Western New England Law Review

Volume 1 *1 (1978-1979)*
Issue 4

Article 6

1-1-1979

CIVIL RIGHTS—EMPLOYMENT DISCRIMINATION—RETROACTIVE RELIEF DENIED IN TITLE VII VIOLATION—City of Los Angeles, Department of Water and Power v. Manhart, 435 U.S. 702 (1978)

Marcia R. Conrad

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation

Marcia R. Conrad, *CIVIL RIGHTS—EMPLOYMENT DISCRIMINATION—RETROACTIVE RELIEF DENIED IN TITLE VII VIOLATION—City of Los Angeles, Department of Water and Power v. Manhart, 435 U.S. 702 (1978)*, 1 W. New Eng. L. Rev. 779 (1979), http://digitalcommons.law.wne.edu/lawreview/vol1/iss4/6

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

CIVIL RIGHTS—EMPLOYMENT DISCRIMINATION—RETROACTIVE RELIEF DENIED IN TITLE VII VIOLATION—*City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978).

The Equal Employment Act, Title VII of the Civil Rights Act of 1964,[1] prohibits discrimination by employers on the basis of "race, color, religion, sex, or national origin."[2] Among the remedies which were created to implement the purposes of the Act is section 706(g), available to individuals injured by employer discrimination.[3] After an individual exhausts the appropriate administrative remedies[4] and a federal district court makes a finding of discrimination,[5] section 706(g) authorizes the trial court to enjoin the discriminatory practice and order appropriate relief to individuals. Appropriate relief includes reinstatement or hiring, with or without backpay.[6]

Backpay and similar retroactive relief, awarded to victims of employer discrimination, are intended to compensate individuals for monetary losses directly traceable to discriminatory practices.[7]

---

1. 42 U.S.C. §§ 2000a-2000h (1976). The present statute incorporates the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103-13.

2. 42 U.S.C. § 2000e-2 (1976).

3. *Id.* § 2000e-5(g).

4. *Id.* § 2000e-4 provides for the creation of the Equal Employment Opportunity Commission (EEOC), which has limited powers of conciliation and intervention in civil suits brought under Title VII. Once a charge is filed by or on behalf of a person claiming to be aggrieved under Title VII, the EEOC serves notice of the charges on the charged party and conducts an investigation of the complaint. If the EEOC determines that there is reasonable cause to believe the truth of the charge "the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." *Id.* § 2000e-5(b). If the EEOC is unable to secure compliance it has the authority to bring a civil action against the party. If the charged party is a government, governmental agency, or political subdivision and the EEOC has been unsuccessful at securing compliance with Title VII, the EEOC will refer the case to the Attorney General who may bring an action in federal district court. If the EEOC or the Justice Department fails to file a civil action or dismisses the charge, the person claiming to be aggrieved may file a civil action within 90 days of the individual's notice of the action taken by the Justice Department or the EEOC. *Id.* § 2000e-5(f).

5. *Id.* § 2000e-5(g). The remedy provision may be applied after a finding by the court "that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice. . . ." *See* text accompanying notes 44-48 *infra*.

6. 42 U.S.C. § 2000e-5(g) (1976).

7. The remedy of backpay is usually viewed as a grant to the district courts of the equitable power, restorative in nature, to fashion the most complete relief possi-

The purpose of this relief under Title VII is twofold.[8] First, it is intended to make victims of discriminatory employment practices whole by compensating them for losses suffered. Second, the relief is intended to eradicate discrimination by discouraging discriminatory employment practices.

Courts applying section 706(g) have used a variety of standards to determine whether backpay should be granted. Results of the section's application have differed depending on how the courts weigh various equitable factors and how they interpret the legislative intent underlying the Act.[9] The United States Supreme Court provided lower courts with guidelines for applying section 706(g) and with standards to measure the appropriateness of an award of backpay. In *Albemarle Paper Co. v. Moody*,[10] the Court set forth a strong presumption favoring backpay awards to be applied by trial courts deciding employment discrimination cases.[11] Recently, however, in *City of Los Angeles, Department of Water and Power v. Manhart*,[12] the Supreme Court again addressed the appropriateness of a district court's award of retroactive relief, this time reversing the award of backpay. The *Manhart* decision complicated the application of standards for awarding retroactive relief that were established in *Albemarle*. Recognizing the confusion caused by *Manhart*, this note will analyze the problem of construing section 706(g) and propose standards by which future awards of retroactive relief should be made.

On June 5, 1973, Marie Manhart and other female employees[13] of the Los Angeles Department of Water and Power filed

---

ble. *See* Note, *Retroactive Seniority as a Remedy for Past Discrimination*: Franks v. Bowman Transportation Co., 51 ST. JOHN'S L. REV. 181, 190 (1976). Some commentators classify backpay as a legal remedy, awarded when a claimant proves he or she has suffered loss of income as a result of an unlawful employment practice. *See* Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. INDUS. & COM. L. REV. 495, 514-15 (1966).

8. *See* Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971), where the Supreme Court stated: "The objective of Congress in the enactment of Title VII is plain from the language of the statute." The Court has consistently recognized the Congressional purposes which are inherent in the language of Title VII. *See also* Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-21 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

9. *See* text accompanying notes 41-54 *infra*.

10. 422 U.S. 405 (1975).

11. *See* text accompanying notes 55-63 *infra*.

12. 435 U.S. 702 (1978).

13. The plaintiffs included Marie Manhart, a former employee of the department; four other named present employees of the department; the Committee to Pro-

charges with the Equal Employment Opportunity Commission alleging violations of Title VII.[14] Female employees of the department were required to contribute 14.84 percent higher monthly contributions to a pension plan[15] than were males of comparable age, length of service, and salary.[16] Plaintiffs claimed that this plan discriminated against women employees in violation of the Civil Rights Acts of 1871 and 1964.[17] After an investigation of the complaint by the Equal Employment Opportunity Commission and the Justice Department, the plaintiffs sought an injunction in federal district court to compel the department to cease requiring discriminatory contributions.[18]

The district court granted injunctive relief to the plaintiffs, holding that the unequal contributions to the mandatory retirement plan violated Title VII.[19] The court also granted the plaintiffs' motion for summary judgment on their claim and awarded retroactive relief. The backpay award, measured by computing the difference between the amounts female employees and male employees were required to contribute to the plan, was granted to restore to the female employees monies lost as a result of the Title VII violation.[20]

---

tect Women's Retirement Benefits Association, composed of female supervisory employees of the department; and the International Brotherhood of Electrical Workers, Local Union No. 18, an unincorporated labor union whose members included women employed by the department. Petitioner's Brief for Certiorari at B-9, City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978).

14. Manhart v. City of Los Angeles, Dep't of Water and Power, 553 F.2d 581, 584 (9th Cir. 1976), *aff'd in part, vacated in part*, 435 U.S. 405 (1978).

15. The pension plan is officially referred to as the Public Employees Retirement, Disability and Death Benefit Plan. All employees of the department were required to participate in the plan, which was funded and managed by the department. Each employee made monthly contributions which were matched 110% by the department. *Id.* at 583.

16. Petitioner's Brief for Certiorari at B-10.

17. Manhart v. City of Los Angeles, Dep't of Water and Power, 553 F.2d 581, 584 (9th Cir. 1976), *aff'd in part, vacated in part*, 435 U.S. 405 (1978).

18. Manhart v. City of Los Angeles, Dep't of Water and Power, 387 F. Supp. 980 (C.D. Cal. 1975), *aff'd*, 553 F.2d 581 (9th Cir. 1976), *aff'd in part, vacated in part*, 435 U.S. 405 (1975). For procedures followed, see note 4 *supra* and accompanying text.

19. Manhart v. City of Los Angeles, Dep't of Water and Power, 387 F. Supp. 980, 984 (C.D. Cal. 1975), *aff'd*, 553 F.2d 581 (9th Cir. 1976), *aff'd in part, vacated in part*, 435 U.S. 405 (1978). The district court rejected the defendant department's argument that the longevity tables were based on "a factor other than sex" which would bring the unequal contributions under an exception to the Equal Pay Act, 29 U.S.C.A. § 206(d) (1978).

20. For the district court's determination of the appropriate award, see Petitioner's Brief for Certiorari at B-9-10. The court awarded the female employees retroactive relief of their excess contributions to the plan made between April 5, 1974 and

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision in *Manhart*.[21] In reviewing the district court's award of retroactive relief, the appellate court balanced "the merits of the plaintiff's claim and the public policy behind it . . . against the hardship on a good faith employer."[22] The court found that the equities favored reimbursement of the female employees' unequal contributions to the pension plan and, therefore, upheld the grant of retroactive relief.

On appeal, the Supreme Court affirmed the lower courts' determinations that the pension plan violated Title VII by discriminating against female employees as a class.[23] The Court, however, reversed the award of retroactive relief, denying the appellees reimbursement of their disproportionate and excessive contributions to the pension plan.[24] Despite recognizing that section 706(g) favors restoring economic status to victims of employment discrimi-

---

December 31, 1974. April 5, 1974 was the date that the EEOC amended its regulations, stating in 29 C.F.R. 1604.9(e) (1977) that the fact that the cost of benefits "is greater with respect to one sex than the other" is not a defense to an action based on sex discrimination under Title VII. The Los Angeles Department of Water and Power discontinued the unequal contributions requirement on December 31, 1974 in response to CAL. GOV'T CODE § 7500 (West Supp. 1979), which directed any city with a population of over one million to revise existing pension plans so that individuals of the same age contributed equally without regard to sex. The statute was effective as of January 1, 1975.

21. 553 F.2d 581 (9th Cir. 1976), *aff'd in part, vacated in part*, 435 U.S. 405 (1978). The court refused the appellant's petition for a rehearing in light of the recently released Supreme Court decision, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). There the Court held that an employee benefit plan which did not provide coverage for pregnancy was not an unfair employment practice prohibited by Title VII.

22. 553 F.2d at 591. The court applies the test developed in Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (1972): "In the case of damages of this nature, a court must balance the various equities between the parties and decide upon a result which is consistent with the purpose of the Equal Employment Opportunity Act, and the fundamental concepts of fairness." *Id.* at 1007.

23. Justice Stevens wrote the opinion in which a majority of the Court concurred. Justices Stewart, White, and Powell concurred in full. Chief Justice Burger, with Justice Rehnquist joining his opinion, concurred in the Court's denial of retroactive relief but dissented from the finding that the plan violated Title VII. Justice Blackmun dissented from the Court's finding of a violation of Title VII, preferring a posture which would have recognized and resolved the conflict between *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), and *Manhart*, and concurred in the denial of the backpay award. Justice Marshall found the retirement plan to violate Title VII and dissented from the Court's holding denying relief to those plaintiffs affected by the plan. Justice Brennan took no part in the decision of the case.

24. 435 U.S. at 718-23. The Court found that the differences in contributions required under the plan violated Title VII by discriminating against individual female employees because of classwide predictions of longevity. Even if the longevity calculations were accurate, the Court held that the policy behind Title VII precluded employers from treating individuals differently because of a class generalization.

nation and that backpay should normally be awarded, the Court denied relief. It focused on the hardships that reimbursement would cause the employer.[25] In analyzing the appropriateness of this denial, it is necessary to examine the legislative history behind Title VII and its remedial provisions.

On July 2, 1964, President Johnson signed into law the Civil Rights Act of 1964.[26] This Act was designed to give statutory force to the constitutional protections afforded to blacks after the Civil War.[27] The legislation was intended to eradicate discrimination by assuring that blacks would not be hindered from full participation in society.[28] One of the provisions included in the Act was Title VII, which restricted employers of twenty-five or more employees[29] from discrimination based not only on color, but also on the classifications of religion, sex,[30] and national origin.[31]

To aid in carrying out the purpose of Title VII, Congress enacted section 706(g). The section provided for injunctions to eliminate particular discriminatory practices and backpay and reinstatement to compensate individuals for losses suffered because of

---

25. *See* text accompanying notes 70-74 *infra*.

26. Pub. L. No. 88-352, 78 Stat. 241 (current version at 42 U.S.C. §§ 2000a-2000h (1976)).

27. *See* 110 CONG. REC. 15865 (1964) (concise explanation of the Civil Rights Act of 1964, Chronology of Congressional Action submitted by Senator Humphrey). *See also* Vass, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966); Note, *Standards Governing Backpay Awards for Violations of Title VII of the Civil Rights Act of 1964*, 61 CORNELL L. REV. 460, 462-65 (1976).

28. On June 19, 1963 President Kennedy addressed Congress regarding the importance of the then pending Civil Rights legislation in a message to the House of Representatives. Referring to the employment provision, Kennedy stated, in part:

> Racial discrimination in employment is especially injurious both to its victims and to the national economy. It results in a great waste of human resources and creates serious community problems. It is, moreover, inconsistent with the democratic principle that no man should be denied employment commensurate with his abilities because of race or creed or ancestry.

109 CONG. REC. 3248 (1963).

29. The 1972 amendments to the Act made Title VII applicable to employers of 15 or more employees. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (current version at 42 U.S.C. § 2000e (1976)).

30. Representative Howard Smith of Virginia, an opponent of the civil rights legislation, offered a last minute addition proposing an amendment to Title VII which would make the Act applicable to sex discrimination in employment. 110 CONG. REC. 2577 (1964). A number of commentators have stated, and their views are supported by the legislative record, that this amendment was introduced to block the passage of Title VII. *See* Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs*, 74 COLUM. L. REV. 1203, 1216-17 (1974); Lines, *Sex Based Fringe Benefits*, 16 J. FAM. L. 489, 499-500 (1977-1978).

31. 42 U.S.C. § 2000e-2 (1976).

discriminatory practices.[32] The legislative history of the remedy provision clearly emphasizes the compensatory purpose of the relief: "[T]he scope of relief . . . is intended to make the victims of unlawful discrimination whole . . . restored to the position where they would have been were it not for the unlawful discrimination."[33] The focus of section 706(g), therefore, is not concerned with the hardships on the employer, but with the restoration of the economic status of the victims of discrimination.[34]

The importance of the make-whole intent inherent in section 706(g) can be better understood by comparing it to the National Labor Relations Act (NLRA).[35] The legislative history of Title VII documents that section 706(g) was modeled after the remedies section 10(c) of the NLRA.[36] Section 10(c) directs the National Labor Relations Board "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."[37] In enacting section 706(g) of Title VII, Congress directed the courts to look to judicial interpetation of 10(c) for criteria to determine the appropriateness of reinstatement, backpay, and other affirmative action.

The judicial interpretations of the remedies provision in 10(c) of the NLRA reinforce the Congressional intent that section 706(g) have a restorative function. Under the NLRA, awards of backpay have been liberally granted with the remedy viewed as "a reparation order designed to vindicate the public policy of the statute by

---

32. *Id.* § 2000e-5(g) provides:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . the court may enjoin the respondent . . . and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

33. 118 CONG. REC. 7166-69 (1972) (section-by-section analysis of H.R. 1746 by House and Senate Conferees). The 1972 amendments to Title VII provided Congress with an opportunity to review the purposes of § 706(g). In that review, Congress made clear that the intent of § 706(g) was to give the courts the discretion "to make the victims of unlawful discrimination whole." *Id.* at 7168.

34. If back pay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.'

422 U.S. at 422.

35. 29 U.S.C. §§ 151-169 (1976).

36. *See* 110 CONG. REC. 7214 (1964) (interpretative memorandum of Senators Clark and Case); 110 CONG. REC. 6549 (1964) (remarks by Senator Humphrey).

37. 29 U.S.C. § 160(c) (1976).

making the employees whole for losses suffered on account of an unfair labor practice."[38] The Supreme Court has stressed the importance of backpay awards under the NLRA in "restoring the economic status quo" of victims of discriminatory employment practices.[39] The National Labor Relations Board and the courts have consistently upheld the importance of backpay as a remedy for compensating victims of discrimination for monies lost due to illegal employment practices.[40]

Despite the Congressional intent to award backpay to victims of Title VII violations, judicial interpretation of the appropriateness of these awards under the Act has been inconsistent.[41] Section 706(g) lends itself to a variety of interpretations, since it grants the district courts discretion to award the appropriate relief. Rather than specifically directing the courts to award relief, the statute states that the courts "may" award the relief which they deem "appropriate."[42] The Supreme Court in *Albemarle* recognized the discretionary powers vested in the district courts and stated that the courts applying the provision should be guided by sound legal principles consistent with the purposes and objectives of the Act.[43]

One reason for the inconsistent application of section 706(g) is the judicial confusion over whether the employer's culpability in fostering the employment discrimination should be a factor in determining relief.[44] Congress clearly stated that only "inadvertent or accidental discrimination will not violate the title or result in en-

---

38. Nathanson v. NLRB, 344 U.S. 25, 27 (1952). The Court there reviewed the recovery available under the provisions of § 10(c) of the NLRA. In that case the Court held that the Board's order requiring an employer to pay backpay was a provable claim in bankruptcy and that the Board, rather than the bankruptcy court, should liquidate the claim.

39. NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969). The Supreme Court in that case upheld the NLRB's order granting reinstatement and backpay to strikers who had been denied reinstatement to their former positions. The NLRB computed individual back pay awards, which the court of appeals had modified.

40. *See* NLRB v. Seven-Up Bottling Co., 344 U.S. 244, 346 (1953).

41. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), *aff'd in part, rev'd. in part*, 576 F.2d 1157 (5th Cir. 1978); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973); Kober v. Westinghouse Electric Corp., 480 F.2d 240 (3d Cir. 1973); United States v. St. Louis-S.F. Ry., 464 F.2d 301 (8th Cir. 1972); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972); LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir. 1971) (per curiam), *cert. denied*, 409 U.S. 990 (1972); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

42. 42 U.S.C. § 2000e-5(g) (1976).

43. 422 U.S. at 417-18.

44. *See* Note, *supra* note 27.

try of court orders."[45] Some courts had interpreted the application of section 706(g) to involve a balancing test in which the employer's "good faith" efforts to abide by the laws are reviewed. When the courts found that there had been good faith, they used it as justification for denying relief.[46] The Supreme Court, however, has held that the employer's "good intent or bad intent" is not relevant to finding discrimination under Title VII.[47] Further, it has implicitly suggested that intent is not relevant in awarding relief under the remedies section since "Congress directed the thrust of the Act to the consequences of the employment practices not simply the motivation."[48]

Many of the circuit courts of appeal have reviewed awards of backpay under the "special circumstances" test which closely follows the Congressional intent in the enactment of section 706(g).[49] Courts supporting the "special circumstances" test emphasize the importance of backpay in terminating discrimination and making the victims of the discriminatory employment practices whole. This test presumes that backpay should be awarded to victims of employment discrimination and directs the district courts to refuse to grant backpay relief only in "special circumstances." Few courts applying this test have actually defined situations in which such special circumstances are present.[50] The practical effect of the

---

45. 110 CONG. REC. 12723-24 (1964) (remarks by Senator Humphrey discussing changes in Title VII and § 706(g)).

46. Good faith is not a defense to a finding of a violation of Title VII, but it is often viewed as a factor which might limit the remedies available to the defendant. *See* Note, *supra* note 27, at 466. The Court in *Albemarle* stated that "bad faith" is

> not a sufficient reason for denying backpay. Where an employer has shown bad faith—by maintaining a practice which he knew to be illegal or of highly questionable legality—he can make no claims whatsoever on the Chancellor's conscience. But, under Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor.

422 U.S. at 422.

47. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (court held that high school diploma requirement and general intelligence test were not job related and violated the rights of black employees under Title VII).

48. *Id.*

49. The "special circumstances" standard for backpay under Title VII was applied in Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) (reversed denial of backpay award based on employer's good faith) *aff'd in part, rev'd in part*, 576 F.2d 1157 (5th Cir. 1978) (remanded denial of backpay to determine award under presumption favoring back pay), and Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) (remanded denial of backpay to women discriminated against in job classifications and plant seniority).

50. In Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 253 (5th Cir.

"special circumstances" test has been that employees who have suffered financially from discriminatory employment practices have been granted relief uniformly.[51]

Retroactive relief under Title VII has also been reviewed under a standard of equitable balancing which generally fails to carry out the Congressional intent. Under this approach, the courts balance the merits of individual claims for relief against the economic hardships which such relief would impose on the employer.[52] Factors which often weigh in favor of the employer include good faith attempts by employers to rectify discrimination and employer's reliance on statutes and regulations condoning discrimination.[53] Such balancing often leads to a denial of retroactive relief to employees and fails to make them whole.[54]

The Supreme Court, by reviewing *Albemarle*, seized an opportunity to interpret the provisions of section 706(g) and to resolve the conflict among the circuits. In this case, black employees

---

1974), *aff'd in part, rev'd in part*, 576 F.2d 1157 (5th Cir. 1978), the court rejected past good faith of the company and the possibility of future violations as not being "special circumstances" which would justify denial of backpay. In Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973), the court rejected good faith of the employer as a "special circumstance" which would justify denial of relief. *But see* Manning v. International Union, 466 F.2d 812 (6th Cir. 1972), where the court denied backpay because the employer relied on a state protective statute.

51. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), *aff'd in part, rev'd in part*, 576 F.2d 1157 (5th Cir. 1978); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1971).

52. In Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972), the Court of Appeals for the Ninth Circuit remanded the issue of backpay and directed the district court to balance "the various equities between the parties and decide upon a result which is consistent with the purposes of the Equal Employment Opportunities Act, and the fundamental concepts of fairness." *Id.* at 1006. In LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir. 1972), the court also applied a balancing test, determining that an award of backpay was inappropriate because the employer was acting in good faith and the practices were in accord with state protective laws.

53. State protective statutes have often been relied on by employers to elude the sanctions of Title VII. State protective statutes are state laws which restrict the working conditions, hours, and wages of female employees. In *Manhart*, the Supreme Court states that *Albemarle* does not require backpay to be awarded automatically. 435 U.S. at 719 n.35. One of the areas which the Court notes may justify denial of relief is employer reliance on a state protective statute. The *Manhart* Court noted that *Albemarle* reserved the question of whether this reliance would save a defendant from liability. *See* 422 U.S. at 423 n.18.

54. *See* Kober v. Westinghouse Electric Corp., 480 F.2d 240 (3d Cir. 1973); LeBlanc v. Southern Bell Tel. & Tel., 460 F.2d 1228 (5th Cir. 1972); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Garneau v. Raytheon Co., 341 F. Supp. 336 (D. Mass. 1972); Baxter v. Birkins, 311 F. Supp. 222 (D. Colo. 1970).

of the Albemarle Paper Company in Roanoke Rapids, North Carolina filed a complaint with the Equal Employment Opportunity Commission alleging discriminatory employment practices in violation of Title VII.[55] The employees charged that the company's use of personality tests and educational requirements was not job-related and was used to restrict minority hiring and promotions. The district court found that the company's testing programs and seniority system violated Title VII. The court refused, however, to grant backpay. It reasoned that the employer's good faith and the employees' delay in requesting relief justified the denial.[56]

The Court of Appeals for the Fourth Circuit reversed the judgment of the district court regarding the retroactive relief, and ruled that backpay should have been granted.[57] The court held that denying backpay based on the employer's lack of bad faith was inappropriate.[58] It rejected the district court's application of a balancing test in which the hardships of the employer would be weighed against the individuals' economic loss. The court enjoined the discriminatory testing practice and upheld a presumption in favor of backpay to be awarded to "a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII . . . unless special circumstances would render such an award unjust."[59]

The Supreme Court granted certiorari in *Albemarle* to determine, among other issues,[60] the standards by which awards of backpay should be governed. Implicitly, the Court adopted the "special circumstances" test by restricting the denial of backpay awards to situations which "would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[61] This presumption, referred to by the Court in *Manhart* as the "*Albemarle* presumption,"[62] focuses on the importance of restoring

---

55. 422 U.S. at 408.

56. 474 F.2d 134, 140-41 (4th Cir. 1973), *vacated*, 422 U.S. 405 (1975).

57. The Courts of Appeals for the Fourth Circuit found that because of the strong Congressional policy behind backpay awards and the compensatory nature of the awards, backpay should be granted in all but unusual circumstances. *Id.* at 142.

58. *Id.* at 141.

59. *Id.* at 142 (footnote omitted).

60. The Court also addressed the issue of what an employer must show to "establish that pre-employment tests racially discriminatory in effect, though not in intent, are sufficiently 'job related' to survive challenge under Title VII." 422 U.S. at 408.

61. *Id.* at 421 (footnote omitted).

62. 435 U.S. at 719.

the economic status of the employee, rather than mitigating the hardships of the employer.[63]

Courts have subsequently reinforced the standards laid out in *Albemarle* and applied the presumption in favor of backpay awards which was asserted in that case.[64] The United States Supreme Court, in *Franks v. Bowman Transportation Co.*,[65] applied the *Albemarle* standards and reversed the lower court decision which denied seniority relief to victims of discrimination. The Court held that the make-whole purpose behind section 706(g) extended to seniority rights of employees.[66] It failed to find merit in the defendant company's argument that the award of seniority relief would conflict with the economic interests of the other employees.[67] The Court stated that a denial which was based on potential harm to other employees would frustrate the central make-whole objective of Title VII.[68]

In reviewing the retroactive relief awarded by the lower courts to the female employees of the Los Angeles Department of Water and Power, the Supreme Court in *Manhart* recognized the validity of the *Albemarle* presumption favoring retroactive relief. Neverthe-

---

63. 422 U.S. at 419-22. The Supreme Court directed the lower courts to recognize the purposes of Title VII and to deny backpay only for reasons which will not frustrate the purposes of the Act. The Court stated that it was "necessary, therefore, that if a district court does decline to award backpay, it carefully articulate its reasons." *Id.* at 421 n.14 and accompanying text.

64. In Stewart v. General Motors Corp., 542 F.2d 445, (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977), the Court of Appeals for the Seventh Circuit reinforced the *Albemarle* presumption and directed the district court to follow three general mechanical rules when reviewing computation of backpay awards: "(1) unrealistic exactitude is not required; (2) ambiguities in what an employee or group of employees would have earned but for discrimination should be resolved against the discriminating employer; (3) the district court . . . must be granted wide discretion in resolving ambiguities." *Id.* at 452.

65. 424 U.S. 747 (1976).

66. *Id.* at 774.

67. *Id.* Chief Justice Burger, dissenting from the majority opinion, found that "competitive type-seniority relief" would be an inappropriate and inequitable award because innocent employees would be harmed. Burger recommended that a more equitable remedy would be a monetary award to the victims of discrimination. *Id.* at 781. In *Manhart*, although the victims actually suffered loss of wages and there was no claim that innocent employees would be harmed by the award, Burger joined in denying relief. 435 U.S. at 725.

Justice Powell, dissenting, admonished the Court for diminishing the importance of the discretionary power of the district court to fashion appropriate relief under § 706(g). 424 U.S. at 794. Powell also joined the Court's decision in *Manhart*, which overturned the district court's determination of relief and failed to remand the issue. 435 U.S. at 723.

68. *Id.* at 771.

less, other factors were deemed more compelling, and the Court reversed the district court's award of backpay.[69] Justice Stevens, writing for the Court, did not focus on the importance of economically restoring the status of the victims of discrimination as provided by section 706(g). Rather, he emphasized the inequities that an award of backpay would entail.

A number of factors, according to the Court, favored denying retroactive relief to the plaintiff employees. First, the confusing state of administrative regulations pertaining to employment discrimination created a morass which might justify the employer requiring unequal contributions to the pension plan.[70] Next, an award of backpay would create a precedent which, if applied to similar plans throughout the country, would adversely affect the nation's economy.[71] Finally, an award of backpay to the female employees who contributed excessively to the plan might jeopardize the economic stability of the plan in *Manhart* and result in harm to all the beneficiaries.[72] The Court stressed that the economic hard-

---

69. *Id.* at 723.

70. 435 U.S. at 720 n.37. The EEOC guidelines, 29 C.F.R. § 1604.9(e)-(f) (1977), required equal benefits. The Wage and Hour Administration regulations, 29 C.F.R. § 800.116(d) (1977), only required an employer to equalize his or her employee contributions or benefits. The Office of Federal Contract Compliance, in 41 C.F.R. § 60.20.3(c) (1977), adhered to the Wage and Hour Administration's position. Until recently, it has been difficult to ascertain which governmental unit had the responsibility for enforcement of the federal equal employment laws. Prior to the approval of Reorganization Plan No. 1 of 1978 prepared by the President and transmitted to the Senate and House of Representatives, 14 WEEKLY COMP. OF PRES. 405 (Feb. 27, 1978), 18 governmental units exercised responsibilities under statutes, executive orders, and administrative regulations. The Reorganization Plan provides for the EEOC to become the primary agency in the area of job discrimination, with the Department of Labor relinquishing many of its responsibilities. The implementation of this Plan is intended to eliminate the conflicting agency regulations in the employment discrimination area.

71. The Court noted that "[f]ifty 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 were reserved for retirement benefits at the end of 1976 and reserves are increasing by almost $50 billion a year." 435 U.S. at 721 (footnotes omitted). In Allied Structural Steel Co. v. Spannaus, 98 S. Ct. 2716, 2724 (1978), the Supreme Court cited *Manhart* to stress the importance of economic stability and the element of reliance which is vital to the funding of pension plans. The Court held that the Minnesota Private Pension Benefits Protection Act violated the contract clause by retroactively modifying the compensation which the employer agreed to pay to employees.

72. The Court speculated that if the plaintiffs' contributions were recovered from the pension fund "the administrators of the fund will be forced to meet unchanged obligations with diminished assets." 435 U.S. at 723. If this happened, the Court foresaw that the "expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future se-

ships to the employer would not serve the goal of eradicating discrimination under the Act.[73] Although a backpay award in this case might not advance the statutory purpose of eliminating discrimination,[74] the Court failed to properly review the denial in terms of the make-whole purpose of the Act. These factors alone are not sufficient to justify denial of the female employees' claims for restitutionary relief.

Justice Marshall, dissenting from the denial of backpay relief in *Manhart*, did not find the majority's arguments persuasive. He failed to find that the confusion in the administrative regulations justified denying relief to the female employees and believed that during the three-year liability period the administrators of the plan should have recognized that the unequal contribution requirement violated the Equal Employment Opportunity Commission's guidelines.[75] Marshall also noted the Court's fear of the potential impact that such an award would have on the nation's economy. He recognized that none of the parties had claimed that the award would threaten the plan's solvency and argued that the Court should have restricted its review to the case at hand.[76] Marshall also rejected as unfounded the Court's fear that an award would result in harm to innocent employees.[77] Marshall's analysis of the

---

curity but also for the unanticipated reduction in the contributions of past employees." *Id.* at 722-23 (footnotes omitted).

73. *Id.* at 722-23.

74. *Id.* at 720. The Court stated: "There is no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision." *Id.*

75. The *Manhart* Court found that even assuming that the EEOC's guidelines should have put the department on notice that the unequal contributions were illegal, the date chosen by the district court to determine liability was too early. *Id.* at 719 n.36. Marshall states that even if the 1972 date was too early for determining liability "during the nearly three year period involved," from April 5, 1972, the date the EEOC regulations were issued, until December 31, 1974, the date the department changed to an equal contribution plan, "there surely was some point at which 'conscientious and intelligent administrators' . . . should have responded to the EEOC guidelines." *Id.* at 730.

76. *Id.* at 730-32.

77. *Id.* at 732. The Supreme Court previously decided that the harmful effect that backpay would have on employees not victims of the discriminatory employment practices was not relevant in determining relief appropriate under Title VII. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). The Court in *Franks* found "untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected." *Id.* at 775. The Equal Pay Act, 29 U.S.C.A. §206(d)(1) (1978), prohibits employers from reducing the wage rate of any employee in order to comply with the provisions of that Act. *See also* CAL. GOV'T CODE § 7500 (West Supp. 1975), which expressly prohibits unequal contribu-

award reveals that the factors relied on by the Court to justify denial of the award were insufficient to compel denial of backpay.

The Court's emphasis on the "equitable nature of the Title VII remedies"[78] and focus on the hardships of the employer appear misplaced in *Manhart*. The intent of the Act as well as the *Albemarle* presumption justify granting an award of backpay to those female employees who had contributed nearly fifteen percent more than did comparable male employees. *Manhart* inadequately deals with the "central statutory purpose of Title VII,"[79] making persons whole for losses suffered as a result of employment discrimination.[80] The female employees' claim for relief is "more compelling" in this case than in many other backpay situations, since the plaintiffs in *Manhart* actually received less pay for the work they performed. This differs from the situation in which the person who is granted backpay receives wages for a period when he or she is not working.[81] Certainly, an award of backpay in this situation would serve the statutory make-whole purpose of Title VII.[82]

In addition to minimizing the importance of restoring the economic status of the victims of discriminatory employment practices, *Manhart* fails to grant proper review to the claim for relief. Prior to this case, an appellate court reviewing a lower court decision regarding retroactive relief under Title VII and finding error in the award would remand the case for a factual determination of the appropriateness of the award.[83] *Manhart* should have been remanded for further findings to support or deny the backpay relief.[84] There

---

tions, states that increases in the contributions required of members of the plan are not authorized by the statute.

78. 435 U.S. at 719 (footnote omitted).

79. 422 U.S. at 421.

80. Moroze, *Back Pay Awards: A Remedy Under Executive Order 11246*, 22 BUFFALO L. REV. 439 (1973); Morse, *Judicial Relief Under Title VII of the Civil Rights Act of 1964*, 46 TEX. L. REV. 517 (1968).

81. 435 U.S. at 733.

82. *See* text accompanying notes 32-40 *supra*.

83. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 780 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 436 (1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 267 (5th Cir. 1974) *aff'd in part, rev'd in part*, 576 F.2d 1157 (5th Cir. 1978); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1008 (9th Cir. 1972); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 721 (7th Cir. 1969).

84. The lower court decisions inadequately address the appropriateness of the backpay award. Retroactive relief is discussed in Brief for Petitioner for Writ of Certiorari at 28-35, Petitioners' Opening Brief at 37-46 and Respondents' Brief at 55-59, City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978). None of the amici briefs prepared by insurance-related groups addressed the issue of retroactive relief and the harm such relief might impose on the industry.

was no record of factual determinations by the district court regarding computation of the award, and, moreover, the issue of retroactive relief was insufficiently briefed and argued in the lower courts.[85] The Court usurped the district court's role as factfinder by refusing to remand the determinations of relief. Consequently, the Court minimized the importance of the trial court's discretion to determine the relief appropriate under section 706(g).

Manhart does little to effectuate the intent of section 706(g) in particular and Title VII in general. The Court refused to return the female employees who were discriminated against to their proper economic status. By reviewing the award in terms of the hardships to the employer and the potential impact on the nation's economy, the Court failed to implement the purposes for which section 706(g) was enacted. Title VII is not only intended to discourage discriminatory employment practices, but also, more important, to make-whole individuals who experienced discrimination. To achieve these statutory goals courts must emphasize the strength of the *Albemarle* presumption which favors awarding backpay relief. The continuing validity of this presumption mandates that the *Manhart* rationale not extend beyond the unique facts of the case. The goals of Title VII will not be achieved unless those injured by employment discrimination are restored to the economic status which they would have enjoyed under nondiscriminatory circumstances.

Marcia R. Conrad

---

85. The only record of the determinations of the district court may be seen in the conclusions of law which were filed with the district court decision granting an injunction to the department employees. *See* Petitioner's Brief for Certiorari at B-11-12.