plaintiff's delay with prejudice to a defendant is primarily left to the sound discretion of the trial court." *Id*. Even if a defendant "has not been sufficiently prejudiced by [a] delay to warrant the sanction of dismissal of the action," courts "reserve[] the discretion to reduce any excessive back pay liability attributable to the period of unreasonable delay." *EEOC v. Lockheed Martin Global Telecommunications, Inc.*, 514 F. Supp. 2d 797, 805-806 (D. Md. 2007).

A "lack of diligence . . . exists where the plaintiff delayed inexcusably or unreasonably in filing suit." *White*, 909 F.2d at 102 (quotation omitted). "Prejudice . . . is demonstrated by a disadvantage on the part of the defendant in asserting or establishing a claimed right or some other harm caused by detrimental reliance on the plaintiff's conduct." *Id*. "However, the defendant is aided by the inference of prejudice warranted by the plaintiff's delay." *Id*. "The plaintiff is then to be heard to excuse his apparent laggardness and to prove facts manifesting an absence of actual prejudice." *Id*. (quotation omitted). "Clearly the greater the delay, the less the prejudice required to show laches, and vice versa." *Id*. However, "the defendant is ultimately required to prove prejudice (given the defendant's burden to plead and prove laches under Fed. R. Civ. P. 8(c)) and may either rest on the inference alone or introduce additional evidence. *Id*. (quotation omitted).

Neither the United States Supreme Court nor the United States Court of Appeals for the Fourth Circuit has explicitly decided whether the doctrine of laches may be asserted as an affirmative defense to claims brought by the federal government. *See, e.g., National Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002) ("Nor do we have occasion to consider whether the laches defense may be asserted against the EEOC . . . ."). However, the EEOC concedes that "[i]n some cases, the Fourth Circuit has assumed without deciding that the defense may be asserted against the EEOC." Mem. Supp. EEOC Mot., p. 18, ECF No. 241-1 (citing *EEOC v. Navy Federal Credit Union*, 424 F.3d 397 (4th Cir. 1978)). In *Navy Federal Credit Union*, the EEOC brought a retaliation claim against the Defendant Credit Union in the United States District Court for the Eastern District of Virginia. *Navy*, 424 F.3d at 404. Subsequently, the Credit Union moved for summary judgment both on the merits and on the grounds that laches barred the EEOC's claim. *Id*. at 404-405. The district court granted the Credit Union's motion on both grounds, but the Fourth Circuit vacated that judgment. *Id*. at 411. As to the Credit Union's laches argument, the Fourth Circuit did not hold that the doctrine of laches could not be raised against the EEOC, but rather that the district court had improperly attributed a delay by the Fairfax County Human Rights Commission to the EEOC in that case. *Id*.

Likewise, this Court in *EEOC v. Lockheed Martin Global Telecommunications, Inc*. considered a laches defense raised by Lockheed Martin to an ADEA claim brought by the EEOC. *See Lockheed Martin*, 514 F. Supp. 2d at 801. This Court observed that "[n]o particular period of delay by the EEOC is *per se* invalid," but that the reasonableness of the EEOC's delay depends on the EEOC's reason for the delay." *Id*. (internal quotation omitted). "If the time period is lengthy, the Court should scrutinize carefully any justifications proffered by the EEOC." *Id*. This Court declared that a 30 month delay "between the end of conciliation, and when the EEOC finally filed suit" was "unreasonable." *Id*. at 802-803. This Court objected that the EEOC had "not really explain[ed] the cause for this delay," but "only provide[d] more details about the events that transpired during that time period." *Id*. at 803. The Court noted that "each month the EEOC did not apprise [Lockheed Martin] of its continuing interest in the case likely led [Lockheed Martin] to believe, with increasing certainty, that it had avoided litigation." *Id*. With respect to prejudice, this Court observed that "[t]he potential for increased back pay liability [was] arguably the most prejudicial aspect of the EEOC's delay." *Id*. at 805. While this Court ultimately held that Lockheed Martin had not been sufficiently prejudiced to warrant dismissal of the action, it "reserve[d] the discretion to reduce any excessive back pay liability" if the EEOC prevailed on the merits. *Id*. at 805-806.

As discussed *supra*, charges of age discrimination were initially filed against the County in 1999 and 2000. The County timely denied these charges and provided the EEOC with all requested information, including its actuary's cost justification for the employee contribution rates. The County's actuary, Buck Consultants, had advised the County in 1988 that its employee plan contribution rates did not violate the ADEA. *See* Joint Appendix 17-19. Furthermore, in response to the charges of age discrimination filed against the County in 1999 and 2000, Buck Consultants issued a letter expressing its understanding that "a bonafide employee benefit plan does not discriminate against older employees, even if older employees must pay more for their benefit, so long as older employees do not have to bear a greater percentage of the cost of the benefit than a younger employee." *Id*. at 6-10. With no further inquiry from the EEOC, five and one half years passed until March of 2006 when the EEOC issued a notice that the County's pension plan violated the Age Discrimination in Employment Act of 1967 ("ADEA"). Another year and one half passed before the EEOC brought this action against Baltimore County.

The EEOC's eight-year delay in bringing this suit constitutes an unreasonable delay, far exceeding periods of delay previously deemed unreasonable by this Court and others. *See, e.g., Lockheed Martin*, 514 F. Supp. 2d at 802-803 (30 month delay between end of conciliation and filing of suit); *EEOC v. Dresser Indust., Inc.*, 668 F.2d 1199 (11th Cir. 1982) (five year and eight month delay between the charge and complaint); *EEOC v. Liberty Loan Corporation*, 584 F.2d 853 (8th Cir. 1978) (two year and two month delay before determination). The EEOC has conceded that "an unreasonable delay occurred during [its] investigation of the charges from which this lawsuit emanates." Mem. Supp. EEOC Mot., p. 17, ECF No. 241-1. Additionally, at this Court's hearing on the EEOC's pending Motion, counsel for the EEOC admitted to this Court that the EEOC's delay of eight years in filing this action "trouble[d]" him. Hearing Tr., at M-72. The EEOC has offered no convincing explanation for its delay. While the EEOC delayed prosecution of this suit, the County continued to accrue retroactive liability. As this Court observed in *Lockheed Martin*, "[t]he potential for increased back pay liability" is highly "prejudicial." *Lockheed Martin*, 514 F. Supp. 2d at 805. Additionally "each month the EEOC did not apprise [the County] of its continuing interest in the case likely led [the County] to believe, with increasing certainty, that it had avoided litigation." *Id*. at 803. At this Court's hearing on the pending Motion, counsel for the County indicated that he "thought the case was over" during the period of the EEOC's five and a half year delay and "had no idea what was going on." Hearing Tr., at M-68. Accordingly, this Court is authorized to reduce the County's retroactive liability as appropriate. In light of the extreme circumstances present here, retroactive monetary relief will not be available.

The EEOC objects that the equitable doctrine of laches does not authorize this Court to bar retroactive relief at this stage in the proceedings and is not applicable to its ADEA, as opposed to Title VII, claims or to the *legal* remedy of back pay that it seeks. Again, the EEOC fails to cite authority holding that laches is inapplicable in this case. On the contrary, Judge Legg of this Court has specifically held that "[t]he amount of any damages to be assessed against Baltimore County, and any amount to be disallowed due to the EEOC's delay in filing suit, is to be determined if the EEOC prevails on its claims after the development of a full factual record." Mem., p. 9, ECF No. 78. Furthermore, at this Court's hearing on the pending Motion, counsel for the EEOC characterized it as a "difficult question" and an "open question" whether laches applied. Hearing Tr., at M-70, 71. However, even if the doctrine of laches is inapplicable to the EEOC's claims in the present case, the United States Supreme Court's decision in *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 373 (1977) provides an alternative grounds for reducing the County's retroactive liability in light of the EEOC's unreasonable delay. At this Court's hearing, counsel for the EEOC "concede[d] . . . that, even if laches doesn't apply . . . the Supreme Court's *Occidental* decision" provides an alternative grounds for relief. Hearing Tr., at M-71. The Supreme Court in *Occidental* announced the following:

> [A] defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts. If such cases arise the federal courts do not lack the power to provide relief. This Court has said that when a Title VII defendant is in fact prejudiced by a private plaintiff's unexcused conduct of a particular case, the trial court *may restrict or even deny*

> *backpay relief*. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424-425 (1975). The same discretionary power "to locate 'a just result' in light of the circumstances peculiar to the case," *ibid.*, can also be exercised when the EEOC is the plaintiff.

Occidental, 432 U.S. at 373 (emphasis added); *see also Lockheed Martin*, 514 F. Supp. 2d at 805 ("a court may use its equitable power to '[] located a just result in light of the circumstances peculiar to the case' if the EEOC ultimately prevails on the merits.") (quoting *Occidental*). In accordance with the *Occidental* decision, this Court now "den[ies]" retroactive relief based on the EEOC's unreasonable delay in prosecuting this action and the prejudice that delay caused the County in the form of substantially increased retroactive liability.

CONCLUSION

For the reasons stated above, the EEOC's Motion for Determination on Availability of Retroactive and Prospective Monetary Relief (ECF No. 241) is DENIED. Neither retroactive nor prospective monetary relief is mandatory under the Age Discrimination in Employment Act ("ADEA") and, under the circumstances of this case, neither form of relief is appropriate. Even if retroactive monetary relief were mandatory, a closer question than prospective relief, this Court would still decline to award retroactive relief due to the EEOC's unreasonable delay in pursuing its claims. Accordingly, neither retroactive nor prospective monetary relief is available in this case.[21] The Joint Consent Order having been entered on April 26, 2016 (ECF No. 238) and there being no further issues in this case, this matter is now concluded after a seventeen year journey. This case shall be CLOSED.

A separate Order follows.

Dated: August 24, 2016 ___/s/___________________
Richard D. Bennett
United States District Judge

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[21] Baltimore County has indicated that a denial of the EEOC's request for retroactive and prospective monetary relief would render moot its pending Motion for Leave to File Third Party Complaint (ECF No. 221) and would also render moot the pending case of *Baltimore County v. Buck Consultants, LLC*, No. RDB-15-0089, in which the County sought to compel Buck Consultants to defend, indemnify, and hold harmless the County in the present case. County Response, p. 47, ECF No. 243. As discussed herein, neither retroactive nor prospective monetary relief is available in this case, and this case will now be closed. Accordingly, the County's Motion for Leave to File Third Party Complaint (ECF No. 221) is now MOOT. The case of *Baltimore County v. Buck Consultants, LLC*, No. RDB-15-0089 is also MOOT and will now be DISMISSED AS MOOT and closed via a separate Memorandum Order.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. RDB-07-2500

[Filed August 24, 2016]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

BALTIMORE COUNTY, *et al*.,

Defendants.

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 24th day of August, 2016, ORDERED that:

1. The EEOC's Motion for Determination on Availability of Retroactive and Prospective Monetary Relief (ECF No. 241) is DENIED;
2. Neither retroactive nor prospective monetary relief is available in this case;
3. Baltimore County's Motion for Leave to File Surreply (ECF No. 245) is DENIED;
4. The EEOC's Motion for Injunctive Relief (ECF No. 215) is MOOT;

5. Baltimore County's Motion for Leave to File Third Party Complaint (ECF No. 221) is MOOT;
6. The Clerk of the Court transmit copies of this Order and accompanying Memorandum Opinion to counsel and the parties; and
7. The Clerk of the Court CLOSE this case.

____/s/____________________
Richard D. Bennett
United States District Judge

APPENDIX C

435 U.S. 702 (1978)

SUPREME COURT OF THE UNITED STATES

No. 76-1810

Argued: January 18, 1978

Decided: April 25, 1978

CITY OF LOS ANGELES DEPARTMENT OF WATER, AND POWER v. MANHART

Opinion

STEVENS, J., Opinion of the Court

MR. JUSTICE STEVENS delivered the opinion of the Court.

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IV

The Department challenges the District Court's award of retroactive relief to the entire class of female employees and retirees. Title VII does not require a district court to grant any retroactive relief. A court that finds unlawful discrimination "may enjoin [the discrimination] . . . and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1970 ed., Supp. V). *719 To the point of redundancy, the statute stresses that retroactive relief "may" be awarded if it is "appropriate."

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, the Court reviewed the scope of a district court's discretion to fashion appropriate remedies for a Title VII violation and concluded that "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id*., at 421. Applying that standard, the Court ruled that an award of backpay should not be conditioned on a showing of bad faith. *Id*., at 422-423. But the *Albemarle* Court also held that backpay was not to be awarded automatically in every case.[35]

The *Albemarle* presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district courts' duty to determine that such relief is appropriate. For several reasons, we conclude that the District Court gave insufficient attention to the equitable nature of Title VII

[35] Specifically, the Court held that a defendant prejudiced by his reliance on a plaintiff's initial waiver of any backpay claims could be absolved of backpay liability by a district court. 422 U.S. at 424. The Court reserved the question whether reliance of a different kind – on state "protective" laws requiring sex differentiation – would also save a defendant from liability. *Id*. at 423 n.18.

remedies.[36] Although we now have no doubt about *720 the application of the statute in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that a program like the Department's was entirely lawful. The courts had been silent on the question, and the administrative agencies

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[36] According to the District Court, the defendant's liability for contributions did not begin until April 5, 1972, the day the Equal Employment Opportunity Commission issued an interpretation casting doubt on some varieties of pension fund discrimination. *See* 37 Fed.Reg. 6835-6837. Even assuming that the EEOC's decision should have put the defendants on notice that they were acting illegally, the date chosen by the District Court was too early. The court should have taken into account the difficulty of amending a major pension plan, a task that cannot be accomplished overnight. Moreover, it should not have given conclusive weight to the EEOC guideline. *See General Electric Co. v. Gilbert*, 429 U.S. at 141. The Wage and Hour Administrator, whose rulings also provide a defense in sex discrimination cases, 29 U.S.C. § 259 refused to follow the EEOC. *See* n.37, *infra*.

Further doubt about the District Court's equitable sensitivity to the impact of a refund order is raised by the court's decision to award the full difference between the contributions made by male employees and those made by female employees. This may give the victims of the discrimination more than their due. If an undifferentiated actuarial table had been employed in 1972, the contributions of women employees would no doubt have been lower than they were, but they would not have been as low as the contributions actually made by men in that period. The District Court should at least have considered ordering a refund of only the difference between contributions made by women and the contributions they would have made under an actuarially sound and nondiscriminatory plan.

had conflicting views.[37] The Department's failure to act more swiftly is a sign not of its recalcitrance, but of the problem's complexity. As commentators have noted, pension administrators could reasonably have thought it unfair – or even illegal – to make male employees shoulder more than their "actuarial share" of the pension burden.[38] There is no *721 reason to believe that the threat of a backpay award is needed to cause

[37] As noted earlier, n.26, *supra*, the position of the Wage and Hour Administrator has been somewhat confusing. His general rule rejected differences in average cost as a defense, but his more specific rule lent some support to the Department's view by simply requiring an employer to equalize either his contributions or employee benefits. Compare 29 CFR § 800.151 (1977) with § 800.116(d). The EEOC requires equal benefits. *See* 29 CFR §§ 1604.9(e) and (f) (1977). Two other agencies with responsibility for equal opportunity in employment adhere to the Wage and Hour Administrator's position. *See* 41 CFR § 60.20.3(c) (1977) (Office of Federal Contract Compliance); 45 CFR § 86.56(b)(2) (1976) (Dept. of Health, Education, and Welfare). *See also* 40 Fed.Reg. 24135 (1975) (HEW).

[38] "If an employer establishes a pension plan, the charges of discrimination will be reversed: if he chooses a money purchase formula, women can complain that they receive less per month. While the employer and the insurance company are quick to point out that women as a group actually receive more when equal contributions are made – because of the long-term effect of compound interest – women employees still complain of discrimination. If the employer chooses the define benefit formula, his male employees can allege discrimination because he contributes more for women as a group than for men as a group. The employer is in a dilemma: he is damned in the discrimination context no matter what he does." Note, Sex Discrimination and Sex-Based Mortality Tables, 53 B.Y.U.L.Rev. 624, 633-634 (1973) (footnotes omitted).

other administrators to amend their practices to conform to this decision.

Nor can we ignore the potential impact which changes in rules affecting insurance and pension plans may have on the economy. Fifty million Americans participate in retirement plans other than Social Security. The assets held in trust for these employees are vast and growing – more than $400 billion was reserved for retirement benefits at the end of 1976, and reserves are increasing by almost $50 billion a year.[39] These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.[40] The EEOC *722 itself has

[39] American Council of Life Insurance, Pension Facts 1977, pp. 223.

[40] In 1974, Congress underlined the importance of making only gradual and prospective changes in the rules that govern pension plans. In that year, Congress passed a bill regulating employee retirement programs. Employee Retirement Income Security Act of 1974, 88 Stat. 829. The bill paid careful attention to the problem of retroactivity. It set a wide variety of effective dates for different

recognized that the administrators of retirement plans must be given time to adjust gradually to Title VII's demands.[41] Courts have also shown sensitivity to the special dangers of retroactive Title VII awards in this field. *See Rosen v. Public Serv. Elec. & Gas Co.*, 328 F.Supp. 454, 466-468 (NJ 1971).

There can be no doubt that the prohibition against sex-differentiated employee contributions represents a marked departure from past practice. Although Title VII was enacted in 1964, this is apparently the first litigation challenging contribution differences based on valid actuarial tables. Retroactive liability could be devastating for a pension fund.[42] The *723 harm would

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provisions of the new law; some of the rules will not be fully effective until 1984, a decade after the law was enacted. *See*, *e.g.*, in 1970 ed., Supp. V of 29 U.S.C. § 1061(a) (Sept. 2, 1974); § 1031(b)(1) (Jan. 1, 1975); § 1086(b) (Dec. 31, 1975); § 1114(c)(4) (June 30, 1977); § 1381(c)(1) (Jan. 1, 1978); § 1061(c) (Dec. 31, 1980); § 1114(c) (June 30, 1984).

[41] In February, 1968, the EEOC issued guidelines disapproving differences in male and female retirement ages. In September of the same year, EEOC's general counsel gave an opinion that retirement plans could set gradual schedules for complying with the guidelines, and that the judgment of the parties about how speedily to comply "would carry considerable weight." *See Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976).

[42] The plaintiffs assert that the award in this case would not be crippling to these defendants, because it is limited to contributions between 1972 and 1975. But we cannot base a ruling on the facts of this case alone. As this Court noted in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, equitable remedies may be flexible but they still must be founded on principle. "Important national goals would be frustrated by a regime of discretion that 'produce[d] different

fall in large part on innocent third parties. If, as the courts below apparently contemplated, the plaintiffs' contributions are recovered from the pension fund,[43] the administrators of the fund will be forced to meet unchanged obligations with diminished assets.[44] If the reserve proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated reduction in the contributions of past employees.

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results for breaches of duty in situations that cannot be differentiated in policy.'" *Id*., at 417. Employers are not liable for improper contributions made more than two years before a charge was filed with the EEOC. 42 U.S.C. § 2000e-5(g) (1970 ed., Supp. V). But it is not unusual for cases to remain within the EEOC for years after a charge is filed, *see*, *e.g*., *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (3 years, 2 months), and that delay is but a prelude to the time inevitably consumed in civil litigation.

[43] The Court of Appeals plainly expected the plan to pay the award, for it noted that imposing retroactive liability "might leave the plan somewhat under-funded." 553 F.2d at 592. After making this observation, the Court of Appeals suggested a series of possible solutions to the problem – the benefits of all retired workers could be lowered, the burden on current employees could be increased, or the Department could decide to contribute enough to offset the plan's unexpected loss. *Ibid*.

[44] Two commentators urging the illegality of gender-based pension plans noted the danger of "staggering damage awards," and they proposed as one cure the exercise of judicial "discretion [to] refuse a backpay award because of the hardship it would work on an employer who had acted in good faith. . . ." Bernstein & Williams, Title VII and the Problem of Sex Classifications in Pension Programs, 74 Colum.L.Rev. 1203, 1226, 1227 (1974).

Without qualifying the force of the *Albemarle* presumption in favor of retroactive relief, we conclude that it was error to grant such relief in this case. Accordingly, although we agree with the Court of Appeals' analysis of the statute, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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APPENDIX D

463 U.S. 1073 (1983)

SUPREME COURT OF UNITED STATES

No. 82-52

Argued March 28, 1983

Decided July 6, 1983

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS ET AL.
v.
NORRIS

Opinion

*1074 PER CURIAM.

Petitioners in this case administer a deferred compensation plan for employees of the State of Arizona. The respondent class consists of all female employees who are enrolled in the plan or will enroll in the plan in the future. Certiorari was granted to decide whether Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* (1976 ed. and Supp. V), prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay lower monthly retirement benefits to a woman than to a man who has made the same contributions; and whether, if so, the relief awarded by the District Court was proper. 459 U.S. 904

(1982). The Court holds that this practice does constitute discrimination on the basis of sex in violation of Title VII, and that all retirement benefits derived from contributions made after the decision today must be calculated *1075 without regard to the sex of the beneficiary. This position is expressed in Parts I, II, and III of the opinion of JUSTICE MARSHALL, *post,* at this page and 1076-1091, which are joined by JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE STEVENS, and JUSTICE O'CONNOR. The Court further holds that benefits derived from contributions made prior to this decision may be calculated as provided by the existing terms of the Arizona plan. This position is expressed in Part III of the opinion of JUSTICE POWELL, *post,* at 1105, which is joined by THE CHIEF JUSTICE, JUSTICE BLACKMUN, JUSTICE REHNQUIST, and JUSTICE O'CONNOR. Accordingly, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion. The Clerk is directed to issue the judgment August 1, 1983.

It is so ordered.

* * *

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE REHNQUIST join, dissenting in part and concurring in part, and with whom JUSTICE O'CONNOR joins as to Part III.

III

The District Court held that Arizona's voluntary pension plan violates Title VII and ordered that future annuity payments to female retirees be made equal to payments received by similarly situated men.[10] 486 F. Supp. 645 (Ariz. 1980). The Court of Appeals for the Ninth Circuit affirmed. 671 F. 2d 330 (1982). The Court today affirms the Court of Appeals' judgment insofar as it holds that Arizona's voluntary pension plan violates Title VII. But this finding of a statutory violation provides no basis for approving the retroactive relief awarded by the District Court. To approve this award would be both unprecedented and manifestly unjust.

We recognized in *Manhart* that retroactive relief is normally appropriate in the typical Title VII case, but concluded that the District Court had abused its discretion in awarding such relief. 435 U.S., at 719. As we noted, the employer in *Manhart* may well have assumed that its pension program was lawful. *Id.*, at 720. More importantly, a retroactive *1106 remedy would have had a potentially disruptive impact on the operation of the employer's pension plan. The business of underwriting insurance and life annuities requires careful approximation of risk. *Id.*, at 721. Reserves

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[10] It is irrelevant that female employees in *Manhart* were required to participate in the pension plan, whereas participation in the Arizona deferred compensation plan is voluntary. Title VII forbids all discrimination concerning "compensation, terms, conditions, or privileges of employment," not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice. It is likewise irrelevant that the Arizona plan includes two options — the lump-sum option and the fixed-sum-for-a-fixed-period option — that are provided on equal terms to men and women. An employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis. Cf. *Mississippi University for Women v. Hogan,* 458 U.S. 718, 723-724, n.8 (1982).

normally are sufficient to cover only the cost of funding and administering the plan. Should an unforeseen contingency occur, such as a drastic change in the legal rules governing pension and insurance funds, both the insurer's solvency and the insured's benefits could be jeopardized. *Ibid.*

This case presents no different considerations. *Manhart* did put all employer-operated pension funds on notice that they could not "requir[e] that men and women make unequal contributions to [the] fund," *id.,* at 717, but it expressly confirmed that an employer could set aside equal contributions and let each retiree purchase whatever benefit his or her contributions could command on the "open market," *id.,* at 718. Given this explicit limitation, an employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market.

As in *Manhart,* holding employers liable retroactively would have devastating results. The holding applies to all employer-sponsored pension plans, and the cost of complying with the District Court's award of retroactive relief would range from $817 to $1,260 million annually for the next 15 to 30 years.[11] Department of Labor Cost Study 32. In this

[11] The present actuarial value of an annuity policy is determined by multiplying the present value (in this case, the value at the time of the employee's retirement) of each monthly payment promised by the probability, which is supplied by an actuarial table, that the annuitant will live to receive that payment. An annuity policy issued to a retired female employee under a sex-based retirement plan will have roughly the same present actuarial value as a policy issued to a similarly situated man, since

case, the cost would fall on the State of Arizona. Presumably other state and local governments also would be affected directly by today's decision. Imposing such unanticipated *1107 financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits. Income, excise, and property taxes are being increased. There is no justification for this Court, particularly in view of the question left open in *Manhart,* to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only.[12]

*   *   *

the lower value of each monthly payment she is promised is offset by the likelihood that she will live longer and therefore receive more payments.

[12] *See Spirt v. Teachers Ins. & Annuity Assn.*, *supra,* at 1061-1062; Brilmayer, Hekeler, Laycock, & Sullivan, Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis, 47 U. Chi. L. Rev. 505, 512-514 (1980).

APPENDIX E

487 U.S. 223 (1988)

SUPREME COURT OF UNITED STATES

No. 86-1685

Argued February 22, 1988

Decided June 22, 1988

FLORIDA ET AL.
v.
LONG ET AL.

*225

Opinion

JUSTICE KENNEDY delivered the opinion of the Court.

The questions presented for decision here are the date upon which pension funds covered by Title VII of the Civil Rights Act of 1964 were required to offer benefit structures that did not discriminate on the basis of sex and whether persons who retired before that date are entitled to adjusted benefits to eliminate any sex discrimination for all future benefit payments. We revisit our decisions in *Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702 (1978), and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983).

The issues before us turn on whether *Manhart's* invalidation of discriminatory contributions necessarily apprised employers that plans which were nondiscriminatory as to contributions must in every case be nondiscriminatory as to *226 benefits. We conclude that *Manhart* neither resolved the issue nor gave employers notice that benefits necessarily were embraced by the decision. The point was not resolved in a definitive way until our decision in *Norris.* We hold further that employees who retired before the effective date of *Norris* are not entitled to a readjusted benefits payment structure.

I

Since 1970, the State of Florida has operated the Florida Retirement System (Florida System) for state employees and employees of over 1,100 participating local governments. Fla. Stat. § 121.011 *et seq.* (1987). The Florida System is a defined benefit pension plan, which guarantees retirement benefits that may not be lowered once the employee retires and selects a pension option. The Florida System's normal retirement benefit is a single life plan with monthly payments for the employee's life, calculated as a percentage of the employee's average highest salary upon retirement. § 121.091 (1). Upon retirement, an employee also may select a pension plan from one of three retirement options: (1) a joint and survivorship option providing monthly payments for the retiree's lifetime and, in the event of the retiree's death within 10 years after retirement, the same monthly payments to the beneficiary for the balance of the 10-year period; (2) a joint annuitant option ensuring monthly benefits for the lives of the retiree and his beneficiary; and (3) a joint annuitant option providing monthly payments for the lives of the retiree and his beneficiary, but reducing by one third, upon the death of either, the monthly benefits to the surviving individual. § 121.091(6).

The state legislature periodically reviews the Florida System's finances and operation, and determines the appropriate contribution rates for government employers as a percentage of the gross compensation of participating employees. Fla. Stat. §§ 121.031, 121.061, 121.071 (1987). The State Constitution requires Florida to collect contributions sufficient *227 to fund the System on a "sound actuarial basis." *See* Fla. Const., Art. X, § 14. The Florida System was funded originally by employer and employee contributions; but, since 1975, the System has been funded entirely by contributions from state and local government employers. Contributions for male and female employees with the same length of service, age, and salary always have been equal. The normal, or single life, plan, moreover, has provided equal monthly benefits to similarly situated male and female employees since the inception of the Florida System. Only the payment structure under the three joint options is in dispute here.

Florida calculates an employee's normal retirement benefit as a product of two variables, with the first variable a statutorily determined percentage of the employee's average monthly compensation upon retirement and the second variable the employee's credited years of employment. Fla. Stat. §§ 121.091(1)(a), (b) (1987). The normal retirement benefit is therefore equal for similarly situated male and female employees. If a retiring employee selects one of the optional joint annuitant plans instead of the normal plan, the Florida System then uses a third variable, the retiree's life expectancy, to determine the present actuarial value of his or her normal retirement benefit. § 121.091(6)(b). Until our *Norris* decision, Florida calculated a retiree's life expectancy using sex-based actuarial tables. As the male's life expectancy was less than a female's, so too was the actuarial value of his normal retirement benefit; and, because the optional plans operated by a presumed exchange of the normal benefit for an optional plan, the lower actuarial value of the male benefit caused the male retiree to receive a joint annuitant benefit with lower monthly payments.

Immediately after our decision in *Norris,* Florida acted to adopt unisex actuarial tables for all employees in the Florida System retiring after August 1, 1983. Under the unisex tables, male and female retirees similarly situated receive equal monthly pension benefits under any of the offered *228 plans. As a result, Florida's current retirement plans create no distinction, either in contributions or in payments, between employees or between post-*Norris* retirees on the basis of sex.

II

Retirees Hughlan Long and S. Dewey Haas brought this suit in the United States District Court for the Northern District of Florida against Florida and various of its officials with responsibility for management of the Florida System. They alleged that petitioners were violating Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, by operating pension plans that discriminated on the basis of sex, and requested the District Court to certify a class action under Federal Rule of Civil Procedure 23. Retirees requested retroactive compensation for underpayment of pension benefits.

On January 20, 1983, the District Court approved respondents' class action, certifying a class consisting of male retirees who elected one of the optional plans and who retired after March 24, 1972,[1] and before August 1, 1983. After an orderly progress to the merits, the District Court entered summary judgment in respondents' favor, holding that Florida's optional pension plans discriminated against male employees in violation of Title VII. The District Court determined that the effective date of our decision in *Manhart* was October 1, 1978. It awarded relief to class members who retired after that date and before August 1, 1983, by retroactive "topping up"[2] of the monthly retirement benefits to Florida's current *229 unisex levels. The

[1] March 24, 1972, is the effective date of the Equal Employment Opportunity Act of 1972, which, for the first time, made public employers like Florida and its local governments an "employer" within the meaning of Title VII. 86 Stat. 103. *See* 42 U.S.C. § 2000e. We do not determine whether this is the appropriate date for public employers' liability under Title VII.

[2] "Topping up" compensates for the difference between the benefits male retirees did receive and the benefits they would have received if the Florida System had used unisex mortality tables, but would not provide male retirees with benefits equal to those female retirees received under the sex-based tables. App. to Pet. for Cert. A65. *See Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 719-720, n.36 (1978) (full equalization "may give the victims of the discrimination more than their due").

topping up was awarded for the period from October 1, 1978, to April 30, 1986, the date of the District Court's judgment for purposes of damages calculation. It also awarded all class members topped-up future monthly benefits, commencing on the date of its judgment.

The Court of Appeals for the Eleventh Circuit affirmed. 805 F. 2d 1542, rehearing denied, 805 F. 2d 1552 (1986) *(per curiam).* It held, in sum, that our decision in *Manhart* had placed employers on notice that pension benefits, not just contributions, must be calculated without reliance on sex-based actuarial tables. *Id.,* at 1547-1548, 1551. We granted certiorari, 484 U.S. 814 (1987), to consider these issues, and we reverse.

III

Two aspects of retroactivity analysis are presented by this case. The first is whether *Manhart* or *Norris* establishes the appropriate date for commencing liability for employer-operated pension plans that offered discriminatory payment options. We discuss below the retroactivity principles already explored in the pension cases and determine that *Norris* is the controlling liability date and that liability may not be imposed for pre-*Norris* conduct. The second question concerns the proper implementation of our nonretroactivity determination. This requires us to determine whether benefit adjustments ordered by the District Court should be classified as retroactive or prospective. We hold the adjustments are retroactive and that pre-*Norris* retirees are not entitled to adjusted benefits for the violations claimed here.[3]

*230 A

We have identified three criteria for determining whether retroactive awards are appropriate in Title VII pension cases involving the use of sex-based actuarial tables. *Manhart,* 435 U.S., at 719-723; *Norris,* 463 U.S., at 1105-1107; *id.,* at 1109-1111 (O'CONNOR, J., concurring). *See also Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-109 (1971). The first is to examine whether the decision established a new principle of law, focusing, in this context, on whether *Manhart* clearly defined the employer's obligations under Title VII with respect to benefits payments. The second criterion is to test whether retroactive awards are necessary to the operation of Title VII principles by acting to deter deliberate violations or grudging compliance. The third is to ask whether retroactive liability will produce inequitable results for the States, employers, retirees, and pension funds affected by our decision.

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[3] The parties raise other issues regarding whether 42 U.S.C. § 2000e-5(g) limits petitioners' liability for retroactive compensation to no more than two years prior to the filing of a proper Equal Employment Opportunity Commission (EEOC) charge of discrimination and whether 42 U.S.C. § 2000e-5(e) requires that the plaintiff class be restricted to include only those individuals who retired no more than 300 days prior to the filing of such an EEOC charge. We do not address these issues because, in either case, the relevant liability limitations would be prior to our decision in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), which sets the controlling date for liability.

The first criterion, the extent to which new principles of law have been established, is of particular significance to our holding today. The Court of Appeals held that *Manhart* placed Florida on notice that optional pension plans offering sex-based benefits violated Title VII, and it awarded retroactive relief accordingly. We disagree. The pension plan provision at issue in *Manhart* was the "requirement that men and women make unequal contributions to an employer-operated pension fund." 435 U.S., at 717. While the language of our decision may have suggested the potential application of Title VII to unequal payments, we were careful *231 to state that we did not reach that issue. We limited our holding to unequal contributions.

We recognized that "[t]here can be no doubt that the prohibition against sex-differentiated employee contributions represents a marked departure from past practice." *Id.,* at 722. Our decision stated two principal limits on the potential liability of employer-operated pension plans. First, we limited the holding to the fact pattern then before us. We stated:

> "Although we conclude that the Department's practice [of requiring discriminatory pension contributions on the basis of sex] violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund." *Id.,* at 717.

Second, we confined the reach of our decision by recognizing the potential for interaction between an employer-operated pension plan and pension plans available in the marketplace. We said:

> "Nothing 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 contributions could command in the open market." *Id.,* at 717-718.

Our references to contributions, as distinct from benefits payments, and our recognition of open market forces limited the decision and left some doubt regarding its command. Ensuing decisions expressed conflicting views of *Manhart's* reach.[4] Commentators

[4] Compare *Peters v. Wayne State University*, 691 F.2d 235 (6th Cir. 1982) (use of sex-based tables does not violate Title VII if actuarial value of pension plans for similarly situated males and females is equal), and *EEOC v. Colby College*, 589 F.2d 1139, 1146 (1st Cir. 1978) (Coffin, J., concurring) (*Manhart* does not necessarily preclude pension system that offers employees equal benefit plans as well as optional "actuarially sound" plans, with unequal benefits, based on sex-based tables), with *Spirt v. Teachers Insurance and Annuity Assn.,* 691 F.2d 1054 (2d Cir. 1982) (unequal benefits as well as unequal contributions barred under *Manhart*), vacated and remanded, 463 U.S. 1223 (1983), and *Sobel v. Yeshiva University*, 566 F. Supp. 1166, 1192 (SDNY 1983) (following *Spirt* as binding Circuit law, but noting that the Court's decision to review *Norris* should end uncertainty regarding "[w]hether the Supreme Court will retreat from its *Manhart* holding or offer some reasonable means of applying it in a nondiscriminatory fashion . . . [and] the Court is almost certain to comment upon several types of distribution options which have been offered to avoid a *Manhart* problem" (footnote omitted)), *rev'd and remanded*, 797 F. 2d 1478 (2d Cir. 1986), *later decision*, 656 F. Supp. 587 (SDNY 1987).

also expressed conflicting opinions *232 regarding the permissible and appropriate scope of the decision.[5]

Not until *Norris,* decided five years after *Manhart,* did we address the matter of unequal benefits payments and the open market exception. *Norris* extended the principle of nondiscrimination to unequal benefits, stating that "the classification of employees on the basis of sex is no more permissible *233 at the pay-out stage of a retirement plan than at the pay-in stage." *Norris,* 463 U.S., at 1081. It also addressed uncertainty over the open market exception and responded to discrete issues not raised in *Manhart.* Granting only narrow operation to the open market exception, we excluded from it employer-operated

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[5] Compare Jacobs, The *Manhart* case: Sex-Based Differentials and the Application of Title VII to pensions, 31 Lab. L. J. 232, 237-238, 244 (1980) (noting that "should the majority have intended the plain meaning of its words, the decision in *Manhart* will not invalidate gender-based mortality tables and pension benefits"), and Kistler & Healy, Sex Discrimination in Pension Plans since *Manhart,* 32 Lab. L. J. 229 (noting that lower court decisions after *Manhart,* "resolved the uncertainty" by extending *Manhart* to "prohibit the payment of sex-based pension benefits as well as the unequal contributions procedure originally proscribed"), with Kimball, Reverse Sex Discrimination: *Manhart,* 1979 Am. Bar Found. Research J. 83, 91-92, 138 (noting expansion of *Manhart* "far beyond what the Court said or even hinted," and concluding that the effect of *Manhart* should be limited to unequal contribution requirement imposed on employees in employer-operated pension plans), and Note, *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris:* Mandate of *Manhart*, 86 W. Va. L. Rev. 437, 452 (1983-1984) (*Manhart* significant "for what it did not do. . . . *Manhart* did not reach beyond `men and women making unequal contributions to an employer-operated pension fund'").

pension plans which offered annuities that duplicated those available from private companies. 463 U.S., at 1087-1088. *Norris* also condemned pension plans offering male and female employee annuities with "the same present actuarial value" where sex-based differentials resulted. *Id.,* at 1082-1083. Pension funds which offered nondiscriminatory plans with alternative discriminatory options were also held in noncompliance with Title VII's requirements. *Id.,* at 1081-1082, and n.10. Thus, some questions left open by *Manhart* were answered in *Norris.* Our close division in the later case, however, suggests that application of the earlier law to differential benefits was far from obvious.

In view of the substantial departure from existing practice that *Manhart* ordered, pension fund administrators could rely with reasonable assurance on its express qualifications and conclude that it was confined to cases of sex-based contributions. A few months before our decision in *Norris,* the United States Department of Labor completed a study of pension plans and the financial impact of an Equal Employment Opportunity Commission proposal to adopt an equal benefits rule. United States Dept. of Labor, Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits (Jan. 1983) (hereinafter Cost Study). The Cost Study found that "[s]ubstantial percentages of both [defined benefit and defined contribution] types of pension plans follow the customary insurance industry practice of using sex-segregated mortality tables in calculating annuity benefits." *Id.,* at 2. It estimated that 45% of the participants in defined benefit plans like the Florida System and 74% of the participants in *234 defined contribution plans continued to receive benefits calculated with sex-based tables. *Ibid.*

The Florida experience further illustrates the difficulty of determining the requirements for full compliance. Since its inception, the Florida System not only required equal contributions for male and female employees but also provided a primary single life benefit with equal payments to similarly situated male and female employees. The primary single life benefit is of particular significance, for it complied with both *Norris* and *Manhart*. *See* Cost Study 11-12; Hager & Zimpleman, The *Norris* Decision, Its Implications and Application, 32 Drake L. Rev. 913, 938 (1982-1983) (*Norris* decision will "have little effect upon defined benefit plans so far as the normal form pension benefit is concerned . . . [since that benefit] already pays equal annuity incomes").

The provision of optional annuity plans in the Florida System provided employees with a range of choices for their convenience. Before *Norris,* Florida could conclude reasonably that, once employees were offered a unisex primary benefit, *Manhart* did not prevent the offering of sex-based annuities as options. The alternative for employers who wished to control, or were unable to finance, the costs of unisex options would be to eliminate optional benefits entirely and offer the primary benefit alone. *See* Hager & Zimpleman, 32 Drake L. Rev., at 938-939. Employees do not benefit from the reduction of their pension plan options, and Florida may have assumed we did not intend to eliminate an employee's flexibility in choosing a retirement option, so long as the options presented included a sex-neutral benefit.

In *Norris* itself we recognized that *Manhart* had reserved the determination of some major issues. While we narrowed the open market exception to include only pension plans where employers set aside an equal lump-sum payment and the individual employee purchased an annuity from a private pension company, 463 U.S., at 1088, we recognized that employers "reasonably could have assumed that it would be lawful *235 to make available to its employees annuities offered by insurance companies on the open market." *Id.,* at 1106. The pension plan we considered in *Norris* reflected a reasonable application of the open market exception. While the forms of the Florida System's plans and those considered in *Norris* may differ, they are the same in economic substance.

Florida's continuance of the optional plans until the *Norris* decision does not justify imposition of a retroactive award. We note, moreover, that while Florida's offer of the nondiscriminatory benefit makes its case against retroactivity more compelling, this particular feature is not essential to establish that *Norris* is the effective date for conforming benefit structures. The considerations discussed below are also of relevance.

The second and third criteria of retroactivity analysis also support our determination that *Norris*, and not *Manhart,* provides the appropriate date for determining liability and relief. In the pension context, we have considered whether retroactive awards are necessary to further the purposes of Title VII and to ensure compliance with our decisions, and we have concluded that retroactivity is not required. *Manhart*, 435 U.S., at 720-721; *Norris*, *supra*, at 1110

(O'CONNOR, J., concurring). We see no reason to depart from that conclusion in the case before us. Florida acted immediately after our decision in *Norris* and modified its optional pension plans to provide equal monthly benefits to each individual employee who retired after August 1, 1983. There is no evidence that employers in general have not complied with the Title VII requirements we announced in *Manhart* and extended in *Norris.*

Finally, we conclude here, as in *Manhart* and *Norris,* that the imposition of retroactive liability on the States, local governments, and other employers that offered sex-based pension plans to their employees is inequitable. The effect of "drastic changes in the legal rules governing pension and insurance funds" on the provision of reserves for unexpected *236 benefits; the complexities of pension funding in an industry that had once relied on sex-based tables, coupled with the lack of authoritative guidance from the courts or administrative agencies; the potential instability in pension and retirement programs and the resulting harm to other retirees as innocent third parties; and the absence of any reason to believe that "the threat of a backpay award" was necessary to effect pension fund compliance with our decision, all compelled our conclusion in *Manhart* that "the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result." *Manhart, supra,* at 720-723. Noting that Congress had, in fact, stressed the importance of "making only gradual and prospective changes" in the legal rules governing pension plans, 435 U.S., at 721-722, n.40, we concluded, in general terms, that the "*Albemarle* presumption in favor of retroactive relief" should not be applied to this type of Title VII pension plan suit. *Id.*, at 723. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

In *Norris,* we reaffirmed our conclusion that retroactive liability was inappropriate in Title VII pension plan cases. 463 U.S., at 1105-1107. Retroactive awards, applied to every employer-operated pension plan that did not anticipate our decision, would impose financial costs that would threaten the security of both the funds and their beneficiaries. *Id.,* at 1110 (O'CONNOR, J., concurring); *id.,* at 1094-1095 (MARSHALL, J., concurring in judgment in part). *See also* Buck Research Corporation, Trends in Corporate Pension Benefits: Unisex Before and After *Norris* 15 (Oct. 1983) (survey of Fortune 500 industrial corporations showing only 39.8% used unisex tables for their pension annuities when *Norris* was decided).

Respondents argue that Florida's pension administrators had "actual notice from internal memoranda and discussions" that the continuation of the sex-based optional pension plans after *Manhart* violated Title VII. 805 F. 2d, at 1550. Similarly, *237 respondents argue that the Florida System can in fact afford the District Court's $43 million award. Our power to order appropriate relief under Title VII is equitable in nature and flexible, *Manhart, supra,* at 718-719; *see* 42 U.S.C. § 2000e-5(g), but the particular circumstances of a case are not the sole determinant of relief. That Florida's fund currently may possess a surplus or that Florida's administrators discussed early intimations of later doctrine should not control a decision that must be based on a broad principle. 435 U.S., at 722, n.42. We will not adopt the premise that the appropriateness of a retroactive award turns on a particular pension fund's current financial status, so that financially successful pension funds pay but financially insecure pension funds do not. To do so imposes a penalty for prudent management. Similarly, the question whether *Manhart* placed employers on notice of Title VII's requirements cannot turn on the internal debates of one pension fund's administrators. The meaning and scope of a decision do not rest on the subjective interpretations of discrete, affected persons and their legal advisers. We have previously noted that "[i]mportant national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.'" *Albemarle Paper, supra,* at 417 (citing *Moragne v. States Marine Lines*, 398 U.S. 375, 405 (1970)).

While we hold that *Manhart* did not establish the date for Florida to conform its payment options to unisex standards, we do not hesitate to say that *Norris* did so. If Florida had continued to use sex-based actuarial tables to calculate benefits for its pension plans after *Norris,* the case before us would have been an altogether different one. *Norris* informed covered employers with pension plans of the obligation under Title VII to provide payment levels, both for contributions and for benefits, that are nondiscriminatory as to sex. We conclude that the effective date of our decision in *238 *Norris* provides the appropriate limit on retroactive liability in this case.

B

We next consider implementation of our nonretroactivity determination. The District Court made two separate awards. The first, for back compensatory payments to employees who retired after *Manhart* and before *Norris* and covering the entire period from *Manhart* to the date of its judgment, is retroactive without doubt and is, by our decision here, impermissible. The second award required that payments after judgment be adjusted for all pre-*Norris* male retirees who are receiving lower benefits. The District Court, and the Court of Appeals in affirming, labeled this latter award prospective relief. We disagree.

The distinction between retroactive and prospective relief is not always self-evident. An order requiring adjusted future payments for pre-*Norris* retirees may contain the essential elements of a retroactive order. Unlike an ordinary injunction against future conduct, the effect of an order that increases pension benefits to employees who have already retired may be retroactive in a fundamental sense if it corrects a fixed calculation based on assumptions that both the State and the retiree held when the retirement occurred. Benefits are altered despite the circumstance that past contributions were keyed to lower benefit payments, which undermines the basic financial calculus of a pension plan that determines contribution rates to support a predicted level of payments. *See Norris,* 463 U.S., at 1092 (MARSHALL, J., concurring in judgment in part). Such changes in benefits based on past contributions and actuarial assumptions may create a deficiency in the pension fund, requiring additional funds from the State and other employers to meet the increased benefits liability or forcing the pension plan to violate its contractual benefit guarantee to other retirees. In sum, an award in many cases may be retroactive in nature "[w]hen a court directs *239 a change in benefits based on contributions made before the court's order." *Ibid.*; *see id.,* at 1105, n.10.

It is not correct to consider payments of benefits based on a retirement that has already occurred as a sort of continuing violation. Our decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), is not to the contrary. *Bazemore* concerned the continuing payment of discriminatory wages based on employer practices prior to Title VII. In a salary case, however, each week's paycheck is compensation for work presently performed and completed by an employee. Further, the employer does not fund its payroll on an actuarial basis. By contrast, a pension plan, funded on an actuarial basis, provides benefits fixed under a contract between the employer and retiree based on a past assessment of an employee's expected years of service, date of retirement, average final salary, and years of projected benefits. In the pension fund context, a continuing violation principle in every case would render employers liable for all past conduct, regardless of whether the liability principle was first announced by *Manhart, Norris,* or our decision here. We cannot recognize a principle of equitable relief that ignores the essential assumptions of an actuarially funded pension plan.

We applied these principles in *Norris* and held that an order to adjust future annuity payments to female retirees to reach equality with payments to similarly situated men was "fundamentally retroactive in nature." 463 U.S., at 1105, n.10. The District Court's award here is indistinguishable in principle from the one found retroactive in *Norris.* The State of Florida determined contribution rates by relying on a precise assessment of expected future pension benefits for covered state and local government employees. The Constitution of the State of Florida mandated that the fund be maintained on a sound actuarial basis. Fla. Const., Art. X, § 14. As Florida guarantees the level of benefits, the District Court's award affects the pension fund's ability to meet its accrued obligations.

*240 A different case, and a different assessment of retroactivity, might result under pension plan structures which do not provide retirees with a contractual right to a fixed level of benefits or rate of return on contributions. *See Spirt v. Teachers Insurance & Annuity Assn*., 735 F. 2d 23, 28 (2d Cir. 1984). There, an award for future increase may require neither additional funding by the State or employer nor violation of contractual rights of other retirees. That is not the case before us, however. It is essentially retroactive to disrupt past pension funding assumptions by requiring further adjustments based on conduct that could not reasonably have been considered violative of Title VII at the time retirements occurred and funding provisions were made. Respondents "could not have done anything after *[Norris]* to eliminate [the resulting disparity in the pension fund] short of expending state funds." *Norris*, *supra*, at 1095 (MARSHALL, J., concurring in judgment in part).

Under the Florida plan, no adjustment in benefits payments is required for employees who retired before the effective date of our decision in *Norris.* As the class here consists only of employees who retired before *Norris,* it is not entitled to the relief ordered by the District Court.

The judgment of the Court of Appeals for the Eleventh Circuit is reversed.

It is so ordered.

*   *   *

APPENDIX F

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION**

Civil Action No. 1:07-2500-RDB

[Filed April 26, 2016]

U.S. EQUAL EMPLOYMENT	)
OPPORTUNITY COMMISSION,	)
Plaintiff,	)
	)
v.	)
	)
BALTIMORE COUNTY, *et al.*,	)
Defendants.	)
	)

JOINT CONSENT ORDER REGARDING INJUNCTIVE RELIEF

Recitals

On September 18, 2007, the EEOC brought this action under the Age Discrimination in Employment Act of 1967, as amended (the "ADEA"), 29 U.S.C. § 621, *et seq. See* Complaint, ECF No. 1 at ¶1. In both its original Complaint and Amended Complaint, EEOC alleged that "Defendant Baltimore County has engaged in unlawful employment practices by requiring Wayne A. Lee, Richard J. Bosse, and a class of similarly situated aggrieved individuals within the protected age group to pay higher contributions than those paid by younger individuals to Defendant's pension plan, in violation of Section 4(a)(1) of the A[DEA], 29 U.S.C. § 623(a)(1)." Complaint, ECF No. 1 at ¶14; Amended Complaint, ECF No. 57 at ¶14.

EEOC named American Federation of State, County & Municipal Employees, Local 921 ("AFSCME"); Baltimore County Federation of Public Employees, AFT, AFL-CIO ("BCFPE"); Baltimore County Federation of Public Health Nurses ("BCFPHN"); and Baltimore County Professional Fire Fighters Association, International Association of Fire Fighters Local 1311 — AFL-CIO ("IAFF"), Fraternal Order of Police Lodge 4 ("FOP Lodge 4"), and Baltimore County Sheriff's Office Fraternal Order of Police, Lodge Number 25 ("FOP Lodge 25"), as Rule 19(a) Defendants (collectively "Rule 19(a) Defendants"). *See* ECF No. 57 at ¶ 6 – 12.

In its Amended Complaint, the EEOC requested that the Court grant, in relevant part, the following injunctive relief:

A. Grant a permanent injunction enjoining Defendant Baltimore County, its officers, successors, assigns and all persons in active concert or participation with it, from requiring its older workers to contribute more than its younger workers to its pension plan and from engaging in any other employment practice which discriminates on the basis of age against individuals 40 years of age and older;

B. Order Defendant Baltimore County to institute and carry out policies, practices, and programs which provide equal employment opportunities for individuals 40 years of age and older, and which eradicate the effects of its past and present unlawful employment practices;

. . .

F. Grant such further relief as the Court deems necessary and proper in the public interest.

See Amended Complaint, ECF No. 57 at Prayer for Relief.

While Defendant Baltimore County did change its pension plan after EEOC initiated this lawsuit so that "employees hired after July 1, 2007 contribute to the [plan] at a flat rate regardless of their age at the time of hiring," individuals hired before that date continued to make contributions at rates determined by their age at the time of enrollment. ECF No. 196 at 3.

On January 21, 2009, Judge Benson Everett Legg of this Court granted summary judgment to Baltimore County determining that the County's pension plan was not based on age, but on the number of years an employee has until reaching retirement (the time value of money). The Court found that the County "was wholly motivated by something other than age, and consequently, that the ERS does not violate Section 4(a)(1) of the ADEA." *EEOC v. Baltimore County*, 593 F. Supp. 2d 797, 802 (D. Md. 2009). On June 18, 2009, the EEOC appealed. On June 25, 2010, the Fourth Circuit vacated Judge Legg' s order. *EEOC v. Baltimore County*, 385 F. Apx, 322, 325 (4th Cir. 2010).

Following remand, on October 17, 2012, the Court, Benson Everett Legg, District Judge, granted partial summary judgment in favor of the EEOC on the issue of liability, finding the County's pension system was facially discriminatory and that, because "age is the "but-for" cause of the disparate treatment, the County's plan violated the ADEA. *EEOC v. Baltimore County*, 2012 WL 5077631, *5 (D. Md. October 17, 2012). With respect to the issue of intent, Judge Legg found that the problem identified by the Fourth Circuit was an "unintended consequence of two separate and independently lawful provisions of the County Code enacted decades apart." *Id.* at *3. The Court further found that there was "no evidence to suggest that the County subjectively intended, at any point in the history of the ERS, to treat older workers less favorably than young workers." *Id.* at *5. The Court, however, concluded that the "County's benign motives [were] ... irrelevant" because the pension system was "facially discriminatory." *Id.*

Judge Legg subsequently granted Defendant Baltimore County's Motion for Leave to Permit Interlocutory Appeal and for Stay. *See* Order, ECF No, 206 at 3: "The question for review is whether a defined benefit pension plan violates the ADEA if it requires employees to contribute disparate percentages of their wages based on the age at which they entered the plan, despite the fact that all employees are eligible to retire after a fixed number of years of service." The United States Court of Appeals for the Fourth Circuit granted permission for the appeal. *See* Order, ECF No. 207.

On March 31, 2014, the Court of Appeals for the Fourth Circuit held "that the district court correctly determined that the County's [pension] plan violated the ADEA, because the plan's employee contribution rates were determined by age, rather than by any permissible factor." ECF No. 210 at 6, 747 F.3d 267, 269 (4th Cir. 2014). Accordingly, the Court affirmed the District Court's award of summary judgment on the issue of liability, and remanded the case for consideration of damages. *See* ECF No. 210 at 6, 747 F.3d at 270. On June 27, 2014, the County filed a petition for writ of certiorari to review the Fourth Circuit's ruling. *Baltimore County, Md. v. EEOC*, 2014 WL 2961000 (June 27, 2014). On November 4, 2014, the Supreme Court denied the County's petition. *Baltimore County, Md. v. EEOC*, 135 S.Ct. 436 (U.S. 2014).

Following remand to this Court, Judge Richard D. Bennett was assigned this case as a result of Judge Legg's retirement from the bench. On December 12, 2014, the EEOC filed a Motion for Injunctive Relief. ECF No. 215. On January 2, 2015, 19(a) Defendants filed their response to the EEOC's Motion for Injunctive Relief. ECF No. 217. On January 5, 2015, Defendant Baltimore County filed its Opposition to EEOC's Motion for Injunctive Relief. ECF No. 218. While the EEOC's Motion for Injunctive Relief was pending, Defendant Baltimore County reached tentative agreements with five of the Rule 19(a) Defendants (Defendants AFSCME, IAFF, BCFPE, BCFPHN, FOP Lodge #25) to establish flat contribution rates and eliminate age-based rates. The particular flat contribution rates vary between the six Rule 19(a) Defendants. Each of the various flat rates is founded on the particular range of age-based rates being remediated. ECF No. 232. The agreements also provide for a 2% COLA each year for three years. Pursuant to these agreements, age will no longer be a factor in employee contribution rates beginning in July 2018. *Id.* Due to a bargaining impasse between Defendant Baltimore County and Defendant FOP Lodge No. 4 regarding the contribution rates, interest arbitration took place on March 18, 2016. On March 28, 2016, Arbitrator Joshua Javits held that effective July 1, 2016, and through the duration of the fiscal year, the pension rates of all FOP members hired prior to July 1, 2007 shall be 8.65%. ECF No. 234.

The Commission and Defendants now desire to resolve the EEOC's claims for injunctive relief without the time and expense of continued litigation, and they desire to formulate a plan to be embodied in a Joint Consent Order which will promote and effectuate the purposes of the ADEA.

The Court has examined this Joint Consent Order, and finds that it is reasonable, just and in accordance with the Federal Rules of Civil Procedure and the ADEA. Therefore, upon due consideration of the record herein and being fully advised in the premises, it is hereby ORDERED:

Scope of Order

1. This Order resolves the claims for injunctive relief sought by the EEOC in its ADEA Amended Complaint.

2. This Order does not resolve the claims for monetary relief (retroactive or prospective) sought by the EEOC in its ADEA Amended Complaint. The Court and parties understand that the EEOC intends to seek retroactive monetary relief from the County for

individuals harmed by the pension practice found to be unlawful by this Court, and also intends to seek prospective monetary relief from the County for employees who may be harmed by the phase-in of age-neutral contribution rates described below. The availability of such monetary relief shall be addressed by the Court at a later date following briefings and argument by the parties. The EEOC agrees not to seek monetary relief from any Rule 19(a) Defendant.

Injunction

Baltimore County Lodge No. 4 Fraternal Order of Police

3. Effective July 1, 2016, Defendant Baltimore County, its officers, agents, servants, employees, successors, assigns, and all persons acting or claiming to act on its behalf are enjoined from requiring employees and members of the Baltimore County Employees' Retirement System (ERS or "pension plan") who are at least forty years of age and who are also members of Baltimore County Lodge No. 4 Fraternal Order of Police (FOP Lodge No. 4) to contribute to the pension plan at greater rates than younger employees based on age.

4. Effective July 1, 2016, Rule 19(a) Defendant FOP Lodge No. 4, its officers, agents, servants, employees, successors, assigns, and all persons acting or claiming to act on its behalf are enjoined from entering into any contract, compensation or benefits plan, collective bargaining agreement, or memorandum of understanding, which requires their member employees of Defendant Baltimore County who are at least forty years of age to contribute to the pension

plan at greater rates than younger employees based on age.

5. Effective July 1, 2016, all FOP Lodge No. 4 pay schedule IV and pay schedule VII (police SMC) employees hired prior to July 1, 2007, and who are members of the Baltimore County ERS, shall contribute 8.65% of their base pay to the pension plan.

Firefighters

6. Effective July 1, 2016, Defendant Baltimore County, its officers, agents, servants, employees, successors, assigns, and all persons acting or claiming to act on its behalf are enjoined from requiring employees and members of the Baltimore County Employees' Retirement System (ERS or "pension plan") who are at least forty years of age and who are also members of Baltimore County Professional Fire Fighters Association to contribute to the pension plan at greater rates than younger employees based on age.

7. Effective July 1, 2016, Rule 19(a) Defendant Baltimore County Professional Fire Fighters Association, its officers, agents, servants, employees, successors, assigns, and all persons acting or claiming to act on its behalf are enjoined from entering into any contract, compensation or benefits plan, collective bargaining agreement, or memorandum of understanding, which requires their member employees of Defendant Baltimore County who are at least forty years of age to contribute to the pension plan at greater rates than younger employees based on age.

8. Pursuant to agreement reached between Defendant Baltimore County and Defendant 19(a)

Baltimore County Professional Fire Fighters Association, the following terms shall apply for Baltimore County employees who are members of the Baltimore County Professional Fire Fighters Association, on Pay Schedules V or VIII, and who are members of ERS:

a. On July 1, 2016, ERS contributions for all employees hired prior to July 1, 2007 shall contribute at a rate of 8.65% of their base pay. On July 1, 2017, those employees hired prior to July 1, 2007 shall have their contributions increase to 9%. On July 1, 2018, Pay Schedule V employees hired prior to July 1, 2007 shall have their contributions increase to 9.5% and Pay Schedule VIII employees shall have their contributions increase to 10%.

b. On July 1, 2016, ERS contributions for all employees hired between July 1, 2007 and June 30, 2011 shall contribute at a rate of 8.65% of their base pay. On July 1, 2017, those employees hired between July 1, 2007 and June 30, 2011 shall have their contributions increased to 9.0%. On July 1, 2018, Pay Schedule V employees hired between July 1, 2007 and June 30, 2011 shall have their contributions increased to 9.5% and Pay Schedule VIII employees shall have their contributions increase to 10%.

c. Employees hired on or after July 1, 2011, whose ERS contributions are currently 10%, shall remain at 10% through at least June 30, 2019, and all new employees on Pay Schedules V and VIII will continue to contribute at a rate of 10% through June 30, 2019.

AFSCME Members

9. Pursuant to agreement reached between Defendant Baltimore County and American Federation of State, County and Municipal Employees Local #921, the following terms shall apply for Baltimore County employees who are members of AFSCME, on Pay Schedule 2, and who are members of ERS:

a. On July 1, 2016, ERS contributions for employees hired prior to July 1, 2007, whose contributions are at or below 6.25%, shall contribute at a rate of 6.25% of their base pay. On July 1, 2017, those employees hired prior to July 1, 2007, whose ERS contributions are 6.25% or higher but less than 6.75%, shall have their contributions increase to 6.75%. On July 1, 2018, those employees hired prior to July 1, 2007, whose ERS contributions are 6.75% or higher but less than 7.25%, shall have their contributions increase to 7.25%.

b. On July 1, 2016, ERS contributions for those employees hired prior to July 1, 2007, whose ERS contributions are higher than 7.25%, will have their contributions decreased to 7.25%.

c. Employees hired on or after July 1, 2007, whose ERS contributions are currently 7%, shall remain at 7% through at least June 30, 2019, and all new employees on Pay Schedule 2 will contribute at a rate of 7% through at least June 30, 2019.

Nurses

10. Pursuant to agreement reached between Defendant Baltimore County and Baltimore County Federation of Public Health Nurses, the following terms shall apply for Baltimore County employees who

are members of the Baltimore County Federation of Public Health Nurses, on Pay Schedule 3, and who are members of ERS:

a. On July 1, 2016, ERS contributions for employees hired prior to July 1, 2007, whose contributions are at or below 6.25%, shall contribute at a rate of 6.25% of their base pay. On July 1, 2017, those employees hired prior to July 1, 2007, whose ERS contributions are 6.25% or higher but less than 6.75%, shall have their contributions increased to 6.75%. On July 1, 2018, those employees hired prior to July 1, 2007, whose ERS contributions are 6.75% or higher but less than 7.25%, shall have their contributions increased to 7.25%.

b. On July 1, 2016, employees hired prior to July 1, 2007, whose ERS contributions are higher than 7.25%, shall have their contributions decreased to 7.25%.

c. Employees hired on or after July 1, 2007, whose ERS contributions are currently 7%, shall remain at 7% through at least June 30, 2019, and all new employees on Pay Schedule 3 will contribute at a rate of 7% through at least June 30, 2019.

Sheriffs

11. Pursuant to agreement reached between Defendant Baltimore County and Baltimore County Sheriff's Department, Fraternal Order of Police, Lodge #25 the following terms shall apply for Baltimore County employees who are members of the Baltimore County Sheriff's Department, Fraternal Order of Police, Lodge #25, on Pay Schedule 13, and who are members of ERS:

a. On July 1, 2016, employees hired prior to July 1, 2007, whose ERS contributions are at or below 6.5%, shall contribute at a rate of 6.5% of their base pay. On July 1, 2017, those employees hired prior to July 1, 2007, whose ERS contributions are 6.5% or higher but less than 7%, shall have their contributions increased to 7%. On July 1, 2018, those employees hired prior to July 1, 2007, whose ERS contributions are 7% or higher but less than 7.5%, shall have their contributions increased to 7.5%.

b. On July 1, 2016, those employees hired prior to July 1, 2007, whose ERS contributions are higher than 7.5%, shall have their contributions decreased to 7.5%.

c. Employees hired on or after July 1, 2007, whose ERS contributions are currently 8% or 10% will remain at those rates through at least June 30, 2019, and all new employees shall contribute at a rate of 10% through at least June 30, 2019.

Baltimore County Federation of Public Employees

12. Pursuant to agreement reached between Defendant Baltimore County and Baltimore County Federation of Public Employees, the following terms shall apply for Baltimore County employees who are members of the Baltimore County Federation of Public Employees, on either Pay Schedule I-C, I or I-E, and who are members of ERS:

a. On July 1, 2016, pay schedule I-C employees hired prior to July 1, 2007, whose ERS contribution rates are at or below 6.5%, shall contribute at a rate of 6.5% of their base pay. On July 1, 2017, those pay schedule I-C employees hired prior to July 1, 2007, whose ERS contributions are 6.5% or higher but less than 7%, shall have their contributions raised to 7%. On July 1, 2018, those pay schedule I-C employees hired prior to July 1, 2007, whose ERS contributions are 7% or higher but less than 7.5%, shall have their contributions raised to 7.5%.

b. On July 1, 2016, pay schedule I-C employees hired prior to July 1, 2007, whose ERS contributions are higher than 7.5%, will have their contributions decreased to 7.5%.

c. Pay schedule I-C employees hired between July 1, 2007 and June 30, 2011, whose ERS contributions are currently 8.0%, will remain at 8.0%, through at least June 30, 2019. Pay schedule I-C employees hired on or after July 1, 2011, whose ERS contributions are currently 10%, will remain at 10%. All new employees shall contribute at a rate of 10% through at least June 30, 2019.

d. On July 1, 2016, pay schedule I and I-E employees hired prior to July 1, 2007, whose ERS contribution rates are at or below 6.25%, shall contribute at a rate of 6.25%. On July 1, 2017, those pay schedule I and I-E employees hired prior to July 1, 2007, whose ERS contributions are 6.25% or higher but less than 6.75%, shall have their contributions raised to 6.75%. On July 1, 2018, those pay schedule I and I-E employees hired prior to July 1, 2007, whose ERS contributions are 6.75% or higher but less than 7.25%, shall have their contributions raised to 7.25%.

e. On July 1, 2016, pay schedule I and I-E employees hired prior to July 1, 2007, whose ERS contributions are higher than 7.25%, will have their contributions decreased to 7.25%.

f. Employees on pay schedules I and I-E hired on or after July 1, 2007, whose ERS contributions are currently 7.0%, will remain at 7.0% through at least June 30, 2019, and all new employees shall contribute at a rate of 7.0% through at least June 30, 2019.

Pay Schedules 6, 11 and 12, Part-Time Employees, Exempt Employees and All Employees of Outside Entities that are ERS Members

13. The following terms shall apply to employees on Pay Schedules 6, 11 and 12; part-time employees; exempt employees; and, all employees of outside entities that are members of ERS.

a. On July 1, 2016, employees hired prior to July 1, 2007, whose ERS contributions are at or below 6.25%, will contribute at a rate of 6.25%. On July 1, 2017, those employees hired prior to July 1, 2007, whose ERS contributions are 6.25% or higher but less than 6.75%, will have their contributions increased to 6.75%. On July 1, 2018, those employees hired prior to July 1, 2007, whose ERS contributions are 6.75% or higher but less than 7.25%, will have their contributions increase to 7.25%.

b. On July 1, 2016, employees hired prior to July 1, 2007, whose ERS contributions are higher than 7.25%, will have their contributions decreased to 7.25%.

c. Employees hired on or after July 1, 2007, whose ERS contributions are currently 7%, will remain at 7% through at least June 30, 2019, and all new employees shall contribute at a rate of 7% through at least June 30, 2019.

Appointed Department Heads

14. The following terms shall apply for Appointed Department Heads who are members of ERS.

a. On July 1, 2016, employees hired prior to July 1, 2007, whose ERS contributions are at or below 8.75%, will contribute at a rate of 8.75%. On July 1, 2017, employees hired prior to July 1, 2007, whose ERS contributions are 8.75% or higher but less than 9.25%, will have their contributions increased to 9.25%. On July 1, 2018, employees hired prior to July 1, 2007, whose ERS contributions are 9.25% or higher but less than 10%, will have their contributions increased to 10%.

b. On July 1, 2016, employees hired prior to July 1, 2007, whose ERS contributions are higher than 10%, will have their contributions decreased to 10%.

c. Employees hired on or after July 1, 2007, whose ERS contributions are at 10.5% will remain at 10.5% through at least June 30, 2019, and all new employees will contribute at a rate of 10.5% through at least June 30, 2019.

Other Injunctive Provisions

15. Effective July 1, 2018, Defendant Baltimore County, its officers, agents, servants, employees, successors, assigns, and all persons acting or claiming to act on its behalf are enjoined from requiring any of its employees and members who are at least forty years of age and who are also members of the American

Federation of State, County and Municipal Employees Local #921; Baltimore County Federation of Public Health Nurses; Baltimore County Federation of Public Employees; and Baltimore County Sheriff's Department, Fraternal Order of Police, Lodge #25 to contribute to the pension plan at greater rates than younger employees based on age.

16. Effective July 1, 2018, Rule 19(a) American Federation of State, County & Municipal Employees, Local 921 ("AFSCME"); Baltimore County Federation of Public Employees, AFT, AFL-CIO ("BCFPE"); Baltimore County Federation of Public Health Nurses ("BCFPHN"); and Baltimore County Sheriff's Office Fraternal Order of Police, Lodge Number 25 ("FOP Lodge 25"), their officers, agents, servants, employees, successors, assigns, and all persons acting or claiming to act on their behalf are enjoined from entering into any contract, compensation or benefits plan, collective bargaining agreement, or memorandum of understanding, which requires their member employees of Defendant Baltimore County who are at least forty years of age to contribute to the pension plan at greater rates than younger workers based on age.

17. The terms set forth above regarding contribution rates above shall be reflected in the Baltimore County Code. Defendant Baltimore County may, in its discretion and subject to its duty to bargain, make subsequent amendments to its County Code affecting member contribution rates so long as those rates do not base the employee contribution rate in whole or in part on age.

18. This Order does not limit or abridge the collective bargaining rights of the County and the Rule 19(a) Defendants, as established under the Baltimore County Code, to negotiate over pension contribution rates, except that contribution rates cannot be based in whole or in part on age. The contribution rates set out above may be negotiated when, and as, allowed by the Baltimore County Code and the agreements between the County and the respective Rule 19(a) Defendants.

19. Because the Rule 19(a) Defendants were included in this lawsuit as necessary parties to establish prospective age-neutral contribution rates, this Joint Consent Order makes the Rule 19(a) Defendants no longer necessary parties to this action for purposes of EEOC's additional claim for monetary relief. Accordingly, the Rule 19(a) Defendants are hereby dismissed from further proceedings in this action related to the monetary claim.

20. The undersigned counsel of record in the above-captioned action hereby consent, on behalf of their respective clients, to the entry of the foregoing Joint Consent Order.

FOR PLAINTIFF:

/s/______________________
Debra M. Lawrence
Regional Attorney

/s/______________________
Christopher Lage
Assistant General Counsel

/s/______________________
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FOR DEFENDANT BALTIMORE COUNTY:

/s/______________________
James J. Nolan, Jr.
(Signed by Maria Salacuse with permission of James J. Nolan)
Assistant County Attorney
Baltimore County Office of Law
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Towson, MD 21204

FOR 19(a) DEFENDANT BALTIMORE COUNTY LODGE NO. 4 FRATERNAL ORDER OF POLICE

/s/______________________
Matthew Clash-Drexler, Esq.
(Signed by Maria Salacuse with permission of Matthew Clash-Drexler)
Bredhoff & Kaiser, PLLC
805 Fifteenth Street, NW
Washington, D.C. 20005

FOR 19(a) DEFENDANTS AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL #921; BALTIMORE COUNTY FEDERATION OF PUBLIC HEALTH NURSES; BALTIMORE COUNTY FEDERATION OF PUBLIC EMPLOYEES; AND BALTIMORE COUNTY PROFESSIONAL FIRE FIGHTERS ASSOCIATION LOCAL 1311, AFL-CIO:

/s/ ____________________
David Wright, Esq.
(Signed by Maria Salacuse with
permission of David Wright)
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201 North Charles Street, 10th Floor
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FOR 19(a) DEFENDANT BALTIMORE COUNTY SHERIFF'S DEPARTMENT, FRATERNAL ORDER OF POLICE, LODGE #25:

/s/ ____________________
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(Signed by Maria Salacuse with
permission of Dilip B. Paliath)
Preller and Preller
102 W. Pennsylvania Avenue, Suite 302
Towson, MD 21204

SO ORDERED, this 26th day of APRIL, 2016.

/s/ ____________________
Richard D. Bennett
United States District Judge