

No. 13-16102

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Aimee GREENE
Plaintiff-Appellant,

v.

BUCKEYE VALLEY FIRE DISTRICT, et al.
Defendants-Appellees

On Appeal From the United States District Court For The District of Arizona
No. CV-11-02351-PHX-NVW
The Honorable Neil V. Wake

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION
FOUNDATION WOMEN'S RIGHTS PROJECT, ACLU FOUNDATION OF
ARIZONA, EQUAL RIGHTS ADVOCATES, NATIONAL
ORGANIZATION FOR WOMEN FOUNDATION, NATIONAL WOMEN'S
LAW CENTER AND WIDER OPPORTUNITIES FOR WOMEN, IN
SUPPORT OF APPELLANT AIMEE GREENE**

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RULE 29(C)(5) STATEMENT

Pursuant to FRAP Rule 29(c)(5) *Amici* state that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), the undersigned counsel for *Amici* hereby disclose that *Amici* have no parent corporations and that no corporation directly or indirectly holds ten percent or more of the ownership interest in any of the *Amici*.

STATEMENTS OF INTEREST OF AMICI¹

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty, equality, and justice embodied in this nation's Constitution and civil rights laws. The ACLU Women's Rights Project (WRP) is a leader in the legal effort to ensure women's full equality in American society, including in the workforce. Because economic opportunity is the bedrock of personal autonomy, WRP seeks to ensure that women have equal access to employment and fair treatment in the workplace, with a particular emphasis on issues affecting low-income women of color and women in non-traditional occupations such as firefighting.

The American Civil Liberties Union of Arizona (the ACLUAZ) is an affiliate of the American Civil Liberties Union. The ACLUAZ has regularly advocated against employer discrimination based on gender or race and litigated Title VII cases.

Equal Rights Advocates (ERA) is a national nonprofit civil rights advocacy organization based in San Francisco that is dedicated to protecting and expanding economic justice and equal opportunities for women and girls. Since its founding in 1974, ERA has sought to end gender discrimination in employment and

¹All parties have consented to the filing of this brief.

education and advance equal opportunity for all by litigating historically significant gender discrimination cases and engaging in direct services as well as other advocacy. ERA recognizes that women historically have been the targets of legally sanctioned discrimination and unequal treatment in the workplace, especially in fire service, and that this unfair treatment often is reinforced and/or perpetuated by retaliation against those who speak out against it.

National Organization for Women Foundation (NOW Foundation) is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. For decades, NOW Foundation has advocated for equal rights and full protection of the law against sex-based discrimination. Established in 1986, NOW Foundation is affiliated with the National Organization for Women (NOW), the largest feminist activist organization in the U.S., including hundreds of chapters in every state and the District of Columbia, with hundreds of thousands of members and contributing supporters.

The *National Women's Law Center* (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, including in fields that are nontraditional for women, and has promoted voluntary compliance by employers with federal and state civil rights laws. NWLC has prepared or participated in the preparation of numerous *amicus*

briefs in cases involving Title VII and the equal protection clause in this Court and in other federal circuit courts of appeals.

Wider Opportunities for Women (WOW) works nationally to promote economic independence and equality of opportunity for women and their families across their lifespans. WOW works to educate policy makers at all levels of government to promote the development of budgets, laws and regulations that help individuals obtain quality jobs and move toward economic security. For almost 50 years, WOW has been a national leader in promoting women's increased participation in non-traditional occupations such as public security, supporting more than 100 state and local public agencies, community organizations and job training programs. WOW also provides direct training to women in our home community of Washington, DC.

SUMMARY OF ARGUMENT

Appellant Aimee Greene, a woman firefighter, was subjected to abusive and discriminatory treatment while employed by Defendant Buckeye Valley Fire District, resulting in her arbitrary exclusion from firefighter positions that she was qualified to hold. Along the way, she was subject to verbal abuse and ridicule by male firefighters and required to demonstrate abilities above and beyond those of her male coworkers; meanwhile, Buckeye Valley officials permitted the abuse and discrimination to continue while maintaining a system that allowed gender bias to influence promotion decisions.

As discussed in this brief, the abuses and discriminatory actions visited on Ms. Greene mirror those that women throughout the country regularly endure when seeking firefighter positions. Historically, the fire service has been a bastion of masculinity and this continues to this day; effectively, the sign remains on firehouse doors: “For Men Only.” As set out in Appellant’s brief, the trial court erroneously found that Defendants’ actions were not illegal or unconstitutional. *Amici* urge reversal because the court’s failure to recognize the discrimination and decisions-by-stereotype in this case reinforces the existing high and often insurmountable barriers to all women seeking an equal chance to be a firefighter.

ARGUMENT

I. Women Endure Sex-Based Exclusion from and Discrimination in the Fire Service

Few occupations carry a more intense masculine and heroic image than firefighting, and few are more male-dominated in terms of personnel and workplace culture. Women attempting to enter and advance within the fire service face persistent exclusion and discrimination.

A. The long history of women's discriminatory exclusion from the fire service continues to the present day.

For most of its history, the fire service in the United States has been an exclusively male domain. The first paid female firefighter was hired in about 1973, only after Congress extended Title VII of the Civil Rights Act of 1964 to include government employers.² Even then, physical ability tests were implemented to keep women out, just as written tests excluded racial minorities.³ Gender integration of the fire service has lagged behind racial integration, in part because decision-makers within the Department of Justice initially subscribed to the

² Denise M. Hulett, Marc Bendick, Jr., Sheila Y. Thomas, & Francine Moccio, *Enhancing Women's Inclusion in Firefighting in the USA*, 8 Int'l J. of Diversity in Organisations, Communities, and Nations 189, 191 (2008) [hereinafter *Enhancing Women's Inclusion*]; Symposium, *Taking the Heat: Gender Discrimination in Firefighting*, 17 J. of Gender, Soc. Pol'y & the L. 713, 715 (2009) [hereinafter *Taking the Heat*] (statement of Richard Ugelow).

³ See *Taking the Heat*, *supra* note 2, at 717; Ann C. McGinley, *Ricci v. DeStefano: A Masculinities Theory Analysis*, 33 Harv. J.L. & Gender 581, 587 (2010).

stereotype that women were not physically capable of the job of firefighter, and therefore sought no hiring reforms for women.⁴

The representation of women and minorities in some fire departments has painstakingly increased in part through litigation enforcing Title VII.⁵

Nevertheless, the small number of women in the fire service today amounts to “huge underrepresentation.”⁶ Women account for only 3.7% of the 350,000 paid firefighters in the U.S., with the majority of fire departments never having had a paid female employee.⁷ The rate of change over time is also extremely small, with women’s representation increasing less than 0.2 percentage points per year.⁸ The fire service excludes women at an even greater rate than other traditionally male occupations, such as military service and the construction trades, where the proportion of women is only 17%.⁹

As described by both the Appellant’s and Appellees’ experts, the exclusion of women from the fire service in Arizona, and in the Phoenix area in particular,

⁴ See *Taking the Heat*, *supra* note 2, at 715-17; McGinley, *Ricci*, *supra* note 3, at 591-92.

⁵ See *Taking the Heat*, *supra* note 2, at 715.

⁶ Denise M. Hulett, Marc Bendick, Jr., Sheila Y. Thomas & Francine Moccio, *A National Report Card on Women in Firefighting 2* (2008) [hereinafter *National Report Card*].

⁷ *National Report Card*, *supra* note 6, at 1 (citing figures from the U.S. Census, 2000).

⁸ *Id.* at 4.

⁹ *Id.* at 1.

mirror the national trend.¹⁰ The first female firefighter to be employed full-time by the Phoenix Fire Department was hired in 1980, over the resistance of male firefighters.¹¹ Defendant Buckeye Valley Fire District has only hired four women to full-time positions in its entire history.¹²

B. The few women who enter the fire service are routinely excluded from high-ranking and high-status jobs, and otherwise suffer pervasive sex discrimination.

Firefighting is a sought after profession because of its high pay, job security and prestige. Thus it is unsurprising that the enduring underrepresentation of women in firehouses across the country has been attributed by researchers to persistent, systemic discrimination.¹³ The women who overcome obstacles to entering the fire service face pervasive on-the-job discrimination, both overt and subtle. This extends to the granting of promotions, and the existence of a “glass ceiling” blocking women’s access to these desirable positions is well-documented.¹⁴ The representation of women in the fire service shrinks with each

¹⁰ Excerpts from Expert Report of Wes Trayner 12, *Greene v. Buckeye Valley Fire Dep’t*, No. 2:11-cv-02351-NVW (D. Ariz. Jan. 18, 2013), ECF No. 86; Expert Report of Brenda Tranchina 21, *Greene v. Buckeye Valley Fire Dep’t*, No. 2:11-cv-02351-NVW (D. Ariz. Dec. 7, 2012), ECF No. 76-3. The defendant’s expert stated “Clearly, the fire service has historically been, and continues to be, a male dominated field” and described the participation of women in the fire service as a “drastic change.” Expert Report Tranchina 21, ECF No. 76-3.

¹¹ Expert Report Trayner 12, ECF No. 86.

¹² Expert Report Trayner 14, ECF No. 86.

¹³ *Enhancing Women’s Inclusion*, *supra* note 2, at 190-91.

¹⁴ *National Report Card*, *supra* note 6, at 9.

step up the managerial hierarchy, with women holding less than 3% of first line supervisory positions.¹⁵ Nationwide, women account for only about 150 battalion chiefs or deputy chiefs and thirty-one department chiefs.¹⁶ Although fire departments typically require only three to five years' experience before permitting firefighters to apply for promotions, self-reporting by departments indicates that an average of ten years elapses between the first hiring of a woman and the promotion of a woman to any higher rank.¹⁷

One identified source of the glass ceiling in the fire service is the use of subjective promotional practices which permit biased decision-making; Ms. Greene was subjected to this practice.¹⁸ Fire departments are more likely to manifest discrimination in their promotional decisions when they lack objective, formal promotion processes including explicit selection criteria validated as job-related and predictive of on-the-job performance, as well as training for managers in how to control their own unconscious stereotypes.¹⁹ Aside from promotional practices themselves, the "glass ceiling" is enforced through inequitable drilling requiring women to prove themselves beyond their male counterparts; the denial of

¹⁵ *Id.* (citing figures from the U.S. Census 2000).

¹⁶ *Id.* at 9; *Enhancing Women's Inclusion*, *supra* note 2, at 201, citing *Women in the Fire Service, Status Report 2005*, 1 (2005).

¹⁷ *National Report Card*, *supra* note 6, at 9.

¹⁸ Pl.'s Resp. Defs.' Separate Statement of Facts Supp. Mot. Summ. J. ¶¶27-32, ¶37, *Greene v. Buckeye Valley Fire Dep't*, No. 2:11-cv-02351-NVW (D. Ariz. Jan. 18, 2013), ECF No. 81.

¹⁹ *National Report Card*, *supra* note 6, at 10.

access to classes, coaching, and equipment to train for promotional exams; unfair administration of promotional tests (such as requiring women to drag wet hoses over wet pavement while men are provided dry hoses and pavement); and inequitable testing conditions, such as testing male candidates in the presence of cheering colleagues, while women are tested alone and in silence.²⁰ As this final example demonstrates, the attitudes and behavior of a firefighter's lateral colleagues, not just her managers, shape the culture of the workplace and can directly impact women's access to promotions.²¹

Ms. Greene's experience reflects these nationally observed trends. As the first and only female firefighter to test for a captain position in the Buckeye Valley Fire District, she was picked on by male firefighters and a captain who wanted to "break" her so that she would not take the promotional test.²² In addition, male firefighters and a captain stated openly that they would never work under the supervision of a woman.²³

Interrelated with the glass ceiling is a "glass wall," wherein male and female firefighters are assigned sex-differentiated roles and tasks.²⁴ Women are often relegated to low-status paramedic, fire inspection, and investigation positions,

²⁰ *Id.* at 9; *Taking the Heat*, *supra* note 2, at 731 (statement of Marc Bendick, Jr.).

²¹ *Taking the Heat*, *supra* note 2, at 731 (statement of Marc Bendick, Jr.).

²² Pl.'s Add'l Stmnts. Fact ¶120, ¶144, *Greene v. Buckeye Valley Fire Dep't*, No. 2:11-cv-02351-NVW (D. Ariz. Jan. 18, 2013), ECF No. 81.

²³ Pl.'s Add'l Stmnts. Fact ¶125.

²⁴ *National Report Card*, *supra* note 6, at 9.

while high-status fire suppression duty is reserved for male firefighters.²⁵ Such sex segregation within the firehouse in turn feeds the perception by male firefighters that their female colleagues are not full-fledged team members, thereby limiting women's access to promotional opportunities.²⁶ This "glass wall" is evident in the instant case, wherein Appellant and other women firefighters were largely assigned to ambulance or rescue duty, and were refused the opportunity to gain experience on engine or firefighting duty.²⁷ Another "glass wall" operating in Buckeye Valley was the denial to Ms. Greene and other women firefighters of opportunities to rotate into the position of acting captain. Such temporary assignments were used to help male firefighters gain experience and training as captains, and ultimately those who were promoted to full-time captain were promoted because of the time spent working as acting captains.²⁸

Women firefighters face myriad other forms of discrimination within the male dominated firehouse. Researchers concluded that "when women get hired, their experiences almost universally fall well outside legal boundaries for equal opportunity and non-harassment."²⁹ 84.7% of women firefighters report having

²⁵ *Id.*

²⁶ *Id.*

²⁷ Pl.'s Resp. Defs.' Sep. Stmt. Facts Supp. Mot. Summ. J. ¶¶19-20; Pl.'s Add'l Stmnts. Fact ¶119.

²⁸ See Pl.'s Resp. Defs.' Sep. Stmt. Facts Supp. Mot. Summ. J. ¶51; Pltf's Add'l Stmnts. Fact ¶¶ 188-196.

²⁹ *National Report Card*, *supra* note 6, at 3.

been treated differently from their colleagues because of their gender.³⁰

Specifically, 50.8% of women have suffered shunning or isolation; 42.9%, verbal harassment; 31.9%, pornography; 30.2%, sexual advances; 18.6%, hazing; 18.2%, hostile cartoons or written material; and 6.3%, assaults.³¹ Commonly encountered forms of discrimination include persistent hostility and ostracism by colleagues; ill-fitting boots, helmets, coats, and equipment; tampering with women's equipment; "pranks" such as human feces in women's boots or on bathroom walls; crude sexual talk and the presence of hardcore pornography; an expectation of sexual relations with male coworkers; constant questioning of women's job competence; forcing women to do more physical drills, including obsolete drills; refusal to cook for or serve women firefighters, and threatened or actual contamination of food; cutting off of the water from a hose held by a woman firefighter at a fire scene; frequent station changes to complicate reporting to superiors; and in some cases, physical assault.³² Paradoxically, women perceived

³⁰ *Id.*

³¹ *Id.* at 9.

³² *Id.* at 7-11; Expert Report Trayner 13, ECF No. 86; *Enhancing Women's Inclusion*, *supra* note 2, at 201; *Taking the Heat*, *supra* note 2, at 723 (statement of Brenda Berkman), 734 (statement of Marc Bendick, Jr.); Pl.'s Add'l Stmnts. Fact ¶106; McGinley, *Ricci*, *supra* note 3, at 605-606, citing Carol Chetkovich, *Real Heat: Gender and Race in the Urban Fire Service*, 54, 62-66 (1997).

as masculine tend to be treated more harshly.³³ Ms. Greene was perceived in this way, and was derisively called a “he-she.”³⁴

Workplace discrimination in firehouses is especially oppressive because firefighters must eat, sleep, and work together in close quarters for twenty-four hours at a time, and must trust each other with their lives in emergency situations.³⁵ Women firefighters must live in a “fraternity house” atmosphere that often reflects an acceptance of sexualized and misogynistic behavior.³⁶ This culture of hostility to women persists in part because it is tolerated by the management of their departments, including through the maintenance of weak internal procedures for addressing complaints by women workers.³⁷

The experiences of Appellant and the other women in the Buckeye Valley Fire District mirror the experience of women firefighters nationwide. In addition to experiencing a “glass ceiling,” and “glass wall,” Ms. Greene was frequently called

³³ McGinley, *Ricci*, *supra* note 3, at 603-4, citing Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 *Psychol. Rev.* 573, 583 (2002); Alice H. Eagly, Mary C. Johannesen-Schmidt & Marloes Lvan Elgen, *Transformational, Transactional, and Laissez-Faire Leadership Styles: A Meta-Analysis Comparing Women and Men*, 129 *Psychol. Bull.* 569, 571-73 (2003).

³⁴ Male firefighters stated that “if the he-she wanted a man’s job, she was going to be treated like a man.” (Pl.’s Add’l Stmnts. Fact ¶132).

³⁵ *National Report Card*, *supra* note 6, at 8.

³⁶ *Id.*

³⁷ *Id.* at 9; *Taking the Heat*, *supra* note 2, at 734 (statement of Marc Bendick, Jr.)

misogynistic names like “bitch” and “girl.”³⁸ She was made to do more and harder trainings than her male coworkers, and forced to do them alone while the male firefighters sat and watched.³⁹ Ms. Greene “would get moved around all the time ... captains wouldn’t want to work with her, so they would send her to another truck”⁴⁰ Another woman firefighter testified that she was treated better by inmates when she worked for the Department of Corrections than by her male firefighting colleagues.⁴¹ As described by Appellant’s expert, there have also been verified complaints of the regular use of profanity, sexual innuendo and comments, and sexual and profane gestures and jokes by male firefighters, with no disciplinary response by Buckeye Valley’s management.⁴² According to Appellant’s expert, even male firefighters found the work environment objectionable, but feared that if they complained they could lose their jobs.⁴³ These facts suggest that, like many other fire departments across the country, Buckeye Valley maintains a workplace where discriminatory attitudes and actions toward women are the norm.

³⁸ Pl.’s Add’l Stmnts. Fact ¶128.

³⁹ Pl.’s Add’l Stmnts. Fact ¶138, ¶139, ¶¶141-143.

⁴⁰ Pl.’s Resp. Defs.’ Sep. Stmnt. Facts Supp. Mot. Summ. J. ¶26.

⁴¹ Pl.’s Add’l Stmnts. Fact ¶116.

⁴² Expert Report Trayner 14-15, ECF No. 86.

⁴³ Expert Report Trayner 15, ECF No. 86.

II. Women Firefighters are Subjected to Implicit Bias Based on Unlawful Sex Stereotypes

The pervasive discrimination suffered by women in the fire service is the product of deeply ingrained sex stereotypes. The operation of invidious stereotyping – including when bias is unstated or even unconscious – should be acknowledged by courts if the objective of antidiscrimination law is truly to be achieved.

A. Discrimination against women firefighters is driven by sex stereotypes.

The fire service is pervaded by powerful stereotypes concerning both the nature of firefighting and women’s capability to fulfill job duties. More than other workers, firefighters often hold a profound personal identification with their work, and this identity is suffused with traditional masculinity. Firefighting is a profession often passed down from father to son.⁴⁴ Firefighting is viewed as a “calling” in which “brotherhood” is the uppermost value.⁴⁵ Firefighters conceptualize their work as bravely fighting interior structural fires and rescuing people, even though, as discussed below, those tasks amount to a minority of their

⁴⁴ McGinley, *Ricci*, *supra* note 3, at 599, citing David Halberstam, *Firehouse 6* (2002); Dennis Smith, *Firefighters: Their Lives in Their Own* 30 (1988); Chetkovich, *supra* note 32, at 48-56.

⁴⁵ *Id.* at 600, citing Chetkovich, *supra* note 32, at 28; Halberstam, *supra* note 44, at 68, 138; Richard Picciotto, *Last Man Down: A Firefighter’s Story of Survival* 6-7 (2003).

actual duties.⁴⁶ They describe the adrenaline rush of entering a burning building or holding a gushing fire hose.⁴⁷ Firehouse humor includes sexual jokes about “hoses,” “fire,” and “heat.”⁴⁸ Firefighting work is structured along paramilitary lines.⁴⁹ Similar to the military, there are strict codes of behavior in the firehouse, including emphasis on the importance of doing one’s part without being asked.⁵⁰ The firefighting profession as it currently exists therefore embodies in many ways what has been termed a “powerful hegemonic masculinity.”⁵¹

This masculine stereotype of firefighting entails a parallel stereotype that the opposite – femininity – is incompatible with the work of firefighting, and thus that women inherently lack characteristics like strength and stamina needed to do

⁴⁶ *Taking the Heat*, *supra* note 2, at 734 (statement of Marc Bendick, Jr.); *National Report Card*, *supra* note 6, at 11; Brenda Berkman, Teresa M. Floren & Linda F. Willing, Fed. Emergency Mgmt. Agency, *Many Women Strong: A Handbook for Women Firefighters* 18 (1999).

⁴⁷ See McGinley, *Ricci*, *supra* note 3, at 598, citing Halberstam, *supra* note 44, at 60-61, 84-85 (2002); Picciotto, *supra* note 45, at 159-60 (2003); Chetkovich, *supra* note 32, at 35-36; Smith, *supra* note 44, at xviii.

⁴⁸ *Id.* at 602, citing Sarah J. Tracy & Clifton Scott, *Sexuality, Masculinity, and Taint Management Among Firefighters and Correctional Officers: Getting Down and Dirty With “America’s Heroes” and the “Scum of Law Enforcement,”* 20 Mgmt Comm. Q. 6, 22 (2006).

⁴⁹ *Enhancing Women’s Inclusion*, *supra* note 2, at 190.

⁵⁰ McGinley, *Ricci*, *supra* note 3, at 598, citing Halberstam, *supra* note 44, at 8-9; Chetkovich, *supra* note 32, at 30.

⁵¹ *Id.* at 586, citing R. W. Connell, *Masculinities*, 76-77 (2d ed. 2005); Michael S. Kimmel, *Masculinity as Homophobia*, in *Feminism & Masculinities* 182, 184 (Peter F. Murphy ed., 2004).

firefighting work.⁵² The mere presence of women in the fire service poses a threat to a firefighters' self-image and self-esteem, and to a longstanding organizational culture that is deeply rooted and fiercely resistant to change.⁵³ The pervasive aggression and discrimination experienced by many women firefighters can therefore be explained as an effort by their male co-workers to protect their own masculine identity and that of their job by mistreating those who represent the antitheses of masculinity.⁵⁴

It is evident that these dynamics are present in the instant case. Appellant's expert describes male firefighters' "resentment" towards women for "invading" the fire service, and some men's belief that women lacked the strength for firefighting work.⁵⁵ Women firefighters in the Buckeye Valley Fire District were told that "women shouldn't be firefighters," and that their "place" was in the kitchen or scrubbing the floors.⁵⁶ Ms. Greene in particular was told that she didn't "know her place," and outside her presence it was said that she had no "right" to test for a

⁵² See *Id.* at 603, 609 citing Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. Colo. L. Rev. 1151, 1217 (2008); Janice D. Yoder & Lynne L. Berendsen, "Outsider Within" the Firehouse: African American and White Women Firefighters, 25 Psychol. Women Q. 27, 32 (2001).

⁵³ *Taking the Heat*, *supra* note 2, at 722-23 (statement of Brenda Berkman), 734-35 (statement of Marc Bendick, Jr.).

⁵⁴ *National Report Card*, *supra* note 6, at 7-9, 11; See McGinley, *Ricci*, *supra* note 3 at 586-87, citing McGinley, *Bullying*, *supra* note 52, at 1217-19, 1151, 1183-89; 1223-26; Kimmel, *supra* note 51, at 186-87.

⁵⁵ Expert Report Trayner 12-13, ECF No. 86.

⁵⁶ Pl.'s Add'l Stmnts. Fact Opp'n Defs.' Mot. ¶112, ¶115, ¶117, ¶134.

promotion.⁵⁷ Another woman firefighter testified: “It’s a guy’s job. It’s always been a guy’s job. ... Everybody knows I can do my job, but there’s [sic] some individuals that still don’t think that I should be here just because I’m a girl.”⁵⁸

Relatively recent changes in the firefighting profession further threaten firefighters’ masculine self-image and exacerbate hostility towards women. Fire-resistant buildings and the use of smoke detectors have reduced the number of fire calls, particularly calls involving ongoing fires.⁵⁹ Because many cities have transferred their emergency medical services to the fire department, more than two-thirds of calls answered by the fire service are for medical assistance instead of fire suppression.⁶⁰ Many of these calls require non-emergency services such as assisting homeless persons or transporting people for non-emergency medical treatment.⁶¹ Additionally, firefighters increasingly perform pedestrian tasks such as performing fire safety and home security inspections, investigating the causes of fires, and helping people at fire and accident scenes.⁶²

This shift in the nature of firefighting calls for a set of skills and attributes that contradicts the traditional masculine stereotype of firefighting, such as care-

⁵⁷ Pl.’s Add’l Stmnts. Fact Opp’n Defs.’ Mot. ¶128, ¶129.

⁵⁸ Pl.’s Add’l Stmnts. Fact Opp’n Defs.’ Mot. ¶108.

⁵⁹ Berkman et al., *supra* note 46, at 18.

⁶⁰ *Enhancing Women’s Inclusion*, *supra* note 2, at 190.

⁶¹ *Id.* at 203.

⁶² McGinley, *Ricci*, *supra* note 3 at 599, citing Halberstam, *supra* note 44; Picciotto, *supra* note 45; Smith, *supra* note 44.

giving skills, medical training, and knowledge of the poor communities in which such services are often required.⁶³ These competencies, often associated with nurses or social workers, are viewed as feminine and therefore as threats to the heroic self-image of male firefighters as battlers of large fires.⁶⁴ In attempting to maintain their identities in spite of this shift, male firefighters engage in shop-talk about the traditional aspects of firefighting while downplaying these newer tasks and “accentuat[e] and celebrat[e] their heterosexuality” through sexual banter.⁶⁵ They actively discourage women firefighters from continuing firefighting, thereby establishing that it is a job only men can do.⁶⁶ In Buckeye Valley, Ms. Greene and other women firefighters observed that women were consistently assigned to ambulance or rescue duty by their superiors while men were given firefighting duty.⁶⁷ This conforms with the national pattern of stereotyped beliefs steering men toward highly-valued, traditionally masculine tasks and relegating women to work viewed as feminine.

⁶³ *Id.* at 618, citing *National Report Card*, *supra* note 6, at 11; *Enhancing Women’s Inclusion*, *supra* note 2, at 203; Chetkovich, *supra* note 32, at 46; Tracy & Scott, *supra* note 48, at 19-24.

⁶⁴ *Id.* at 600, citing *National Report Card*, *supra* note 6, at 11.

⁶⁵ *See Id.* at 595-610.

⁶⁶ *See Id.* at 600-610, 617.

⁶⁷ Pl.’s Resp. Defs.’ Sep. Stmt. Facts Supp. Mot. Summ. J. ¶¶19-20; Pl.’s Add’l Stmnts. Fact ¶119.

B. Courts and commentators have recognized the relevance of impermissible stereotyping and implicit bias in a variety of contexts.

The pervasive discrimination experienced by women in the fire service takes a range of forms, from overtly sex-based maltreatment to more subtle bias informed by sex stereotypes. Differential treatment based on sex stereotypes – including instances in which the decision-maker is unaware that he or she is acting on bias – is as devastating as overt discrimination to both individual targets and women’s access to traditionally male occupations. Such differential treatment, therefore, merits judicial attention.

The widespread problem of implicit bias, sometimes called “unconscious discrimination,” has been thoroughly documented by decades of sociological research.⁶⁸ Implicit bias powerfully influences decision-makers’ perceptions and decisions even when the decision-maker believes that he or she is motivated by legitimate, nondiscriminatory reasons.⁶⁹ Sociological studies establish that people conform their attitudes and behavior to their social surroundings more than they would admit even to themselves.⁷⁰ Fire service in particular has been identified as

⁶⁸ Linda H. Krieger and Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Cal. L. Rev. 997, 1034 (2006).

⁶⁹ *Id.*

⁷⁰ *Id.* at 1027, citing Solomon E. Asch, *Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority*, 70 Psychol. Monographs: Gen. and Applied I (1956).

a site of implicit bias; the persistently low number of women firefighters and the lack of remedial measures taken by managers suggest that fire service culture resents the presence of women and – consciously or unconsciously – acts to exclude and marginalize them.⁷¹ When bias is ingrained in the culture of a workplace, change comes slowly and is met with both active and passive resistance.⁷²

Judicial approaches that ignore the operation of implicit bias have been criticized for disregarding the ways in which discrimination actually manifests. Court decisions equating discriminatory motivation with conscious intention are contradicted by decades of reliable psychological research.⁷³ Thus, for example, the “honest belief” defense asserted in employment discrimination cases makes little sense once it is understood that an employer may consciously believe in his or her asserted legitimate business reason, yet in fact have been motivated by subjective biases.⁷⁴ Similarly, the “same actor inference,” in which equitable

⁷¹ *National Report Card*, *supra* note 6, at 10.

⁷² *Enhancing Women’s Inclusion*, *supra* note 2, at 28, citing Marc Bendick, Jr. & Mary Lou Egan, *Changing Workplace Cultures to Reduce Employment Discrimination*, Presentation to Urban Institute Conference Low Wage Workers in the New Economy (2000).

⁷³ Krieger & Fiske, *supra* note 68, at 1026, 1061-62, 1030, citing Gilbert Ryle, *The Concept of Mind*, 13-14 (1949).

⁷⁴ Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 Harv. C.R.-C.L. L. Rev. 482 (2005); Krieger & Fiske, *supra* note 68, at 1035; See David L. Faigman, Nilanjana Dasgupta & Cecilia Ridgeway, *A Matter*

treatment is presumed where a plaintiff was hired and fired by the same person, ignores both the susceptibility of individual beliefs to social influence and attitudinal shifts over time, and has therefore been criticized by commentators and rejected by some courts.⁷⁵ Most recently, the Supreme Court’s decision in *Wal-Mart v. Dukes* has been criticized for its refusal to consider expert testimony regarding implicit bias in subjective employment determinations.⁷⁶

Elsewhere, the operation of implicit bias has received judicial recognition, including by this Court. In *Costa v. Desert Palace*, this Court found that a woman working in a “male-dominated environment” was terminated at least in part because of her sex where there was circumstantial evidence of discriminatory intent.⁷⁷ The plaintiff had been “chastised for failing to conform to the role stereotypically assigned to women” and told that she did not need overtime

of Fit: The Law of Discrimination and the Science of Implicit Bias, 59 Hastings L.J. 1389, 1404-07 (2008).

⁷⁵ Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 Conn. L. Rev. 1117, 1128–29 (2008); see, e.g., *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 745 (7th Cir. 1999); *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 (10th Cir. 2006); *Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1443 (11th Cir. 1998) (same); Nancy Gertner & Melissa Hart, *Implicit Bias in Employment Litigation*, in *Implicit Racial Bias Across the Law* 18-19 (2012).

⁷⁶ *Wal-Mart Stores, Inc. v. Dukes, et al.*, 131 S.Ct. 2541 (2011); Gertner & Hart, *supra* note 75, at 9-10. The *Wal-Mart* decision is not appropriately applied to cases like this one, in part because a separate legal issue (commonality) was presented, and as a factual matter because the decision rested in part on Wal-Mart’s enormous “size and geographical scope.” See *Wal-Mart*, 131 S.Ct. at 2545.

⁷⁷ *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002), *aff’d*, 539 U.S. 90 (2003).

because she had no family.⁷⁸ This Court reasoned that “[b]ecause she was the only woman in an otherwise all-male unit, linking the differential treatment to her sex was not a difficult leap.”⁷⁹ Further, in *Price Waterhouse v. Hopkins*, the Supreme Court reviewed psychological evidence regarding both explicit and implicit bias against the only woman candidate for partnership in an accounting firm, and held that judging a woman more harshly than a man because of her non-conformity to feminine stereotypes violated Title VII.⁸⁰ In the context of jury selection, Justice Marshall stated in concurrence in *Batson v. Kentucky* that “[a] prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is ‘sullen,’ or ‘distant,’ a characterization that would not have come to his mind if a white juror had acted identically.”⁸¹ As these cases illustrate, judicial acknowledgement of implicit bias requires nothing more than a heightened attentiveness to, and a more realistic appraisal of, the circumstances surrounding potentially discriminatory actions, and in that sense does not differ greatly from the imputation of bias where circumstantial rather than direct

⁷⁸ *Id.* at 861.

⁷⁹ *Id.* at 859-60.

⁸⁰ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See also Costa*, 299 F.3d. at 235–36; *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1114 (D.D.C. 1985) *aff’d in part, rev’d in part*, 825 F.2d 458 (D.C. Cir. 1987).

⁸¹ *Batson v. Kentucky*, 476 U.S. 79, 106 (1986). *See also Briggs v. Grounds*, 682 F.3d 1165, 1187 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 894 (U.S. 2013) (Berzon, J., dissenting) (“Lack of ‘rapport’ [between prosecutor and juror] can be the manifestation of unconscious racial bias or cultural differences in communication.”).

evidence is adduced. Evaluating evidence in a sexual harassment case, for example, this Court stated that conduct “that is not facially sex-specific nonetheless may violate Title VII if there is sufficient circumstantial evidence of qualitative and quantitative differences in the harassment suffered by female and male employees.”⁸²

That implicit bias should be cognizable under Title VII is further supported by the statutory text.⁸³ Title VII outlaws “discrimination” based on sex and other classifications, but does not define “discrimination.”⁸⁴ The 1991 amendments to Title VII specified that discrimination occurs when one of the enumerated classifications is a “motivating factor” in an employment decision,⁸⁵ but “motivating factor” remained undefined.⁸⁶ In ordinary speech, “motive” means “what prompts a person to act,” while “intent” – a word that does not appear in

⁸² *E.E.O.C. v. National Educ. Ass’n, Alaska*, 422 F.3d 840, 842 (9th Cir. 2005). *See also Tuli v. Brigham & Women’s Hosp., Inc.*, 592 F. Supp. 2d. 208 (D. Mass. 2009); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38 (1st Cir. 1999) (Where plaintiff claimed disparate treatment due to gender when passed over for a promotion, the court stated, “Title VII’s prohibition against ‘disparate treatment because of race’ extends to ... employer decisions that are based on stereotyped thinking or other forms of less conscious bias.”).

⁸³ In addition to the foregoing, other textual arguments focus on the meaning of “because of,” with some concluding that implicit discrimination fits the statutory language and others the opposite.

⁸⁴ Section 703(a)(1), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1); 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1).

⁸⁵ Section 703(m), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(m).

⁸⁶ Krieger & Fiske, *supra* note 68, at 1009-10.

Title VII – refers to a person’s conscious state of mind.⁸⁷ This distinction, and its implication that implicit bias should be judicially recognized, has been acknowledged in interpretations of the Age Discrimination in Employment Act.⁸⁸ Where hiring is concerned, moreover, Title VII specifies that to “fail or refuse” to hire an individual because of a protected characteristic is unlawful.⁸⁹ “Refuse” carries a connotation of willfulness while “fail” does not, suggesting that both intentional and unintentional discrimination are meant to be actionable.⁹⁰ An expansive interpretation of Title VII is further supported by the Supreme Court’s oft-made statement that, in enacting Title VII, “Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin.”⁹¹ In another

⁸⁷ *Id.* at 1053, citing Black’s Law Dictionary 727 (5th ed. 1979); *Webster’s Third New International Dictionary* (2002).

⁸⁸ *Id.* at 1055-56 (citing *Burlew v. Eaton Corp.*, 869 F.2d 1063, 1066 (7th Cir. 1989); *La Montagne v. Am. Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984); *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155 (7th Cir. 1981)).

⁸⁹ 42 U.S.C. § 2000e-2(a)(1) (2001).

⁹⁰ Krieger & Fiske, *supra* note 68, at 1055, citing *Webster’s New Collegiate Dictionary* 296 (2d ed. 1956); *Webster’s Third New International Dictionary* 815, 1910 (2002); Merriam-Webster, *Webster’s Online Third New International Dictionary* (2002).

⁹¹ *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

refrain, the Court has stated that Title VII tolerates “no racial discrimination, subtle or otherwise.”⁹²

The social scientific understanding of implicit bias has therefore been applied by some courts, though by no means universally, and its use finds support in the text and judicial interpretations of Title VII. Recognizing implicit bias is especially appropriate in the case of the fire service, where a long history of sex discrimination continues to the present day, and where the discrimination arises from deep seated attitudes about the proper roles of men and women. In the instant case, a reasonable inference that implicit stereotypes were indeed at work would seem to emerge from a number of established facts, including the assignment of fire versus rescue duties along sex stereotypical lines; supervisors’ willingness to tolerate verbal abuse, inequitable drilling, and other mistreatment of a member of a protected group; and the use of a subjective promotional system that permits the operation of bias when more objective systems were available. Even in the absence

⁹² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 526 (1993) (quoting *Green*, 411 U.S. at 801); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989) (same); *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 349 n.31 (1977) (same); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 n.8 (1976) (same). *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (“In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman”).

of smoking gun evidence of discriminatory intent, such facts help establish the operation of implicit bias behind ostensibly neutral decisions within a firehouse culture hostile to women.

CONCLUSION

As the preceding discussion makes evident, the experience of Appellant Aimee Greene amounts to a textbook case of the discrimination and abuse experienced by women firefighters across the country. Such discrimination takes a variety of overt and implicit forms, all of which are discernible within the context of the pervasively male dominated firehouse, and all of which deserve legal recognition and remedy.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6495 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 pt.

DATED: October 4, 2013

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CERTIFICATE OF SERVICE

I certify that on October 4, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All counsel for petitioner and respondents in this case are registered CM/ECF users, so they will be served by the appellate CM/ECF system.

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