

# TAKING THE HEAT: GENDER DISCRIMINATION IN FIREFIGHTING\*

## PROCEEDINGS:

**DANIELA KRAIEM:** Good afternoon everyone. My name is Daniela Kraiem, I'm the Associate Director of the Women in the Law Program, and I am thrilled to be able to bring you this program today. We're working in conjunction with the Program on Law and Government and with Professor Richard Ugelow. I'm going to ask everybody to fill in over here since we're facing this way. It's a little easier for you guys to see.

We are extraordinarily honored to have Captain Berkman here as well as our other guest speakers. One of the most difficult issues in gender discrimination has been addressing the issues of women entering into traditionally male dominated fields, particularly those that are physically demanding and dangerous because this is an area in which stereotypes about the abilities of men and women really come to the fore. It's people like Brenda Berkman and our other guest speakers today who have really shown us how those stereotypes operate and how difficult they are to overcome, and also how oftentimes those stereotypes are based in nothing but myth.

So without further ado, I am pleased to introduce you and pleased to welcome our outside guests and pleased to welcome all of our staff and students here today, and I will turn it over to our moderator, Professor Ugelow. I want to also thank before I do, the *Journal of Gender, Social Policy & the Law*, who will be publishing the transcripts of today's

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\* The American University *Journal of Gender, Social Policy & the Law* sincerely thanks all of the panelists who contributed their expertise, insights, and life experiences to make this dialogue a memorable and meaningful discussion of the obstacles (past and present) faced by female firefighters. We hope this discussion provides the legal, historical, scientific, and social context of the struggle embarked upon by female firefighters like Captain (ret.) Brenda Berkman, who like a phoenix from the ash, inspired and enabled countless women to serve nobly as firefighters. Special gratitude to Professor Richard Ugelow, Washington College of Law, for his assistance in the publication of this transcript, and to Amanda C. Dupree, Washington College of Law, 2009, for the thorough introduction that preceded this transcript.

proceedings as well as searching for other articles on issues of gender discrimination in employment to go along with it. So thank you all and thank you to all the *Journal* students who are with us here today.

**PROFESSOR RICHARD UGELOW:** Thank you, Daniela. What Daniela didn't say is that we worked on the same case involving female firefighters at different times involving the City of San Francisco. I represented the United States and Daniela represented the Union in that case, and we'll talk – maybe talk a little bit about that later. What you have behind you – behind me anyhow – in front of you, is a trailer from a movie called “Taking the Heat.” It was a public broadcasting production a couple of years ago. It will be on reserve in the library if anybody would like to look at it. It's a story about female firefighters in New York and features Brenda Berkman, and it's a very compelling story and I ask – I urge you to look at it if you have any interest in this subject.

First, I want to thank you all for coming today. I – as Daniela said, we have a very exciting panel that I will introduce shortly, and I particularly want to thank the Women in the Law Program and the Law and Government Program for sponsoring today's program. Of course it would not be possible without them. As Daniela said, I am Richard Ugelow. I teach in the General Practice Clinic at Washington College of Law [WCL], and I also teach an employment discrimination course based upon one of the cases that is in the material today about a female firefighter who was denied a position in Connecticut. But before coming to the law school in 2002, I was a trial attorney in the Civil Rights Division at the Department of Justice for twenty-nine years. And as some of you know the Department of Justice, among its other responsibilities, is charged with enforcing Title VII of the 1964 Civil Rights Act.<sup>1</sup>

That statute, Title VII, prohibits discrimination in employment based upon race, national origin, gender, religion and color. Until 1972, Title VII – from 1964 to 1972, Title VII covered private employers. State and local government employers and the federal government were exempt . . . from its coverage. In 1972, Congress amended Title VII to extend its reach to state and local governments and to the federal government. So before 1972, it was perfectly legal to discriminate on the bases of race, sex, religion, national origin, and color by state and local governments and indeed [by] the federal government.

And if you go back to the archives in something called “Newspapers” – print newspapers, at the time – and look at the ads and job announcements for positions for protective service positions like police and fire, you will

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000(a)-(h-6)).

see that what was advertised were jobs like policeman, policewoman, and fireman. Firewoman was never an advertised position. The job of policeman was a patrol position—who we see on the streets walking around the District of Columbia and other jurisdictions. Policewomen were females who worked with juveniles or worked in jails that housed female inmates. Women could not apply to be a policeman, and men could not apply to be a policewoman, and of course women could never apply for the position of fireman.

So let me give you a thumbnail sketch – if I can get this thing going here – of what the demographics of police and firefighters [were] in roughly 1972: largely all white men. Okay. So I have pictures of a firehouse in Los Angeles in 1973 and you can just look at the racial and gender composition of that department, and I suspect fairly typical of all fire departments and probably police departments across the country. And so as I mentioned the Department of Justice is the primary enforcer of Title VII against state and local governments. In 1972 when the statute was extended to state and local governments, much of the Department of Justice's enforcement focused on the integration of police and fire departments in the United States, and there were a number of important reasons why this was the case.

The first is that following the assassinations of Martin Luther King and Robert Kennedy and the riots that ensued, there was a commission called the Kerner Commission that investigated the causes of the riots. And while there were numerous reasons and bases for the riots, one of the issues that was – [one of the] important issues raised by the Kerner Commission – was the lack of representation of minorities and women on protective service forces in the major cities of the United States. They were all, as I said earlier, largely all white males. There were very few females in police departments except for policewomen, and certainly none in the fire service, and of course there were very few minorities, African Americans and Hispanics, and in west coast cities, Asians.

So the Department of Justice felt it important to identify the employment practices that acted as the barriers to the hiring of minorities and to a lesser extent, women. So the primary focus in 1972 and the years and the decades that followed was ensuring that there were hiring opportunities for under-represented males. And this was done through litigation. Nevertheless, many, if not most of the . . . complaints, the lawsuits, filed by the Department of Justice against police and fire departments across the country – and I'm talking about Los Angeles, San Francisco, Buffalo, Cleveland, Miami – you can name major cities in the country and there were lawsuits filed contain[ing] allegations of gender discrimination in addition to race and national origin discrimination. And the cases were concluded either through litigation or through consent decrees, voluntary agreements that are enforced by the court.

The Department of Justice sought relief for those groups in police departments. That is they sought hiring – affirmative hiring relief for minorities and women in police departments, and for minorities in fire departments. And you can read that as “minority males” in fire departments, and no relief for – no affirmative hiring relief [for] women in fire departments, although there was a general injunction included in these agreements that prohibited discrimination based upon race, national origin, and gender.

So as a result, not only was there affirmative hiring relief, you had the names of these jobs changed. In police departments it was no longer policeman and policewoman, it now became police officer. In fire departments it became firefighter, although that’s not generally accepted today and Brenda might touch upon that, but nevertheless there were no – there was no push to have women hired, at least no push by the Department of Justice to do that.

Now, why would you ask the Department to do this? Well, the decision makers at the Department of Justice who were responsible for this litigation quite honestly felt that women were not physically qualified to do the job of firefighter. And there was another reason. Because of the way the hiring process worked at that time – civil service hiring process – most jurisdictions would administer a written test and a physical performance test to hire firefighters, and they would give scores on each – and all of you have taken the LSAT, and you’ve all taken tests that are scored over the years, so you know that this feeling that somebody who scores higher on the test is better than somebody who scores a little lower.

Well, the reality of these tests at the time, and indeed, probably continuing today, is that minorities score less well on written tests and women score less well relative to males on physical performance tests. So if you are rank ordering people, women are not going to be hired based upon their rank order scores in the physical performance test, and minorities are not going to be hired based up their rank order scores on the written tests.

Now what, you may ask, is wrong with having written tests or physical performance tests? Everybody has to take them. They’re neutral selection devices. They keep out favoritism. Well, the reality is at the time they perpetuated favoritism for white males because the touchstone of Title VII is the development of selection criteria that are predictive of successful job performance.

There was no evidence that the tests that were administered in the early ’70s and maybe even today . . . were predictive of successful job performance. That is, that if somebody scored higher on the test [they] would do better on the job, and after all, that’s what we are looking for.

We're looking for people who can do the job effectively and "are the best," however you define the best. But there was no evidence that the selection criteria at that time were doing that job.

So you had a situation which kept – employment practices that kept minorities out – and effectively kept women out of protective service jobs. I would add that prior to 1972, most police departments and many fire departments never had a physical performance test as part of their selection criteria. The only reason that one can discern that they imposed it is because women became eligible for the job for the first time and so there was a concerted effect to keep women out of both police departments and fire departments, but particularly firefighter.

**BRENDA BERKMAN:** It's shocking.

**PROFESSOR RICHARD UGELOW:** It is shocking. It shocks the conscience of the court, you're all law students . . . . In any event, you can argue about the reasons, but the decision makers at the Department of Justice made a decision to favor the hiring of minority males in fire departments and trying to minimize the adverse impact – or eliminate the adverse [impact] of the written or cognitive tests. And this was done by requiring fire departments to use cognitive tests on a pass/fail basis, setting a minimum pass point, and then allowing the departments to hire people based upon the rank order scores of physical performance tests. Well, you can look at the results; the results are going to be there are going to be no women hired. Of course as you'll hear, women do less well and have less upper body strength and speed than men – as a group – as a group. We will talk about this later too – I hope.

Okay, so that was the state of affairs until a law student at . . . New York University Law School, who wanted to be a firefighter contacted Professor Laura Sager, the director of the New York University Women's Rights Clinic. This law student, Brenda Berkman is sitting here today. Brenda Berkman was one of more than 400 people to apply to become a New York City firefighter in 1977. Ultimately 170 women took the physical performance test administered by the City of New York to firefighter applicants and guess what, not one passed. Now, in addition to being a successful law student, Brenda was a marathon runner and she trained diligently for the physical performance examination. Well, the New York City Fire Department had more than 11,000 firefighters at the time, not one was a female. And as statisticians will tell you, something like that doesn't happen by chance.

In 1979, the Women's Rights Clinic at NYU with the assistance of a

private law firm filed a lawsuit, *Berkman v. City of New York*.<sup>2</sup> This was groundbreaking litigation, and the ground continues to shake as a result of Brenda's courage in bringing that lawsuit. Most immediately, the litigation resulted in Brenda and forty-one other women taking and passing a new physical – job-related – physical abilities test, rather than the strength, speed-based abilities test that New York City used traditionally.

This group became the first group of women on [the] New York City Fire Department. Not only did the litigation break the artificial barriers that eliminated fully qualified women from becoming firefighters, it forever changed government policy – federal government policy. That is the policy that existed at that time of not affirmatively promoting the hiring of women as firefighters. But it's not like the Department of Justice turned – changed its policy, changed its colors overnight. It took a lot of effort by a lot of people. Private attorneys and non-governmental organizations took note of the *Berkman* litigation and contacted the Department of Justice and in essence said, "What are you doing about this problem?" Because remember, the Department of Justice is the primary enforcer of Title VII in this area.

As a result, the Department of Justice became active in cases in San Francisco, Los Angeles, Buffalo, New York, Cleveland and many other cities across the country. And none of this would have happened without the courageous effort of Brenda Berkman. Now the *Berkman* litigation shows how law school clinics can have an impact or have a good result for the clients and serve the public interest. It changed government policy and had a wonderful result. We are fortunate here at WCL to have a wonderful clinical program, and we should all be proud of it. We also are fortunate to have the Women in Law Program, which focuses on issues of gender and the law. Indeed, I wish Brenda had been a law student here and had gone to see Professor Ann Shalleck, the director of the Women in Law Program, and maybe somebody else would be putting on this program.

**BRENDA BERKMAN:** It's tough to do it from New York.

**PROFESSOR RICHARD UGELOW:** Well, if you had been a law student here. But before continuing, you should know that after eight years of heavy-duty litigation and two decisions by the United States Court of Appeals for the Second Circuit,<sup>3</sup> a physical performance test [that] had virtually had the same discriminatory impact as the one that Brenda took in 1977 was approved by the court. And the major reason for this

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2. 536 F. Supp. 177 (E.D.N.Y. 1982).

3. *Berkman v. City of New York*, 812 F.2d 52 (2d Cir. 1987); *Berkman v. City of New York*, 705 F.2d 584 (2d Cir. 1983).

discriminating impact was the test emphasized speed and strength and it was used on a rank order basis. The court's final decision, however, does not diminish the importance of the *Berkman* litigation. A great deal of good has come from it, and it continues to come from it. A women's firefighter association was created, which Brenda headed for many years.<sup>4</sup> More importantly, the sensitivity of the Department of Justice and other interested groups was raised by the *Berkman* litigation and has resulted in females being hired and accepted in fire departments throughout the United States, and you'll hear some more about that from Dr. Bendick.

But a lot of work remains, but there's no turning back, so now let's go forward and hear where we were and where we're going. I am delighted that Brenda Berkman, who is seated right here and recently retired as a Captain of the New York City Fire Department, is here to tell you firsthand about her litigation. Seated next to her is Karin Billerbeck, an associate research scientist with Human Performance Systems, a consulting firm in Maryland that develops selection criteria for physically demanding jobs like firefighter. Karin is sitting in for Debra Gebhardt, founder of Human Performance Systems, who could not be here today, and who worked on many of the firefighter cases that I also worked on.

Seated next to Karin is Marc Bendick, a labor economist who will discuss a report that he recently coauthored entitled "A National Report Card on Women in Firefighting."<sup>5</sup> Finally and certainly not least, is Captain Dee Richards from the Montgomery County, Maryland Fire Department who will talk briefly about her experience as a firefighter. She's been a firefighter in Montgomery County almost twenty years now, and has had a dynamic career, and I think you'll all be interested in hearing from her. So let me give – turn it over to Brenda for a few minutes.

(Applause).

**BRENDA BERKMAN:** First of all, I want to apologize for having a really bad head cold, so if I were talking on a fire department radio right now, maybe I'd get a little bit more credence because they'd think I was a guy talking, but –

(Laughter).

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4. *International Association of Women in Fire and Emergency Services (IWOMEN)*, <http://www.wfsi.org/> (last visited Aug. 6, 2009).

5. DENISE M. HULETT, MARC BENDICK, JR., SHEILA Y. THOMAS, & FRANCINE MOCCIO, *A NATIONAL REPORT CARD ON WOMEN IN FIREFIGHTING* (Bendick and Egan Economic Consultants, Inc.) (2008).

**BRENDA BERKMAN:** (Clears throat). No, joking aside, I intentionally always lowered my voice when I was in the firehouse because male voice tones have a lot more authority and women actually get made fun of for having squeaky high-pitched voices. So it's a great pleasure, thank you for taking time out of your busy days to be here, and what Richard has asked me to talk about today is a little bit about life as a litigant because not so many years ago, although most of you were not born yet, I was sitting in spots very similar to yours. I was a law student at NYU and I . . . I had been interested since moving to New York in getting a job in the uniformed services, but I was in law school and I would say intending to go out and practice law, when for the first time in its one hundred plus year history, New York City Fire Department opened its test to women.

As Richard said, prior to that, women – it didn't matter if you were an Olympic caliber athlete, it didn't matter if you had been performing volunteer firefighting for a thousand years successfully and were chief of your department, it did not matter who you were if you were female gender you did not – you were not allowed to even apply to become a New York City firefighter until 1977, not that long ago. And I was in my third year of law school when they opened up the testing to women and I decided I was going to take the test. And – I was very interested in becoming a firefighter, my late father-in-law had represented the Fire Officers Union for over thirty years. Of course, once I got hired they fired him because they blamed him for me coming on the department. That was one of only many acts of retaliation that my family suffered as a result of my coming on the job.

I decided to take the test and as Richard said, I trained very hard for the test, I was a marathon runner. I went out and chopped wood. I carried my husband up and down the stairs of our apartment building.

(Laughter).

**BRENDA BERKMAN:** No joke – and of course you know in reality firefighters don't put victims up on their shoulders and carry them around in fires. We drag them out, and usually more than one of us drags them out. That's one of only many things that were part of the then current New York City Fire Department tests that had absolutely nothing to do with the way that we perform the job of firefighting, and in many cases were just put in there because a bunch of guys sitting around a table thought, "Hm, you know, my daughter can run a mile in eight minutes, therefore we have to make the pass mark for the mile run seven minutes." That was the way that the job validation was going on in 1975, 1976 when they were developing the first tests that women were going to be allowed to take.

But I was in a law clinic at the time. I was not in the Women's Rights



Law Clinic, but I was in a different – the Employment Law Clinic, which was one of the – possibly the best part of my law school experience. And when I took the test and I failed it and I discovered that not a single woman in New York City had passed that exam, I couldn't believe that there wasn't a single woman in – how many million people live in New York City – that couldn't be trained to be a firefighter, and in fact I believed that I could be trained to be a firefighter. I was much bigger in those days, no joke. I've shrunk an inch since coming on the job, it's all that jumping up and down off the rig with heavy equipment on your back, it typically shrinks us at least an inch. Since my retirement I've also lost about fifteen or twenty pounds of muscle, but in those days I was in incredibly good shape, and I believed I could be trained to be a firefighter.

Now, did I know what it was going to be like to be a litigant in this case? And Richard, you got to sort of keep me going on the time here. I had some inkling because I had worked on a female fire – sorry, female police officer's case<sup>6</sup> that my late father-in-law was doing against the City of New York, that [involved], as Richard described, [how] women were prevented from going out on patrol, so therefore they had no promotional – real promotional opportunities. Their job assignments were limited. When Title VII came along – oh, and by the way, they were hired at later dates with higher scores than the men. There were two lists, policeman, policewomen – the same test. Women with much higher scores on the written test were hired after the men. How's that for a merit system?

And so they sued when they got laid off first, and I [worked on] that case. And the named class plaintiff in that case, Bernadine Acha, policewoman Bernadine Acha, went through hell because she was the named class plaintiff.<sup>7</sup> They left her out on patrol by herself, she could never be assured that she was going to have any backup if she called for it, operating in the most dangerous neighborhoods. She got, you know, severe harassment from her coworkers, her marriage broke up. All kinds of things, terrible things, were happening to her as a result of her being the named class plaintiff in that lawsuit. So I had a little bit of an inkling of what might go on when I agreed to be sole named class plaintiff.

When Laura Sager from the Women's Rights Clinic – we tried to find other women who had taken the physical portion of the exam for firefighter and failed it. We tried to find them to agree to become named plaintiffs in our class action lawsuit, and nobody would agree. So I became the sole named class plaintiff. Well needless to say, the City tried to knock me out as the sole named class plaintiff. How could someone who at this point I

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6. *Acha v. Beame*, 570 F.2d 57 (2d Cir. 1978).

7. *Id.*

had graduated law school and passed the bar exam. How serious [was] I really about taking this job? I was just doing it to do some kind of women's rights thing, you know, feminist, Gloria Steinem, burn my bra.

(Laughter).

**BRENDA BERKMAN:** [They thought] I didn't really want to be a firefighter, I was just goofing around here, and so they tried to knock me out. I had to take an oath for Judge Sifton saying that if I won the lawsuit, I would cease the practice of law and take the job of firefighter, and I did that, and as a result he denied their motion to knock me out as named class plaintiff because that would have ended the lawsuit right there. So I was not a serious named class plaintiff, I was one of those you know, lefty, commie lawyers that was really just trying to make a political point here, which is a bit of a joke.

And I had some idea of – things were not going to be easy, but frankly folks, I did not know how hard it was going to be, and people asked me, you know, would I do it again? I don't think that many of us have an opportunity to change history in our lifetime, and for that I'm very grateful to the lawsuit for allowing me to have an impact on something that I regard as a very important issue. (Very emotional tone). Excuse me. I think – I attribute this to the drugs.

(Laughter).

**BRENDA BERKMAN:** (Clears throat). Sudafed is a big depressant.

(Laughter).

**BRENDA BERKMAN:** Anyway, what can I tell you – as lawyers, presumably not a lot of you are going to take the fire department test – but what can I tell you as lawyers about what you can do out there once you're practicing law is to support the litigants like me. Because, does the work continue to need to be done? Yes, it does. And as a matter of fact, I would say that we have gone backwards as a country . . . and I'd say that's still the case. But what can I tell you as lawyers who are about to go out there? I think this work continues to need to be done, but it is not easy work, and you have to understand some things about your clients. And that's what I want to tell you very very quickly because I don't want to take up all these other people's time.

Social change is long and hard. It does not occur overnight. You know . . . [that] all of a sudden an organizational culture that had a quota for

women prior to the mid 1970s – and that quota was zero – that that organizational culture, which so many people take the job in because they identify that job with their maleness, is hard to change.

And I was – at the beginning of this talk I was tempted to ask you to raise your hands if you believed – (clears throat) – honestly, that the majority of men – well, I'll do it now – how many of you believe honestly that the majority of men can be trained to be firefighters? How many of you believe – well. Nobody believes that the majority of men – I'd raise my hand. I believe that the majority of men can be trained to be firefighters, and I also believe that a very large percentage of women can be trained to be firefighters. But the general public doesn't believe that, and I would venture to say that you do not believe that . . . . [I]f I had believed that I was going to be putting my life at risk or other peoples' lives at risk, including your lives at risk because I could not do the job, I would not have stayed on the job. I am not that crazy.

It's serious work out there, you have to physically and mentally be able to do this job. And I worked with people who could not do the job. A lot of them were men, and yet their ability to do the job was never questioned because of their gender, whereas women's ability to do the job was questioned minute by minute for my entire career, twenty-five years. Not by everyone, but by a large percentage of the general public and also by my coworkers. So it takes a long time to do this.

The litigant is going to be lonely. It's very important that they have a great support system, that their family, that their friends, that – hopefully some of their coworkers, that other women from similar occupations, whether it be firefighting, police, military, plumbers, whatever those you know, blue collar, male-dominated jobs that they have those people to support them. That they have women's organizations and civil rights organizations to support them.

The biggest single support that I got early in my career was from the Organization of African American Male Firefighters. I mean, they had no women at the time 'til I won my lawsuit, and then they took on you know, African American women, but they supported me as a minority – so-called minority. And their experience was very similar to mine, being put out of the meals, being harassed endlessly, being given the worst possible assignments, being shunned, being left alone in fires, having our air tanks drained, you know. They didn't have the pornography sent to their homes so much or – but they got – you know, I had death threats to my home, they had all that stuff.

So your named class plaintiff is going to need to be a lot of support. I know you don't want to hear that to some degree [you have to] be social workers, but you do. And the other thing about that is you have to keep in

touch with what your client needs, and that may change over the course of the litigation. What do they really want? You know, because they may discover that it's just too hard, and all of a sudden you have no client, and now you've put in all this work on this case and you haven't established a precedent, you haven't gotten women on the fire department because your client has disappeared. So it's important that you know what they want and you continue to support them and that you make sure that they have what they need in order to go forward.

You need to use the political system. That was one thing that I wish I had done more of early in my career was to take – you know, to really push with the city government to – and the Justice Department – to change the fire service. And you need to be smart about using the media. If you have a media class here at the school, I would strongly recommend that you take it. The media can make or break your case, particularly in these cases where you're asking people to really alter their world view, and the media, of course, is not always going to do what the client thinks is helpful. I and most of my women firefighters, we just wanted to fade into the woodwork. We didn't want to have our pictures on the front page in the New York Times, like I did twice . . . I needed media training as a client, and I needed to have been media trained as a lawyer because the media ended up being sort of a double-edged sword for us.

I'm just going to wrap up because I know I'm running out of time. There is power and there is respect in winning, so you know, if you manage to get your client on the job, a lot of people will respect that just because you won. And for years afterwards I had guys calling me up and saying, "Who were your lawyers?" Because first of all they couldn't believe that I'd actually won, so I must have performed some kind of miracle. I must have had miracle working lawyers here, and so they wanted to know who they were because they had an impossible case, and so they wanted my lawyers. Most of the time I had to tell them my lawyers didn't do that kind of work.

So there is a certain amount of protection or, you know, political capital to the fact that you win, and don't ignore that. And I just want to say that unfortunately as Richard mentioned, we haven't really made a whole lot of forward progress in terms of hiring women for these nontraditional jobs. I have a book here that one of my friends just wrote down here called "Sisters in the Brotherhoods," and it's interviews with women in blue collar professions, plumbing, carpentry, electricians, firefighting, elevator mechanics, those kinds of things. We haven't increased our numbers folks since the 1970s, in some cases – in a lot of cases we've gone backwards. How does that bother you as civilians? Why do you care – why should you even care about this? You don't want these jobs and frankly you know, maybe sort of in the back of your mind think, well, how could that little teeny tiny person really carry me out of a – you know, drag me out of a

burning building?

The fact of the matter is that the fire service is not giving the best possible service to its communities because it is not diverse. It is tunnel vision . . . You know, it doesn't help to bring people like myself onto the job and then expect me to act exactly like the cookie cutter, white, male firefighters, 6'6", handlebar mustache, blonde, you know carrying an ax, bare-chested, which – you're not going to get that from me today, I'm sorry.

(Laughter).

**BRENDA BERKMAN:** . . . Expect me to act like him? What good does that do because now I'm just like one of the people that is homogenous . . . it's a safety issue for all of us . . . firefighters because . . . we're all thinking along the same lines – the people, the communities that we serve, the incredibly diverse community that we serve. All you have to do is like go into a community that has very different religious practices let's say, where they burn candles all the time, and you know that there's a fire service issue there, and yet how do you – how does the fire service even recognize that when they're not aware of those religious practices, and they have no interest in being aware of them? So this is for all of us. It does affect all of us.

I'm going to conclude by saying that when President Clinton bestowed the Congressional Medal – Gold Medal on Rosa Parks in 1991, he said that her life shows that, "We must never forget the power of ordinary people to stand in the line of fire for the cause of human dignity." And I would say as lawyers, that's the most important work that you can do out there. (Very emotional tone). Thank you.

(Applause).

**PROFESSOR RICHARD UGELOW:** It's a very hard act to follow. I mean I think this – what an inspirational presentation. Thank you very much Brenda. There's a saying as you've all probably heard, "You can't fight something with nothing." Well – the something in – the major barrier in female firefighting is the physical performance test that's administered. And they're usually tests of raw strength and speed. The issue is what do you propose to replace that with? So let me give you a little anecdote – [which is] – and people in my class and those from the Department of Justice are not allowed to answer this question – how strong do you have to be to be a firefighter, how much weight do you have to be able to lift to carry somebody out of a building? Which Brenda said you don't do, but we

all have this perception, so you have to be able to carry 200 pounds? Anybody think that? 180? 150? 100?

**BRENDA BERKMAN:** Why? Because you weigh 150?

**PROFESSOR RICHARD UGELOW:** Well, there's the answer. The answer is 162 pounds, that's because the former chief of the Employment Litigation Section weighed 162 pounds at the Department of Justice –

(Laughter).

**PROFESSOR RICHARD UGELOW:** And he said that a firefighter has to be strong enough to carry me out, and he didn't care about anybody else. So it's very difficult – the point is it's very difficult to develop these tests in a way that [they] are predictive of successful job performance. And especially when those tests tend to disfavor the opportunities available to women to become firefighters or any physically demanding job or any nontraditional job.

So we have a speaker who's going to talk about a little bit about this, about the role of differences between males and females and the difficulties involved in developing these tests. So Karin . . .

**KARIN BILLERBECK:** Okay, good afternoon, my name is Karin Billerbeck. I work for Human Performance Systems, standing in for Deborah Gebhardt today like Dr. Ugelow said, and I'm going to talk about physical performance testing and sex differences. Okay, so at Human Performance Systems we have a standard approach to all test development projects. The first and most important in defining the demands of the job is with a detailed job analysis. So I know we've been talking about the physical testing, but before we even look at a physical test, we do a thorough job analysis that includes interviews, site visits. If we're working with a police department or fire department we do ride-alongs and we actually watch them perform the job. So the job analysis and the ergonomic data gathered during the job analysis are used as the foundations for designing and selecting these tests that measure the important and frequent aspects of the essential job tasks.

So the goal of the job analysis is to design – or determine – which are these very essential tasks for the job to perform it successfully. So today I'm going to address the differences in physical performance by sex and the use of minimum acceptable job performance. So when we're designing a physical test, we look at the basic components of a physical test, which are: muscular strength, which is the maximum amount of force muscles can

generate; muscular endurance, the capacity to sustain repeated maximal muscle contractions; aerobic capacity, which is the maximal oxygen uptake; flexibility, range of motion at the joints; equilibrium, which is the ability to maintain a balance point; [and] anaerobic power, which is [the] use [of] stored energy for short maximal effort.

So there are two different types of physical performance tests that we use when we're doing a validation study. The first is basic ability or physiological test, which measures one ability factor, such as aerobic capacity in which we would do a 1.5 mile run, a step test, a bicycle ergometer test, or other test, such as muscular strength [and] endurance, which would be an arm lift where it's a static pull, and you measure how much strength your arm can pull on a load cell. Pushups, sit-ups, there're numerous tests that you can do for each physical ability. The second [test] is a job simulation in which we have incumbents run through what we call work samples that are simulations of actual job tasks, so one example is a pursuit and arrest. If we're working with the police department, we can set up – it's like an obstacle course.

They would go over walls of certain height that we have deemed are essential on their specific job. So if they live in California, they may be going over six-foot walls, but if they live in Virginia Beach, they may be going over only four-foot chain-link fences. So it's really specific to the actual department or job that we're working with. The second example is a manual materials handling, that would be like a selector at a warehouse that's riding around and they pull orders, so they're lifting different amounts of boxes. So we can simulate that with different weighted boxes that they have to lift to different heights.

Okay, and this chart just shows the difference between the U.S. population and workers in arduous jobs. The first line in red is data from the CDC that shows the means of average male height and weight, and women – female height and weight. And the second line, HPS database is data that we've collected on over 62,000 people that have been in our studies over the years, and it's also broken down by ethnicity. But if you look at it, you can see that the average height of men and women performing these arduous jobs is – they're usually taller and weigh slightly less [than average]. So therefore not all women are suited for physically demanding jobs.

Okay, so next we're going to look at the physical jobs performed by women. This just gives you a few examples of jobs that we've looked at over the years. All of these jobs have a physical component to them, but some are obviously more so than others. For example, firefighter and SWAT. Those jobs would be considered higher physical demand because they're wearing extremely heavy equipment, they're going into burning

buildings where they have to breathe with SCBA gear, and these require a lot more aerobic capacity.

Moderate would be a customer service tech or a police officer where – a police officer you might think would be higher, but in the end they have weapons that they can use to – (chuckles) – arrest individuals.

(Chuckling).

**KARIN BILLERBECK:** The low physical demand would be someone such as a meter reader. [T]hey may be walking miles and miles a day for six straight hours reading the meters on your house, but as far as muscular strength, that doesn't really require that much. So that's just to give you an idea of those.

So now that we just talked about the different jobs, we're going to look at differences in performance by sex in the workplace. So this is data that we've collected over the years, and we found that [with] aerobic capacity – not normalized – women's percentage of a men's score is about 50 to 60 percent and then normalized for body mass is 70 to 98 percent. Muscular endurance, the upper body, is a little bit weaker than the lower body. Muscular strength, same thing.

So these percentages vary by job. In the high-strength jobs, women's percentage of men's will be less. If the job is an elite job, such as SWAT, women will have a higher percentage of men's values. In low physically demanding jobs, percentages will be lower because the physical demand is lower.

The distinction between differences in [performance percentages] of females in the workplace versus female athletes – which is denoted in the title of the slide – is because these results don't typically [hold true for] . . . female athletes like they do in the job because [athletes] are training specifically for . . . whatever sport or activity that they're participating in. So that's why we only look at [performance percentages in] the workplace and don't compare [them] to [the percentages of] female athletes.

So this slide looks specifically at muscular endurance and just gives you an idea of a variety of jobs in two different physical tests that we measure on: arm endurance, which is a two-minute test where they pedal on an arm bike, and then the leg endurance, which is also a two-minute test where they would pedal on a normal exercise bike you would see in the gym. So looking specifically at muscular endurance across a variety of jobs, you can see that the women's performance differs by the job they perform. This slide shows two muscular endurance tests, and the same type of results are seen for the muscular strength and aerobic capacity. Most of the time muscular strength and muscular endurance are the important job factors.



Aerobic capacity is rarely found in physically demanding jobs. Only firefighter and some manual material handling jobs require greater aerobic capacities.

Okay. So after we put a set of incumbents through a test battery of every physical ability test we would like to measure based on the job analysis we've done, we can – we look at two different scoring models. The first is a multiple hurdle, which applicants must attain the passing score on each test. So for example, using the multiple hurdle model, if there were two tests in the test battery, one was the two-minute arm test and the second was a one-minute sit-ups test, they would have to get the minimum number of sit-ups required, and the minimum number of revolutions required in order to pass. If they fail one, they fail the whole test. So this model typically has a more adverse impact. And second is a compensatory model in which the scores are combined to yield a single score. So as you can see on the formula, the regression,  $y$  equals seven times the stairs climbed plus leg lift, plus two times the arm endurance.

You would use this standard multiple regression form and multiply each predictor in the regression by a beta weight. You would then add the products to determine the prediction of job performance. So listed on the slides as we said, the stair climb, leg lift and arm endurance tests are going to be used to predict job performance in this example. So the multiplier for each test is the beta weight, which means the stair climb predicts job performance seven times more than the other variables, and the arm endurance predicts twice as much. So this model is likely to have less adverse impact because a participant would be able to offset a low score on the test, say the leg lift, which is still important to predicting job performance, but shouldn't be 100 percent of the deciding factor.

So after you establish the scoring model, you must set a passing score. To identify the test scores indicative of minimal acceptable job performance, we use criterion related validity studies, which involve collection of data from a sample of incumbents currently working in the job of study. We are then able to generalize job performance to the population with this particular job. So from the criterion related validity studies, you can obtain expectancy tables and pass/fail tables.

Our validity studies give us a set of data, which we can then use to generate expectancy tables to estimate possible cut scores. The contingency tables then allow us to perceive the percentages of incumbent pass/fail ranges, which provide empirical data to set the actual pass/fail scores. This data also allows us to determine where false negatives, false positives, true negatives and true positives lie. So in setting the passing score, it's important never to use rank order because women rarely obtain a physically demanding job if this is used as – we talked about earlier – this is where . . .

– if 100 men took the test and 50 women took the test, it's more likely that the 100 men will have higher scores than the women just based on physiological data. That's why they wouldn't get the job, that's why we look at the regression equation instead.

So in conclusion, women can perform arduous jobs effectively. Tests are equally predictive for men and women, but pass scores should be set at a level that is predictive of minimum acceptable job performance. That's it. Thanks.

(Applause).

**BRENDA BERKMAN:** Good job.

**PROFESSOR RICHARD UGELOW:** Let me say that if you are fortunate enough, and I really mean that – fortunate enough to be involved in a case like this on the right side, you will become familiar with all those terms. And one of the jobs of a lawyer, is to become knowledgeable about aerobic capacity, anaerobic capacity, working with statisticians, working with exercise physiologists, and knowing the domain almost as well as they do to help the court.

That's going to win – that's going to make or break your case. And these cases, cases like Brenda's, while there's a lot of testimony by Brenda about taking the tests, what was critical in that case – if you have an opportunity to read it I urge you to do so – was the testimony by the expert witnesses about what the test was really testing. There they showed that the test was an aerobic test that looks at short bursts of energy without burning oxygen, while the job of a firefighter is a paced job and it's anaerobic in nature with the use of oxygen.

So if you look for instance at . . . the times of [males and females] in the 100-yard dash . . . there's a big gap . . . because that's basically an anaerobic event. But if you look at their times in marathons, the times for women and males are much closer. So it very much depends on the type of test and the technical expertise that Karin and others have. Of course they are – these are the people who are going to make or break your case. They're going to help you win or they're just going to determine whether you win or lose it. This is the kind of information you really have to be knowledgeable about.

Now Marc Bendick is – who I've known for a number of years – a labor economist who happens to live in [the] Washington area and has done a lot of work on . . . the status of women in the fire service today and what progress has or has not been made. [H]e's going to discuss the results of that recently published report.

**MARC BENDICK JR.:** Thank you very much Richard. I'd like to start off first by echoing one thing Captain Berkman said, which is incredibly important and not well understood in the legal community. The real heroes of litigation such as we're talking about today are not the lawyers, and they're certainly not the experts like myself. They are the plaintiffs who stick their neck out personally.

And I've been involved in 150 cases over 30 years, and I never fail to be impressed by the cost which those individuals bear by putting themselves on the line to represent classes of people, knowing in many cases full well that they themselves will be among the least of the beneficiaries of the litigation. They're doing it for other people and they take it in the neck year after year in an incredible range of personal ways. So they are the real heroes of the sort of work we're talking about today.

Now I'd like to focus my remarks on – trigger my remarks from the previous presentation about physical abilities test, but I'm going to gradually work you from that physical abilities test issue to a much broader set of issues. If anybody is interested in following up on the remarks I'm making today, Richard mentioned a report which has come out recently called “A National Report Card on Women in Firefighting,”<sup>8</sup> where I was one of the coauthors.

This report is really the first nationwide, systematic, statistical analysis which has given credence to a lot of the anecdotal information, which we hear about in cases like Captain Berkman's. [P]utting things on a rigorous social science empirical basis actually is very important because it not only is convincing to triers of fact, like judges and juries, but it also means that certain kinds of evidence can be brought into cases under the *Daubert* standard<sup>9</sup> of what is expert testimony. If we can't do scientific studies and get them published in scholarly journals under the *Daubert* standard,<sup>10</sup> it's very difficult to get that information admitted in court, and so doing reports such as this one – and then I was very careful to get this published in a scholarly refereed journal – makes the material ripe for being incorporated into the kinds of cases that we're talking about today.

So let me start with physical ability tests. One context in which I want to put those physical ability tests is the question of how many are we talking about here? How many women can pass validated, job-related, legitimate physical ability tests? How many women can be qualified to do the fire

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8. DENISE M. HULETT, MARC BENDICK, JR., SHEILA Y. THOMAS, & FRANCINE MOCCIO, A NATIONAL REPORT CARD ON WOMEN IN FIREFIGHTING (Bendick and Egan Economic Consultants, Inc.) (2008).

9. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

10. *Id.*

job? Women are 46 percent of the U.S. labor force, and not every one of them even with the best of training and the best of interest in the job can meet physical standards which can legitimately be established for firefighters. Our best estimate – my best estimate is that women can be expected to constitute about 17 percent of firefighters. That's about one third of the 46 percent of women who hold all of the jobs in the U.S. So roughly speaking we're talking about a third of women can do that job.

I get to that 17 percent number a couple of different ways. One of the most straightforward is to look at pioneering fire departments today, which are running with about 17 percent women on their fire force. Places like San Francisco, Minneapolis, and Boulder, Colorado. So there's clear demonstration that we can get at least that high, and the city doesn't burn down, and the fire department doesn't fall apart.

A more systematic way to get to the same number I did was by looking at census data on the representation of women in other occupations parallel to U.S. firefighting in what I . . . call dirty, dangerous or demanding occupations. Everything from bus mechanics, to construction workers, to loggers, to tire builders, to septic truck drivers, and when you look at the representation of women in those sorts of jobs, which have comparable physical demands, comparable odd hours, comparable – a need for the kinds of physical strength that . . . we just heard a presentation about, the answer comes out to about 17 percent.

Now, how . . . do the numbers of women in firefighting compare to that 17 percent benchmark? The average across the U.S. today among all firefighters is about 3.7 percent. There's a huge gap, more than 13 percent. That corresponds to about 40,000 missing women compared to about 12,000 women firefighters today. [T]hat number should roughly quadruple if women were [represented on] the fire force at the level [at] which we have demonstrated evidence from other occupations and other departments that they are capable of.

More than 50 percent of the departments – fire departments in the United States today with paid employees – not only don't have a woman firefighter today, but they've never had a woman firefighter. Major cities, despite all Captain Berkman's and other peoples' litigation, New York City has less than one percent women firefighters. The City of Los Angeles, the second largest, has roughly two percent.

At the current rate of increase of women in the fire service, we will get to a 17 percent level in about 72 years, so I would submit that I don't think we're on a track that is acceptable or appropriate. We really have to do something different. We have to change strategies and do something more aggressive if we're ever going to address this inequity in employment in a serious way.

Searching for that kind of new approach, I want to shift to a different context. I've given the numerical context for physical ability testing. Now let me talk about the organizational context, what daily life is like in fire departments and in firehouses. Clearly as Richard and other speakers have talked about today, physical ability tests are one key barrier that are keeping a lot of women out of firefighting and doing the kinds of careful validation of tests, getting them to be job related, getting them to be set at an appropriate level and scored in an appropriate way is certainly one useful thing to breaking down those barriers.

But the next thing we have to note is even validated tests can still keep women out in inequitable ways. And if you got a focus group of women firefighters here today they would fall all over each other telling you horror stories of what happens even with say the CPAT, sort of the gold standard today of a validated test. You'll hear stories of, well, is the hose drag job related activity? Certainly. Can you drag a fire hose over a certain distance in a certain time? When that kind of test is administered to women, maybe the men are given a dry hose to drag over dry pavement, and the women are given a wet heavy hose to drag over wet slippery pavement.

Maybe men are tested through the CPAT activities with all their buddies standing by cheering them on and encouraging them, where women take the test alone and in silence. Maybe – and this is probably the most important thing – men are given coaching tips and trained ahead of administering the test, how do you ace this test, and nobody clues the women in.

What does this say? It says somehow it isn't the test itself in isolation that's the problem. It's the test in a behavioral context. It's how do colleagues behave, how do supervisors behave, how does senior management behave in the fire department in using that test? Up and down the chain of command the circumstances have to be right to getting women into the fire department. You can't simply buy the latest approved test on sort of a turn-key basis and, zap, your problem is solved.

Let me shift to a different example of barriers that women encounter in firefighting: ill-fitting equipment. The report that I'm speaking from, we did a national survey of women firefighters and also a controlled group of male firefighters – comparable male firefighters. We found that more than 80 percent of women reported they had problems with ill-fitting equipment and only 20 percent of men had comparable problems. These problems included everything from bunker coats that didn't fit, to boots that didn't fit, to helmets that didn't fit, SCBA masks, breathing apparatus that didn't fit, and we're not talking just about do you look good in your uniform here.

These can be life and death matters. Turns out if the helmets don't fit, they can slide down over your face in an emergency situation and you can't

see what's going on. If the SCBA mask doesn't fit, you're going to get smoke leaks and can't breathe in a fire situation. So these are very, very serious issues. Now these issues have been around for decade after decade, and they've been around for decade after decade within departments that have women. The problem is not that manufacturers don't make women-sized or shaped equipment. That's been around since at least the 1990's. It isn't a matter of short-term budget constraints in a department or the normal equipment rotation, "We'll buy you the right boots when we get around in our five-year cycle of buying boots," because we find problems of ill-fitting equipment are just as prevalent in departments that have had a lot of women for a lot of years.

So what's going on? It isn't a matter of equipment being available. It isn't a matter of the departments being unaware of the needs. It's they don't want to do it. They are saying to those women through their boots and through their helmets, "you don't belong here, we don't want you here, and we're going to do everything we can do to make your life miserable, and make you fail, and make you want to leave." I could go on and on giving examples of how women are treated in a lot of departments around the country. They're really inflammatory and I don't want to get into them too much, but I do want to mention "silencing." You're living twenty-four hours a day in a firehouse and nobody will talk to you. Shit in your boots. Women at the front end of a fire hose and a fire scene and the water gets cut off from her. That kind of thing is happening in fire departments around the country. And not only is it happening on the front lines, it's being tolerated by the senior management of the departments.

So why is this going on? What is this resistance to having women in fire departments? Well, it's a complex story as many things are in the employment situation. Part of it's a matter of social comfort. There are a lot of guys in the fire department who like sitting around the fire house and scratching where it itches and watching porn. That's one factor. The second factor is that a lot of people in the traditional male-dominated fire services would like to reserve those jobs to "men who really need them," who usually turn out to be their sons or nephews.

But certainly a serious factor is the way in which women in the fire houses threaten men's self-images. Captain Berkman mentioned this image of the great big man with the big ax, bare-chested, dashing into the burning building. That's the historic self-image of firefighters. It makes those men feel if that's their jobs, and they feel threatened if somebody who doesn't look like them, some little bitty women as they would – might put it – can do that job. It makes them feel less masculine.

So what we have is a variety of psychological, and organizational, and historical reasons that add up to saying that resistance to women in fire

services is extremely deeply embedded in the corporate culture of what goes on in fire services and what goes on in individual fire houses. Corporate culture is a fancy sociologist term, it means the norms, and the values, and the – most of the behavior that are shared in common within a workplace. There's a much easier way to remember it rather than that formal definition, it's "the way things are done around here." Organizations will defend to the death the way things are done around here, whether they're rooted in actual job performance or not, and that is certainly what's going on in a lot of fire services.

So if all that's the problem, what's the solution? Well, you got to change the underlying culture. You can't just mandate – go to court and mandate new tests or get the court, the judge to order that they buy helmets. Those sorts of problems are symptoms. They're not the causes. The culture – the underlying culture is the cause. [I]f you get mandates to treat the symptoms, the fact that there aren't curtains in the bunk room, or . . . they haven't bought the right sized SCBA masks, or they aren't using the right tests you're just treating those symptoms and not simultaneously changing the underlying culture. [T]hings are going to slide back, [y]our change is not going to be embedded, it's not going to stick.

So where's all this come down to in terms of litigation? How do you conduct litigation that not only gets the departments to buy new hats and boots, but changes the underlying culture? That's a real challenge for you law students because both statute law and employment case law over the past several decades have paradoxically moved everybody's attention in exactly the opposite of the direction that I'm talking about. You look at cases like the famous *Croson*<sup>11</sup> case, and what did the very distinguished and one of my heroes, Justice O'Connor say in that case? Well, it's all right to have – in that case – race-conscious remedies as long as they are what? Logically related and narrowly tailored to identifiable problems.

Well, who can argue with logic like that? And in fact I don't argue with logic like that. Sounds sensible enough, but consider what that means in practice in things like fire department litigation. It means that the judge approving injunctive relief, or the mediator who [is] in the settlements trying to negotiate injunctive relief, they're going to say, "[w]ell, all the law's going to give you is new helmets or a better test or something and maybe better monitoring of test practices so you don't get wet hoses and dry hoses," but basically there's nothing in there that allows you to go say they've got to change senior management, they've got to do diversity training up and down the department, they've got to completely change the HR practices of the department, ranging far beyond the specific complaints

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11. *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989).

like the physical abilities test on which you base the litigation.

The mandate is not there usually. So problems present themselves, clients – claimants come forward with specific complaints. “I can’t pass the physical abilities test.” That’s why the litigation is brought. You win the case, you get down to the injunctive relief, and what you get is a narrow solution. And we know that that narrow solution is going to be vulnerable and short-term without changing the underlying culture. So as I say, this is my challenge to the law students. First of all, when you go out as litigators, you’ve got to be sophisticated enough to understand those concepts that I’ve just been talking about, and weave your – structure your case. Weave your story so that eventually the trier of fact, the judge, the jury, the mediator, whoever, understands that the remedies which are logically – are related and narrowly tailored to the problem, are the ones which change the underlying culture.

That’s what you have to do by being clever, on-your-feet litigators, as legal strategists, as trying to figure out how to build a body of law that’s going to let us move forward. And you’re going to have to think about developing cases that get precedent set, that allow things like organizational culture information in as directly relevant to the specific complaints on which the cases are being brought. You have to conceptualize the cases differently so that we get the right precedents, so that it’s easier for other people to conceptualize those cases more broadly.

I leave you with that challenge and I look forward to seeing what your generation of employment discrimination lawyers does to help this country move forward. Thank you very much.

(Applause).

**PROFESSOR RICHARD UGELOW:** Thank you very much Marc. I mean Marc has identified a problem that is sometimes within the judge’s reach if the judge is willing to take it on, or often not within the judge’s reach and as Brenda suggested, sometimes the media can help you here by publicizing this and getting the public behind you. I have to say, and I’m sorry to say, or I regret to say that the Department of Justice was not always sensitive to those issues, but needs to be.

Now in this case that – *Berkman v. City of New York*<sup>12</sup>, it was tried before Judge Sifton, who Brenda mentioned, and who happened to be very good on those issues, and even he had limits. What we haven’t said is that Brenda was hired, she got through eleven months of her probationary period, and then the city administered another physical test to her and said,

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12. 536 F. Supp. 177 (E.D.N.Y. 1982).



“You and one of the other named plaintiffs are not qualified to be firefighters,” and they were going to discharge her. Her lawyers went to the judge and sought an injunction prohibiting her discharge, got the injunction, and the city was required to administer yet another training program, another exam for her to – that she passed, and obviously performed quite well over a career in the fire department. Women in fire departments are pioneers and pioneers have to be prepared to take – unfortunately – take the heat, hence the name of the movie . . . And you can see this in any time that somebody is a pioneer, whether it’s an African American or a woman trying to break down the barriers that have kept that group out of a job for which they’re fully qualified. It’s very, very difficult.

But we’re fortunate that there is hope, and one – the hope is like just a mile away in Montgomery County, up the street, and we have – we’re blessed to have Dee Richards, a Captain on the Montgomery County Fire Department, to tell you something – give you a little bit about her history and what she’s experienced, which I think is – we moved a little closer to the 21<sup>st</sup> century.

**CAPTAIN DORCUS HOWARD RICHARDS:** Thank you.

(Applause).

**CAPTAIN DORCUS HOWARD RICHARDS:** Well, good afternoon, thanks for having me here. And my story is nowhere near as exciting as those on my panels, more specifically Captain Berkman coming from New York City, but I have to say that I have to give her honor and respect because she is my big sister in the fire service.

**BRENDA BERKMAN:** You didn’t say older (inaudible at 1:21:26.0).<sup>13</sup>

(Laughter).

**CAPTAIN DORCUS HOWARD RICHARDS:** And people like Brenda have paved the way for a lot of the females in the fire service. I guess when I came in I was too young and too silly to know that a lot of these adverse situations presented themselves. I just knew that this was the job I wanted, and that this is what I needed to do to get there, and I didn’t realize until I was much further along in my career – I didn’t realize that

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13. See Washington College of Law Podcasts, [http://www.wcl.american.edu/gender/wlp/brenda\\_berkman\\_taking\\_the\\_heat\\_2008.cfm](http://www.wcl.american.edu/gender/wlp/brenda_berkman_taking_the_heat_2008.cfm) (follow “Watch Webcast” hyperlink).

people like Brenda had helped pave the way, so I publicly say, "Thanks Brenda."

My career, who am I? I am just – I'm the person who lives next door to you. I'm nobody special, I am not a trailblazer, I am not a pioneer. I am just a student who graduated from college, was thinking about getting my master's degree, and thinking in this expensive moment – I should say back then – in this – for me what was then an expensive economy, how could I get my master's paid for without having it come out of my own pocket? I had no fire service experience, no one in my family had ever been a firefighter. There were no firefighters in my neighborhood, nobody who looked like me was ever a firefighter. But I graduated from college, was trying to look to see what I could do to get my master's degree paid for, and I was an athlete. I came through playing all the sports, had an athletic mind, and I understood the concept of a team and being in a team, and figured out that if – and I had an interest in sports medicine, so I kind of figured okay, I'm going to go, I'm going to get my master's in sports medicine, something like that.

And someone said to me, [w]ell, if you go to the fire department . . . and you become an EMT – I didn't even know what that stood for then – [t]hey said, "[i]f you become an EMT and you get . . . [y]our emergency medical technician license then that will pave the way for you to move on. That will help get you in the door of earning your master's in sports medicine because you can be a sports trainer, you can work with a team." So I go to my local fire department – again, not knowing anything about the fire service – and this was I guess in 19- . . . about 1988, 1987. I go to my local fire department, and [a]gain, I'm just a product of Montgomery County public schools and you know . . . a graduate from James Madison University . . . I [d]idn't know anything about it, didn't know anybody who was there. And I walked in, and everybody looked at me and I looked at them, and I told them that I had an interest in joining their fire department. Well, you could have certainly heard a pin drop.

(Laughter).

**CAPTAIN DORCUS HOWARD RICHARDS:** And they asked me you know, well, questioned me. There was nobody in there that looked like me, no other females. But again, I was too young and silly to know the difference. I figured well, if you wanted to join, you just go and you sign up. They right then and there, tried to talk me out of it. Asked me why did I want to join the volunteer fire service? Why did I want to be a part? I said, "[w]ell, I heard it was a cool thing to do." All the cool people in the neighborhood were doing it, so I wanted to try it.

(Laughter).

But I left there that day with a new experience. I had no real – I felt that they were trying to discourage me, but – really had no understanding as to why. And then from that period began to experience subtle little things like when I went back to get my uniforms – because I was going to join this volunteer fire service – went back to get my uniform, and again this group of people, they're looking at me and I'm looking at them, and they looked at me and said, "[t]here's nothing here that fits you." And I was going around the corner to leave, I – okay, I noticed that my shoe was untied, and I'd parked over in a little corner and I bent down to tie my shoe and I think they thought that I had left, and the batch of names that I had been called and that I was being called, and people telling – or saying to each other, wondering what I was doing there, left me with a little bit more discouragement. But I – you know, I was determined that I wasn't going to pay for this degree. I was determined that I was going to –

(Laughter).

**CAPTAIN DORCUS HOWARD RICHARDS:** I had to find a way to pay for my master's. Got into the fire – finally – so I was persistent, that's just the nature of my personality, and my parents have taught me to be persistent. And so I just persisted and kept going back, and happened to mention to another young lady that I saw, "[y]ou know, they're giving me a hard time. Every time I go, they don't want to – they never have anything that fits me," and she says, "[w]ell, I'll go with you." And I – she and I are still dear friends to this day. But I say that to you all to say that I guess when people walk in the door and say that they want to be a firefighter, there's a certain image that people have as to what a firefighter should look like, how tall they should be, perhaps the color of their skin. They have an image of what that firefighter should be like. And I became a volunteer for a short period of time, and then someone took me under their wing thankfully and said, "[h]ey, have you ever considered a career in the fire service?"

I said, "[y]ou're crazy! I'm not going, everybody's running out of a burning building, why should I go – why should I be running in?" And they explained to me that there are classes, and that they'll teach you, and that if you get into a mentoring process – and keep in mind, this is twenty years ago – if you get into a mentoring process and somebody shows you how, that the job can be done, by somebody even my size. So I kind of sat around the fire house volunteering, and that was something I really liked. I

enjoyed the excitement, I enjoyed helping people, I enjoyed helping my community. [Y]ou find that a lot of people – oftentimes people say, “[t]hat’s all it takes” – they want to give back to their community, they want to give something, they want to do something to help better their community or the environment in which they live in. And I continued on, and I liked being in the fire house, so I put my master’s degree on hold and decided to go ahead and apply as this one person had recommended.

And I applied, and I had someone mentor me, and teach me, and show me various ways of doing things, and I was successful in passing the test. I had no idea then where I’d be now. I just kind of figured it was just a – perhaps a pit stop, but you know, twenty years later, I still haven’t gotten my master’s degree.

(Laughter).

**CAPTAIN DORCUS HOWARD RICHARDS:** And still in the fire service. So I say to law students that – and what I’ve heard reiterated here from my – from the panel – don’t have in your mind if someone comes to you, if a plaintiff comes to you – don’t have in your mind what a firefighter perhaps, or a police officer, or someone who represents a traditional job, don’t have in your mind what they should look like. As Brenda stated, in my twenty-year career, I have never seen anybody carried out of a building. No one throws a person over their shoulder and carries a person out of the building.

You know, a lot of the tests that are performed, a lot of ways that they’re measured – that they measure you, you know, things like can you carry . . . a bundle of hose up some stairs – what we’ve found in being creative and in being a diverse fire service, and what is helpful is, does the bundle of hose necessarily have to be packed in a bag that’s this big and this wide to put on my shoulder? [B]ecause as a woman, I know that my strength is in my hips and in my legs. So what if you take the same bundle of hose and you – instead of making it this wide and this fat, trying to balance on my what tend to be narrow shoulders – what happens if you make it a skinny? [T]ake the same amount of hose, make it thin, and make it maybe five feet long, so now I can drape it over my body, perhaps drape it across my shoulders, and now use my advantage points.

So there are a lot of things in the fire service that have been changed in that respect and I think that a lot of tasks that traditionally have been performed, that’s just the way they did it, but there certainly are ways to change and to be creative about carrying stuff and about getting to a certain place. Certainly in an emergency you want to get there as fast as you can, but it’s kind of like that person who’s doing ninety miles an hour just to get

to the traffic light ahead. You know, if I'm doing my thirty and I have to stop at the same traffic light and the person next to me has done ninety to get there, what was the point? So perhaps that's been some of the argument, that the women are slower, that we aren't quite as able to do the job, but I think we've found over time that – with some change, with some adapting, with some mentoring, perhaps – and most definitely we can be successful in the fire service.

Probably the other thing I want to mention to everybody is that – and I think FDNY, New York, unfortunately is the – the big cities like the New York, and like the Chicagos, and like the L.A.s tend to be your areas . . . that give people the hardest time, and perhaps have the most diversity. And it probably goes back to what you say is that it challenges some of what people think their firefighter or their public safety workers should look like. And please understand that in order to be something, in order to be something, in order to become something you have to have an aspiration, you have to aspire to be something, and it's very difficult to aspire to become something if when you look into that sea, if when you look into that audience, there's nobody there that you can identify with.

And so understand that when you are representing these people, that as has been said many times it's lonely as a female in the fire service when you're the only female at a table full of guys. When you're in your gear in your uniform, and little things like when your coat comes down to your knees and you're not able to lift your legs up just to get up a flight of stairs – you know what – [i]f you cut six inches off of my coat, I can get up the stairs. Or if you order or have in your stock the extra small gloves, which tend to be for guys with small hands, but if you [have] a pair of gloves like that that fit me, maybe I can pull that hose up through the window. Little things like that. As opposed to having my pants dangling under my heels and me tripping under them, perhaps cut them off and make them a little bit shorter. Make the suspenders so that they fit.

So when you're litigating these cases, think of things like that. And also – lastly what I'll say – is that understand that much like myself, people who want to represent public safety, they're nobody special, they're just people who want to go out and help their community, and I have found in recruiting and going out and talking more specifically to people of color that they just never envision themselves being a firefighter, and predominantly because they never thought about it. There was nobody in their community, nobody in their neighborhood, nobody who lived around them, none of their relatives ever talked to them about public safety and the fire service, so keep that in mind when you're performing litigation. And also, if you have an opportunity, get to know something about some of the organizations that represent the minority firefighters, whether it be the Hispanic firefighters organizations, Women in the Fire Service or now

### International Women in the Fire Service, Black Firefighters.

They tend to have – or they tend to give unique perspectives or are able to give you ideas and information about the pulse of that particular community or what those groups of people are thinking. And I certainly know – I know that they’ve helped me. I know that Women in the Fire Service certainly gave me a forum where I could network with other women and say, “[h]ow is it that you carry this hose?” Or, “[h]ow do you – what do you do about your gloves being too big?” I would say able to network with the Black Firefighters Association to say, “[w]hat’s it like when you know people are making racial jokes in the fire service, you know?” People saying things like, “[h]ave you ever been hunting?” You know, just ask you, “[y]ou ever been hunting?” No, I’ve never been hunting. And little subtle jokes like, “[w]ell, if you come with us, we’ll give you a head start.” Is that supposed to be funny? You know?

Is it a culture in the fire service that I’m supposed to be accustomed to or get used to? Am I supposed to just sit back and take that? And it’s little things like that that go on right now, today. So again, thanks for having me. Again, I’m right down the street. Rich certainly knows how to hunt me down and how to find me. And you know, I invite – I always tell people, “[c]ome do a ride-along, come see how we live and what we do, and get to know a little bit more about the fire service.” Thanks.

(Applause).

**PROFESSOR RICHARD UGELOW:** Before I thank the panel, I think we have some time for questions. Why don’t you use the microphone?

**BRENDA BERKMAN:** (Inaudible at 1:35:49.2).<sup>14</sup>

**AUDIENCE MEMBER:** Hi, one point that came up a couple times in the presentations was the idea that the appropriate way to test for physical requirements on a pass/fail basis with the test tailored to basically the minimum requirements for people in physically demanding professions, police, firefighters, what have you. And I have to say, I find that a little striking because for emergency responders, speaking for myself, I don’t necessarily want someone who can just satisfy the minimum requirement, I’d sort of prefer emergency services hire the most capable people they can get, people in excess of the minimum requirement. So I’m just wondering,

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14. See Washington College of Law Podcasts, [http://www.wcl.american.edu/gender/wlp/brenda\\_berkman\\_taking\\_the\\_heat\\_2008.cfm](http://www.wcl.american.edu/gender/wlp/brenda_berkman_taking_the_heat_2008.cfm) (follow “Watch Webcast” hyperlink).

is that – does that make sense to just have the minimum standard be what you're looking for for the physical requirements? Thank you.

**PROFESSOR RICHARD UGELOW:** Who wants to take that on?

**BRENDA BERKMAN:** I'll take part – I can take that on and I'll give it off to other people as well. First of all, it's not just the minimum requirements, it's the requirements that the incumbents are using to actually perform the job. And one of the interesting things, a question you might ask yourself is why is it that most departments have an extraordinarily high standard for the passage of the physical abilities test on entry, and they have not a single maintenance standard that you're required to maintain through the entire rest of your career? After I passed my initial physical exam, I never took another physical exam. Why? Because most incumbents could not meet the entry level standard.

And I think it's wrong to say that it's the minimum standard. It's not the minimum standard, it's supposed to be the standard that's actually required to meet the job. Why isn't it rank ordered? Because we don't have the science to be able to say that a person who scores a half a second faster on a fourteen-minute exam let's say because that's how long most of these take – or less – is going to be able to train to perform the job at a much higher level than a person who scores a half a second slower than them? There's no justification in the science for the rank ordering.

**AUDIENCE MEMBER:** (Inaudible).<sup>15</sup>

**PROFESSOR RICHARD UGELOW:** Well, she was talking about minimum standards based upon the requirements of the job. Let me expand on something that Captain Berkman said. We have found at the Department of Justice when – I found – I don't want to say they found – but sometimes these tests are administered a year or two before the person is actually hired, so between the time of hire and the time –

**BRENDA BERKMAN:** (Inaudible at 1:38:55.9).<sup>16</sup>

**PROFESSOR RICHARD UGELOW:** I mean the time the test is taken,

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15. See Washington College of Law Podcasts, [http://www.wcl.american.edu/gender/wlp/brenda\\_berkman\\_taking\\_the\\_heat\\_2008.cfm](http://www.wcl.american.edu/gender/wlp/brenda_berkman_taking_the_heat_2008.cfm) (follow "Watch Webcast" hyperlink).

16. See Washington College of Law Podcasts, [http://www.wcl.american.edu/gender/wlp/brenda\\_berkman\\_taking\\_the\\_heat\\_2008.cfm](http://www.wcl.american.edu/gender/wlp/brenda_berkman_taking_the_heat_2008.cfm) (follow "Watch Webcast" hyperlink).

and they took the test, and the time of hire, twelve to twenty-four months can lapse and they're not administered another physical performance test at the time of hire.

**BRENDA BERKMAN:** Or ever.

**PROFESSOR RICHARD UGELOW:** Or ever. And the CPAT that Dr. Bendick referred to was actually a joint effort by the International Association for Firefighters and the International Association for Fire Chiefs to develop a wellness program for incumbent firefighters, and they – the incumbent firefighters said, “Well, we’re not going to –” this is the story that I was told and it may or may not be true – that, “We’re not going to take this until we know that the applicants can actually pass that test.” So it’s a –

**BRENDA BERKMAN:** Well, they didn’t want to take it because they knew they were going to lose sixty to seventy-five percent of their incumbent workforce.

**PROFESSOR RICHARD UGELOW:** This is a physically demanding job. It is a dangerous job. There’s no question about it, and it takes a very unique and dedicated public servant to perform this job. But people learn how to do it efficiently over time because they get the experience and they learn the technique to do it.

So I don’t want to minimize the physical demands of the job, but sometimes we have this picture of – as Brenda pictured this big firefighter, shirtless with the big axe as being the prototypical applicant – person we want, that’s not necessarily true. And I would point out one other thing. Karin mentioned about flexibility in her presentation. If you go around and look at the physical performance tests that are administered in fire departments, I bet not one of them has flexibility as a component to them. And you know the reason why? Because women crush men on flexibility, and if you’re going to use that as a criterion, men would score lower. So the system, in a sense, is stacked against women.

**AUDIENCE MEMBER:** I guess my question is about – Mr. Bendick, you mentioned how there’s still a huge gap between what – you know that seventeen percent of what women should make up in fire departments and what they actually are. So is it because women are still like being discouraged from applying just because of the culture of you know, traditional masculinity within fire departments, or is it just women are still being – even though it’s not legal – they’re finding ways to keep women



who are qualified from taking the positions?

**MARC BENDICK JR.:** It's all of the above. It also includes just taking – failing to take obvious steps to recruit. We – in our national survey we turned up a lot of instances where women said that they were recruited through the same personal contact recruitment sources – your parent, your uncle, your neighbor approaches you and says how would you like to become a firefighter? Come on down to the fire house with me and let me show you the ropes and show you around and introduce you to people, and I want to encourage you.

The women told us they often got into the fire service when somebody came over to recruit their brother. And it never occurred to the departments that the same recruitment channels, the personal channels that are very successful at recruiting men, also work with women. So half of it is sins of omission, half of it is sins of commission. The department is actively trying to keep women out, departments not doing obvious things that would bring women in. There's a – it varies all over the map as to in any individual department how that – how those components mix.

**BRENDA BERKMAN:** I don't know if this is true in Dee's department or not, but in my department certainly, I'm constantly asking my male coworkers if they're encouraging their daughters to take the test because they drag their sons out of the test to take that test. They kick them until they go down and file and all this other stuff. And they – and even the men who are relatively supportive of my – of me in my job say, “[o]h, no, it's a dirty job. I really – she wants to be a teacher.” She can be a teacher and a firefighter – you know, they just – and because as Mr. Bendick says, that it's so important these personal contacts, and so many people are recruited through their family and neighbor connections, and to not have the male firefighters recruiting their own family members is a tremendous disadvantage to hiring more women on the job.

**CAPTAIN DORCUS HOWARD RICHARDS:** You know in our department we've found that 99 – it's about 90 percent – of our workforce comes via word of mouth. And also, you have to figure for a lot of women – and some of the women in this room may want to just put themselves in that particular mindset – it's not necessarily an attractive – nobody does anything to make it an attractive job for women, or to make us feel that we fit. I'm a mom, I'm a wife, and you know, there's nothing necessarily in the job that makes it okay – or makes me feel like I'm going to be okay if I am – what happens if I'm pregnant? And I get pregnant and I'm on the job. Or do I have to – do I get fired, or do I get a desk job, or do they hide me,

or what's going to happen to my kid?

You know, usually the mother is responsible – again, something that just has happened over time, just the way it is – usually the mother is responsible for childcare – for finding childcare. So now what do I do when I'm working twenty-four hours and you know, now does my husband now have to take over the role of Mr. Mom? Or what if I'm a single mom?

**BRENDA BERKMAN:** They have all those questions, these women who don't know anything about the job, and what they need are people that can talk to them and say, hey, it is a great job, because in my department for instance, you're only working four days out of every eight. At – four days out of every eight days. Now yes, you have to work nights, and weekends, and holidays, and things like that, but you know, it in fact can be a great job to have a child, and to be able to arrange childcare. And we have all these women who have had children after they came on the job, some of them large numbers of children. How did they manage? They managed, you know. So that kind of information is not out there. I really believe that – and I've said this many times – the fire service needs a “Cagney and Lacey” television program.

(Laughter).

**BRENDA BERKMAN:** They need – you laugh, but there was a huge uptick in the application of women to police departments when they saw women role models on television. What did we have? We had “Third Watch.” I don't know whatever your feelings were about “Third Watch,” but that was a show that generally showed a woman firefighter having problems in the fire house and then ultimately leaving active firefighting because of those problems. So you know, that's not exactly a great encouragement.

**PROFESSOR RICHARD UGELOW:** Last – anybody else? Okay, last question. I have to go to class.

(Chuckling).

**AUDIENCE MEMBER:** Okay. I was just wondering whether any fire departments around the country give preference to military veterans and how that factors into the hiring. And a sort of related question is, now that women do serve in the military, albeit not in combat – for your researchers have you gleaned any new research based on performance of women in the military and you know, and various physical things that they have to do in

the military?

**MARC BENDICK JR.:** Well, there's a long history when women first start moving into a traditional male occupation the predictions always are that things are going to fall apart. This was true in the military, it was also true by the way when they –

**BRENDA BERKMAN:** Police.

**MARC BENDICK JR.:** Talked about racial integration in the military back in 1948. Women on police forces – oh, they said, “Women on police forces are going to get scared and they're going to shoot a lot of people because they don't have the physical strength to deal with the job other than with deadly force.” None of those predictions has ever come true. In fact it turned out women use guns – use deadly force in police jobs at a lot lower rate than men because they're smart enough to talk.

(Multiple speakers and chuckling).

**MARC BENDICK JR.:** It is true that women coming through the military are one of the potential recruitment pools, although it turns out interestingly enough that it's not a very successful pool for recruiting women. A much better place to go to recruit women – and again, this is one of the things that if that departments want to change things, information is out there on how to change things – much better places for departments to go are first of all, healthcare professions. Seventy percent of fire department calls are not fire calls, they're medical calls, so women EMTs and people like that, nurses and other medical professions, that's a real recruiting pool for women in the fire service, and women athletes. Gyms and college sports teams and things like that, that's a great place to recruit women.

Construction and the military are great places to recruit men, and departments keep going to construction and the military, and guess what? They turn up a lot of male recruits and they keep saying, “Well, there are no women out there.” It's because they're not going where the women are and the facts are very well known about where you can find the women.

**BRENDA BERKMAN:** But you're absolutely right, they should be recruiting a lot more of those military women, and I tried to get my department to do that and they absolutely just could never figure out how to do that. I do take a little bit of issue with your statement that women are not in combat roles. I urge you watch a PBS documentary that's going to be

broadcast in November called “The Lioness,” and it’s about women who went to Iraq thinking that they – military women – thinking they were going to be in these noncombatant roles, and all of a sudden they were assigned to a Marine you know, battalion. So there are women out there who are clearly in the military who are clearly perfectly suited for these demanding, physically demanding, you know, heroic jobs, and they’re not being recruited.

**AUDIENCE MEMBER:** Well, I was just going to suggest that veterans’ preference would probably –

**BRENDA BERKMAN:** And there’s a tremendous amount of veterans’ preference, and it would put them right at the top of the list. As a matter of fact, in New Jersey – I believe that they still have it – it’s almost – you can’t get hired as a firefighter in New Jersey without a veterans’ preference.

**PROFESSOR RICHARD UGELOW:** Veterans’ preference works in a number of ways, some jurisdictions have absolute veterans’ preference. Others usually – most commonly they add points to the combination of the physical and written test scores.

**BRENDA BERKMAN:** It shoots you right up there.

**PROFESSOR RICHARD UGELOW:** Anyhow, we’re going to – I really want to thank this extraordinary panel for taking –

(Applause).

**PROFESSOR RICHARD UGELOW:** Time out of their busy days and schedules, so I really appreciate it and I thought this was really wonderful. So thank you – and thank you all for coming and making it wonderful.

**DANIELA KRAIEM:** So I want to say a couple of last thank you’s. Thank you again to all of our panelists. The . . . Program on Law and Government and the Women in Law Program sponsored this event, but Professor Ugelow put it together from beginning to end, and I really want to thank you for your work on this . . . It is wonderful . . . I also want to thank (inaudible at 1:51:21.8)<sup>17</sup>, and also the staff of Law and Government

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17. See Washington College of Law Podcasts, [http://www.wcl.american.edu/gender/wlp/brenda\\_berkman\\_taking\\_the\\_heat\\_2008.cfm](http://www.wcl.american.edu/gender/wlp/brenda_berkman_taking_the_heat_2008.cfm) (follow “Watch Webcast”

and the Women in Law Program, Angie and Julie, for all their hard work on this, as well as the *Journal* for getting together all of the materials. So thank you all for coming, and we'll see you at the next event.

