SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
FLORIDA, ET AL.,	)	
	)	No. 86-1685
Petitioners	)	
v.	)	
	)	
HUGHLAN LONG, ET AL.	)	
	)	

PAGES: 1 through 40

PLACE: Washington, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

FLORIDA, ET AL., :

Petitioners, :

v. : No. 86-1685

HUGHLAN LONG, ET AL. :

Washington, D.C.

Monday, February 22, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

CHARLES T. COLLETTE, ESQ., Tallahassee, Florida;

on behalf of the Petitioners.

WOODROW M. MELVIN, JR., ESQ., Miami, Florida;

on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in number 86-1685, Florida versus Hughlan Long.

Mr. Collette, you may proceed whenever you're ready.

ORAL ARGUMENT OF CHARLES T. COLLETTE, ESQ.

ON BEHALF OF PETITIONERS

MR. COLLETTE: Thank you, Mr. Chief Justice, and may it please the Court.

What this case is is simply the Norris non-retroactive liability holding revisited five years later. And this case deals solely with the relief aspect of Norris. It does not deal with the Norris liability holding.

In this regard, our contention is that what this Court said about remedies in Norris, i.e., that pension plans would not be liable under Title VII for the payment of benefits attributable to pre-August 1, 1983 contributions, even though such benefits were calculated using sex distinct mortality tables.

That what this Court said in Norris bars the award of relief herein because respondents before this Court are all pre-August 1, 1983 retirees whose benefits are therefore completely attributable to pre-August 1, 1983 contributions. In short, we are not proposing that a new rule of law be laid down in this case. Rather, we are simply asking that the

Norris relief rule be most emphatically underscored herein. That prior to August 1, 1983, there will be no liability. But that subsequent to August 1, 1983, there will be and is liability if sex distinct mortality tables continue in the use of benefit calculation.

By way of a brief road map to my argument, I intend principally, and possibly exclusively, to address this Norris non-retroactive, this Norris relief issue. I do not intend to cover the first and second alternative arguments in our Brief for Petitioners unless of course the Court has any questions. Those arguments deal with, respectively, whether in any event Manhart and Norris bar the award of relief to the pre-Manhart retirees in this case, and whether proration, at least under an accrued benefit methodology should have been applied to the award of relief to the post-Manhart retirees herein.

If there remains time, I may briefly address our third alternative argument on the Title VII exhaustion and class scope limitation issues.

QUESTION: Mr. Collette, as a preliminary matter, would you explain to me the mechanics of the plan that led to males receiving lower monthly benefits than females? Normally, the application of a sex-based table would not yield that result.

MR. COLLETTE: Your Honor, it is the result of the mechanics of a defined benefit pension plan. The primary

benefit under a defined benefit plan, such as the FRS, is calculated pursuant to a formula. That produces an equal monthly retirement benefit for similarly situated males and females. When you go to joint annuitant options, then mortality tables are used. And to reduce the future expected single life benefit to a present dollar value, when sex distinct tables were used prior to August 1, 1983, the woman of course had a greater primary single life value because she was expected to live longer. Therefore, when you went to a joint annuitant option, it resulted in her receiving a greater monthly benefit in her joint annuitant than a similarly situated male and his joint annuitant.

There's a good brief explanation in the 1983 Law Review article by Hager and Zempleman, and also in the Department of Labor's 1983 Cost Study.

The basic facts with respect to this central issue are these. The FRS, as I mentioned, is a defined benefit pension plan with over 1100 plus Florida local governmental employers participating there. It is a relatively new or youthful pension plan created in 1970 out of the amalgamation of several earlier Florida retirement plans.

From its inception in 1970 to present, it has always collected equal contributions from or on behalf of similarly situated males and females. From its inception in 1970 to present and as mentioned, it has always paid the same primary

monthly retirement benefit to similarly situated males and females. From its inception in 1970 to present, in addition to its primary life benefit and as mentioned, it has had three joint annuitant benefits. Prior to August 1, 1983, the FRS calculated benefits thereunder which resulted in males and their joint annuitants, in response to your question, receiving a lesser monthly joint annuitant benefit than similarly situated males and females.

However, effective August 1, 1983, and because of this Court's Norris decision, the FRS converted to unisex mortality tables for the calculation of its three joint annuitant benefits. And this has resulted in similarly situated males and females retiring since that time receiving the same monthly retirement benefit.

It should also be noted that all retirees under the FRS obtain a vested contractual right to the full amount of their retirement benefits which vested contractual right arises as of the effective date of retirement and which vested contractual right prevents the State from thereafter ever subsequently reducing that retiree's benefits.

QUESTION: May I ask at that point, is one of the options available, at least pre-August 1, 1983, a lump sum settlement?

MR. COLLETTE: No, Your Honor. The options have not changed since creation. The primary life benefit and three

joint annuitant options. There was no lump sum.

QUESTION: If there had been, just to clarify the question Justice O'Connor raised, if there had been a lump sum, it would have meant that the female would have gotten a larger lump sum?

MR. COLLETTE: That is absolutely right.

QUESTION: Because it's calculated backwards from life expectancy at a fixed rate where they both get the same amount.

MR. COLLETTE: Yes, sir.

QUESTION: I see.

MR. COLLETTE: I think it is also important to remember that there is no question that the award in this case were it to be implemented, will be paid by the FRS for its 1100 plus FRS participating Florida Governmental employers through increased contribution rates.

In short, as of January 1983, the FRS was in exactly the same situation as 45 percent of defined benefit and 74 percent of defined contribution plans in this country. Which plans, as the Department of Labor pointed out in its 1983 cost study, had not yet as of such date converted to unisex mortality tables for benefit calculation.

Moreover, and when Norris came down, Florida promptly complied therewith as mentioned by converting to unisex tables for its benefit calculation.

On these facts, the District Court, disagreeing with the Ninth Circuit's decision in Probe v. State Teachers' Retirement System, awarded relief totalling approximately $43.6 million. The Eleventh Circuit, likewise disagreeing with the Ninth Circuit's Probe decision, affirmed this award of relief.

In essence, what this case boils down to is simply whether Norris bars the award of retroactive relief in the form of both prospective and retrospective adjustment of pension benefits to pre-August 1, 1983 retirees under a State operated defined benefit pension plan.

The Eleventh Circuit held, and plaintiffs argue, that Norris is a narrow decision limited on its facts to the Manhart open market exception and third party insurers. That Norris has no applicability to the FRS. In this regard, they argue that since the State of Florida administers the FRS, there is no third party issue in this case.

That, however, overlooks that with respect to over half of its retirees, the State, through the FRS, is a third-party insurer. Specifically, over half the retirees of the FRS are employees of Florida local governments. And in this situation, the State and its FRS is in essence the same as a third party insurer. It is in essence in the same situation as the TIAA pref plan at issue in Spirt, and it is essence in the same position as the private insurance companies at issue in Norris.

Plaintiffs, as said, argue Norris has no applicability and that Manhart clearly put pension plans such as the FRS on notice that it could not use sex distinct tables to calculate monthly benefits. However, and as Hager and Zempleman pointed out in their 1983 Drake Law Review article, Manhart created confusion and uncertainty in the pension industry as to whether sex distinct mortality tables could continue to be used in benefit calculations. And this confusion and uncertainty was only finally resolved by this Court's Norris decision.

Indeed it was only until this Court's Norris decision that the issue of whether it was proper to do anything other than to top all the way up, in this situation top the male benefits up to the female benefits, only Norris settled that you could use unisex topping up. In fact, the lower court in Norris used the full topping up to the opposite sex's rate.

The Manhart open market exception meant something entirely different to pension plan administrators in the time before Norris than that which it is argued it now here means today. In short, and without the benefit of the lens provided by Norris employed by the Eleventh Circuit in its analysis, and by plaintiffs in their argument, the Manhart open market exception in the period before Norris seemed to permit the calculation of benefits using sex distinct mortality tables, especially optional joint annuitant benefits in a defined

benefit plan such as the FRS. For the use of such tables resulted in the largest benefit a retiree's -- and I quote Manhart -- "accumulated contributions could command." And I emphasize, command. Not purchase, could command on the open market.

Judge Poole, writing for the Ninth Circuit in Probe certainly found such was the case when he held that the California State Teachers' Retirement System -- and again I quote, "reasonably could have assumed that it was lawful to provide an optional annuity system that reflected plans offered by insurance companies on the open market."

Moreover, the facts belie that the pension industry viewed Manhart as requiring a wholesale conversion to unisex tables for benefit calculation. For one thing, the publications of the National Actuarial firms in the period after Manhart stated to the effect that Manhart created more problems than it resolved, and that the pension industry should take a wait and see position.

For another thing, and as previously mentioned, as of January 1983, 45 percent of defined benefit and 74 percent of defined contribution plans in this country had not yet converted to sex neutral tables for benefit calculation.

In any event, Norris was not a narrow decision limited on its facts solely to the issue of the Manhart open market exception and third party insurers. Rather, it is

manifestly clear that the Norris non-retroactive liability holding was meant to apply to all pension plans throughout this country including the FRS. In other words, it is manifestly clear that in Norris this Court intended to wipe the slate clean as of August 1, 1983, for all pension plans in this country. That prior to that line, there would be no liability if sex distinct mortality tables had been used in benefit calculation, but that subsequent to August 1, 1983, there would be liability if such tables continued in benefit calculation.

The primary concern for the Norris non-retroactive majority's denial of retroactive relief was its concern with the impact a retroactive holding could have on pension plans throughout this country, both private and public. And that concern was not misplaced, given the percentages of plans which the Department of Labor found in its cost study had not, as of January '83, yet converted to sex neutral tables.

Moreover, I think the fact that this Court took a highly unusual action in Norris by delaying its judgment three weeks underscores that the Norris decision was intended to apply to all pension plans throughout this country. Since there was no reason to provide a grace period for the Arizona plan at issue in Norris because by the time that plan reached this Court, its objected to provisions had been eliminated.

The key is that that grace period was effectively utilized by the FRS in this case to convert to unisex mortality

tables for the calculation of its future retirement benefits. That grace period was also effectively utilized by the New York State Teachers' Retirement System in Hannahs v. New York State Teachers' Retirement System and no doubt that grace period was effectively utilized by thousands of pension plans throughout this country.

In short, Norris announced a broad rule of relief founded on policy and clearly intended to prevent a regime of discretion which rule is applicable to all pension plans throughout this country, both defined benefit and defined contribution. Which rule allows those plans and says those plans could continue to pay their retirement benefits to pre-August 1, 1983 retirees even though those benefits had been calculated using sex distinct mortality tables.

Because of this, and because respondents before this Court, i.e., plaintiffs and the plaintiff class, are all pre-August 1, 1983 retirees.

QUESTION: Are some of them pre-Manhart?

MR. COLLETTE: Yes, Your Honor, by the reason of the structure of the District Court's order, both prospective and retrospective adjustment of pension benefits were awarded. The class actually consists of all persons who retired from the date of Title VII up to but just prior to August 1, 1983.

Prospective adjustment of benefits was awarded to the entire class.

QUESTION: Including pre-Manhart?

MR. COLLETTE: Yes. To the post-Manhart portion of the plaintiff class, both prospective and retrospective were awarded back to the date of Manhart. So in essence, the pre-Manhart retirees were awarded prospective adjustment of pension benefits, and the post-Manhart retirees were as well awarded retrospective.

QUESTION: And you say all of that was wrong?

MR. COLLETTE: Yes, Your Honor, particularly my concern is the pre-Manhart retirees. I simply can't conceive how Florida could know in 1975 or 1976 or 1977 anticipate Manhart, even arguing that Manhart was clear. How could it know? It couldn't.

In fact, if we had done everything the District Court said we'd do; Manhart comes out, we convert to unisex tables right then for benefit calculation regardless of all the unanswered questions in the area at the time.

QUESTION: But you say both retrospective and prospective awards were in error under Norris?

MR. COLLETTE: Yes, Your Honor.

QUESTION: Yes. All right.

MR. COLLETTE: Specifically in Norris and Justice Marshall writing for the Court on the liability issue, pointed out that the --

QUESTION: With me joining him.

MR. COLLETTE: Yes, Your Honor, I'm aware of that.

Pointed out. And then Justice Powell concurring that when you award benefits, even prospectively, it's based on past contributions and it is in essence retroactive relief because it's going to require a funding that's already been fixed.

QUESTION: May I ask a question about the pre-Manhart retirees. The award as to them only went back to the date of Manhart, though, didn't it?

MR. COLLETTE: No.

QUESTION: You mean if they got too low benefits, received benefits before Manhart, those are also adjusted?

MR. COLLETTE: Yes, Your Honor. Let me explain.

QUESTION: Benefits calculated on contributions prior to Manhart.

MR. COLLETTE: The benefits were always calculated using sex distinct mortality tables until Norris.

QUESTION: But these pre-Manhart people you're talking about are people whose contributions were made before manhart.

MR. COLLETTE: Yes.

QUESTION: Yes.

QUESTION: And benefits received before Manhart?

MR. COLLETTE: Benefits, anybody who retired up to the date of Manhart benefits calculated as of date of retirement and payment so if somebody retired in '72, '73, '74,

they get a full prospective award for all their --

QUESTION: Full prospective award, but they did not get an adjustment of the award that was paid to them between the date of their retirement and the date of the Manhart decision?

MR. COLLETTE: If I understand, Your Honor --

QUESTION: Well, let me put it this way. You retired in 1975, Manhart was decided when in '78?

MR. COLLETTE: Yes.

QUESTION: And say they received $100 a month during those three years in benefits. Was that benefit increased later for those three years?

MR. COLLETTE: Yes. But prospectively.

QUESTION: Well, how can it be? If they got an addition on account of those checks, that wouldn't be prospective.

MR. COLLETTE: No, there was nothing paid back. There was no retrospective relief.

QUESTION: Okay.

MR. COLLETTE: I think that's what you're talking about.

QUESTION: Yes.

MR. COLLETTE: There was no $100 we're going to --

QUESTION: The only payments that were increased were those benefits that were paid after August 1, 1983?

MR. COLLETTE: No. Actually, the prospective award was effective as of April 30, 1986. It's been stayed in this case.

QUESTION: Yes, but all I'm saying is that no one who received a benefit check prior to August 1, 1983 had that check adjusted.

MR. COLLETTE: That is not entirely correct. The post-Manhart retirees had that check adjusted back to the October 1 Manhart effective date in this case.

QUESTION: Okay. Right.

QUESTION: Well, I don't want to add to the confusion but supposing that someone retired say before 1978, received retirement checks before the effective date of Manhart. Now does this decree augment any of the payments that person got for that period of time before '78?

MR. COLLETTE: No, Your Honor. That person as of April 30, 1986, it would augment his payments from that date. But the funding and the actuarial evaluation it requires a funding, that prospective award requires a funding of liability that was not anticipated by the retirement system at the time the individual retired.

Unless there are any further questions, I will reserve the balance of my time for rebuttal.

QUESTION: Just a small point. Does the plaintiff class include any male retirees who have chosen male joint

annuitants? I take it it would.

MR. COLLETTE: Very likely. The class size is roughly around 12,000 people. And most of them are joint annuitant, the vast majority 95 percent are spouses, but on the ten-year fixed which is a guaranteed joint annuity for ten years for the primary life, you can have a beneficiary that is a male. So it is a possibility.

QUESTION: And under the Eleventh Circuit's holding, do any retirees get lower benefits as a result of that holding, or is everything a topping up in effect?

MR. COLLETTE: No. And as a matter of fact, it can't. That's why there's a funding impact on the FRS because of vested contractual rights.

I thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Collette.

We'll hear now from you, Mr. Melvin.

ORAL ARGUMENT OF WOODROW M. MELVIN, JR., ESQ.

ON BEHALF OF RESPONDENT

MR. MELVIN: Thank you, Mr. Chief Justice, and may it please the Court.

With your permission, I will depart from the intended structure to comment on three features of my opponent's argument that will perhaps contribute to an understanding of the problem we are here to address.

First, Justice O'Connor inquired about the apparent

anomaly that it is the male here who has brought the claim and who is receiving the lower benefit. That can be simply explained perhaps by pointing out that the familiar phenomenon of an assumed longer life expectancy for the female which would require in typical circumstances that a fixed amount of benefit be extended over a longer assumed life time is precisely the same type of impact that produces the illegal result here.

It's a bit disguised for the simple reason that it arose in this case as a consequence of the choice made by the men to elect a spousal protection option under which not the single lifetime of the retired employee is considered but the combined lifetimes of the two. As a consequence of that, for instance -- and you can just work this out with a piece of paper should you care to, and I'll assume figures to make it simple -- if you assume a 65 year old male retires and his life expectancy is 70, then that person has a five-year life assumption.

But if he's designating the protection of a slightly younger female age 60, who would have a 75-year life expectancy, her life expectancy is some additional 15 years. The system simply looks at the longer of the two. Of course, it doesn't add them, just looks at the longer of the two. That's a 15 year payout.

If you reverse that and you assume that you have a 65 year old retiring female who, with a 75 year life expectancy

expects to live ten more years, and you add to that picture the identical other facts, i.e., that she designates the protection of a male spouse and give the male spouse the same age, 60, with his lower life expectancy of 70, he's expected to live ten years. Both the male and the female are expected to live ten years.

Those are comparable, identically comparable opposite relationships between the male and the female retiring employee, but because of the 15 year payout that's assumed for the life expectancy that's extended by reason of sex, there results the familiar downgrading of the pension benefit. It is disguised in that it takes place in the male paycheck.

The members of this class are not exclusively males. They are males and they are also the surviving joint annuitants of the males so in many instances, we have widows who are participating in this class.

If I may mention another thing that has come up in the argument that I think requires some clarification, counsel has placed some considerable emphasis and twice cited to this Court, a statistic by which he advises you that I think some 45 percent of the pension plans in this country are defined benefit plans that as of 1983 when you decided the Norris case had not yet converted to unisex.

He doesn't also advise this Court, so I shall, that he's using a statistic which by his own admission doesn't

discriminate between employer operated plans and employer sponsored plans. So he's citing it to you to infer that throughout this country, even after Manhart, there were a huge number of defined benefit plans employer operated, we must assume if it's to be relevant to our case, which did not make the switch to unisex until 1983, inferring to you the enormity of a national impact.

But the statistic on which he relies specifically says that there has been no attempt to distinguish between an employer operated plan and an employer sponsored plan in developing that statistic. And I invite you to look at the 33rd page of the State's brief, footnote 27, where they explain that in detail, stating, and I quote:

"We'd quickly reveal that it covers all state, local government and private defined benefit and defined contribution pension plans with no distinction as to whether employer operated or employer sponsored."

So the inference urged by counsel is not supported by the statistic on which he relies.

Counsel has also made an argument in his oral presentation to the Court that's not in the briefs and has never been made before in any of the earlier judicial proceedings affecting Florida v. Long. He says to us today for the first time that the State of Florida occupies a position analogous to that of a third party insurer because after all

the State of Florida is an umbrella or parent governmental unit having enormous sub-tiers of other governmental units within the State of Florida.

Clearly, this is something that's occurred to counsel just recently in preparing his argument. I would remind him, and I respectfully point out to this Court that a stipulation that they entered into, which appears in the Appendix, page 36, completely belies any argument that would be predicated upon it, and it's unfortunate that he has made that argument to you today. Stipulation No. 4, and I'm reading from the 39th page of the Appendix, expressly says the following:

"The State of Florida for the purposes of Title VII is the employer of the members of the plaintiffs' class, and is authorized and charged under Florida statutes with the duty and responsibility of lawfully administering the FRS. No third party unrelated to the State of Florida is authorized to or does administer the FRS."

So counsel's argument, while it may have some appeal to him, has been placed to rest deep in --

QUESTION: Just a minute, Mr. Melvin.

MR. MELVIN: Yes, sir.

QUESTION: That could have been for the purpose of indispensible parties. You know, when you talk about something being an employer for one purpose, it doesn't necessarily mean it's for another purpose.

MR. MELVIN: Your Honor, having tried the case, I can assure that that meaning of that stipulation is as I have just presented it to the Court. Not only did we not join any subunits of government but we did not get into the integral aspects of any of the subunits of government. We would have joined issue with them had they wanted to quarrel with that, but that idea is a new one before us this morning.

It's not urged in the brief, it's not presented to the Eleventh Circuit, was not argued to the trial judge below. And I think the reason it never was is that the stipulation to which I've just referred does appear to have precluded it.

The central theme of the argument that counsel has made in effect is that in 1983, this Court laid down a rule of amnesty with respect to pension plans. A rule of amnesty that said that a pardon is given with respect to Title VII violations through the use of a sex based mortality table for all kinds of plans, even those plans that had five years before that been the subject of an earlier ruling of this Court in Manhart.

QUESTION: Well, Mr. Melvin, what language in Manhart informed employers that they were forbidden to apply sex based tables to non-employee joint beneficiaries? I've reread the opinion and I had trouble finding anything in there that would address that.

MR. MELVIN: I find nothing in that that addresses

that issue, either. Nor has the issue been phrased that way by the petitioner the employer before this Court. In the course of these proceedings, that question has never been asked of either of us, I don't believe. And we have not joined issue on it.

QUESTION: Are we dealing with that?

MR. MELVIN: In effect, you are dealing with the consequence of the choice of designating a joint annuitant, but the question cannot be isolated in that fashion as is evidenced by the fact that the class primarily consists of males -- these are the retired employees themselves who are making this application on behalf of themselves and their joint annuitants, it's not only the joint annuitant following the death of the male who suffers a reduction in the pension payment. The reduction in the pension payment begins to occur from the occasion of retirement and affects the male as well as the female.

And so as you have phrased it, that actually does not describe the manner in which the issue arises.

QUESTION: But the male employee is not suffering discrimination because of his sex?

MR. MELVIN: That is correct. But he is suffering discrimination on the basis of sex.

QUESTION: Of somebody's sex.

MR. MELVIN: The sex of his joint annuitant.

QUESTION: But that's different from Manhart.

MR. MELVIN: Yes. Yes, that question is different from Manhart.

I would suggest to this Court that that type of problem is not unlike two of the other questions that were raised in Norris, decided in Norris, and yet were not thought to be such a new and unforeseeable resolution of a rule of law as would have invoked concerns about retroactivity or would have led to discussions of proration.

In the Norris decision, the Court looked backward at Manhart and found that there were two other questions in Manhart that had not been addressed and answered.

Manhart of course dealt with the inequality in the required contributions in the pension system. It did not deal, as we do here, and as Norris did in 1983, with discrimination at the payout stage in the monthly benefit check. Nor did it deal specifically with the question of whether an otherwise liable employer for a violation of the Act could justify the practice by offering a non-discriminatory option in combination with the discriminatory option.

When we read Manhart, we don't find answers to those questions either, necessarily. But when those questions were addressed five years later in Norris, this Court disposed of them without struggling over those questions as it did struggle and split on the question of whether to extend the liability on

an employer operated plan to the employer sponsored plan, which were the facts before it in Norris.

The Court said with respect to the issue of discrimination in the pay-in contribution stage versus discrimination in the payout stage, "we have no hesitation at holding, as have all but one of the other lower Courts . . . " and it went on to say that that type of new question could be answered rather forthrightly in the negative. It was illegal.

Similarly, the Court said, "it is likewise irrelevant that the Arizona plan includes two options." And went ahead to dispose of that question.

If this is a question which the Court would address, I think it would address it and come to the conclusion that liability still attaches. And I would suggest that if that is the consideration that this body undertakes that when it reaches the conclusion, which I would submit should be that liability still attaches, that this Court will not conclude that it has announced a new and unforeseeable rule of law.

Consequently, this Court would not conclude that to impose that conclusion upon the State of Florida at this time would lead to non-retroactivity considerations.

Now, if I may, what's being argued here essentially is a per se rule of law. The State employer contends that there is a per se rule of defense beginning in 1983 as to which all prior possible liabilities for a Title VII pension

violation are excused. We submit to the Court that that approach to the problem is not workable. That essentially is the outlook taken by the Ninth Circuit. And where there are conflicts between the Ninth and the Eleventh, it is largely in this area.

The primary distinction between what occurred as our case came up through the court system and out of the Eleventh Circuit versus what took place in the Ninth Circuit is simply this. The Ninth read Norris, and we say misread Norris, to establish a per se rule of defense for all pension cases regardless of the type of fund that was involved, regardless of how much money the pension fund might have, regardless of whether the pension fund had an excess cash surplus, regardless of whether it was a defined benefit plan or defined contribution plan. In other words, a blanket rule.

We submit to the Court that the imposition of a blanket rule is often an inappropriate way to get to the best judicial result. What occurred in this case was quite different. In this case, without the imposition of any blanket rule, the trial judge undertook to hear this case on its facts, and to let the State undertake to prove, if they could, what they now argue they have the right to assert to you as a a matter of law.

He put them to the proof of it as a matter of fact. When he put them to the proof of it as a matter of fact, they

failed. I submit to you that in looking in broad terms at which is the better result, that of the Eleventh or that of the Ninth, we should come to the conclusion that the benefit of taking the approach suggested by the Eleventh Circuit is simply that it does permit a case by case individual pension plan by pension plan analysis of impact, of the arguments in support of proration, and any other matter which may on behalf of an employer constitute a basis for an alleged defense. And it lets those defense occupy the posture of fact.

QUESTION: We didn't do that in Norris, then. We were wrong in Norris, then, if the case by case approach is preferred. We certainly didn't treat it -- did we treat it as a factual issue? I thought we announced a rule that would apply for you know generally in Norris, didn't we?

MR. MELVIN: Yes, you did, in many respects.

QUESTION: So you're saying that was wrong?

MR. MELVIN: No, it's not wrong, I don't think. You announced a general rule of liability that what had been illegal since 1978 in Manhart for an employer operated plan was to now be extended to and similarly become illegal for an employer sponsored plan, as was the case in Norris.

And then in Norris, the Court dealt with one of the very important aspects of that case which differ from ours. The Norris case was a defined contribution plan. There are some clear implications of that type of plan. And if we view

Norris as a per se rule of law applying to a defined contribution plan, it does no violence to the judgment that you have before you in Florida v. Long. And it would seem to make good policy, because there are characteristics of a defined contribution plan which make it highly sensitive to being impacted by subsequent impositions of liability through changes of law.

The primary concern --

QUESTION: Mr. Melvin, one sentence in the Court of Appeals opinion in this case, when it's dealing with retroactive relief says, "the District Court's refusal to consider evidence of the impact on pension funds on the national level is also not in error."

I gather then some evidence was offered to kind of make this a case by case thing and the district court didn't consider it?

MR. MELVIN: No, I think that that's being misread there, Mr. Chief Justice. They offered some evidence -- not unlike the statistic on which they relied a few minutes ago twice in their argument. In fact, that was some of the evidence, I believe, that was precluded below, and they continued to cite it because the Court would have the authority to notice it judicially whether it was stamped in evidence below or not.

And they are simply saying that there ought to be a

kind of national concern on how many other possible plans generically similar to this one might be impacted by an outcome in this case. I think that that's a wrong approach in that it, for instance, it overlooks the inferences that this Court in 1976 in the Bowman case put upon the fact that Title VII guarantees no claimant damages, guarantees no claimant any particular outcome.

It grants to the Federal trial judge, the discretion to fashion such relief as the circumstances may require, and within his discretion, that might be merely declaratory, merely injunctive in certain respects. It may or may not in his discretion extend to the application of back pay concepts. And this flexibility is the desirable thing.

And I think when we look at the facts of the case that were tried in Florida, we see why that was so desirable. And if I may, I'd like to turn to some of those facts because this fact unique case, when we look at some of those features, I think it becomes clear to us as to why the Federal trial judge was not convinced.

Remember the difference between the Eleventh and the Ninth is that the Ninth reads Norris as giving a rule of law about the defense. The trial judge in the Eleventh Circuit and the Eleventh Circuit itself took the approach that there is no absolute rule but that there are these defenses of which you can avail yourself if you can prove the adequate facts. These

people were unable to prove those adequate facts.

The first thing that we put in proof below, which I think was especially convincing, was a memorandum written by the State Retirement Actuary two years before you decided the Manhart case. And in that memorandum, it's an absolutely prophetic memorandum written by the State Retirement Actuary, it's a statutory position in Florida. His job is what it sounds like it is.

And he wrote it to his boss, the Pension Administrator of the State of Florida that he had attended a seminar about unisex tables. And he came back from that seminar convinced that an employer operated pension plan, such as the one that was in Florida, could not lawfully use sex based mortality tables. And since he didn't think so, he recommended that before the year 1977 began that they abolish them.

And in that memorandum, he said, just briefly, that there was a general thrust taken by the Equal Employment Opportunity Commission by which their -- and I'm quoting -- "now is a very strong possibility that actuaries will no longer be permitted to use mortality standards which provide for the use of differentiation in the rate of mortality by sex."

And I think it's interesting because when Manhart came up about 24 months later, this Court divided on the liability questions. And some of the Justices in the minority

on liability expressed some concerns about the validity of unisex actuarial tables, the availability of them to various employers, the general practicality of proceeding to require the use of unisex tables.

In the facts of the Florida case, it's clear that those expressed concerns were not a problem for the Florida facts and this State Retirement Actuary explains. The use of mortality rates on a single unisex basis has been found quite practical for non-insured plans which have been shifting over to the use of approximate benefit factors anyway and thus getting away from the type of precise actuarial equivalent for early retirement and optional benefits.

He went on to explain exactly what the probable illegality of the plan would be. That the EEOC is concerned that when actuarial tables are sex segregated, this frequently results in the payment of different periodic pension benefits to males and females under the guise of actuarial equivalence. He specifically said, this will violate the 1964 Civil Rights Act.

And in the last page of his memorandum, his recommendation to his boss was, "in light of the strong possibility of the Federal Government mandating the use of such tables, I would recommend that we resolve this difference once and for all."

Now, that was two years before you wrote a word in

Manhart. When the Manhart decision came down -- and I might add the evidence was that he got no reply to that memo -- when the Manhart decision came down, he wrote another memorandum. This one is dated May 19, 1978, and it was very short. He said, I am attaching some option factors that we can use to straighten out the sex based tables in Florida.

And now, I'm quoting, he says, "this analysis will serve as a guide to developing a unisex table for option reduction factors. In light of the recent Supreme Court decision, it is not a question of, if, but when we adopt such factors."

The State of Florida was never puzzled about what Manhart meant. The State of Florida at that time was not struggling with payout versus pay-in. Was not struggling with the question of having a non-discriminatory option benefit combined in a package with discriminatory benefits. The State Retirement Actuary simply said, it is not a question of, if, but when we adopt such factors.

What happened in Florida was a tragedy. The policy makers didn't agree with the pension administrators. Now, as we view the State of Florida in its context here as an employer, the State Government is in a role analogous to any other employer. Its legislature makes its policy.

What did the Florida legislature do on the statement of the Manhart case in 1978? In 1979, the Florida legislature

passed an anti-Manhart Act. Florida Statute 112.66, subsection 9. In their wisdom, they passed an Act that said first of all, the good part, no Florida Government pension plan shall discriminate in its benefit formula based on color, national origin, sex or marital status.

And then here comes the hooker. Nothing here shall preclude a plan from actuarially adjusting benefits or offering options based on sex, age, early retirement or disability.

So their reaction to Manhart in 1978 was to pass a piece of local policy in 1979 that is in effect an anti-Manhart Act. So the State Actuary warned them two years before you ruled that this was going to happen. When you did rule in Manhart, he says, looked it has happened. It's no longer a question of, if; it's a question of when.

The reaction of the legislature was to say, oh, no, we'll just pass a law about it. And they made a statement of policy that says, we're going to continue to make sex based discriminatory differences in pension payments, notwithstanding the fact that Florida was an employer operated defined benefit plan, just like Manhart. So under those facts, those defendants knew that the plan was illegal.

There is also a clear statement of proof as to what the motivation was when Florida refused to make the change. And since there's a comment about this in the Eleventh Circuit opinion, they suggested that this finding of fact was a

conclusion of law. Because the Court in a conclusion of law section discusses this at some considerable length, I'd like to clear that up.

In disputed finding of fact number ten, appearing in the Appendix at page 60, Judge Stafford, the Trial Court Judge in this case, said, and I am quoting, as a finding of fact, before he got to his conclusions and he built on this in his conclusions, but as a fact finding, he said, "on rebuttal, Mr. McMullian [who was a State Retirement Director who wouldn't answer those memos] identified the reason for not developing the no cost unisex approach before 1983."

That's referred to as a no cost unisex approach because if they had made that switch in 1978 when they knew they should have, you simply adopt a unisex table which is an averaged result of the higher male rate and the lower female rate or the reverse of that if you apply it here. Anyway, it's an aggregation of the two and since you're dealing with nonvested rights, you simply reduce one class and increase the second class, and you strike a unisex level of benefit for both sexes. And they're talking about that as a no-cost approach.

And they said, "Mr. McMillian identified the reason for not developing a no-cost unisex approach before 1983. That reason was because the no cost approach would result in a reduction of benefits to over one-half of the membership, i.e., women. Those in charge did not want to take that step unless

they had to."

The Court then went on to say, in its conclusions, "the State simply did not want to make the politically unpopular decision to reduce female benefits. The State chose to maintain the discriminatory status quo."

The key to it in my view is that the superior thing about the Eleventh Circuit conclusion has to do with the procedures used in arriving at that conclusion. It did not follow a per se rule of defense. It did not grant to this employer an absolute irrevocable assumption that its plan is just like the most sensitive of plans, or that its plan was just like the Norris plan. The trial judge quite correctly, and the Eleventh Circuit affirmed him for doing it, permitted a trial on the facts about those matters. Whereas in the Ninth Circuit, the Ninth Circuit overruled the trial judge as a matter of law.

I would point out parenthetically that in my reading of those Ninth Circuit cases, I do notice that they were all summarily adjudicated below. And while we are critiquing such things, it might be well to say that it would have perhaps been better for the Ninth Circuit at the trial level to have had a full trial, rather than to have undertaken to summarily adjudicate some of those questions.

QUESTION: Mr. Melvin, could I interrupt you for a minute?

This letter that you read us from the -- what was the fellow's title? The auditor? Do we know that he was pronouncing on you know what Title VII required and what Manhart held and so forth?

MR. MELVIN: He is the State Retirement Actuary. His job is created by State statute, and his responsibilities are described in the statute that creates that job and that's been in effect for many many years.

QUESTION: Is he a lawyer?

MR. MELVIN: No. He is an enrolled actuary, a professional pension administrator. He is not an attorney.

QUESTION: So for all we know, this may be one piece of advice that the managers of the system got, but they may well have taken that letter and consulted with their lawyers.

MR. MELVIN: Yes.

QUESTION: And their lawyers may well have told them, you know, Manhart doesn't say this. Pre-Manhart it doesn't require, and Manhart doesn't say it. And who is this fellow who is just some actuary and we went to law school.

MR. MELVIN: Yes. We tried that case and we won that case on those facts. We convinced the trial judge that this advice was the real advice that they were getting that the administrators took the stand and they said that they had the oral advice of the general counsel of the Department of Administration and he also testified that it was his oral

opinion that because in Manhart, you had not ruled that it was illegal to discriminate at the payout stage, that he had a doubt. And also in Manhart, you hadn't ruled that you couldn't combine a discriminatory and a non-discriminatory pension plan together and have both be legal. And so he had these questions.

However, the trial judge wasn't convinced, and I'm emphasizing that finding of fact. He took all of that into account, because what you're suggesting did exactly occur.

QUESTION: Wasn't convinced as to what?

MR. MELVIN: And in fact, there were lawyers' memos.

QUESTION: Who had the burden of proof on this? This was a factual question. Who had the burden of proof on the factual question?

MR. MELVIN: I think it's an employer's burden because there is a presumption in favor of retroactivity, a presumption in favor of full relief that extends from your Albemarle decisions and so forth. I would not argue to you that those are per se rules that require retroactivity. I think it is error to accept an argument originating from the Ninth Circuit interpretation that says there is a per se rule of defense that applies to every employer regardless of the type of pension plan or the amount of money that he has in the plan.

It was proven here that this plan has an excess of

over $200 million.

CHIEF JUSTICE REHNQUIST: Your time has expired, Mr. Melvin.

MR. MELVIN: Thank you, sir.

CHIEF JUSTICE REHNQUIST: Mr. Collette, you have four minutes remaining.

ORAL ARGUMENT OF CHARLES T. COLLETTE, ESQ.

ON BEHALF OF PETITIONERS - REBUTTAL

MR. COLLETTE: Thank you, Mr. Chief Justice.

Just one point. The stipulation petition appendix, page A-106, paragraph 4, was simply made for the purposes of Title VII to recognize the use of the word, employer, as it's used in the definitional section of Title VII, which the law recognizes is quite broad, covers agents, etcetera.

It resolved the issue that the only entity needed to be sued in this case was Title VII; that is all.

Unless the Court has any additional questions, I'll waive --

QUESTION: The only thing I'd ask about that is did you argue in the lower courts that the State was in the posture of a third party?

MR. COLLETTE: No. It's inherent in the facts that there are over 1100 and we kept reemphasizing that point factually that there are over 1100 plus local governmental employers.

QUESTION: For what purpose did you emphasize that fact when you made this stipulation that the Court could regard the case as though it involved only one employer? Why would you be talking about 1100 employers?

MR. COLLETTE: Because in point of fact, the FRS -- there is no third party outside the State of Florida that administers the FRS. But it is in essence the agent of its local governments. That was the reason for the complication for the fact. The other reason for that 1100 plus is the local impact for which there was a concern expressed in Norris that if the relief is implemented, then these local governmental employers who have no choice will face increased contribution rates, and there is some expert testimony in this that as generally recognized in Norris, Florida local governments are in a crunch, fiscally.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Collette.

The case is submitted.

(Whereupon, at 1:59 p.m., the case in the above-entitled matter was submitted.)

REPORTERS' CERTIFICATE

DOCKET NUMBER: 86-1685

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HEARING DATE: 2/22/88

LOCATION: WASHINGTON, DC

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States, and that this is a true and accurate transcript of the case.

Date: 2/22/88

Margaret Daly
Official Reporter

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