

08-5171-cv

Nos. 08-5171-cv (L), 08-5172-cv (xap), 08-5173-cv (xap), 08-5375-cv (xap), 08-5149-cv (con),
08-4639-cv (con)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant,
and
JANET CALDERO, CELIA I. CALDERON, MARTHA CHELLEMI, SALIH CHIOKE,
ANDREW CLEMENT, KRISTEN D’ALESSIO, LAURA DANIELE, CHARMAINE
DIDONATO, DAWN L. ELLIS, MARCIA P. JARRETT, MARY KACHADOURIAN,
KATHLEEN LUEBKERT, ADELE A. McGREAL, MARGARET McMAHON,
MARIANNE MANOUSAKIS, SANDRA D. MORTON, MAUREEN QUINN, HARRY
SANTANA, CARL
D. SMITH, KIM TATUM, FRANK VALDEZ, and IRENE WOLKIEWICZ,
Intervenors-Appellees-Cross-Appellants,
and
PEDRO ARROYO, JOSE CASADO, CELESTINO FERNANDEZ, KEVIN LaFAYE,
STEVEN
LOPEZ, ANIBAL MALDONADO, JAMES MARTINEZ, WILBERT McGRAW,
SILVIA
ORTEGA DE GREEN, and NICHOLAS PANTELIDES,
Intervenors-Appellees
-against-
JOHN BRENNAN, JAMES G. AHEARN, SCOTT SPRING, and DENNIS
MORTENSEN,
Intervenors-Appellants-Cross-Appellees,
and
NEW YORK CITY DEPARTMENT OF EDUCATION,
CITY OF NEW YORK, MARTHA K. HIRST, Commissioner, New York City
Department of
City Administrative Services, NEW YORK CITY DEPARTMENT OF CITYWIDE
ADMINISTRATIVE SERVICES,
Defendants-Appellees-Cross-Appellants,

Appeal No. 08-5149-cv (con)

JOHN BRENNAN, JAMES AHEARN, SCOTT SPRING, DENNIS MORTENSEN,
JOHN
MITCHELL, and ERIC SCHAUER,
Plaintiffs-Appellants,
v.
ATTORNEY GENERAL OF THE UNITED STATES, ASSISTANT ATTORNEY
GENERAL
OF THE UNITED STATES FOR CIVIL RIGHTS, U.S. DEPARTMENT OF JUSTICE,
NEW
YORK CITY DEPARTMENT OF EDUCATION, CITY OF NEW YORK, NEW YORK
CITY
DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, MARTHA K.
HIRST,
Commissioner, New York City Department of City Administrative Services,
Defendants-Appellees,
and
JANET CALDERO, CELIA I. CALDERON, MARTHA CHELLEMI, SALIH CHIOKE,
ANDREW CLEMENT, KRISTEN D’ALESSIO, LAURA DANIELE, CHARMAINE
DIDONATO, DAWN L. ELLIS, MARCIA P. JARRETT, MARY KACHADOURIAN,
KATHLEEN LUEBKERT, ADELE A. McGREAL, MARGARET McMAHON,
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CARL
D. SMITH, KIM TATUM, FRANK VALDEZ, and IRENE WOLKIEWICZ,
Intervenors-Appellees
and
PEDRO ARROYO, JOSE CASADO, CELESTINO FERNANDEZ, KEVIN LaFAYE,
STEVEN
LOPEZ, ANIBAL MALDONADO, JAMES MARTINEZ, WILBERT McGRAW,
SILVIA
ORTEGA DE GREEN, and NICHOLAS PANTELIDES,
Intervenors-Appellees

RUBEN MIRANDA,
Plaintiff-Appellant
v.
NEW YORK CITY DEPARTMENT OF EDUCATION,
Defendant-Appellee

On Appeal from the
United States District Court
for the Eastern District of New York

**BRIEF OF *AMICUS CURIAE* LEGAL MOMENTUM IN FAVOR OF
INTERVENORS-APPELLEES-CROSS-APPELLANTS
JANET CALDERO, ET AL.**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Legal Momentum, formerly NOW Legal Defense and Education Fund, is the nation's oldest women's legal rights organization. Throughout its nearly 40-year history, Legal Momentum has pursued litigation as counsel and *amicus curiae* to secure full enforcement of laws prohibiting sex discrimination, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), and to protect employers' ability to take affirmative action to correct longstanding discrimination. See *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 537 U.S. 306 (2003).

Legal Momentum has special expertise concerning the barriers faced by women entering traditionally male-dominated fields, such as the skilled trades and law enforcement. The organization litigated *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), a landmark sexual harassment case on behalf of women craftworkers in a virtually all-male shipyard, and recently secured the first federal appellate decision holding that failure to provide adequate firehouse restroom facilities and properly-fitting safety gear for women firefighters is sex discrimination. *Wedow v. City of Kansas City*, 442 F.3d 661 (8th Cir. 2006). Legal

Momentum further advocates with federal, state, and local policymakers, as well as with unions and private business, to promote recruitment and retention of women in non-traditional jobs.

Legal Momentum submits this brief to provide additional context for the court's analysis of the Settlement Agreement's challenged provisions providing permanent appointment and retroactive seniority for 22 women.

SUMMARY OF ARGUMENT

The decision of the district court correctly held that the female beneficiaries are entitled to the permanent custodian status and retroactive seniority provided them under Paragraphs 13 through 16 of the Settlement Agreement. Without these remedies, the Settlement Agreement's laudable efforts to improve recruitment of women will have little more than a superficial effect on the gender composition of the custodian workforce. Social science confirms that a sex-segregated workforce breeds entrenched stereotypes and animus toward the (female) "out-group," while inflating (male) "in-group" members' perception of their own merit. In this way, certain jobs earn the labels "women's work" or "men's work." These built-in cultural barriers are powerful deterrents to any woman considering a "non-traditional" job. For these reasons, merely increasing efforts to recruit women does nothing to assure that those women actually apply, or that they are encouraged to stay on the job.

However, social science also shows that in-group members' prejudices diminish as their contact with out-group members increases. These theories are borne out by the experiences of countless women – and men – working in historically male-dominated jobs. Moreover, by diminishing the single-group identification with a given job, diversity helps

change out-group members' own perceptions of which environments will and will not accept them. Accordingly, advocates promoting women's entry in male-dominated jobs cite women's visibility in the incumbent workforce as critical to both recruiting and retaining women. The success of this strategy is not merely hypothetical: over the course of a decade beginning in the late 1990s, the Minneapolis Fire Department used an aggressive mentoring campaign to attract women firefighters, ultimately achieving a firefighter workforce that now is close to 17 percent women – one of the highest in the nation – and appointing a woman fire chief in 2004.

For these reasons, as well as those set forth in the Brief for the Caldero Intervenors, the district court's ruling that the women's permanent appointments and retroactive seniority complied with Title VII and the Constitution should be affirmed.

ARGUMENT

I. THE SETTLEMENT’S GOALS OF INCREASED RECRUITMENT AND RETENTION OF WOMEN CUSTODIANS WOULD HAVE BEEN SIGNIFICANTLY HINDERED IF THE INCUMBENT WORKFORCE WERE NOT DIVERSIFIED.

Long-term workplace sex segregation not only has many causes, but many results, as well. Among these are sex stereotypes that become embedded in settled norms of workplace behavior, conceptions of what makes a “good” worker or supervisor, and decisions about work assignments, among others. These norms, alone and in concert, can be as exclusionary as a “men only” hiring policy, but are less obvious. Indeed, they often are not intentional or even conscious – and thus they can be more enduring and pernicious, while also being less susceptible to straightforward proscriptive remedies alone. This “second generation discrimination,” as one commentator has described it, demands multiple, pro-active solutions. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 463 (2001). In the instant case, such solutions should include those provided in Paragraphs 13 through 16 of the Settlement Agreement.

A. All-male work environments breed gender stereotypes that hinder women's opportunities.

The individual's reflex to stereotype is well-documented and broadly accepted in the social psychology literature. *See, e.g.,* William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 *Contemp. Soc.* 120, 121-22 (2000); Galen Bodenhausen, et al., *Stereotypes in Thought and Deed: Social-cognitive Origins of Intergroup Discrimination*, in *Intergroup Cognition and Intergroup Behavior*, 311, 311-15 (Constantine Sedikides, et al., eds., 1998). Stereotypes associated with gender, and gender roles, are especially entrenched. *See, e.g.,* Cecilia L. Ridgeway and Lynn Smith-Lovin, *The Gender System and Interaction*, 25 *Ann. Rev. of Soc.* 191, 192 (1999). In the context of employment, such "sex labeling" defines the kind of work that is appropriate for women, and what kind of woman is appropriate in the workplace.¹ Where a work environment is starkly sex-segregated – and where the work involved aligns with a trait considered

¹ The extensive literature devoted to exploring the gender wage gap confirms that women remain concentrated in a small universe of low-paying fields, such as sales, office, and service jobs; in contrast, women's numbers are dwarfed by those of men in jobs like construction worker (2.7% women), structural iron and steelworkers (.4%), and electrician (1.7%), where wages can be as much as 30% higher than in female-dominated fields. U.S. Dep't. of Labor & U.S. Bureau of Labor Statistics, *Women in the Labor Force: A Databook* 26-34 (Dec. 2008), available at <http://www.bls.gov/cps/wlf-databook-2008.pdf>.

typical of one sex, such as physical strength, or willingness to get dirty – such stereotypes can flourish unchallenged. *See, e.g.,* William T. Bielby & James N. Baron, *Men and Women at Work: Sex Segregation and Statistical Discrimination*, 91 Am. J. Soc. 759, 782-85 (1986); V.K. Oppenheimer, *The Sex-Labeling of Jobs*, 7 Indus. Rel. 219, 226-28 (1968).

Consequently, enduring stereotypes about women's preferences, needs, and abilities can warp decisions such as those related to recruitment and hiring, training opportunities, work assignment, performance evaluation, and promotion, particularly when the job in question is associated with masculinity.² *See* Bielby & Baron, *supra*, at 782. One group of commentators summarizes the phenomenon as follows:

The reinforcing effects of context on decision makers' jobholder schemas are one important reason for the persistence of gender segregation. A second reason why gender segregation persists is that gender-associated jobholder schemas may reinforce contextual factors that generate segregation. For example, if a job's current gender composition is skewed, then

² Of course, this is precisely why the Supreme Court long has held that an employer's reliance on gender stereotypes in making an adverse employment decision is discriminatory. *See, e.g.,* *Hibbs v. Nevada Dep't of Human Resources*, 538 U.S. 721, 729-30 (2003); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978). *See also* *United States v. Virginia*, 518 U.S. 515, 533 (1996) (for purposes of interpreting constitutionality of state's gender classification, state's justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females").

gender becomes part of decisionmakers' schema (through the process of repeated observation). Consequently, when decisionmakers use these gender-associated schemas in hiring and promotion decisions, the current gender composition of the job is recreated. . . . Thus, context and cognition may operate in a mutually reinforcing fashion to sustain gender segregation.

Elissa L. Perry, et al., *Explaining Gender-Based Selection Decisions: A Synthesis of Contextual and Cognitive Approaches*, 19 Acad. Mgmt. Rev. 786, 808 (1994).³

B. All-male environments create in-group favoritism that resist integration.

It is well-settled that all interactions – familial, social, occupational – involve the individual's sense of self vis a vis the outside world. Bielby, *supra*, at 121-22. That world consists of myriad groups to which the individual may belong (or identify with), or not, and accordingly, to which he or she assigns favorable or pejorative associations: in addition to the fundamental distinctions of sex, race, national origin, and ethnicity, these include role (*e.g.*, manager, subordinate, breadwinner, caretaker), status

³ This “mutually reinforcing” effect also fuels the perception that sex segregation in certain jobs is “just the way things are”: “With the world neatly compartmentalized into gendered people and jobs, sex segregation becomes easy to explain. Women bring to the workplace their preexisting preferences for traditionally female work, and employers merely honor those preferences.” Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 Harv. L. Rev. 1749, 1805 (1990).

(e.g., wealthy, “blue-collar”), and traits (e.g., decisive, compassionate, strong). See, e.g., Miller McPherson, et al., *Birds of a Feather: Homophily in Social Networks*, 27 Ann. Rev. Soc. 415, 419 (2001).

A vast body of research has explored the dynamics of this “in-group favoritism.” Charles W. Perdue, et al., *Us and Them: Social Categorization and the Process of Intergroup Bias*, 59 J. Personality Soc. Psychol. 475, 475 (1990). Three main axes have emerged: Social categorization theory, by which the individual divides the world into “members of their own group (in-group) or as members of another group (out-group)”; social identity theory, by which “a basic need for positive self-esteem will induce perceivers to favor their in-groups” over others; and self-categorization, by which individuals’ own group status determines whether they view others favorably or unfavorably. *Id.* at 475.

Also known as “homophily,” McPherson, *supra*, at 415, in-group favoritism reinforces male-dominated environments by spurring men to replicate the environment with which they have become self-identified. *Id.* at 434 (“occupational sex segregation induces strong baseline homophily”).⁴

⁴ Understood this way, even seniority – a mechanism that would appear to be an “objective” criterion for workplace success – becomes recognizable as a structure that reinforces sex segregation by conferring benefits and opportunities on those who have benefited from stereotypes about “men’s work” in the first instance. Bielby, *supra*, at 122-23.

This instinct has obvious ramifications for an applicant pool if employers rely upon informal recruitment methods like word-of-mouth. *See, e.g.,* Troy Tassier, *Referral Hiring and Gender Segregation in the Workplace*, 34 E. Econ. J. 429, 429 (2008) (“Since social networks are segregated by ethnicity and gender . . . information about jobs is likely to be segregated across social groups as well.”) (citation omitted); Perry, *supra*, at 790 (“If individuals learn about jobs from similar others . . . who are already in them, the gender composition of applicant pools may be stable over time, reinforcing current levels of segregation.”).

C. All-male environments convey hostility to women and discourage them from applying and staying on the job.

Social science confirms that the greater the disparity between the number of out-group members and in-group members, the more uncomfortable the environment for the outsiders. “Women who are relatively new to traditionally male-dominated work settings often attract more attention, are evaluated more extremely, are perceived as different, receive less support, and are more likely to be viewed as a disruptive force in the workplace, compared to male co-workers.” Bielby, *supra*, at 123. *See also* Henri Tajfel, *Social Psychology of Intergroup Relations*, 33 Ann. Rev. Psychol. 1, 5 (1982) (“[O]ne woman in a group of men . . . leave[s] a relatively ‘stronger impression’; the evaluations of that person are polarized

as compared with the evaluations of the same person identified as belonging to the majority in the group.”). A related problem arises from the stereotype that a lone woman in a male-dominated environment is a “token” and lacks the qualifications for the job. *See, e.g.,* Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 Harv. Women’s L. J. 1, 12 (2004) (citation omitted).

Women face harsher results than men when they venture out of work roles traditionally associated with their gender. One study found that although perceptions of men who are “occupationally deviant” may have improved since the 1970s, “negative stereotypes of nontraditionally employed women simply may have become more subtle. [Participants in one study] socially distanced themselves from these women, derogated them personally by regarding them as less likeable and attractive and by evaluating them less positively overall, and questioned their femininity.”

Janice D. Yoder, *Undergraduates Regard Deviation from Occupational Gender Stereotypes as Costly for Women*, 34 Sex Roles 171, 184 (1996).

This study’s predictions are consistent with the results culled from studies of “real-life” women working in nontraditional jobs, “who often are socially

isolated” and “striv[ing] to ‘prove’ their femininity in the context of a highly masculinized profession.” *Id.* (and citations therein).

In sum, women inspire exceptionally intense reactions when they attempt to integrate a male-dominated work environment. Not surprisingly, fear of the consequences that come with being a “first” or “only” in a homogeneous work environment leads women to avoid certain jobs altogether.

II. THERE IS BROAD CONSENSUS THAT FEMALE ROLE MODELS AND MENTORS ARE CRITICAL TO ANY EFFORT TO RECRUIT AND RETAIN WOMEN IN HISTORICALLY MALE-DOMINATED FIELDS.

Unquestionably, the Board of Education’s increased efforts to recruit women as provided under the Settlement Agreement are an invaluable first step toward integrating the custodian ranks. However, because a nearly all-male work environment poses so many barriers to women,⁵ outreach alone

⁵ Tradeswomen Now and Tomorrow (“TNT”), a national coalition of organizations working to increase women’s representation in the skilled trades and technical careers, explains: “Women face unique challenges to entering and succeeding in male dominated careers: isolation, lack of role models and mentoring, discrimination in hiring and layoffs, and menial assignments. Although women have been in the trades for more than 25 years, few women are represented in [union] leadership positions” Tradeswomen Now and Tomorrow, *Strategies for Increasing Recruitment, Retention, and Leadership Development for Women in the Trades* (hereinafter, “*Strategies*”), at 1, available at <http://www.tradeswomennow.org/resources/publications/Labor.pdf>.

does not go far enough.⁶ A vast body of social science data, organizational studies, and “real world” examples confirm that in order to assure that women actually apply, and that they stay and thrive on the job, additional strategies are necessary.⁷ Key among these is the presence of female role

⁶ As explained in the Federal Emergency Management Agency’s (“FEMA”) manual on women and firefighting,

A [fire department’s] recruitment effort has not necessarily succeeded just because dozens or even hundreds of women fill out applications and show up to take the test. . . . The true measure of the success of a recruitment drive is found much farther down the road, in the number of women who are on the job as skilled and productive firefighters 2 or 3 years later. . . . When new employees who differ from the dominant group are not allowed to express their differences, only the most adaptable and invisible will stay on the job. The result is a high turnover of employees, and a loss of much of the value of having hired a diverse workforce. . . . Hiring a few women . . . and dropping them to sink or swim in the white male culture of the fire station is not a way to manage change progressively.

FEMA, *Many Faces, One Purpose*, 1, 92, 93 (1999). *See also* Schultz, *supra*, at 1825-26 (“[W]omen in higher-paying, male-dominated occupations are much less likely to remain . . . than are women in lower-paying female-dominated occupations Thus, just as employers appear to have begun opening the doors to nontraditional jobs for women, almost as many women have been leaving . . . [as] entering them.”) (citation omitted).

⁷ Indeed, the Board’s new outreach strategies ignore the many women who already work directly for the custodial staff in supporting roles, such as cleaners, handypersons, and boiler operators, and who may aspire to become custodians, but presently have few role models. They also do not prevent male incumbents from continuing to replicate the majority-male workforce through word-of-mouth recruitment, the very problem identified by the

models and mentors in the incumbent workforce.⁸ Women's visibility within the custodian workforce accomplishes two, interconnected goals: encouraging women to become custodians, and in the process, helping to dismantle the stereotypes underpinning their out-group status.

For all of these reasons, women's numbers in the incumbent custodian workforce – and facilitating their transfer to the more prestigious positions at larger schools with greater supervisory authority – must be increased in the

Department of Justice as causing the Board of Education's historic exclusion of women candidates.

⁸ One court, in finding a state Highway Commission's word-of-mouth hiring practices in filling the position of "maintenanceman" were discriminatory under both disparate impact and disparate treatment theories, noted that an increase in women's representation in the incumbent workforce had a "parallel relationship" with female applicant flow:

In 1975, when no women had been employed as maintenanceman in District Eight, there were only nine female applicants. In 1976, when the first female was hired as a maintenanceman in District Eight, the number of female applicants rose to sixteen. In 1977, two more women were hired, and 55 females applied in District Eight. Similarly, in 1978, the number of women hired in District Eight reached a high of five, and the number of female applicants rose to its highest level at 120.

Catlett v. Missouri Hwy. and Transp. Comm'n, 589 F. Supp. 929, 943 (W.D. Mo. 1983). Indeed, because potential applicants may know little about a particular employer or its commitment to non-discrimination, they "may use, as a proxy for the likelihood of discrimination, other more visible information – specifically, the number of women present in that particular occupation or workplace." Moss, *supra*, at 14.

first instance to provide visible female role models and mentors to applicants and employees alike.

A. Experts on male-dominated fields agree that female role models and mentors are critical to increasing female applicant flow and retention.

The Board is hardly the first employer faced with the challenge of integrating a virtually all-male workforce. An extensive body of “best practices” literature concerning women’s entry into historically male-dominated fields confirms that countless employers have addressed the issue, and successfully so. Although optimal results demand a variety of institutionalized supports for incoming women, it is universally recommended that, at the very least, there be incumbent women to welcome them.⁹

⁹ Moreover, the immediate introduction of 22 women among the Board’s custodial ranks could be expected not only to encourage other women to apply to and to stay on the job, but also to help change the “us versus them” orientation of the majority-male workforce – a critical step in breaking the cycle of sex segregation. Social science data confirms that as integration occurs, individuals’ implicit negative associations with out-groups also diminish. *See, e.g.,* Samuel L. Gaertner, et al., *How Does Cooperation Reduce Intergroup Bias?*, 59 *J. Personality & Soc. Psychol.* 692, 692 (1990). A recent study among university students, for example, found that when whites belong to groups that are racially integrated, they are more likely to view the minority members favorably. Jay J. Van Bavel and William A. Cunningham, *Self-Categorization With a Mixed-Race Group Moderates Automatic Social and Racial Biases*, 35 *Personality. & Soc. Psychol. Bull.* 321, 330 (2009).

Women in firefighting and law enforcement have faced some of the most entrenched male-dominated cultures possible. Consequently, incumbent women in those fields play a prominent role in sending the message – to the men they work with, to potential women candidates, and to the public – that women are capable of dangerous, physically strenuous work and are able to succeed in those careers. FEMA’s 1999 handbook for fire service leaders, drafted by Women in the Fire Service,¹⁰ explains why recruitment efforts must include members of the department’s out-groups:

Women and people of color currently on the department should be included in all of the department’s public activities. . . . If only white men are visible when your department puts out a fire, holds a rescue demonstration, or has a press conference, it’s primarily white men who will be recruited as a result. Every time your department is in the public eye, and especially when it is being covered by the press, its diversity should be visible.

Many Faces, One Purpose, *supra*, at 3. Similarly, the National Center for Women in Policing recommends: “The [recruitment] brochures and posters should feature *pictures of women in uniform performing police tasks*. The potential applicant has to be able to envision herself in that role. Include women in high-ranking positions and quotes from women officers about why they like their job.” Nat’l Center for Women & Policing, Recruiting

¹⁰ In 2007, the organization changed its name to the International Association of Women in Fire and Emergency Services (“IAWFES”).

and Retaining Women: A Self-Assessment Guide for Law Enforcement (hereinafter, “Recruiting and Retaining Women”), at 48 (2000) (emphasis in original). *See also* Nat’l Inst. for Women in Trades, Technology & Science, Employer Tips for Recruiting Women, *available at*

http://www.iwitts.com/html/employer_tips_for_recruiting_w.html

(“Employers can counteract the strong negative messages women receive about technology and trade occupations with their own strong, positive messages [including]: We have women employees in X occupation; We want women; We welcome women; Women are leaders in our organization and have upward career paths; Women have career opportunities in all areas of the company. . . . Companies seeking to attract female candidates should make sure that at least one third of the images on their [recruiting materials] are images of women employees.”);

Tradeswomen, Inc., Hire a Woman: Recruiting Women for Your Workforce (hereinafter, “Hire a Woman”), at 1, *available at*

<http://www.tradeswomen.org/PDFs/HireAWoman-recruit.pdf> (“[M]ost [role models encouraging entry into the trades] are men; young women don’t see other women in these positions to serve as an example for themselves. If you attend career fairs, bring female employees who work with the tools to give demonstrations of their craft and talk about their work. If you have a

website or produce printed materials, be sure to include images of tradeswomen.”); Western States Regional Summit on Youth of Color and Women in the Highway Construction Trades Project, Solutions for an Emerging Workforce: Strategies for Recruiting, Training, Hiring, Retaining and Advancing Youth of Color and Women in the Highway Construction Trades (hereinafter, “Solutions”), at 23-24 (Feb. 6, 2005) (“Without role models they can relate to, minorities and women will not picture themselves in construction careers. . . . Marketing . . . should portray highway trades careers as suitable, achievable, . . . and professionally rewarding for minorities and women.”).¹¹

¹¹ Visible female role models’ positive impact cannot be underestimated. Even brief exposure can yield lasting results. For instance, after attending the one-week “Phoenix Firecamp” sponsored by the Fire Service Women of New York State with the goal of “attracting young women [ages 14-19] into the state’s career and volunteer fire and emergency services,” the young attendees were hooked:

Ashley Baker, who planned to be a journalist, will instead attend the University of New Haven’s Fire Science program, majoring in Arson Investigation. Ashley wrote, “If it wasn’t for camp, I don’t think I would have been able to see everything a woman can do in the fire service and I would have never picked Fire Science as a major.” Right after camp, Ashley joined the Lee Center Volunteer Fire Department in her hometown.

Kori Wilson has changed her college major to Firefighter/Paramedic. A resident of Beavers Dam, NY and a member of that fire department, she aspires to be the first

Once new recruits are on the job, incumbent women provide ongoing support as mentors, crucial to assuring retention: “The mentor provides personal contact, information on unofficial ‘rules’ and behavior standards within the organization, the benefit of the mentor’s experience as guidance for the younger firefighter, and, if need be, a sympathetic voice or a shoulder to cry on.” *Many Faces, One Purpose*, *supra*, at 103. *See also* Recruiting and Retaining Women, *supra*, at 93 (“Women . . . benefit greatly by developing alliances and networks to help one another cope with the challenges of working in law enforcement and fostering support systems that help women advance.”); Strategies, *supra*, at 1 (“[To promote retention], [c]onvene meetings of tradeswomen by craft or occupation; Establish and support women’s committees at local, statewide and regional levels; [and] Establish and support mentoring programs for women at the local union level”); Solutions, *supra*, at 32 (“Good training happens for a new worker when they have a positive relationship with the more experienced worker on the job. Information about the next job, who is hiring, or

female firefighter hired by the City of Corning and will take the exam in June. She wrote, “Camp has impacted my life greatly . . . Now I know that I’m not the only one out there . . . I have people to back me up and help me to achieve my dreams.”

Jackaline Ring, *In Their Own Words: Phoenix Firecamp Graduates Up for Firefighting*, The Volunteer Firefighter, Fireman’s Ass’n of the State of New York, at 32, *available at* http://www.fswnys.org/fasnys_vol_ff.pdf.

expected behaviors for a construction worker, or even where to eat lunch comes from your co-workers. Because societal biases can interfere with forming relationships, it is critical that minority and women workers have journey-level or peer mentors they can turn to for this information, and for support.”).

B. Case study in gender integration: The Minneapolis Fire Department.

Starting in the mid-1990s, a coordinated effort began within the Minneapolis Fire Department (“MFD”) to increase the number of women firefighters in its ranks. *See* International Association of Women in Emergency and Fire Services, Minneapolis Walks the Walk, at 3, *available at* http://www.i-women.org/archive_articles.php?article=24. As of 1995, there were 40 women out of a force of approximately 400 – around 10 percent. After two women firefighters became concerned that a newly-adopted physical agility test would unfairly screen out most women applicants, they formed the Minnesota Women Fire Fighters Association (“MWFFSA”) to encourage women to apply and to prepare them for the test. *Id.* Although this strategy focused on orienting women to the test itself holding numerous practice and training sessions, the sessions also provided the recruits with mentors:

Beyond placing recruitment posters in strategic locations and spreading the word in other ways, the firefighters [take] a personal interest in each woman who contacts them. “We invite them to a test practice session, and talk with them in detail about how to prepare.” Phone calls and direct personal contact keep the women involved in the program and optimistic about their progress. . . . “When the women go through the test for the first time, they’re often discouraged. . . . We do a lot of phone calls, encouraging them to come back. We guarantee they’ll not only finish it, they’ll shave three minutes off their time. We’ve had enough experience to be able to see what they’re capable of doing, with training. . . . We try to pair a woman who’s been in the program for several months up with one who’s starting out at about the same place the first woman started out. This gives her a role model, someone she can relate to.” Once the women reach recruit school, they already have friends there from the training sessions. *Id.* (citation omitted).

Id. at 3-4.

By the early 2000s, the MFD was incorporating much of the MWFFA’s program into its overall recruitment efforts. *Id.* at 4. By 2006, women’s numbers almost had doubled, to 71, close to 17 percent. 2006 Minn. Fire Dep’t Ann. Stat. Rep. at 4, *available at* http://www.ci.minneapolis.mn.us/fire/2006_Annual_Statistical_Report.pdf. Moreover, in 2004 the City appointed its first woman fire chief, a 15-year veteran of the MFD and one of the founders of the MWFFA. *Bonnie Bleskachek Named Minneapolis Fire Chief*, Fire Chief, Nov. 10, 2004, *available at* <http://firechief.com/news/bleskachek-named-firechief983764/>.

An especially striking outcome of the transformation at the MFD was the changed outlook of the ultimate “in-group” member: the fire chief at the time, Rocco Forte:

Forte is the first to admit that he had to get “a lot of education” in workforce diversity. . . . The shortcomings of old ways of testing, Forte says, forced management to start identifying the barriers encountered by women and people of color. “It’s hard for white men to do this if they’ve always been through systems where it’s easy for them to succeed. If I never hit the barrier, I never know it’s there. But once you want to look for the barriers, you’ll find them. . . . The money we’ve spent [on recruitment and mentoring] is almost a joke compared to what we’ve saved in lawsuits – and we’re getting a better, more qualified department in the bargain.”

Minneapolis Walks the Walk, at 6.

CONCLUSION

For these reasons, as well as those set forth in the Brief for Intervenor-Appellees-Cross Appellants, the judgment of the district court should be affirmed to the extent it concluded that the permanent appointments and retroactive seniority complied with Title VII and the Constitution.

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Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(a)(7)(C)(i), I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and Fed. R. App. 32(a)(7)(B) because this brief contains 4,923 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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Dated: April 20, 2009

/s/ Rachael N. Pine

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