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MORTALITY TABLES AND THE SEX-STEREOTYPE DOCTRINE: INHERENT DISCRIMINATION IN PENSION ANNUITIES

I. Introduction

The Employee Retirement Income Security Act (ERISA)[1] has triggered nationwide redesign of pension plans and reevaluation of many important financial and actuarial procedures.[2] Nevertheless, one crucial factor inherent in all mortality based plans is being overlooked: sex discrimination. This discrimination results from the different actuarially determined life expectancies of men and women. If an employer contributes equally to retirement annuities for men and women, a woman employee will receive a smaller periodic benefit than a man, due to her longer life expectancy. Conversely, if an employer provides for equal periodic benefits, he must pay more for the woman's retirement annuity.[3] Therefore, whether the plan provides for equal contributions or for equal benefits, the underlying financial and actuarial assumptions dictate that male and female employees are treated differently.

The law applicable to sex discrimination in pension plans is scarred with inconsistencies. The Equal Pay Act of 1963[4] which is enforced by the Wage and Hour Division of the Labor Department specifically outlaws wage differentials based on sex. The legislative intent and a strict reading of the statutory exceptions would require that both contributions and benefits be equal. The Division's approach in analogous situations, however, indicates that the employer's contributions are the dispositive consideration. Yet in the area of pension plans, the Division has taken neither position in holding that *either* equal contributions or equal benefits satisfy the Act.[5]

On the other hand, the Equal Employment Opportunity Commission (EEOC) has applied Title VII of the Civil Rights Act of 1964[6] to pension plans,[7] prohibiting sex-based differences in pension benefits.[8] Therefore, notwithstanding sex differences inherent in plans using actuarial tables, the employer must make contributions which, though larger for one sex than the other, yield equal periodic benefits.[9] By making it more expensive to employ a woman, this EEOC ruling is counterproductive to the spirit of Title VII legislation.[10] It allows dissimilar treatment of men and women who are homogenous in all other respects, while ignoring the economic realities of such treatment.

The overlapping jurisdiction of these two statutes encourages an employer to fulfill the EEOC requirements which also satisfies the Division's standards. Therefore, as applied, two acts which were both intended to prevent dissimilar

1 29 U.S.C. §§ 1001-1381 (1970).
2 34 BNA PENSION REP. A-1.
3 *See* text accompanying note 24 *infra.*
4 29 U.S.C. § 206(d) (1970).
5 WAGE-HOUR OPINION LETTER No. 1276 (WH-224), Apr. 26, 1973.
6 42 U.S.C. §§ 2003-2000e-15 (1970).
7 Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971).
8 29 C.F.R. § 1604.9(f) (1972).
9 29 C.F.R. § 1604.9(e) (1972).
10 Bernstein & Williams, *Title VII And The Problem Of Sex Classifications In Pension Programs,* 74 COLUM. L. REV. 1203 (1974).

treatment based on sex are satisfied by financially penalizing an employer for hiring a woman. Struck by this irony, the courts have looked to the essence of the legislation and have held that applying sex-based stereotypes to individuals is discriminatory. This sex-stereotype doctrine, which originated under Title VII, logically requires that *both* contributions *and* benefits must be equal. At least in dicta, this doctrine has also been read into the Equal Pay Act through both § 703(h)[11] of Title VII and a strict reading of statutory Equal Pay exceptions.

By using a simplified model, it is possible to demonstrate the employer's plight, discuss the inconsistencies and developments in the applicable law, and, while not arriving at a solution, point out the practical ramifications of this problem under ERISA.

II. The Problem

Due to statistically different life expectancies, the planned periodic return from a life annuity of equal size will be less for a woman than for a man.[12] In fact, a substantial difference exists. Hypothetically, ABC, Inc. wishes to provide its employees with a maximum[13] straight life retirement annuity through a single employer plan.[14] For the purposes of this model, the following assumptions are made: 1) the plan will pay out a straight life retirement annuity;[15] 2) interest and payout periods coincide and occur at the end of the year;[16] 3) guaranteed interest is five percent per annum;[17] 4) life expectancy differentials are determined by a simple five-year setback;[18] 5) there are no provisions for employee contributions;[19] and 6) *M* and *F*, a male and female employee, are homogenous in every respect and earn $12,000.00 per year.

If ABC, Inc. uses a defined contribution plan,[20] and makes the maximum contributions allowed under ERISA,[21] then the annual annuity income that results upon retirement at age 65 will be:[22]

11 42 U.S.C. § 2000e-2 (1970).

12 *See* text accompanying note 23 *infra.*

13 *See* text accompanying note 21 *infra.*

14 Multiemployer Plans are subject to different rules. INT. REV. CODE OF 1954, § 414(f).

15 ERISA requires that plans offering an annuity must allow election of joint and survivor annuities. The problem of discrimination is demonstrated in principle by the single straight life annuity. 29 U.S.C.A. § 1055 (1974).

16 This assumption simplifies the compound interest aspects of the model.

17 This figure is higher than the usual 2.5 percent of the last 20 years. But it is an aspect of the "new money" of the last five years.

18 This is a standard method used in rating and charging schedules by many insurers. Although not as accurate as working from a commutation table, it serves the purpose of the model.

19 The equations for computing maximums are slightly different if employee contributions are involved. INT. REV. CODE OF 1954, § 415(b)-(c).

20 29 U.S.C.A. § 1002(34) (1974) states: "The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely on participant's account."

E. HICKS, ACCOUNTING FOR THE COST OF PENSION PLANS 142 (1965) defines "defined contribution plan" as:

> A pension plan which '(a) states the benefits to be received by employees after retirement or the method of determining such benefits. (b) accompanies a separate agreement that provides a formula for calculating the employer's contributions.

21 The maximum contribution under these assumptions is $3,000 per year. INT. REV. CODE OF 1954, § 415(c).

22 This assumes a full vesting of the benefits upon retirement.

TABLE I[23]

Years Employed	Annual Annuity Income		
	M's	*F*'s	Difference (*M*'s-*F*'s)
4	1,308	1,089	218
6	2,064	1,719	344
8	2,897	2,413	484
10	3,817	3,179	637
20	10,034	8,357	1,676
30	20,162	16,793	3,369
40	36,660	30,533	6,126

Although a difference of a few thousand dollars might seem negligible, the significance of this income differential increases when accumulated over several years: if *M* and *F* were employed for 30 years, at age 73 the difference in their total retirement income would be $26,955; sex is the sole basis for this difference.

If, on the other hand, ABC, Inc. uses a defined benefit plan[24] to avoid the differential in annual annuity income, then the annual employer contributions are:

TABLE II

Years Employed	Annual Annuity Income	Contributions Per Year By ABC, Inc. for *M*	for *F*	Difference	Total Difference for the Years Employed
4	4,800	11,009	13,217	2,208	8,835
6	7,200	10,464	12,563	2,099	12,596
8	9,600	9,706	11,931	2,225	17,805
10	12,000	9,431	11,323	1,892	18,923
20	12,000	3,587	4,307	719	14,396
30	12,000	1,785	2,143	358	10,747
40	12,000	982	1,179	197	7,881

Attaching lost investment or interest income to the extra contributions required for women further aggravates the sex-based differences in an employer's pension costs.

23 Tables I and II are computed through standard annuity and present value formulas. *See* P. RIDER, MATHEMATICS OF INVESTMENT 49-105 (1961); T. SIMPSON, MATHEMATICS OF FINANCE 231-77 (1969); J. VALENTINE, QUANTITATIVE TECHNIQUES FOR FINANCIAL ANALYSIS 62-64, 108-23 (1971).

24 The term "defined benefit plan" means a pension plan other than an individual account plan. 29 U.S.C.A. § 1002(35) (1974). The American Institute of Certified Public Accounts defines "defined benefit plan" as follows:

> A pension plan stating the benefits to be received by employees after retirement, or the method of determining such benefits. The employer's contributions under such a plan are determined actuarially on the basis of the benefits expected to become payable.

HICKS, *supra* note 20.

III. The Law

As the model demonstrates, both methods yield a difference based solely on sex. Therefore, a strict construction of the Equal Pay Act dictates that both should be a violation. The Division's application of the Act in analogous situations suggests, however, that only unequal contributions are a violation. In fact, as the Act has been applied, neither plan independently is an Equal Pay violation. The essence of Title VII indicates that both plans are violations, yet as applied by the EEOC, only the unequal benefits violate Title VII. The sex-stereotype doctrine, however, clearly indicates that both methods should violate both statutes.

A. *Wage & Hour: The Equal Pay Act*

The Equal Pay Act applies to employers and employee organizations otherwise covered by the Fair Labor Standards Act,[25] but does not reach employee hiring or job classification.[26] The Act provides in pertinent part:

> No Employer having employees subject to any provisions of this section shall discriminate, . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs in the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .[27]

The Act is the fruit of congressional concern over the economic and social consequences of different wage treatment based on sex.[28] Allowing either unequal benefits or unequal contributions ignores this intent. The large differences in periodic retirement income in Table I readily evidences the economic consequences of different treatment by sex.[29] This income gap of 20 percent could feasibly result in an entirely different standard of living. The social and economic consequences of the unequal contributions in Table II are more subtle, but are present nonetheless.[30]

Retirement benefits are a function of annual income, and the employer is encouraged to discriminate against women since it costs more to initiate a woman into the pension plan initially, and any promotion to higher compensated positions widens this cost difference. The economic conditions of the 1970's mandate a concern over the economic and social consequences of these incentives[31] to discriminate. Unless both contributions and benefits are equal, these problems are not alleviated under the Act as Congress intended.

This conclusion is strengthened by reference to the intent behind the

25 29 U.S.C. § 206(d) (1970).
26 Shultz v. Kimberly-Clark Corp., 315 F. Supp. 1323, 1326 (W.D. Tenn. 1970).
27 29 U.S.C. § 206(d) (1970).
28 109 CONG. REC. 9212 (1963) (remarks of Representative Donahue).
29 *See* text accompanying note 24 *supra.*
30 *See* text accompanying note 23 *supra.*
31 Bernstein & Williams, *supra* note 10.

statutory exceptions to the Equal Pay Act.[32] Of the four exceptions, only § 206(d)(1)(iv) applies to this problem: "a differential based on any factor other than sex."[33] Congress, intending by this subsection to eliminate subjective assumptions and traditional stereotyped misconceptions regarding the value of women's work,[34] refused to restrict § 206(d)(1)(iv) to differences "solely on the basis of sex."[35] Sex-based mortality tables might have been justified under such an exception, but Congress rejected it.

The Wage & Hour Division also realized the importance of the narrow application of this exception. In an interpretive bulletin, it pointed out that "the requirements for such an exception are not met unless the factor of sex provides no basis for the wage differential."[36] With the courts having accepted this narrow reading of the exception,[37] the picture is *almost* complete: congressional intent, statutory text, administrative bulletin, and case law all maintain that sex can play no role in different wage treatment of employees, yet administrative rulings do not fall within this pattern.

The Division's enforcement history of the Equal Pay Act has avoided requiring equal benefits and contributions; the focus has been on contributions. A good example is the treatment of insurance. The Division excluded sex as a factor in determining coverage by a hospital insurance plan.[38] However, the amount of the benefits and the extent of dependency coverage were allowed to be differentiated by sex as long as employer contributions were equal[39] or the employer did not contribute at all.[40]

A similar analytical focus on contributions has not been applied to mortality based pension plans. In 1965, Wage & Hour stated that the Equal Pay Act will look to either the contribution or the benefit and will not deal with the actuarial method of determining that benefit.[41] This position was reiterated in 1966 when the Division stated that if the contributions are equal, then unequal benefits are not an Equal Pay violation.[42] Furthermore, in 1973 the Division's most recent opinion stated that either benefits *or* contributions must be equal.[43]

These rulings do not flow from the equal contribution approach of the Division. Furthermore, they conflict with the congressional intent established previously. Therefore, the 1973 ruling is seemingly only a measure to avert conflict with the EEOC.

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32 "Recognizing that the concept of wage payment discrimination against women is false . . . this represents the correction of basic injustice being visited upon women in many fields of endeavor." 109 CONG. REC. 9212 (1963) (remarks of Representative Donahue).

33 The other three exceptions are: (1) a seniority system; (2) a merit system; and (3) a system which measures earnings by quantity or quality of products.

34 Shultz v. First Victoria Nat'l Bank, 420 F.2d 648, 656 (5th Cir. 1969).

35 110 CONG. REC. 2728 (1964) (remarks of Representative Dowdy).

36 29 C.F.R. § 800.151 (1972).

37 Hodgson v. Security Nat'l Bank, 460 F.2d 57, 59 (8th Cir. 1972), *citing* 29 C.F.R. § 800.142 (1972).

38 WAGE-HOUR SPEECH, Jan. 10, 1966; WAGE-HOUR OPINION LETTER No. 394, Oct. 27, 1965, No. 388, Oct. 14, 1965.

39 WAGE-HOUR OPINION LETTER No. 484, Aug. 3, 1966.

40 WAGE-HOUR SPEECH, Jan. 10, 1966.

41 WAGE-HOUR OPINION LETTER No. 406, Nov. 24, 1965.

42 WAGE-HOUR OPINION LETTER No. 484, Aug. 3, 1966; 29 C.F.R. § 800.116(d) (1964).

43 WAGE-HOUR OPINION LETTER No. 1276 (WH-224), Apr. 26, 1973.

B. *EEOC: Title VII*

Title VII of the Civil Rights Act[44] strives to eliminate disparate treatment of women by placing them on an equal footing with male employees.[45] Section 703(a)(1) of the Act is the most critical for pensions:

> It shall be unlawful employment practice for an employer . . .
> (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .[46]

The EEOC has long recognized that retirement and pension plans are "conditions of employment" within the meaning of the Act.[47] Prior to 1972, the EEOC simply required that an employer satisfy the Wage & Hour requirements under Equal Pay in order to satisfy Title VII.[48] However, in 1972 the Commission interpreted Title VII as demanding equal benefits under § 703(a)(1).[49] Therefore, pension provisions which allow one sex to retire at an earlier age than the other,[50] and plans with different survivor benefits based on sex,[51] different dependance coverage for one sex than the other,[52] and different fringe benefits of all types[53] were brought within the scope of § 703(a)(1) by the *EEOC Guidelines on Discrimination Because of Sex*.[54]

As indicated in Table II, providing equal benefits causes a large cost differential. If the EEOC accepted this cost difference as a defense for benefit differences, their position would have effectively been unchanged. Therefore, to ensure equal benefits, the EEOC refused to accept this cost differential as a valid defense to a § 703(a) violation.[55]

Nor is lack of intent to discriminate a valid defense, since merely an intent to do that which turns out to be discriminatory[56] is sufficient. Other defenses which might have legally sustained mortality based plans have also been discredited. The administrative convenience, which the tables provide, is not a valid justification for the discrimination.[57] The fact that the tables are partially based on nondiscriminatory considerations is also of little aid.[58] Therefore, if

44 42 U.S.C. §§ 2000e to 2000e-15 (1964).
45 Gerstle v. Continental Airlines, Inc., 358 F. Supp. 545, 550 (D. Colo. 1973).
46 42 U.S.C. § 2000e-2(a)(1) (1970).
47 Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90 (3d Cir. 1973); Peters v. Missouri-Pac. R.R., 483 F.2d 490 (5th Cir. 1973); Bartmess v. Drewrys U.S.A., Inc. 444 F.2d 1186 (7th Cir. 1971); Fitzpatrick v. Bitzer, 390 F. Supp. 278 (D. Conn. 1974); Mixson v. Southern Bell, 4 Fair Emp. Prac. Cas. 27 (N.D. Ga. 1971).
48 29 C.F.R. § 1604.7(a)-(b) (1967).
49 29 C.F.R. § 1604.9(f) (1972).
50 *Id. See* Peters v. Missouri-Pac. R.R., 483 F.2d 490 (5th Cir. 1973); Fitzpatrick v. Bitzer, 390 F. Supp. 278 (D. Conn. 1974).
51 Mixson v. Southern Bell, 4 Fair Emp. Prac. Cas. 27 (N.D. Ga. 1971).
52 29 C.F.R. § 1604.9(d) (1972).
53 29 C.F.R. § 1604.9(a) (1972).
54 29 C.F.R. § 1604.9 (1972).
55 29 C.F.R. § 1604.9(e) (1972).
56 Griggs v. Duke Power Co., 401 U.S. 424 (1971); Roger v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975); Jones v. Lee Way Motor Freight Inc., 431 F.2d 245 (10th Cir. 1970); Trivett v. Tri-State Container Corp., 368 F. Supp. 134 (E.D. Tenn. 1973).
57 Polelle v. HEW, 386 F. Supp. 443 (N.D. Ill. 1974).
58 King v. Laborer's Local 818, 443 F.2d 273 (6th Cir. 1971).

mortality based plans are to be saved as an exception to Title VII, the prospects are limited to the business necessity exception.

In *United States v. Bethlehem Steel Corp.*,[59] the Second Circuit held that an employer must meet the following criteria to establish the business necessity defense: 1) the act must do more than serve a legitimate managerial function; 2) the act must be essential to the ends of safety and efficiency; and 3) there cannot be any less discriminatory alternative.[60]

The tables do serve a legitimate managerial function as a basis for planning, costing-out, tax matters, and simplifying administrative procedures. And while the tables also promote efficiency, this is not enough to meet the first two prongs of the *Bethlehem* test. As for the third requirement, there are any number of factors that demonstrate higher statistical validity for life expectancy than does the factor of sex.[61]

These mortality based plans, then, do not fall within the business necessity exception.

C. *The Sex-Stereotype Doctrine*

1. Under Title VII

Ironically, even if one satisfies both Acts as applied by the Division and the Commission, employees are being treated differently solely because of sex. Perhaps this is why many courts have looked to the nature of the discrimination in their decisions: employees should not be treated differently on the basis of general sex-class stereotypes.[62] This approach was first used under Title VII.

In *Willingham v. Macon Telegraph Publishing Co.*,[63] the court extended § 703 of the Civil Rights Act to all differences in the treatment of men and women resulting from sex stereotypes. In 1971, the EEOC determined that the height criterion is inherently discriminatory and hence subject to strict scrutiny.[64] In *Rosenfeld v. South Pacific Co.*,[65] the Ninth Circuit held that regulating the hours women could work and the weight they could lift violated Title VII.

This sex-stereotype approach has also been applied to sex-plus criteria. In *Sprogis v. United Air Lines Inc.*,[66] the Seventh Circuit struck down a no marriage rule for women flight cabin attendants. The defendant insisted that Title VII did not apply because the rule discriminated against married women as opposed to single women and not as opposed to men. The court noted that Congress had intended to eliminate the entire spectrum of disparate treatment of men and

59 446 F.2d 652 (2d Cir. 1971).
60 *Id.* at 662.
61 *See, e.g.*, Note, *Sex Discrimination and Sex Based Mortality Tables*, 53 B.U.L. REV. 624 (1973), discussing factors such as height, weight, smoking, etc.
62 *See* Silbowitz v. HEW, 95 S. Ct. 1503 (1975); Reed v. Reed, 404 U.S. 71 (1971) (applying equal protection to sex discrimination).
63 482 F.2d 535 (5th Cir. 1973).
64 CCH Empl. Prac. Guide 6223; EEOC Decision Case No. 71-1418 (1971). For similar holding, see Smith v. City of East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973); 42 U.S.C. § 1983 (1970); Hardy v. Stumpf, 37 Cal. 3d 958, 112 Cal. Rptr. 738 (App. 1974).
65 444 F.2d 1219 (9th Cir. 1971).
66 444 F.2d 1194 (7th Cir. 1971).

women resulting from sex stereotypes. The *Sprogis* approach would necessarily find sex-based mortality tables in pension plans discriminatory.

Other statistically valid regulations have failed under the sex-stereotype standard. For example, in 1969 the EEOC invalidated a retirement plan that allowed a lump-sum option only to women below the age of 50. The option was premised on statistical proof that men remained in employment longer than women. EEOC, however, refused to accept the statistical evidence as a defense.[67]

From the standpoint of statistical assumptions, the recent cases dealing with regulations excluding pregnancy from temporary disability coverage present the closest parallel to the application of the sex-stereotype doctrine to sex-based mortality tables.[68] Therefore, the court's strict application of the sex-stereotype doctrine in those maternity cases weighs heavily on the future of mortality based pension plans. In *Gilbert v. General Electric Co.*[69] and *Sale v. Waverly-Shell Rock Board of Education,*[70] federal district courts invalidated the disability exclusions. The *Sale* court pointed out that the Civil Rights Act of 1964 is not limited to a constitutional rational basis standard, nor is it to be narrowly construed to cover only discrimination based *solely on sex.* In short, the court recognized the sex-stereotype doctrine as an essential element in the application of Title VII.

The Third Circuit's use of this approach in another pregnancy disability case, *Wetzel v. Liberty Mutual Insurance Co.*,[71] is especially significant for the pension problem. The appellant company raised several defenses for its program which excluded pregnancy from temporary disability coverage: 1) pregnancy is not a sickness; 2) it is a situation voluntarily entered into; and 3) the high cost of insuring pregnancy as a disability. Using insurance and actuarial criteria, the arguments in favor of allowing a sex-based difference in disability coverage are much stronger in *Wetzel* than in pension plans. In *Wetzel,* the employer and the insurance carrier knew with certainty that no male employees would become pregnant. On the other hand, mortality tables reflect only a probability that most women will live longer than most men. Yet the *Wetzel* Court, citing *Sprogis,*[72] struck down the differential coverage as based on sex-stereotypes which overly categorized distinctions between men and women,[73] with the three reasons given by the employer all failing as defenses under § 703.[74]

A rigid adherence under Title VII to the *Sprogis* sex-stereotype approach, despite certainty that a man cannot become pregnant, leads to the conclusion that mortality based pension plans will not withstand attack under the sex-stereotype doctrine.

2. Equal Pay Act

67 EEOC Decision Case No. DC-68-9-183t, 2 Fair Emp. Prac. Cas. 119 (1969).
68 *See* note 61 *supra.*
69 375 F. Supp. 367 (E.D. Va. 1974).
70 390 F. Supp. 784 (D. Iowa 1975). *See also* Wisconsin Tel. Co. v. Department of Industry, Labor & Human Relations, 68 Wis. 2d 345, 228 N.W.2d 649 (1975) (similar result based on state statute).
71 511 F.2d 199 (3d Cir. 1975).
72 *See* note 66 *supra.*
73 511 F.2d at 207.
74 *Id.* at 206.

Anticipating conflicts between the EEOC and the Wage & Hour Division in the treatment of overlapping areas, Title VII § 703(h) provides that:

> Notwithstanding any other provision of this subchapter, . . . [i]t shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.[75]

This section was intended to prevent usurpation of the Equal Pay Act by Title VII. For example, in 1964 Senator Humphrey noted that valid statistical differences were allowed under the Equal Pay Act and therefore would be allowed under the Civil Rights Act by virtue of § 703(h).[76] This safety valve, however, was eliminated in *Shultz v. Wheaton Glass Co.*,[77] when the Third Circuit held that because these Acts have the "same fundamental purpose against discrimination"[78] the Equal Pay Act cannot undermine the Civil Rights Act through § 703(h).

Under this interpretation, § 703(h) limits permissible activity under the Equal Pay Act to that which is permitted under the Civil Rights Act. Therefore, should the Civil Rights Act require that both contributions and benefits be equal, the Equal Pay Act must likewise require equal benefits *and* equal contributions.

A federal district court reaches this conclusion in *Manhart v. City of Los Angeles.*[79] There, the defendant maintained a defined benefit pension plan which required employee contributions.[80] As a consequence of planning for equal benefits, as required by the EEOC, the contributions required of the female employees were higher per period than those required of the male employees. The plaintiff, suing on behalf of the female employees of the defendant, moved for a preliminary injunction. The court, after addressing itself to the likelihood of plaintiff's success on the merits, surveyed the established case law, statutes, and administrative regulations, and concluded:

> The basic principle which emerges from these authorities and from the case law is that sexual discrimination under § 703(a)(1) exists whenever general fact characteristics of a sex-defined class are automatically applied to an individual within that class.[81]

This was, in short, a concise restatement of the sex-stereotype doctrine.

The defendants cited § 703(h) and 29 C.F.R. § 800.116(d), "a regulation of the Wage-Hour Administration which implies that segregated actuarial treat-

75 42 U.S.C. § 2000e-2(h) (1970).
76 110 CONG. REC. 13,663-64 (1964) (remarks of Senator Humphrey).
77 421 F.2d 259 (3d Cir.), *cert. denied,* 398 U.S. 905 (1970).
78 *Id.* at 266.
79 387 F. Supp. 980 (C.D. Cal. 1975).
80 It is important to note that this case involved employee funding which was assumed not to occur in the model discussed in text at notes 12-24 *infra.*
81 387 F. Supp. at 983.

ment of men and women"[82] is allowed under the Equal Pay Act. The court quickly disposed of this: Even if § 206(d)(1) applies to this case, the court believes that differentiation based on sex segregated actuarial tables constitutes a differential based on the "factor" of sex in violation of that section.[83]

Through very strict construction of the 206(d)(1)(iv) exception, the court read the sex-stereotype doctrine into the Equal Pay Act, the same result as in *Shultz* but by a more direct route.

IV. Conclusion

To describe the state of the applicable law, one must first decide which inconsistencies to overlook. The sex-stereotype doctrine, which meets the intent and textual understanding of both acts, and which will satisfy both enforcing agencies, excludes any use of sex-based mortality tables. The equal benefits approach satisfies the enforcing agencies and makes employment of women more expensive. Equal contribution satisfies the Wage & Hour Division, but not the EEOC.

These legal intricacies effectively emasculate the flexibility allowed by ERISA. If the employer uses an annuity plan, then he must guarantee equal periodic benefits, absorb the cost differences himself, and somehow ignore this distinct economic disadvantage of hiring women.[84] This form of benefit planning involves defined benefit plans, which may be undesirable.[85] The employer must use a more intricate financial and tax planning scheme.[86] He also becomes subject to the required Pension Benefit Guarantee Corporation charges[87] and the automatic 30 percent lien upon empoyer net worth in the event of plan termination.[88]

The cautious employer must also avoid options which mix mortality-based benefits with benefits determined notwithstanding life expectancy. For example, a plan with an option to take an annuity in lieu of a lump-sum distribution[89] is desirable for the employee.[90] However, since the periodic retirement benefits must be equal, the cash value of the woman's annuity will be greater and, hence, the woman's lump sum larger than the man's.

In any event, for all the employer's pains, the net periodic income is still unequal because the federal government uses sex-based mortality tables to tax annuity income.[91] Therefore, if the employer makes the necessary unequal contributions to equalize gross periodic benefits, the man's net annuity income will be less than the woman's net annuity income.

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82 *Id.* at 984.
83 *Id.*
84 Bernstein & Williams, *supra* note 10.
85 Hurd, *Defined Benefit Plans: An Endangered Species?* 14 TRUSTS & ESTATES 206-08 (1975).
86 *Id.*
87 29 U.S.C.A. §§ 1321-23 (1974).
88 29 U.S.C.A. §§ 1362-81 (1974).
89 INT. REV. CODE OF 1954, § 72(h).
90 The employee can elect to take the lump sum subject to INT. REV. CODE OF 1954, § 402(e)(1), or take the annuity depending on other income or capital gains.
91 I.R.S. PUBL. No. 575 (1975).