

# INTRODUCTION<sup>†</sup>

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The thirtieth anniversary of Captain (ret.) Brenda Berkman's efforts to become a New York City firefighter provides an opportunity to reflect on the ways her career has impacted the opportunities for women in firefighting.<sup>1</sup> While women have served as volunteer firefighters for over a century, it is only relatively recently that women have grown up with the assumption that they could even be professional firefighters.<sup>2</sup> Indeed, there was an "absolute bar" to hiring women to be New York City firefighters until Congress enacted the Equal Employment Opportunity Act of 1972, which prohibited sex-based discrimination in hiring.<sup>3</sup> So common was the perception that only men became firefighters that the usual practice was to

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<sup>†</sup> The American University, Washington College of Law Women and the Law Program, Program on Law and Government, and Professor Richard Ugelow presented this event on October 21, 2008. The *Journal of Gender, Social Policy & the Law* senior staff member Thomas Hay compiled the CLE materials for this event.

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1. See Brenda Berkman et al., *Roundtable Discussion*, 26 FORDHAM URB. L.J. 1355, 1355 (1999) [hereinafter *Roundtable Discussion*] (characterizing her case as having "tremendous" impact on traditional thinking about gender roles and explaining that she considers having made it possible for girls to imagine themselves becoming firefighters a reward for her efforts).

2. See BRENDA BERKMAN ET AL., MANY WOMEN STRONG: A HANDBOOK FOR WOMEN FIREFIGHTERS, iii, 17 (1999), <http://www.usfa.dhs.gov/downloads/pdf/publications/fa-195.pdf> (estimating that 40,000 women serve as volunteer or professional firefighters).

3. See 42 U.S.C. §§ 2000e, 2000e-2 (2006) (bringing state and local governments under the protections of Title VII of the Civil Rights Act of 1964); Susan T. Epstein, *Women in the Firehouse: The Second Circuit Upholds a Gender-Biased Firefighters' Examination*, 54 BROOK. L. REV. 511, 511 (1988) (noting that women candidates still face "significant" challenges to being hired).

refer to the position as “fireman” rather than “firefighter” until the 1980s.<sup>4</sup>

Recent estimates indicate approximately 11,000 women serve as professional firefighters, comprising less than four percent of the nation’s 350,000 firefighters.<sup>5</sup> In New York City, where Brenda Berkman made her career, the numbers are even bleaker; on a force of nearly 11,000, only twenty-two women serve as uniformed firefighters.<sup>6</sup> Nationally, female firefighters advance to higher ranks at a slower rate than their male counterparts; although first promotions usually require three to five years’ experience, typically ten years pass between a woman entering the force and her first promotion.<sup>7</sup> Reasons for women’s delay in promotion range from the need to overcome stereotypical perceptions about women’s basic physical and mental abilities to a lack of equal access to training opportunities or use of equipment for practice.<sup>8</sup>

Rather than following a steady progression, however, women firefighters’ advancement has been intermittent.<sup>9</sup> Following the September 11, 2001 terrorist attacks, the media appeared to neglect female first responders’ rescue efforts at Ground Zero, effectively absenting their service from history.<sup>10</sup> Instead, male firefighters received most of the media attention for their efforts, resulting in an idealization of the New York City firefighter as a “brawny young man in his helmet carrying the wounded young woman in his arms.”<sup>11</sup> In response, the Women at Ground

4. See Deirdre Carmody, *Women Graduate as City Firefighters, and a New Era Starts Next Week*, N.Y. TIMES, Nov. 6, 1982, § 1, at 29 (reporting on the first women to graduate from the New York City Fire Academy and noting that the cover of the graduation program still read “Probationary Firemen Graduation”); Elissa Gootman, *Far Cry From Days of ‘Fireman’: Woman Becomes Battalion Chief*, N.Y. TIMES, June 26, 2003, at B1 (describing opposition to changing the title from ‘fireman’ as women became eligible to enter the force).

5. See DENISE M. HULETT ET AL., A NATIONAL REPORT CARD ON WOMEN IN FIREFIGHTING 1 (2008), <http://www.i-women.org/images/pdf-files/35827WSP.pdf> (analyzing the 2000 census to determine that over half of the nation’s fire departments have never employed a woman as a firefighter).

6. See Corey Kilgannon, *Seeking to Fill a Husband’s Boots; Firefighter’s Widow Tries to Join the Department*, N.Y. TIMES, Apr. 2, 2003, at D1 (noting that since 1990, only nine of the last 5,000 firefighters hired have been women).

7. See HULETT ET AL., *supra* note 5, at 9 (observing that across the nation, there are approximately 150 women serving in the ranks of battalion chief or deputy chief and 31 as department chief).

8. See *id.* at 9-10 (explaining that women firefighters report having to work harder than men just to prove the same basic competency).

9. See Gootman, *supra* note 4 (observing that having so few women firefighters means “firsts” are few and far between).

10. See Kay Miller, *It’s Hard to be a 24/7 Hero*, STAR TRIB. (Minneapolis-St. Paul), Jan. 13, 2002, at 1A (explaining that the media “so roundly ignored” the work of women firefighters that the vernacular returned to “fireman”).

11. See Charlotte Allen, Editorial, *Return of the Guy: Manliness Without Apology Has Made a Comeback Since Sept. 11 – And Not a Moment Too Soon, Says Charlotte Allen*, PITTSBURGH POST-GAZETTE, Mar. 17, 2002, at E1 (arguing that there are jobs that are simply better suited to men).

Zero Project organized to prevent women's contributions and service from disappearing into forgotten history.<sup>12</sup> The Women in the Fire Service Conference meets every two years to bring together and celebrate the accomplishments of women firefighters internationally.<sup>13</sup> Although completely changing perceptions and challenging stereotypes will take time, Brenda Berkman helped lay the foundation for women in the fire service through eight years of groundbreaking litigation.<sup>14</sup>

### I. MORE THAN A PLAINTIFF: WHO IS BRENDA BERKMAN?

From a young age, growing up in Richfield, Minnesota, Berkman resisted efforts to limit her ambitions because of her sex.<sup>15</sup> While in her twenties, Berkman, originally intending a career in immigration law, decided to make a career in firefighting after the New York City Fire Department began allowing women to take its qualifying exam.<sup>16</sup> Berkman was a third-year law student when her opportunity arose in 1978 to take the entrance exam to join the City's all-male firefighting force, and she seized the chance to realize her childhood dream.<sup>17</sup> Berkman should have been an ideal candidate; she ran marathons and relished the idea of a physically active job.<sup>18</sup> The Department, however, administered a physical exam that concentrated on brute strength and maximum speed and was virtually impossible for even the most physically fit women to pass.<sup>19</sup> Berkman passed the written exam, but like every other female applicant, failed the physical exam.<sup>20</sup> Convinced the physical test was invalid, Berkman asked

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12. See generally SUSAN HAGEN & MARY CAROUBA, *WOMEN AT GROUND ZERO: STORIES OF COURAGE AND COMPASSION* (2002) (collecting stories and experiences from female firefighters and other female rescue workers).

13. See Amanda Coggin, *Burning Down the Barriers, Divine Caroline*, <http://www.divinecaroline.com/22343/32154-burning-barriers> (noting that many of the conference attendees had twenty years experience in the fire service, a dramatic increase from years prior).

14. See Gootman, *supra* note 4 (noting that Berkman persuaded the federal court that the Department's physical test was unrelated to successful job performance).

15. See Miller, *supra* note 10 (explaining that the Little League would not permit Berkman to play because she was a girl).

16. See *id.* (quoting Berkman as characterizing firefighting as "a way of serving your country without joining the military and killing people").

17. See *Roundtable Discussion*, *supra* note 1, at 1357-58 (explaining that Berkman had always wanted to be a firefighter and was not, as some suspected, merely a "stalking horse" who would return to the practice of law after the litigation).

18. See Miller, *supra* note 10 (quoting Berkman on her desire not to work a desk-job).

19. See *id.* (noting that when news broke that the physical exam would eliminate women's eligibility, less than one-fifth of the women who had taken the written exam even applied to take the physical exam).

20. See *Berkman v. City of New York* (*Berkman I*), 536 F. Supp. 177, 179, 205 (E.D.N.Y. 1982) (describing Berkman as class representative for 410 women who passed the written part of Exam 3040 and either failed the physical test or were

Laura Sager of the New York University Law School's Women's Rights Clinic to challenge the physical portion of the entrance exam as being unrelated to a firefighter's job performance and having a disparate impact on women candidates.<sup>21</sup>

## II. EIGHT YEARS OF LITIGATION: *BERKMAN I-IV*

Brenda Berkman filed a class action lawsuit in 1979, alleging that the firefighters' qualifying Exam 3040 discriminated on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1871, the Fourteenth Amendment, and New York state law.<sup>22</sup> The resulting litigation consumed eight years and produced four opinions concerning the legitimacy of the qualifying process for New York City firefighters.<sup>23</sup>

### A. *Berkman I and II*

After hearing several weeks of evidence, the United States District Court for the Eastern District of New York held for Berkman, and against the City of New York, that the physical portion of the entrance exam unfairly disadvantaged women who wished to become firefighters.<sup>24</sup> Berkman argued that the physical performance exam tested only anaerobic ability—mainly bursts of speed and upper-body strength—while the job of firefighting requires aerobic ability, that is stamina or pacing, as well as a great deal of technique and training.<sup>25</sup> Berkman maintained that because the exam accounted for neither aerobic ability nor the technique and training critical to firefighters' successful performance of their duties, the exam was not sufficiently related to the job performance of a firefighter.<sup>26</sup>

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deterred from taking it).

21. See *Roundtable Discussion*, *supra* note 1, at 1357-58 (noting that strong, physically fit women were capable of both passing a valid test and successfully serving as firefighters).

22. See *Berkman I*, 536 F. Supp. at 179 (holding that the physical component of Exam 3040 constituted sex-based discrimination and ordering injunctive, interim, and other relief for Berkman).

23. See generally *id.*; *Berkman v. City of New York (Berkman II)*, 705 F.2d 584 (2d Cir. 1983); *Berkman v. City of New York (Berkman III)*, 626 F. Supp. 591 (E.D.N.Y. 1985); *Berkman v. City of New York (Berkman IV)*, 812 F.2d 52 (2d Cir. 1987); Epstein, *supra* note 3 (chronicling the process of developing a firefighter qualifying exam that does not discriminate on the basis of sex).

24. See *Berkman I*, 536 F. Supp. at 179, 205-06 (finding that the zero percent pass rate for women gave rise to the inference of disparate impact).

25. See *id.* at 212 (explaining that firefighting requires paced physical endurance over long durations of time, not short periods of activity at maximum strength and speed).

26. See *id.* (noting that veteran firefighters are able to consistently perform their duties over the course of their careers using these skills, while demonstrating a physical capacity "no better than the average American male").

Further, the City's decision to use rank-order scoring further exacerbated the disparity between women's and men's scores on the exam because it had the effect of placing more weight on the physical exam, making it nearly impossible for women to score higher than men.<sup>27</sup>

Using statistics, Berkman made out a prima facie case of disparate impact.<sup>28</sup> The burden then shifted to the City of New York to show that Exam 3040 was a valid predictor of job performance; the City, however, was unable to show that the exam was an accurate predictor of which candidates would make the best firefighters.<sup>29</sup>

The court instructed the City of New York to develop an interim test for Berkman and her fellow class members and to develop a new, non-discriminatory physical exam for future use.<sup>30</sup> The court also enjoined the City from using the tainted eligibility list that Exam 3040 produced and directed the City to hire as many as forty-five women who failed the 1977 and 1978 physical performance exams but would be able to pass the interim exam.<sup>31</sup>

The court approved the interim physical test in August 1982.<sup>32</sup> The Uniformed Firefighters Association ("UFA") appealed, arguing, inter alia, that the court had abused its discretion by ordering the City to hire up to forty-five women and that the interim exam endangered public safety by lowering standards for qualifying as firefighters.<sup>33</sup> The court held for Berkman and against the UFA, and in September 1982, Berkman and thirty-seven other women took and passed the interim exam.<sup>34</sup> After a

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27. See *Berkman III*, 626 F. Supp. at 594-600 (describing how the scores from the physical exam demonstrated a considerable gap between men's and women's scores, with men as a group scoring higher, whereas women's and men's scores were clustered closer together for the written exam); Epstein, *supra* note 3, at 511-12 (noting that with rank-order scoring, a system that ranks candidates based on their total scores, women typically score lower than men on tests measuring speed and strength, resulting in a lower overall ranking and a decreased chance of being hired).

28. See *Berkman I*, 536 F. Supp. at 205-06 (comparing women's zero percent pass rate with men's forty-six percent pass rate and finding that this number did not result from chance).

29. See *id.* at 206-16 (rejecting the test as being both content and criterion invalid and finding that rank-order scoring was unjustifiable based on these defects).

30. See *id.* at 216-18 (providing Berkman interim and injunctive relief until the City of New York reached compliance).

31. See *id.* at 216-17 (reasoning that negative publicity surrounding Exam 3040 deterred women from even attempting the physical portion of the test, and that a non-discriminatory test with no such deterrent effect would have yielded approximately forty-five qualified women); *Berkman v. City of New York (Berkman II)*, 705 F.2d 584, 588-89 (2d Cir. 1983) (discussing the deterrent effect of test-related publicity).

32. See *Berkman II*, 705 F.2d at 589-92 (describing the process by which Berkman and the City developed the interim physical test).

33. See *id.* at 593, 598 (dismissing the UFA's contentions as meritless and affirming the district court).

34. See *Berkman v. City of New York (Berkman III)*, 626 F. Supp. 591, 592

yearlong probationary period, the City terminated Berkman and another class member, Zaida Gonzalez, alleging "poor performance as probationary firefighters."<sup>35</sup> Forced back into court, Berkman and Gonzalez sued, and the court found that their firings were retaliatory and ordered their reinstatement and other relief.<sup>36</sup>

### B. Berkman III and IV

Berkman succeeded in becoming a firefighter, but the City still had to develop a non-discriminatory test for future firefighter candidates.<sup>37</sup> The new test, Exam 1162, generally complied with the court's instructions from *Berkman I*, but the court found its scoring mechanism was not precise enough to make meaningful distinctions between candidates on the basis of their score.<sup>38</sup> The court ordered three changes to the scoring mechanism, which were designed to improve validity, to decrease emphasis on the disproportionately weighted physical exam, and to compensate for the decrease in the number of women taking the exam resulting from the publicity surrounding the Berkman/Gonzalez firings.<sup>39</sup>

Both Berkman and the City appealed this ruling to the United States Court of Appeals for the Second Circuit; the City opposed every change the District Court ordered, while Berkman continued to oppose the exam, *inter alia*, for failing to value adequately aerobic ability, which would have benefited women and would have reduced the disparity between women's and men's scores on the physical performance exam.<sup>40</sup> The Second Circuit affirmed the District Court's holding that the physical portion of the exam was valid and reversed the District Court's changes to the scoring

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(E.D.N.Y. 1985) (explaining that while the parties reached agreement regarding the interim exam, developing a new, non-discriminatory test for future use proved much harder).

35. See *id.* at 592-93 (relating the district court's finding that the firings were not performance-based but were intentional discrimination).

36. See *Berkman v. City of New York*, 580 F. Supp. 226, 244-45 (E.D.N.Y. 1983) (stating "I entertain no serious doubts concerning Berkman's ultimate ability to perform as a firefighter, and what uncertainties exist concerning Gonzalez exist entirely because of defendants' failure to develop any reliable record concerning her work.").

37. See *Berkman v. City of New York (Berkman I)*, 536 F. Supp. 177, 179, 216 (E.D.N.Y. 1982) (ordering the City to develop a new exam that had the least adverse effect on women).

38. See *Berkman III*, 626 F. Supp. at 593, 601-02 (directing the City to develop a new, non-discriminatory scoring system and to select women passing Exam 1162 using the new system).

39. See *id.* at 600-02 (detailing the changes needed to make the test fully compliant and the least adverse to women).

40. See *Berkman v. City of New York (Berkman IV)*, 812 F.2d 52, 58-60 (2d Cir. 1987) (noting that Berkman also opposed continued use of the written exam, which the District Court had found gave the physical test greater weight in determining successful candidates).

mechanism, effectively ending Berkman's quest for parity in the firefighting exam.<sup>41</sup> The Supreme Court denied certiorari on October 5, 1987.<sup>42</sup>

Despite the Second Circuit's approval of a firefighting qualifying exam shown to be adverse to women both in content and scoring, some women have passed the test and have successfully made careers out of firefighting in New York City.<sup>43</sup> Some of these women achieved leadership positions; in 1999, for example, Rochelle Jones was the first woman to achieve the rank of captain.<sup>44</sup> Four years later, the New York City Fire Department promoted her to be the first female battalion chief.<sup>45</sup> After twenty-five years with the Department, Brenda Berkman herself retired in 2006 as a captain.<sup>46</sup>

### III. THE PANELISTS

The *Journal of Gender, Social Policy & the Law* prepared the following transcript from the October 21, 2008 discussion "Taking the Heat: Gender Discrimination in Firefighting."<sup>47</sup> Professor Richard Ugelow moderated the panel of speakers, which included Captain (ret.) Brenda Berkman, New York City Fire Department; Karin Billerbeck, Human Performance Systems; Marc Bendic, labor economist; and Captain Dorcus Howard Richards, Montgomery County Fire Department.

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41. See *id.* at 62-63 (holding that the exam was valid despite its emphasis on anaerobic ability and the resulting adverse effect on women).

42. See *Berkman v. City of New York*, 484 U.S. 848, 848 (1987).

43. See Kilgannon, *supra* note 6, at D1 (noting that in 2003, twenty-two women were employed as firefighters in New York City).

44. See Jan Hoffman, *Public Lives; How Rocky Jones Got Her Captain's Bars*, N.Y. TIMES, June 30, 1999, at B2 (noting that Jones ranked twenty-fourth out of the 417 lieutenants passing the test).

45. See Gootman, *supra* note 4, at B1 (celebrating Jones' promotion while noting that since 1982, when the Department hired forty-two women, including Jones, it has hired only nine more women).

46. See Bill Mason & Sophia Chang, *An FDNY Pioneer*, NEWSDAY, Sept. 17, 2006, at A06 (characterizing Berkman as "one of New York's bravest").

47. The video podcast from this event is available at [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).

