IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 04-1443 and 04-1704

ANNE WEDOW and KATHLEEN KLINE
Plaintiffs/Appellees-Cross Appellants

vs.

CITY OF KANSAS CITY, MISSOURI
Defendant/Appellant-Cross Appellee

On Appeal from the United States District Court
For the Western District of Missouri
The Honorable Ortrie D. Smith, District Judge

PLAINTIFFS/APPELLEES-CROSS APPELLANTS' BRIEF

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

Chiefs Anne Wedow and Kathleen Kline have been employed with the City of Kansas City, Missouri's Fire Department since 1977. The terms and conditions of their jobs required them to be on duty for 24-hour shifts and to wear protective clothing each time they respond to emergency scenes.

The City refused to order female-sized protective clothing for Wedow and Kline, instead requiring them to wear male-sized protective clothing. The poor fit of the clothing made it difficult to perform their duties at emergency scenes and exposed them to hazardous materials resulting in injuries, including burns. In contrast, the male-sized protective clothing fit the male firefighters well, they did not have any difficulties with the fit.

As required by the terms of their jobs, Wedow and Kline went to all of the City's 34 fire stations. Most of the stations do not have female restrooms, forcing Wedow and Kline to use the male facilities, adversely affecting Wedow and Kline in terms of privacy concerns and delay of access. In addition, some of the locks were not operational. As to the few stations which did have female restrooms, those restrooms were not available to Wedow and Kline because of the deplorable conditions, and because male firefighters have "taken over" the female restrooms for their own use. Further, the few female restrooms were not comparable to the male locker-rooms which are much larger and are full-service facilities, whereas

the female restrooms are not. Male employees were not disadvantaged as Wedow and Kline were. Fire Department management were aware the facilities were inadequate for its female employees and asked the City for monies for female facilities. However, the Fire Department did not spend the allocated monies on female facilities.

Wedow and Kline's retaliation claims involve Fire Department managers who were aware of their protected activity and refused to assign them to critical shift designation positions which adversely impacted their careers.

The Kline case was tried in January, 2001 and the Wedow case was tried in January, 2002. Two separate juries found in favor of Kline and Wedow. On September 2-3, 2003 a hearing was held on Kline's Motion for Equitable Relief. The District Court ordered the City to provide Kline with proper fitting female-sized protective clothing. On 11/10/03 the Court denied Kline's motion as to the relief requested on her facility claims, including ordering the City to provide comparable facilities for her as the City provides for its male employees.

Request for Oral Argument

This case involves a number of complex issues which raise difficult questions. Kline and Wedow request 30 minutes of oral argument for each party.

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JURISDICTIONAL STATEMENT

1. **Name of the Judge who rendered the decisions appealed from:**

   The Honorable Ortrie D. Smith, District Court Judge, U.S. District Court for the Western District of Missouri, Western Division.

2. **Concise Statement of the grounds upon which the jurisdiction of the Court was invoked with citations:**

   The jurisdictional basis rests on federal questions raised by 42 U.S.C. §2000e (Title VII . Subject matter jurisdiction is vested in the Court pursuant to 28 U.S.C. 1331.

3. **A concise statement of the grounds on which the jurisdiction of this Court is invoked, with citations and with reference to relevant filing dates establishing the timeliness of the appeal:**

   The jurisdiction of the Eighth Circuit Court of Appeals is invoked by Appellees pursuant to 28 U.S.C. 1291 and F.R.A.P. 4(a)(1) wherein this case was a civil case in which an appeal is permitted by law as of right from a District Court's decision. The final Orders appealed from by Appellees were entered by the District Court on 11/10/03 and 2/02/04. (Add. Tabs C, D, E). Wedow and Kline's Notice of Cross Appeal was timely filed with the District Court on 3/24/04.

STATEMENT OF ISSUES

POINT I

THIS COURT SHOULD UPHOLD THE JURIES' VERDICTS THAT THE CITY'S PROVISION OF INADEQUATE PROTECTIVE GEAR AND SANITARY FACILITIES TO APPELLEES DISCRIMINATED AGAINST THEM ON THE BASIS OF SEX IN VIOLATION OF TITLE VII

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POINT III
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Tademe v. Saint Cloud State University, 328 F.3d 982 (8th Cir. 2003)

POINT IV
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Foster v. Time Warner Entertainment Co., 250 F.3d 1189 (8th Cir. 2001)

Warren v. Prejean, 301 F.3d 893 (8th Cir. 2002)

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Wentz v. Maryland Cas. Co., 869 F.2d 1153 (8th Cir. 1989)

POINT V
KLINE WAS ENTITLED TO EQUITABLE RELIEF ON THE FACILITIES CLAIMS

Tadlock v. Powell, 291 F.3d 541 (8th Cir. 2002)

STATEMENT OF THE CASE

This is an action for damages for both legal and equitable relief under 42 U.S.C. §2000. Anne Wedow and Kathleen Kline filed suit in the United States District Court on the grounds of federal question jurisdiction.

There were two jury trials and an equitable relief hearing in this case. Trial was held in the Kline case during January 12-19, 2001. The jury in the Kline trial returned a verdict in favor of Kathleen Kline on her claims for intentional sex discrimination for clothing and facilities and for retaliation for not being designated as Battalion chief Hazmat Officer, Safety Officer, EMS Officer, Shift Advisor and not being allowed to work out of class. (Def. Add. 1-7, 17). One year later, January 7-11, 2002, trial was held in the Wedow case. A separate jury in the Wedow trial returned a verdict in favor of Anne Wedow on her claims for intentional sex discrimination for clothing and facilities and for retaliation for not being designated as Battalion chief Hazmat Officer, Safety Officer and EMS Officer. (Def.Add. 8-15, 17). In the Kline case, the City filed a motion for Judgment as a Matter of Law and/or for New Trial. On 6/06/01 the Trial Court denied the City's Motion. (Add. Tab B). The City did not file any post-trial motions in the Wedow case.

Wedow and Kline filed a motion for Equitable Relief seeking relief as to their clothing and facility claims. (App. 579-647). On September 2-3, 2003, a hearing was held on the Motion for Equitable Relief. At the end of the hearing the Court ordered the City to provide female-sized protective clothing to Kline and denied the relief Kline requested as to her facility claims. (Add. Tab D). On 11/10/03 the Court denied Kline's Motion as to the relief requested as to her facility claims, including ordering the City to provide comparable facilities for her as the City provides for its male employees. On 11/24/03, Kline filed a motion to Alter or Amend the judgment, which the District Court denied. (App. 706-717;Add. Tab E).

STATEMENT OF FACTS

Plaintiffs-Appellees Anne Wedow and Kathleen Kline respectfully offer the following counter statement of the facts of the case, which this Court must read in the light most favorable to the jury verdict. *Blackmon v. Pinkerton Sec. & Investigative Servs.*, 182 F.3d 629, 630 (8th Cir. 1999).

Wedow and Kline have been full-time members of the Fire Department since 1977, and each was promoted to captain in the late 1980s. (App. 204-05, 79-80.) During the period of time relevant to this lawsuit, the Department has had 20-30 women, and 750-800 men, serving as firefighters. (App. 338, 136, 147, 410.) This is the second time Wedow and Kline have sought legal redress for sex discrimination in their employment by the Fire Department.

A. WEDOW'S AND KLINE'S PRIOR LAWSUIT

Aspects of appellees' prior lawsuit are relevant to the instant appeal. In 1994, appellees, together with other plaintiffs, filed a lawsuit (hereinafter *Kline I*) asserting claims of sex discrimination, hostile work environment, and retaliation under Title VII arising during the time period of September 1992 to July 1997. (Def. App. 171, 260.) The suit alleged in part that the Department subjected women to disparate treatment by providing male firefighters, but not female firefighters, with appropriate protective clothing and sanitary facilities (Def. App.

110-11). These clothing and facilities claims were dismissed by the district court, however, because plaintiffs had not exhausted their administrative remedies by presenting them to the EEOC before filing suit. (Def.App.232-40.) The District Court's judgment was not on the merits.

During trial in *Kline I*, plaintiffs argued that evidence concerning the dismissed clothing and facilities claims was relevant to their remaining hostile environment claims. They made an offer of proof: as to protective clothing, they alleged that the long crotch in the male-sized bunker pants made climbing onto ladders or fire trucks "difficult"; that Wedow's boots had, at unspecified times, come off because they were too large; that another firefighter's boot had once stuck on a ladder rung; and that the frame of the mask rested too low on women's backs, inhibiting maneuvering. As to facilities, the offer noted the "embarrassment" that ensued when male firefighters walked in on Kline as she showered or changed clothes and when Wedow walked in on men using restroom, shower, and changing facilities; that for a number of years, Wedow had never taken a shower after fighting a fire, while men did; and the Department's overall lack of progress on building appropriate women's facilities. (Def.App.155-67.) The district court ruled the evidence inadmissible.

Following trial, both parties appealed to this Court. As relevant here, this

Court held that the trial court should have admitted evidence concerning what it termed "poorly fitting clothing, the lack of firefighting clothing designed for women, deficient restroom facilities for women . . . and the lack of privacy in the restrooms and bunk area," *Kline v. City of Kansas City*, 175 F.3d 660, 669 (8th Cir. 1999), as relevant to the hostile environment claims. However, the Court ruled the error was harmless, opining that admission would likely not have increased the nominal damages Kline received on her hostile environment claim, and would not have preserved Wedow's hostile environment claim from summary judgment. *Id.* at 668-69.

B. **PROCEDURAL HISTORY OF THIS LAWSUIT**

On November 28, 1997, Wedow and Kline filed new EEOC charges of sex discrimination and retaliation for engaging in activities protected by Title VII. By this date, both had become battalion chiefs.[1] The 1997 charges alleged that the Department discriminated on the basis of sex by providing unequal protective clothing and sanitary facilities. (App.728-36, 758-62.) Wedow's charge also referenced not being selected for "shift designation" positions, and stated:

> That in many situations Battalion Chiefs are called into other fires to act as Safety Officer or Interior Sector Officer. These are tactical

[1] In 1996, during the pendency of *Kline I*, Wedow was promoted to battalion chief. (App. 205). In 1998, as a result of the *Kline I* jury's verdict, the district court ordered the City to retroactively promote Kline. (App.80, 153, 146, 949-950).

> firefighting positions which give a Battalion Chief experience . . . . It also exposes the Battalion Chief to higher level fires. I have never been asked to have these positions.

(App.731-32.) Kline's charge referenced retaliation in the Department's refusal to allow her to work "out of class" by temporarily performing the duties of a higher-ranked officer. (App.761, ¶ 13(f).)

In 1999, appellees timely filed this suit, for Title VII sex discrimination and retaliation claims within the period February 1997 to May 2000 (the "relevant period"). (Def.App. 39-96; App.117.)

C. EVIDENCE PRESENTED TO THE JURY

Relevant Fire Department Officials

Top Fire Department management officials during the relevant period, listed by rank, were:

Richard Brisbin.....Fire Director (1/1997-12/1999)

Ed Weixeldorfer.....Acting Fire Director (1/2000-5/2000) and Deputy Chief 1992-2000, 2001-present

Richard Dyer.....Fire Director (10/2000-present)

Germann, Nelson & Gilchrist.....Deputy Chiefs

Chris Bosch.....Division Chief in charge of research and planning (facilities)

(App. 222, 287, 292, 61-62, 90, 470.)

Evidence About Clothing and Protective Gear

1. Importance of Protective Gear in Firefighting

To protect firefighters' safety, the Fire Department issues each employee two sets of protective clothing (also called "bunker gear"), consisting of a fire coat, bunker pants, boots, helmet, gloves, a tool belt, and a self-contained breathing apparatus (SCBA.) (App. 207, 224, 41, 91, 40, 334, 81.) Weixeldorfer testified that two sets of gear are issued so that a clean, dry set is available if the firefighter's first set has become contaminated or wet on the interior during an emergency call. (App. 40.)

Weixeldorfer testified that the Fire Department has a responsibility to provide its fire suppression force with protective clothing that fits properly. (App. 319, 41.) The Fire Department relies on standards issued by the National Fire Protection Association (NFPA), which require that the protective coat close completely to ensure that the products of combustion, smoke, water, heat and chemicals are kept off the body. (App. 206, 215, 318, 41-42, 82, 208, 316-19.) According to Weixeldorfer, protective clothing that does not fit compromises mobility at a fire scene; requires use of additional energy to work the scene; and can cause bodily harm. (App. 316-18, 38.)

3. Inadequacy of Protective Gear Issued to Chiefs Wedow and Kline

Chiefs Wedow and Kline's duties include responding to fires, medical emergencies, automobile accidents and scenes of violence. They extinguish fires, rescue people, extricate victims from auto wrecks, administer first aid, and respond to hazardous chemical and fuel spills. (App. 79, 205.) They must climb on roofs, chop ceilings and walls, and operate heavy machinery, such as extrication equipment and chain saws. (App. 41, 79, 205.)

a. Impact on Performing Firefighting Duties

The male-sized bunker gear issued to Wedow and Kline compromised their mobility. Wedow testified that bunker coats fit just past men's waists, allowing them to move their legs freely, while the coats went down to Wedow's and Kline's knees, greatly restricting their legs. (App. 83, 209.) The too-long sleeves of the coats pushed down on their gloves, requiring constant readjustment of the gloves to protect their hands. The overall width and size of the coats created excessive bulk and gaps that readily caught on things, requiring the women to stop moving and release themselves at emergency scenes. (App. 83-84, 209-11.)

The male-sized pants the City provided to Wedow and Kline were too large. The huge waist could not be completely closed up. The crotch went down to their knees, completely restricting their movement: stepping, bending, squatting, and

crawling, the very maneuvers firefighters perform at emergency scenes, were very difficult. (App. 85, 211.) Wedow could not raise her legs up to step onto a ladder or onto the fire truck without first grabbing hold of the crotch of the pants and pulling it up. She has had accidents where she has tripped because of the crotch. (App. 211.)

Helmets were also male-sized, falling off their heads and requiring them to stop what they were doing to put the helmets back on. (App. 83-84, 212.) The male-sized gloves had excess length in the fingers, causing much difficulty in gripping objects including the fire hose. (App. 213.) The male-sized boots were so large they came off Wedow's feet at emergency scenes, requiring her to stop whatever she was doing, go back, and get her boots. (App. 212.)

The constant need to stop and adjust their protective gear was far more than an inconvenience to appellees; ill-fitting clothes actively hindered their efficiency and required them to fight the very gear that was supposed to protect them. (App. 83-85, 217, 210, 213.) As Wedow testified:

> [I]n a fire situation you usually have your hands full. You may have a hose line. You may have a fire extinguisher. You may have a saw. You've usually got your hands full. So if you've got to climb up a ladder, holding a saw, then you have to grab your crotch to pull it up so that you can lift your leg up high enough to get up the ladder, it makes it very difficult.

(App. 211.) Moreover, the clothing's poor fit made it difficult for appellees to retrieve their radios or to check the air remaining in their SCBA bottles, crucial to effective and safe firefighting. (App. 210, 228.)

b. Impact on Safety and Health

The male-sized protective clothing that the Fire Department provided to Wedow and Kline failed to fulfill its critical function of protecting appellees from the hazards of emergency scenes. (App. 208.)

Wedow and Kline testified that openings in their coats, on a regular basis, permitted water, steam, heat, smoke, fire, asbestos needles, carcinogens, hazardous chemicals, gases and gasoline to get onto their skin. During the relevant period, Kline testified she was endangered in this manner at least a half dozen times a month. (App.84-93, 179-80, 209-10, 215-16.) Wedow testified she was exposed hundreds of times. (App. 209-210, 215-216). Roof tar and boiling water fell on Wedow's head when her helmet fell off, and the boiling water blistered her scalp. (App.217). Gaps from the overlarge coats allowed moisture to get inside, which combined with heat around them caused steam burns. Hot steam ranges from 300-600 degrees and can peel human skin. (App. 88, 179-80, 216).

Wedow sustained multiple injuries that she attributed to the poor fit of the bunker gear, including a neck burn where "the skin was actually, literally, hanging

off my neck." (App. 217.) She submitted injury reports to management (App. 283, 272), and Weixeldorfer testified that he was aware of at least ten such reports from Wedow that included burns, tripping, and exposure to communicable disease. (App. 317, 344.)

5. Adequacy of Protective Gear Given to Male Firefighters

The trial record is devoid of any evidence that protective gear endangered male firefighters or inhibited their ability to perform their duties. To the contrary, Chiefs Wedow and Kline observed that males at emergency scenes, including Weixeldorfer, did not have to adjust and readjust their clothing, nor did their helmets fall off. (App. 209, 212, 89, 352, 371.) Wedow and Kline testified that they never heard any male fire suppression employees make any complaints about their protective clothing. (App. 86.)

6. Adequacy of Female-Sized Gear

In October 1998, Chief Kline finally received a single set of female-sized bunker gear. (App. 89.) Kline testified that the fit of this gear is "much better and so much more accommodating to the physical activity I have to do." (App. 91.) Indeed, the fit of the female-sized gear is so much better that she wears it even when trapped moisture creates a risk of steam burns, testifying, "I choose to take that risk, because my male-sized gear makes it even riskier." (App. 91.)

7. The Fire Department's Knowing Failure to Provide Chiefs Kline and Wedow with Adequate Protective Gear

A "stores" supervisor, who reports to a Deputy Chief, maintains the Fire Department storeroom, which is the only permissible source of gear for firefighters. (App.86, 311, 298-99, 200, 220.) Wedow and Kline repeatedly (in 1997-98, monthly) explained to stores supervisors Arnote and Abshire that the ill-fitting male-sized clothing adversely impacted their ability to perform their jobs. (App.86-87, 175, 220, 345-46.) In 1993, they gave Arnote, the *Women in Firefighting* handbook, published by the Federal Emergency Management Agency (FEMA), United States Fire Administration, which listed manufacturers of female-sized protective clothing. Fire Director Brisbin and Weixeldorfer also received a copy of the handbook. (App.88, 218-19, 967-76). Arnote and Abshire told Wedow and Kline, in effect, "if the vendors don't carry it, you can't get it. And our vendors don't carry it." (App.87, 175, 345-46, 220-21.) Arnote told Wedow there was no procedure to go outside the City's vendors to get the clothing. (App. 346, 221.)

Appellees contacted Fire Director Brisbin about protective gear four to five times during 1997-1999, but he never responded. (App.163, 166.) Brisbin

admitted he made no effort to find out if Wedow had any protective clothing that was female-sized (App.222, 300), nor did he even once discuss the need for female-sized protective gear with his Deputy Chiefs at their weekly staff meetings during the period 1997-2000. (App.320.)

Deputy Chief Weixeldorfer was responsible for purchasing protective clothing and overseeing vendors and contracts from 1992 to 2000. (App.39, 43, 163, 298, 315-316, 319, 321.) Weixeldorfer knew that the available, male-sized protective clothing did not fit Wedow and Kline. (App.43, 319-20, 323.) He had known since 1993 that the *Women in Firefighting* provided sources of female-sized bunker gear. (App.319-20, 44.) However, during 1993-2000, he made no effort to contact any of the vendors listed in the handbook, nor did he ask the City to add vendors who sold female-sized protective clothing to its list. (App.44, 319-20.) Weixeldorfer could not provide any reason why he did not order the clothing. (App.320.)

Appellant cites Fire Directive 10-95 – which stated a policy to provide protective clothing that properly fits subject to what the market provides - as evidence that adequate protective gear was available to appellees, but the trial record shows the Department simply did not adhere to this policy. Before the directive came out, Fire Director Brisbin received letters from manufacturers

confirming the availability of female-sized protective clothing, yet that information was not in the directive. (App.299-300.) Alterations were not actually available because they would void the warranty and certification of the safety of the protective clothing. (App.283.) Fire Director Brisbin testified that in order to utilize Directive 10-95, Wedow and Kline were to talk to him directly, which they did, without any result. (App.300, 222, 92.) Further, Kline testified that when women firefighters started to complain about the fit of their protective gear and requested alterations, the City regarded it as too expensive and ended the purported policy. (App.146.)

From 1990 through late 1998, no one in Fire Department management made any effort to provide clothing to Kline or Wedow that would adequately protect them from the hazards of firefighting. (App.222-23.) Finally, in October 1998, Kline received a single set of female-sized protective clothing. (App.89.) In late 1998, Wedow received a female-sized pair of bunker pants and a male-sized coat. (App.223, 322.) By the end of the relevant period, however, Wedow still had not received a complete set of female-sized bunker gear, nor had anyone in the Fire Department explained why she did not have a female-sized protective coat. (App. 223.) Despite the Department's practice of issuing to male firefighters two sets of appropriately sized protective gear, Kline has never received a secon

appropriate gear, (App.91-92, 223), and Brisbin, Weixeldorfer and Abshire have not responded to her inquiry about when she would receive a second set. (App. 92, 182.)

Evidence About Lack of Adequate Facilities

1. Importance of Adequate Changing, Shower and Restroom Facilities

Firefighters, who live for 24-hour periods in their workplace, from 7 a.m. one day to 7 a.m. the next (App.51, 58, 206), have work-based needs for adequate restroom, shower and changing facilities. Ready access to a restroom both immediately before and after responding to an emergency call is necessary as emergency scenes often involve several hours without restroom access. (App. 428.) Firefighters must have space to change into their bunker gear. Weixeldorfer testified that clothing becomes soiled and wet from suppressing fires and that chemicals, dirt, grime and water seep onto the bodies of firefighters, making showering right after a fire not just a convenience but a health measure. (App. 40.)

2. Fire Station Facilities Relevant to Appellees

The trial court properly ruled that the jury should consider evidence with respect to sanitary facilities both at the stations to which appellees were assigned

and at other stations they visited for business reasons. (App.22.) Wedow and Kline could be assigned to any of the Fire Department's 34 stations (App.93, 231), and they went to all City fire stations in the course of their employment. (App.93, 231, 156, 348, 233-40, 247-51, 80, 97, 101-06, 118-21.)

During 1998-2000, Kline, as a battalion chief, was assigned to District 105 and visited District 105's Stations, Nos. 30, 33, 35, 39 and 43, one to three times daily. (App.80, 118-19, 97, 131.) During 1997-2000, Wedow was a battalion chief assigned to District 108 and on a daily basis would go to District 108's Stations, Nos. 4, 5, 16, 38 and 40. (App.244, 247-49, 286, 275.) Both testified when they went to the stations, they would need to use the restroom facilities. (App.234-40, 247-51, 414, 416, 422.)

3. Inadequacy of Restroom Facilities

a. Lack of female restroom facilities

A number of stations have no female restroom facilities whatsoever. (App. 237-40, 250-51, 104, 106.) In stations 30, 39, and 43 in Kline's District 105, the restrooms available to Kline were in the male locker rooms amidst gang showers. (App.98, 233, 100). At station 35, Kline, as the only female, had to compete with fourteen to twenty-four male firefighters for restroom access. (App.93). Kline is the only battalion chief who must share the chief's restroom with captains. During

shift changes, when there is overlap of personnel, Kline must compete with at least 6 captains and a battalion chief for access to the officer's restroom. Kline's facilities as battalion chief at Station 35 were inferior to facilities available to other chiefs in the Fire Department in size, accommodations and privacy. (App. 412, 414, 1017-22.)

In Wedow's District 108, Stations 16, 38, and 40 did not have female restrooms or restrooms designated for officers, leaving Wedow to use the restroom in the male locker room. (App.247-49).

Other stations Wedow and Kline went to for business reasons had neither officers' restrooms nor women's restrooms; therefore the only available restrooms were those in the male locker rooms. (App.237-40, 250-51, 104, 106.)

b. Inadequacy of the doors and locks to protect privacy in male restrooms

Although the City relies on the purported existence of "locks on fire station restroom doors since 1994," (Def. Br. at 12), these locks were often inoperable: deadbolts were reversed or removed by men who worked at the stations; the slide-bolt locks to the officers' restroom at Station 35 did not work; and although keyed locks were installed at Station 35, the Fire Department did not provide Kline with a key. (App.155, 349, 244, 284, 349-51, 148, 167.)

Restrooms lacked privacy in other ways: in one station, paint was scratched off glass in the restroom door, affording a view inside (App.350-52), while in others, restroom doors were not secure with handles missing and holes covered by cardboard inserts. (App.350-52, 1024-25.) Males had keys to the female restrooms. (App.284, 352.) Men used the female restroom at Station 4 and when that happened, Wedow was denied access. (App.284.)

Wedow testified that she always felt stressed when she used restrooms located in male locker rooms, and had to adopt a cautionary strategy before entering these rooms because she was wary of being walked in on. (App.233, 237-38, 240, 247-49.)

c. Inadequacy of female restrooms where they existed

The female restrooms were often so extremely unkempt and unsanitary they were virtually unusable. (App.235, 240, 250, 417.) In two stations, the station dog's water and food dishes were kept in the "women's" room. (App.1027, 1031.) Chief Germann testified he was aware the female restrooms were used by the male firefighters (App.65, 289), and there was abundant evidence male firefighters had "taken over" the female restrooms for living and sleeping: televisions, cable boxes, telephones and VCRs were installed in the restrooms. (App.235, 240-41, 250, 283-84, 417, 419, 421-22, 1026-30, 1048.) There were even sexually explicit

magazines and a poster inside the female restroom in Station 23. (App.1043, 1045, 1047.)

At Station 10, where Wedow and Kline attended chiefs' meetings, the female restroom had stagnant water from a garden hose that drained onto the floor. (App.417, 465-66, 1012-13.) Women's restrooms were missing ceiling tiles and had rusted showers; they were used for storage of an ice machine, freezer, refrigerator, microwave oven, mattresses, headboard, easy chairs, fans, a safe, and vacuum cleaners. (App.1010-15, 1018, 1029-50, 102-03, 244, 250, 418-19, 421-23, 464-65.)

In some of the stations, there was either no door signage indicating a restroom for females, or female signage had been removed. (App.273, 289, 421, 1009.) Some female restrooms could be reached only by going through the male bunkroom. (App.247, 289, 251-252.)

Male locker rooms, by contrast, were clean, more spacious, and devoid of large-item storage. (App.417, 419, 422, 1023.) The male locker rooms contained showers while most of the female restrooms did not. (App.415, 419, 421, 423-24.)

4. Inadequacy of Showers and Lockers For Female Firefighters

As discussed above, the ability to take showers after fighting a fire is critically important for firefighters. In many stations, the only showers available

were the gang showers in the male locker room. (App.98, 233.) When Kline was assigned to Station 30, she testified that she would go out to fires, return dirty, and wash her hands and face in the captains' office, but she did not take a shower because of the lack of privacy. (App.99, 132.) She was similarly unable to shower in other stations after fires. (App.100-01) Kline also testified that, contrary to appellant's unsupported assertions, there was no plan or procedure for "taking turns," with males and females and alternating use of the showers. (App. 99.) Rather, when firefighters came back from a fire, the males always took showers first. (App.99.)

5. Relevant Fire Department Officials Knew that Female Facilities Were Inadequate.

From 1992-1994, Weixeldorfer was the assigned liaison between the fire department and the city public works department for facilities; Germann had this job between 1994 and 1999; and Bosch had it beginning in January 2000. (App. 73-74, 292, 45, 325, 62, 287.) As early as 1993, Weixeldorfer and Germann heard numerous complaints from women about unequal facilities (App.46, 66-67), and Germann testified the problem was common knowledge among fire department management. (App.65, 289.)

Appellees made repeated reports to management about the unequal facilities

for female firefighters. (App.121-122, 68, 469-470, 281.) During 1994-1996, Wedow spoke with then-Fire Director Fisher about the lack of privacy at Station 37 where she was assigned. (App.156, 159.) In 2000, Wedow went to Brisbin, Germann and Bosch to urge them to redirect money to build female restrooms from Station 4, which already had a female restroom, to stations that did not have them. Brisbin and Germann did not respond. (App.246-247, 290.)

Bosch testified that he believed women should have comparable facilities in the stations, and that he had indicated to upper management that it was "highly important" to address female facilities with respect to privacy. (App.74, 76, 292-293.) However, he was not aware of any plan to provide women with facilities comparable to men's. (App.76-77.) Similarly, Germann never participated in any meeting about setting a timetable for improving stations for women, nor did he hear Brisbin or Weixeldorfer discuss any plan to improve female facilities. (App.68, 293, 74-75.)

During 1994-2000, the Fire Department submitted yearly budgets to the City requesting monies for female locker room upgrades giving as a justification, "poorly maintained stations have a negative impact on firefighter health, safety and morale." (App.326.) Every year the City allocated money for female upgrades: $400,000 in 1994, and another $200,000 in 1998-89. (App.290, 143,

294, 327, 67, 75.) German and Bosch testified they knew the $200,000 was supposed to go strictly for female upgrades. (App.67, 75, 290, 293.) Instead, it was diverted to a whole station upgrade for Station 4, which already had a female restroom. (App.67, 75.) During trial, the trial court ruled the evidence was relevant with respect to the issue of discrimination. The trial court stated, "If the $200,000 was earmarked for female improvements and it was used for some other purpose, it seems, it does go to the issue of discrimination." (App.75).

Evidence About Retaliation Against Wedow and Kline

In addition to receiving evidence pertaining to appellees' claims of sex discrimination in the provision of inadequate protective gear and sanitary facilities, the jury heard evidence supporting appellees' claims that they were unlawfully retaliated against for opposing discrimination that is prohibited by Title VII.

1. **During 1993-present Appellees actively engaged in Protected Conduct.**

In 1993-1994 Wedow and Kline filed EEOC charges against the City. . (App.122-23, 253, 279, 718-727, 737-757). The EEOC charges were ongoing until they filed the 1994 lawsuit against the City. (App.123, 253, 279, 819-947). Their pursuit of the lawsuit continued through discovery and a jury trial in 11/97,

ongoing equitable relief proceedings through 2/98 and an Appeal during 1998-2000. In 11/1997 each filed an EEOC charge against the City which was ongoing through 1999 and filed the second lawsuit in 1999. (App.253, 279-280, 90, 763-817).

2. The Fire Director and the Deputy Chiefs were aware of Wedow and Kline's Protected Activities

Fire Department officials, including Weixeldorfer, were aware of appellees' 1994 lawsuit and the prior supporting EEOC charges. (App.122-23, 253, 319-20, 340.) Weixeldorfer assisted the City in defending that lawsuit and the ensuing 1997 trial. (App.338.) Weixeldorfer read the 1997 EEOC charges. He testified the City gave the 1997 EEOC charge to the fire department and it went to the Fire Director. Weixeldorfer testified that Fire Director Brisbin and all the active Deputy Chiefs (Weixeldorfer, Germann, Gilchrist and Nelson) had a meeting to discuss those charges. (App.320, 324.) Weixeldorfer read the complaint in this action and knew appellees contended that they were not being assigned "shift designation" jobs. (App.59-60.)

3. **Importance of Shift Designations**

As Deputy Chief from 1997 to 2000, Weixeldorfer and the other deputy chiefs assigns "shift designations," in which a battalion chief is designated to

oversee particular subject matter functions if they arise during the shift (for instance, hazardous materials cleanup, emergency medical services, public information, group safety, or personnel supervision.) (App.51, 256, 327-30) The deputy chief is expected to assign these duties on a daily basis from among the seven battalion chiefs on duty per shift. (App.123-125, 154, 253-55.) The decision as to whom to appoint is discretionary with the deputy chief. (App.47-51, 327-330).

Weixeldorfer testified that shift designations are critical to career advancement. (App.48-52, 328-30.) They provide "on the job training," affording designees opportunities, for example, to address personnel issues and grievance proceedings, participate in senior officers meetings, and deal with hazardous materials at emergency scenes; in addition, shift designees go to more emergency scenes. (App.48, 50-52, 328-30.) Shift designations allow battalion chiefs to develop and demonstrate their abilities at emergency scenes and to become known to the Fire Director and Deputy Chiefs. (App.329, 48-51.)

4. Failure to Appoint Appellees to Shift Designation Positions

Wedow, once she became a battalion chief, noticed she was never being sent to the larger fires like the other battalion chiefs. (App.160.) In 1997, Wedow asked Chief Gilchrist to designate her to these positions so she could get

experience similar to other battalion chiefs. (App.256, 340.) Fire Director Brisbin responded to Kline's request for shift designations by saying he would take care of it, but he never did. Deputy Chief Nelson did not respond to Kline's e-mail request for the designations. (App.125-26.)

During each shift Wedow and Kline worked in the period February 1997 to May 2000, they were denied opportunities to work the shift designation positions. Kline testified she has never been selected to serve as shift advisor, hazardous materials officer, or EMS officer, and was only designated safety officer once.[2] (App.123, 125.) Wedow testified she had never been designated as hazardous materials officer or shift advisor, and had been designated safety officer only once.[3] [App.67, 147, 154, 255].

5. More Favorable Treatment to Other Firefighters

Seven male battalion chiefs, most of whom had less time in rank than appellees, served in shift designations while appellees were being denied these opportunities. (App.125, 129-30, Ex. 41 at 977.) Moreover, the Deputy Chiefs often passed over Battalion Chiefs Wedow and Kline to appoint captains, who

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[2] Kline was asked on cross about Defendant Exhibit 15 which were the daily staffing schedules which showed Kline was designated as doing those duties on a few occasions; however, Kline testified she did not know she was designated, because no one ever told her. (App.138, 145, 150-152, 154, 158.)

[3] Wedow did testify she had been selected to be public information officer.

were not even eligible for shift designations. (App.123-24, 152, 254.) During 1997 May 2000 eighteen captains served in the shift designation positions on multiple occasions. Most, if not all of these captains were assigned to more than one of the jobs during the same shift. (App.124, 255.)

6. Impact of Being Denied Shift Designations

The evidence showed that seven battalion chiefs and captains who had been given shift designations had been promoted. (App.257-58, 126.). Wedow testified that not having performed shift designation duties made portions of a promotion test she took for a division head position difficult. (App.257, 259-60.) Moreover, Chief Humston, the person who received the division head position, had received the opportunities denied to Wedow to work as safety officer and hazmat officer. (App. 260.) Kline testified that not being selected for the positions adversely impacts her ability to improve her skills and move up the career ladder, and hindered her being able to achieve the "expected results" set forth in her job evaluation. (App. 126, 149.) Further, by not being chosen as shift advisor, Wedow and Kline were deprived of the opportunity to sit in senior staff meetings with the deputy chiefs. (App. 257.)

(App.154, 158). She did not claim this shift PIO job at trial.

7. Evidence about Working Out of Class

The Fire Department permits employees to "work out of class" ("WOC") by temporarily assuming the duties of higher ranked officials. Weixeldorfer testified WOC enhances the ability for career advancement and is good preparation for the deputy chief job. (App. 339, 244.) Kline testified WOC is good preparation for taking any promotional test. (App.139, 127.)

From 1997-May 2000, Kline worked out of class only once, during Christmas week 1998[4] (App. 56, 139, 150, 145), whereas at least four male battalion chiefs worked out of class for several months each. (App. 145, 338.) Furthermore, during January 2000-May 2000 Kline was not paid deputy pay for a special assignment testing a new radio system and training all firefighters on how to use it. (App. 46, 58, 61.)

EVIDENCE PRESENTED AT THE EQUITABLE RELIEF HEARING

Testimony at the equitable relief hearing demonstrated that two years after the Kline jury verdict, female firefighters' access to sanitary facilities had, if anything, deteriorated posing substantial privacy problems. There was evidence males were still occupying the female restrooms. Firefighter Lisa Malloy testified

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[4] In 1999, Nelson was on injury leave for several months. Kline was not asked to WOC for him during that time, but other battalion chiefs were. (App.56).

that she had found a man sleeping in the women's restroom at Station 6 and that she observed males going into the female restroom at Station 10. (App. 412-27, 448-59.) Locks on restroom doors were missing, broken, or even installed backwards so that the doors could not be locked. (App. 412, 420, 424, 438, 450.) Despite Malloy's repeated reports, the Fire Department failed to fix the locks at Station 47. (App.450.) The male locker room at Station 41 – the only locker room there – had a missing door. (App. 1016.) Other station locker rooms still had transparent door windows. (App.237, 273, 420.). Kline had also contacted fire department management about problems with the facilities at the stations. (App. 508-509).

A facilities conditional analysis, performed by Rafael Architects at the City's request, listed Stations 35 and 39 in Kline's district as needing immediate attention (App. 472-75, 520-21, 566), yet, at the time of the hearing, the City had no plans to remodel or replace these or any stations in Kline's district.

Fire Director Dyer, the top official in the Department, was fully aware from having attended appellees' trials in 2001 and 2002 that there were terrible conditions in female restrooms, and he admitted that the City does not supply adequate female locker-rooms in the stations. (App. 476.) Both Dyer and Louis Wright, president of the International Union of Firefighters, Local 42, testified that

poorly maintained stations have a negative impact on firefighters' health, safety and morale. (App. 401, 481.) Yet, at the equitable relief hearing, Dyer testified that he had not once checked the conditions in any female restroom. (App. 476-77.)

SUMMARY OF ARGUMENT

This court should uphold the verdicts of two juries that the City's provision of inadequate protective gear and sanitary facilities to appellees, firefighters in the Kansas City fire department, discriminated against them on the basis of sex in important terms and conditions of their employment in violation of Title VII. It is clear that Title VII prohibits such discrimination. It is equally clear that the trial evidence fully supports the juries' verdicts of sex discrimination in provision of protective gear and facilities. This litigation is not barred by res judicata, collateral estoppel or the statute of limitations under the law governing those doctrines. The juries' verdicts in favor of appellees on their retaliation claims should also be upheld by this court as there was ample evidence to support the juries' conclusions that appellant engaged in actions to harm appellees because of their legal challenges to the fire department. Finally, the denial of equitable relief was an abuse of discretion by the District Court in light of the egregious discrimination against appellees in facilities and the importance of remedying that

discrimination in order to provide complete relief.

ARGUMENT

POINT I
THIS COURT SHOULD UPHOLD THE JURIES' VERDICTS THAT THE CITY'S PROVISION OF INADEQUATE PROTECTIVE GEAR AND SANITARY FACILITIES TO APPELLEES DISCRIMINATED AGAINST THEM ON THE BASIS OF SEX IN VIOLATION OF TITLE VII

Following full jury trials that concluded with verdicts in favor of appellees Wedow and Kline, judgment was entered finding discrimination on the basis of sex due to denial of appropriate female-sized firefighter gear and denial of adequate bathroom, shower and changing facilities. In addition to damages, appellant was ordered to provide female-sized clothing for appellee Kline and to modify its Clothing Supply Request Form to include a category for female sizes. Despite the overwhelming evidence presented at trial of the risk of harm to women firefighters when they do not have protective gear in the appropriate size, the easy availability of female-sized gear for firefighters, and the juries' determination that failure to provide the appropriate gear is illegal sex discrimination, the City appeals from this order. Similarly, despite voluminous evidence of disparate treatment with respect to restroom, shower and changing facilities ("sanitary facilities"), appellant challenges the juries' finding that inadequate and differential facilities demonstrated unlawful sex discrimination.

Appellant's request that this Court overturn the juries' verdicts and grant judgment as a matter of law, a request appropriately subject to a heavy burden.

> Judgment as a matter of law is proper only when there is a complete absence of probative facts to support the conclusion reached so that no reasonable juror could have found for the nonmoving party. On such a motion the court must assume as proven all facts that the nonmoving party's evidence tended to show . . . The grant of a motion for judgment as a matter of law will only be affirmed when all the evidence points in one direction and is susceptible to no reasonable interpretation supporting the jury verdict.

Eich v. Board of Regents for Central Mo. State Univ. 350 F.3d 752, 761 (8th Cir. 2003) (quoting *Hathaway v. Runyon*, 132 F.3d 1214, 1220-21 (8th Cir. 1997) (internal citations and quotations omitted). See also *Garcia v. City of Trenton*, 348 F.3d 726, 727 (8th Cir. 2003).

Given the abundant evidence that the Fire Department discriminated against appellees on the basis of sex in the terms and conditions of their employment, the verdicts must be sustained.

A. Title VII Prohibits Employers From Discriminating Against Women Firefighters in the Provision of Protective Gear and Sanitary Facilities

Appellant contends that as a matter of law the district court erred in allowing this case to proceed to judgment. (Def. Br. at 15-26.) The district court after hearing voluminous evidence of discrimination in clothing and facilities, sent

the cases to the juries with instructions to determine whether appellant had treated appellees differently and adversely because of their sex in provision of clothing and facilities. The district court was correct in instructing the juries that they could find a violation of Title VII based on disparate treatment in provision of clothing and facilities and there was ample evidence to support the juries' verdicts.

Title VII makes it unlawful to discriminate against an individual "with respect to . . . terms, conditions or privileges of employment because of such individual's . . . sex," and prohibits an employer from doing anything that "deprive[s] or tend[s] to deprive any individual of employment opportunities or otherwise adversely affect[s] his status as an employee, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a). The Equal Employment Opportunity Commission is statutorily charged with administering Title VII, 42 U.S.C. §§ 2000e-5 – 2000e-6, and its Compliance Manual "constitutes a body of experience and informed judgment" to which this Court may resort for guidance. *Clackamas Gastroenterology Assoc. v. Wells,* 538 U.S. 440, 449 n.9 (2003). The EEOC Compliance Manual states that differential provision of equipment or facilities based on sex can constitute unlawful disparate treatment under Title VII. EEOC Compliance Manual, § 618.2(c).[5]

[5] Other statutes and regulations support the need for separate and adequate

Courts agree that providing female, but not male, employees with inadequate equipment or sanitary facilities can violate Title VII's bar on sex discrimination in the terms or conditions of employment. Failure to provide appropriately fitting gear for female firefighters supports a finding of discrimination. *See, e.g., Winnett v. City of Portland*, 847 P.2d 902, 905 (Or. App. 1993) [providing plaintiff with men's gloves and boots was evidence of intentional discrimination under Oregon civil rights law which is interpreted consistently with Title VII]; *Derasmo v. City of Gainesville*, 1998 U.S. Dist. Lexis 16046, 78 Fair Employment Practices Cases 384 (N.D. Fla., Sept. 21, 1998) [failure to provide correctly fitting gear proper basis for sex discrimination claim]. Similarly, it has long been established that an employer's failure to provide adequate sanitary facilities to women demonstrates unlawful disparate treatment

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restroom facilities and adequate protective clothing. *See, e.g.*, Rev. Stat. Mo. §§ 292.150 & 292.160 (requiring employers to provide separate restrooms for employees of each sex). The Office of Federal Contract Compliance Programs, which enforces equal opportunity requirements for federal contractors, requires employers to "assure appropriate physical facilities to both sexes," 41 C.F.R. § 60.20.3(e), and mandates that "separate or single user restrooms and necessary dressing or sleeping areas shall be provided to assure privacy between the sexes." 41 C.F.R. § 60.1.8. Regulations issued by the Federal Occupational Safety and Health Administration (OSHA) require employers to determine if protective gear is necessary to safely perform their work and, if so, to "select personal protective equipment that properly fits each affected employee." 29 C.F.R. § 1910.132(d)(1)(iii). Commercial fire brigades are specifically required to provide appropriate gear. 29 C.F.R. §1910.156.

based on gender. In *Kilgo v. Bowman Transportation, Inc.*, 789 F.2d 859, 874 (11th Cir. 1986), the failure of a trucking company to provide separate sleeping, shower and restroom facilities for women employees was found to be evidence of illegal disparate treatment under Title VII. In *Harrington v. Vandalia-Butler Board of Education*, 585 F.2d 192, 193-194 (6th Cir. 1978), cert. denied, 441 U.S. 932 (1979). the court held that requiring a female physical education teacher to use student restrooms when private restrooms were provided male physical education teachers violated Title VII.[6] In *Ammons-Lewis v. Metropolitan Water Reclamation District*, 1997 U.S. Dist. Lexis 1950 (N.D. Ill. Feb. 21, 1997), disparate treatment in the assignment of locker facilities between men and women was held to be a violation of Title VII. *See also Hulbert v. Memphis Fire Dep't*, 2000 U.S. App. Lexis 15804 at 12 (6th Cir. June 25, 2000) [affirming finding of disparate treatment sex discrimination under Title VII due to denial of an opportunity to serve at particular firehouse because it lacked shower facilities for females].

Cases cited by appellant are not to the contrary. Appellant cites *Causey v. Ford Motor Co.,* 516 F.2d 416 (5th Cir. 1975), an early Title VII case using a standard of review later disapproved by the U.S. Supreme Court, *Pullman-*

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[6] The issue of damage awards in Title VII addressed in this case was

Standard v. Swint, 456 U.S. 273 (1982); *U.S. v. Georgia Power Company*, 695 F.2d 890, 892 (5th Cir. 1983). *Causey* rejected plaintiff's sex discrimination claim for lack of equal facilities, but only because plaintiff in fact had access to a women's bathroom that contained a toilet, sink, paper and a mirror. 516 F.2d at 424. Appellant's other cases are irrelevant. *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977), dealt with men's hair length, while *Allen v. Lovejoy*, 553 F.2d 522 (6th Cir. 1977) concerned a name change.

Appellant's attempt to cast this Court's decision in *Kline I* as a holding that as a matter of law a plaintiff cannot prevail on a sex discrimination claim based on unequal facilities or improper clothing for women fails. In *Kline I*, this Court held that lack of facilities and proper gear was an appropriate factor to consider in evaluating "all circumstances of the complainant's employment," in a hostile environment claim. *Kline I*, 175 F.3d at 668. *Kline I* did not consider, much less hold, that forcing women to work with inadequate protective gear and sanitary facilities could never constitute disparate treatment in conditions of employment under Title VII. As explained by the court below, "All the Eighth Circuit held was that the evidence was not sufficiently severe or pervasive to persuade the jury to award more than nominal damages for Kline's hostile environment claim. This

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clarified in the 1991 amendments to the Civil Rights Act.

has no bearing on a claim of disparate treatment, which is a different legal claim that does not consider severity or pervasiveness." (Def. App. 305-306). (*See also infra,* Point II(B).)

Austin v. Minnesota Mining and Manufacturing Co., 193 F.3d 992 (8th Cir. 1999), also cited by appellant, is easily distinguishable. The plaintiff there did not claim she was denied equal restroom facilities on the basis of sex; rather, she attempted to use the absence of on-site restroom facilities to prove a hostile environment claim. *Id.* at 994. And, unlike Ms. Austin, appellees work in 24-hour shifts and must change in and out of bunker gear and shower after fires as part of their jobs, making the availability of appropriate sanitary facilities an integral "term and condition" of their employment.[7] (App. 58, 51, 206).

In evaluating appellees' claims, this Court must consider the particular importance of adequate protective clothing and sanitary facilities for firefighters. Whereas facilities and gear might not play an important role for women with jobs in offices, sales, etc., they are critically important in the uniformed services. Currently only 2% of firefighters in the United States are female.[8] As the evidence

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[7] Cases continue to consider denial of appropriate clothing or facilities for female workers as evidence of hostile environment sexual harassment. *EEOC v. Union Camp Corp.*, 7 F. Supp. 2d 1362 (S.D. Ga. 1997); *Brandenberger v. West*, 1994 EEOPUB LEXIS 3037 (E.E.O.C. Mar. 31, 1994).

[8] Federal Emergency Management Agency, United States Fire

at trial indicated, female firefighters' lack of female-sized protective gear is not a mere inconvenience or a trivial concern; it can literally mean the difference between safety and injury, between life and death. Similarly, the ability to use restrooms, changing facilities and showers is of critical importance after fighting a fire as well as in the context of 24-hour days at the fire station.

Appellant claims that because the same, male-sized gear and the same, men's room facilities were provided to men and women, there was no discrimination under Title VII. Appellant misunderstands the law. In a situation where men's gear and facilities will be adequate for men and women's gear and facilities will be adequate for women but the employer chooses to provide only gear and facilities that suit men, this is discriminatory treatment of women employees under Title VII. In other words, when men and women are both provided the same protective gear but that gear fits men and not women, failure to provide women gear that fits and protects them while providing similarly situated men with gear that fits and protects them is an adverse employment action based on sex that violates Title VII. Similarly, intentionally providing both men and women with men's bathroom facilities that afford men privacy, or providing women's bathrooms that are far inferior to men's, is also an adverse employment

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Administration, *Many Faces, One Purpose*, (September 1999).

action against women because of their sex that violates Title VII. Such treatment is intended to, and does, keep women out of firefighting. *Cf. Kilgo*, 789 F.2d at 874 (finding the employer told prospective female truck drivers of lack of separate sanitary facilities in order to discourage them from applying for jobs).

B. Evidence At Trial Clearly Supports the Juries Findings that Appellant Failed to Provide Plaintiffs With Adequate Gear and Facilities While Providing Them to Similarly Situated Men

As detailed below, abundant evidence supports the juries' findings of sex discrimination in clothing and facilities.

1. The Trial Evidence Fully Supports the Juries' Verdicts of Sex Discrimination in Provision of Protective Gear

The record below is replete with evidence that the bunker gear issued to appellees did not protect them from job hazards and interfered with their ability to do their jobs because, contrary to appellant's claims that the gear was "unisex," in fact, it was designed to fit men, not women. (App. 86, 215, 217, 83, 209, 83-85, 211). Furthermore, male firefighters did not experience routine failures in protective equipment like those experienced by appellees.

The record establishes that appellant relies on standards of the National Fire Protection Association as its source of appropriate standards for protective gear for firefighters (App. 41); that according to those standards, protective clothing

must fit closely and if it does not, firefighters' bodies may be subjected to smoke, water, heat and chemicals (App. 316, 318, 319), and that clothing that does not fit properly compromises mobility and can lead to injury and bodily harm (App. 318, 316, 40). Appellees testified that being forced to wear male-sized protective gear meant that there were gaps in their clothing that allowed water, smoke, gasoline and chemicals to seep onto their skin (App. 84-93, 86, 179-180), that boiling water fell on Wedow's head when her oversized helmet fell off burning her scalp (App. 217), and that the insides of their coats would get wet because of gaps causing steam burns. (App. 88, 179-180, 216). The record also shows that female-sized protective clothing was readily available, and that Fire Director Brisbin, Chief Weixeldorfer and other relevant management officials knew of sources for such gear. (App. 88, 219). The record further shows that despite Chief Weixeldorf's awareness that male-sized gear compromised women's safety as firefighters, and despite the known availability of female-sized gear, no effort was made to order female-sized protective clothing for female firefighters. (App.163, 166,319-320, 323).

The evidence further demonstrated that similarly situated male firefighters were treated differently – the bunker gear issued to them fit them. It did not interfere with their ability to perform their jobs or expose them to the additional

physical risks experienced by female firefighters. (App. 209, 212, 89).

2. The Trial Evidence Fully Supports the Juries' Verdicts of Sex Discrimination in Restroom Facilities

The record provides ample evidence that restrooms, showers and changing facilities were not provided for the use of women firefighters on the same basis they were provided to men. There were no female restrooms in most of the stations that appellees used (Firehouses 5, 16, 18, 30, 35, 38, 39, 43). Because of this, appellees were forced to use male restrooms in firehouses where they had no guarantee of privacy. The evidence further showed that locks and doors in stations were frequently broken or open. (App. 155, 284, 349-350). In the few stations where there were women's restrooms, they were in terrible condition. (App. 235, 240, 250, 417). In fact, the deplorable conditions of those female restrooms that did exist – stagnant water on the floor (App. 417), large items stored (App. 102-103, 244, 250, 418, 419, 421-423), dogs living and eating in the restrooms (App. 1027, 1031) and pornography in the female bathrooms (App. 1043, 1045, 1047) – was further evidence of discriminatory intent with respect to an important term or condition of employment.

The evidence showed that firefighters routinely shower after fighting a fire in order to protect their health. (App. 40.) The absence of adequate facilities for female firefighters delayed, and sometimes effectively denied appellees the ability to clean up after a fire or during their 24 hour shifts.

The record also shows that appellant was aware of the problems with basic facilities for appellees due to complaints lodged by appellees (App. 121-122, 469-470), and that, indeed, the City had allocated money specifically for upgrades of female restrooms, but did not use the money for that purpose. (App. 67, 326, 290). As with protective gear, the fact that male firefighters were given male restrooms and male showers and female firefighters could use the same male restrooms and male showers does not indicate that there was no discrimination. Rather, forcing female firefighters to use male showers and bathrooms is an adverse employment action.

3. Appellees' Evidence Satisfied the Applicable Legal Standard

Taken as a whole, the protective clothing and sanitary facilities evidence was more than enough to support the jury's finding in each case that appellees were discriminated against because of their sex in the terms and conditions of their employment, in violation of Title VII.

Analyzed under the *Harlston v. McDonnell Douglas*, 37 F.3d 379, 382 (8th

Cir. 1994), test offered by appellant, appellees are members of a protected class and there are no complaints about their meeting expectations of their employer. They have proved that they suffered an adverse employment action by being given protective clothing that does not properly fit females, but rather fits males, and also shown that males do not suffer the same adverse employment action because the male protective gear provided by the department fits males properly. Likewise, appellees proved that they suffered an adverse employment action by being forced to use men's restrooms and showers or clearly inferior women's facilities, while males in the department continued to use facilities designed for, and used almost exclusively by, their own gender.

Since appellees made out a prima facie case of discriminatory denial of adequate protective clothing and sanitary facilities, the burden shifted to appellant to demonstrate a legitimate business reason for these failures. No such reasons were offered at trial. Indeed, the Deputy Chief responsible for ordering clothing, acknowledging that he knew of the problems with male gear for female firefighters and acknowledging he knew female gear was available, was unable to give any reason that he did not provide female gear for female firefighters. (App. 320). Nor did the City proffer a business justification for failing to provide equal sanitary faculties for women.

Moreover, the jury was entitled to infer that appellees' sex was the motivating factor in the City's failure to provide adequate gear and facilities to appellees while providing appropriate gear and clothing to similarly situated male firefighters. Circumstantial evidence of intent is sufficient to establish a prima facie case of disparate treatment, *Desert Palace v. Costa*, 539 U.S. 90, 99-100 (2003), and appellees presented an impressive amount of such evidence. Simply put, the evidence showed that the Fire Department provided men, but not women, with adequate protective gear, and that the Fire Department provided men, but not women, with adequate sanitary facilities. This was so despite the ready availability of female sized gear and money specifically allocated to upgrade female facilities. In the face of such evidence, the inference of discriminatory motive was all but inevitable. *See Meyer v. Missouri State Highway Comm'n*, 567 F.2d 804, 807 n.4 & 808 (8th Cir. 1977), ["Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment"; "showing of differences in treatment often implies discriminatory intent."]

The overwhelming evidence, viewed through the appropriate legal standard, clearly supported the determination by two reasonable juries that appellees were discriminated against on the basis of their sex. *Bevan v. Honeywell, Inc.*, 118 F.

3d 603, 609 (8th Cir. 1997). This Court must defer to the juries' resolution of the evidence. *Jackson v. Virginia*, 443 U.S. 307, 326 (1979).

POINT II
THE DISTRICT COURT PROPERLY CONCLUDED THAT THIS ACTION IS NOT BARRED BY RES JUDICATA OR COLLATERAL ESTOPPEL

The district court denied appellant's motion to dismiss on procedural grounds of res judicata and collateral estoppel and properly allowed appellees' cases to proceed to two jury trials on the basis that the previous dismissal of appellees' clothing and facilities claims was not an adjudication on the merits. This Court should uphold the district court's decision.

A. Res Judicata Does Not Bar Plaintiffs' Clothing or Facilities Claims

Under this Court's precedent, the doctrine of res judicata precludes an action only when: "(1) the prior judgment was rendered by a court of competent jurisdiction, (2) the decision was a final judgment on the merits, and (3) the same cause of action and the same parties or their privies were involved in both cases." *De Llano v. Berglund*, 183 F.3d 780, 781 (8th Cir. 1999) (citing *Mills v. Des Arc Convalescent Home*, 872 F.2d 823, 826 (8th Cir. 1989)). Although the instant action involves the same parties as the *Kline I* case, this action's claim of unlawful disparate treatment in the denial of adequate protective gear and sanitary facilities

never reached a final judgment on the merits in the previous case. Instead, as noted above, in *Kline I*, the district court dismissed plaintiffs' protective gear and facilities claims because they had not been presented to the EEOC. As the court below recognized, "This [*Kline I*] was not a decision on the merits and does not operate as a bar to Plaintiff's assertion of the claims following proper exhaustion." (Def. App. 305). Rather, the court correctly held that the prior dismissal "should be construed as a dismissal without prejudice. A dismissal without prejudice is not a decision on the merits and has no preclusive effect." (Doc. 139, p. 1). Under the requirements of *DeLlano*, therefore, res judicata does not preclude this action.

Bright line law on res judicata supports the district court's ruling. In *Costello v. United States*, 365 U.S. 265 (1961), the Supreme Court made clear that res judicata was not a bar for "those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the court's going forward to determine the merits of [the] substantive claim." *Id.* at 285. This principle applies to the circumstance here, when a Title VII claim, previously dismissed for failure to exhaust administrative remedies, is the subject of a new suit. *See Criales v. American Airlines, Inc.*, 105 F.3d 93, 97 (2d Cir. 1997) cert. denied, 522 U.S. 906 (1997) (relying on *Costello* to hold that prior dismissal of Title VII claim for failure to exhaust administrative remedies "should not have been found to operate as an

adjudication upon the merits and as a bar to the subsequent complaint filed after the precondition had been satisfied. . . . To consider it an adjudication on the merits of his discrimination complaint is a distortion.").

The cases cited by the City are inapposite because they concern cases in which the plaintiffs did litigate their substantive claims on the merits. The plaintiff in *Poe v. John Deere Co.*, 695 F.2d 1101, 1103 (8th Cir. 1982), brought suit for wrongful discharge, and the facts surrounding the discharge were fully litigated before a jury before judgment was entered against her. Her subsequent suit, filed in state court, on the same claims was thus properly barred by res judicata. Similarly, in *Chester v. St. Louis Housing Authority*, 873 F.2d 207 (8th Cir. 1989), where plaintiff had previously litigated his demotion and resignation as a race discrimination case claiming procedural due process violations, his attempt to bring an identical action under Title VII was properly barred by res judicata. id. at 208.

By contrast, in *Lundquist v. Rice Memorial Hospital*, 238 F.3d 975, 978 (8th Cir. 2001), this Court ruled that denial of a motion to amend a prior discrimination complaint did not bar a subsequent action on the previously disallowed claims, noting, "As we see it, the merits of Lundquist's wrongful termination claim were never addressed by the district court; thus Lundquist's second lawsuit should not

be barred by res judicata." *Id.* at 978. *See also Johnson v. Boyd-Richardson*, 650 F.2d 147 (8th Cir. 1981); *Smith v. Smith, Barney, Harris et al.*, 505 F. Supp. 1380 (W.D. Mo. 1981).

Faced with the fact that res judicata does not apply when there has been no litigation on the merits of a claim, appellant argues that appellees' clothing and facilities claims were actually adjudicated in the previous action. This contention is specious, given that the district court dismissed those claims and barred all evidence pertaining to them.

Nor may appellant succeed with the argument that appellees are litigating the same claims they litigated in *Kline I* under a different theory, and that they could have brought the present case at that time. Appellees were barred from bringing these disparate treatment claims in *Kline I*, because they had not exhausted administrative remedies as required to bring suit. As the district court said in denying defendant-appellant's summary judgment motion on their res judicata claim, "When determining whether a claim 'could have been brought' for res judicata purposes, the inquiry is not so broad as to automatically include all claims a plaintiff could theoretically assert . . . ." (Def. App. 304). See, e.g., *Glass v. IDS Fin. Servs.*, 798 F. Supp. 1411, 1416 (D. Minn. 1992) [holding that res judicata did not apply between plaintiff's prior individual disparate treatment age

discrimination claim and current class action pattern and practice age discrimination claim, because the elements of proof were different].

Further, the cases do not cover the same period of time: *Kline I* concerned only events that took place up to June 1, 1997, while this suit reaches events from June 1997 to May 31, 2000, which could not possibly have been addressed in the first lawsuit. Important evidence in this case comes from the post-1997 period. For example, there is evidence that between 1997 and 2000, Kline was exposed to water, smoke, and gasoline at least half a dozen times a month (App. 84-93, 86). Wedow was exposed hundreds of times. (App. 209-210, 215-216). Evidence about which firehouses Kline and Wedow worked in and the facilities available in those houses pertained to the period 1997-2000 after *Kline I* was litigated.

None of the considerations underlying the principle of res judicata apply in this case. Plaintiffs did not previously have their day in court on their clothing and facility claims, and the defendant-appellant did not previously have to defend the claims of discrimination on the basis of clothing and facilities. Accordingly, there is no need here to protect a party against repeated litigation of the same claims. The City's res judicata argument is without merit and should be rejected by this Court.

B. Collateral Estoppel Does Not Bar Appellees' Clothing or Facilities Claims

Similarly without merit is the contention that the present claims are barred by collateral estoppel. As the Supreme Court has explained, "collateral estoppel precludes relitigation of issues actually litigated and necessary to the outcome" in subsequent suits based on a different cause of action involving a party to the prior litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). Appellant appears to argue that the issue of whether the Fire Department's denial of equal protective gear and sanitary facilities constitutes unlawful discrimination was determined in the *Kline I* litigation. As set forth below, this argument is without merit.

At the outset, it is clear that, as the court below found, the dismissal of these claims for failure to exhaust administrative remedies meant that "[i]ssues regarding equipment and/or facilities were not actually litigated [in *Kline I*], making collateral estoppel inappropriate. Certainly, the jury did not hear any evidence on the issue and therefore it formed no conclusions on the matter." (Def. App. 305).

Appellant, however, contends that this Court's evidentiary ruling in *Kline I*

on the significance of plaintiffs' offer of proof in the prior case somehow amounts to a legal ruling on their disparate treatment claims. The court below properly rejected this argument stating, as indicated above, that a hostile environment claim and a disparate treatment claim are different claims with different measures of proof:

> The Eighth Circuit's conclusion that the improper exclusion of the [facilities and clothing] evidence was harmless in the context of a hostile environment claim is not a merit-based decision, and in any event it is irrelevant... [The ruling] has no bearing on a claim of disparate treatment, which is a different legal claim that does not consider severity or pervasiveness. Plaintiffs' claims of disparate treatment in the provision of clothing, equipment and facilities are not barred by collateral estoppel.

(Def. App. 305-306).

In its briefing to this Court, appellant cites no case law to support the novel proposition that an evidentiary ruling based on a bare-bones offer of proof could bar a subsequent legal claim. Plaintiffs' offer of proof in *Kline I* contains brief general statements about facilities and clothing for women with insufficient detail to determine the merits of a disparate treatment claim. Indeed, that claim was not before this Court in *Kline I* and no attempt was made to come to a conclusion on its merits.

In the *Kline I* litigation, the absence of a full trial record meant that neither

this Court nor the trial court had the opportunity to "actually and necessarily determine" any issue concerning inadequate protective gear and sanitary facilities. Thus, while in *Kline I*, there was little evidence to reach a conclusion about the merits of appellees' claims, the fully developed evidentiary record now available demonstrates that the lack of protective gear and adequate facilities interfered with appellees' daily ability to safely and efficiently perform their jobs as firefighters, creating for them palpably inferior "terms and conditions of employment" than their male comrades enjoyed. In these circumstances, when the issue at hand was not previously fully or fairly litigated, collateral estoppel cannot apply.

POINT III
THE DISTRICT COURT PROPERLY CONCLUDED THAT THIS ACTION IS NOT TIME BARRED

Appellant contends that appellees' clothing and facilities claims are time barred, arguing that they were not presented to the EEOC within 300 days of the acts complained of, as required by law. 42 U.S.C. § 2000e-5(e). The district court properly rejected this argument, holding that the Fire Department's actions concerning clothing and facilities were continuing violations:

> When a violation begins before the limitation period but continues to exist within the limitation period, "[t]he employee may challenge ongoing discriminatory acts even if similar illegal acts could have been challenged earlier and are thus time-barred." *Ashley v. Boyles Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) (en banc).

(Def. App. 306-307).

In *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the Supreme Court's most recent consideration of the continuing violation doctrine, the Court held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Id.* at 113. However, the *Morgan* Court was clear that discrete acts are those that are "easy to identify," and it listed examples: "termination, failure to promote, denial of transfer, or refusal to hire." *Id.* While limiting the doctrine for such discrete acts, the Court confirmed that the doctrine continues to apply in situations where discrimination is ongoing as long as one act occurs inside the statutory time period. *Id.* at 115.

The *Morgan* court cited *Bazemore v. Friday*, 478 U.S. 385 (1986), which concerned a discriminatory salary structure that had been instituted prior to such a claim becoming actionable under Title VII. *Morgan*, 536 U.S. at 111-12. The fact that the salary structure had been created outside the limitations period did not bar the plaintiff's pay discrimination claim because, the *Bazemore* Court held, "each week's paycheck that delivered less to a black than to a similarly situated white is a wrong actionable under Title VII..." *Id.* Thus, regardless of when the discriminatory structure was put into place, as long as discriminatory acts occur

during the limitations period, an EEOC complaint based on those acts is timely and prior acts may be used as background evidence in support of a timely claim.

This Court's post-*Morgan* jurisprudence clearly supports finding a continuing violation here. In *Tademe v. Saint Cloud State University*, 328 F.3d 982, 984 (8th Cir. 2003), a black Ethiopian alleged racial discrimination in tenure, promotion and salary. The district court granted the defendant's motion for summary judgment, holding that all three claims were time barred. Citing *Morgan*, this Court upheld dismissal of the timeliness of tenure and promotion claims because Tademe had failed to file an EEOC charge within 300 days of these discrete acts. However, on the salary discrimination claim, the Court reversed, relying on *Morgan* and *Bazemore* to hold that Tademe's claim was timely because "his EEOC charge was filed within 300 days of receiving allegedly discriminatory paychecks." *Id.* at 989. In another post-*Morgan* decision, this Court confirmed that a continuing violation may be established as long as there is "one independent discriminatory act occurring within the charge-filing period." *Madison v. IBP*, 330 F.3d 1051, 1058 (8th Cir. 2003). [quoting *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W. 2d, 512, 528, (Iowa 1990)].

Appellees' claims fit precisely within the continuing violations doctrine. These claims do not concern discrete job actions that occurred once. Rather, each

time appellees must use inadequate protective gear or inappropriate facilities, they suffer actionable discrimination in the terms and conditions of their employment. Furthermore, the effects of providing only male-sized protective clothing and inadequate restroom, shower and changing facilities are not "neutral" consequences of a single discriminatory act, but are ongoing instances of disparate and unlawful treatment. Appellees' claim is based on the fact that they have worked under continuously discriminatory conditions. Appellant does not dispute that appellees suffered these conditions within the 300-day charge period. Thus, this action is not time barred.

POINT IV
THE DISTRICT COURT PROPERLY DENIED JUDGMENT AS A MATTER OF LAW ON APPELLEES' RETALIATION CLAIMS

A. Adequate Evidence Supported the Juries' Findings of Retaliation

Appellant argues that Kline and Wedow failed as a matter of law to establish that the Fire Department's refusal to assign them to certain shift designation positions constituted retaliation in violation of Title VII. (Def. Br. at 26-36.) "To establish a prima facie case of retaliation, a plaintiff must show that (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the adverse employment action and the protected activity." *Smith v. Riceland Foods, Inc.*, 151 F.3d 813,

818 (8th Cir. 1998). A defendant can rebut the prima facie case by giving proof of a legitimate, nondiscriminatory reason for its action, and if it does so, the plaintiff must show that this reason was a pretext for prohibited discrimination. *Id.* Appellant does not contest that Wedow and Kline engaged in protected activity; rather, appellant argues that refusing to assign the shift designations was not an adverse action, and that there was no causal connection to Kline and Wedow's legal actions against the Fire Department. The conclusions of the two trial juries to the contrary were supported by substantial evidence, and the District Court was correct to deny judgment as a matter of law.

1. The Denial of Shift Designations Was an Adverse Employment Action

As with all the prongs of the jury's retaliation verdict, the jury's finding that Kline and Wedow suffered materially in their employment as a result of appellant's denial to them of shift designations is to be interpreted assuming that all reasonable inferences, credibility determinations, and weighing of fact went in their favor. *Eich v. Board of Regents for Central Missouri State University*, 350 F.3d 752, 761 (8th Cir. 2003). To be actionable, retaliation must "have had some materially adverse impact on [the plaintiff's] employment terms or conditions." *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1245 (8th Cir. 1998). Adverse employment

actions include those with "serious employment consequences that adversely affected or undermined [the plaintiff's] position, even if he [or she] was not discharged, demoted or suspended." *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997). In *Coffman*, this Court held that revoking previously given permission to take all federal holidays off was, by itself, a materially adverse employment action because it was a material change in the existing conditions of the plaintiff's employment. *Coffman*, 141 F.3d at 1245. In *Davis v. Sioux City*, 115 F.3d 1365 (8th Cir. 1997), this Court upheld a jury finding that a plaintiff's reassignment was materially adverse even where her old job had not been eliminated out of retaliatory animus and her new job actually carried an *increase* in pay: "The jury apparently put more weight on [the plaintiff's] evidence that the new position lacked supervisory status, had fewer opportunities for salary increases, and offered [the plaintiff] little opportunity for advancement. The jury was free to credit this evidence and we will not disturb its verdict." *Id.* at 1369.

Appellant claims that Kline and Wedow did not suffer "materially" enough because they did not suffer a cut in pay and were not forbidden to undertake duties explicitly required for promotion. (Def. Br. at 29-32.) But, as the trial court ruled: "An adverse employment action is not limited to those actions that directly affect pay or benefits; the concept is sufficiently broad to include actions that

'significantly affect an employee's future career prospects.'" (App., Tab B, pp. 5-6) (quoting *Spears v. Missouri Dep't of Corrections and Human Resources*, 210 F.3d 850, 853 (8th Cir. 2000).) The trial court found, as did the juries in these cases, that denial of shift designations was an "independent," "actionable" wrongful act. (*Id.*)

The evidence showed that Kline and Wedow were denied shift designations that were given to less qualified males. (App. 48, 50, 51, 329-30, 349.) In addition to Wedow and Kline, Weixeldorfer testified that shift designations provided battalion chiefs critical training and experience necessary for their professional development, providing practical "on-the-job" training, exposing chiefs to a wide range of duties, and giving them opportunities to demonstrate their abilities to higher-ranked officials. (App. 48-52, 126, 257, 328-30, 349.) The denial of shift designations deprived Kline and Wedow of opportunities to learn how to deal with hazardous materials, emergency medical situations, personnel issues, and specialized aspects of firefighting safety. (App. 48-52, 329-330.) Battalion Chiefs and Captains who had the opportunity to serve in these positions were promoted. (App. 126, 257-58.)

The juries could reasonably have concluded that the deprivation of shift designations reduced Kline and Wedow's "opportunity for advancement" and

concomitant "opportunities for salary increases," *Davis,* 115 F.3d at 1369, thus meeting the adverse impact requirement. Additionally, in light of testimony that not being selected "infers to subordinates you are inferior to other chiefs," (App. 257), the juries could have concluded that granting such designations to lower-ranking male firefighters, but only rarely to Kline and Wedow, "undermined [Kline and Wedow's] positions" and supervisory status. *Davis,* 115 F.3d at 1369; *Kim,* 123 F.3d at 1060.

2. Sufficient Evidence Supports the Juries' Findings of a Causal Connection Between the Adverse Actions and Protected Activity

A fact-finder may rely on circumstantial evidence to establish a causal connection between a protected activity and a subsequent adverse employment action, *Desert Palace v. Costa*, 539 U.S. at 99-100; *Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir. 1993).

a. Temporal Proximity

This Court's settled law permits a jury to make an inference of retaliation when a plaintiff establishes temporal connection between the plaintiff's "ongoing struggle" to enforce antidiscrimination law and the employer's adverse employment action. *Foster v. Time Warner Entertainment Co.*, 250 F.3d 1189, 1195-96 (8th Cir. 2001); *see also Hocevar v. Purdue Frederick & Co.*, 223 F.3d

721, 726 & n.5 (8th Cir. 2000) (discharge followed protected activity so closely in time enough to create inference of retaliating motive).

In this case, Wedow and Kline were involved in ongoing Title VII activities against the Kansas City Fire Department, including two EEOC charges and one fully litigated lawsuit, since 1993. Their second EEOC charge was filed one week after they received their first jury verdict in 1997 (App. 172-76, 178-86, 261-67, 268-72), a verdict that would result in an order by the District Court to promote Kline to Battalion Chief, effective February 1994. (App. 153, 949-50.) Weixeldorfer clearly knew about this litigation; he gave a deposition in the 1994 case and testified he assisted the City in defending both the 1994 and 1997 lawsuits. (App. 338.) Weixeldorfer testified that he gave out shift designations from 1997 to 2000, that shift designations gave Battalion Chiefs important on-the-job training and opportunities to interact with and be observed by the Fire Director and Deputy Chiefs, and that **he participated in a 1997 meeting of Fire Director Brisbin and all five Deputy Chiefs in which they discussed Kline and Wedow's 1997 EEOC charges.** (App. 50-51, 256, 320, 324, 328-29, 348).

Giving Kline and Wedow the benefit of all reasonable inferences and assuming that all conflicts were resolved in their favor, *Eich v. Board of Regents for Central Missouri State University*, 350 F.3d 752, 761 (8th Cir. 2003), there was

ample evidence from which to conclude that the Fire Department meant to punish Kline and Wedow for taking their complaints to the EEOC for the second time, or meant to deprive them of the full duties of a battalion chief because they regarded those promotions as the ill-gotten gains of the first lawsuit. As the trial court explained, "a jury could find retaliation was renewed following the [1997] verdicts, particularly in light of the relief obtained by Kline. All of the alleged retaliatory acts occurred after the 1997 EEOC complaints were filed . . . ." (App. 980).

Appellant contends that temporal proximity is inadequate as a matter of law to prove causation in retaliation claims (Def. Br. at 34-35); however, a close reading of the cases appellant cites shows only that temporal proximity was insufficient *on particular facts*. *See Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 716 (8th Cir. 2000) (plaintiff failed to establish employer was aware of protected activity); *Feltmann v. Sieben*, 108 F.3d 970, 976-977 (8th Cir. 1997) (plaintiff's immediate supervisor responsive to initial claims, rebutting inference of retaliation); *Kneibert v. Thomson Newspapers, Mich., Inc.*, 129 F.3d 444, 455 (8th Cir. 1997) and *Nelson v. J.C. Penney Co., Inc.*, 75 F.3d 343, 346-47 (8th Cir. 1996) (plaintiffs reprimanded before employer became aware of discrimination claims); *Wolff v. Berkley, Inc.*, 938 F.2d 100, 103 (8th Cir. 1991) (plaintiff failed to establish notice element of retaliation prima facie case); *Caudill v. Farmland*

Indus., Inc., 919 F.2d 83, 86-87 (8th Cir. 1990) (plaintiff *hired* by subsidiary of defendant at time he alleged age discrimination and only fired for violating company's anti-nepotism clause). In this case, two trial juries heard the facts and decided in favor of Kline and Wedow, and it was their "role and province" to "determine which inferences [were to be] drawn from the evidence presented." *Garcia v. City of Trenton*, 348 F.3d 726, 727 (8th Cir. 2003).

b. Treatment of Others Similarly Situated in Relation to Rank

Evidence that a plaintiff was treated less favorably than other similarly situated employees may also be probative of retaliation. *Warren v. Prejean*, 301 F.3d 893, 900 (8th Cir. 2002). Here, the evidence showed that male battalion chiefs with less seniority, and even lower-ranked male captains supposedly ineligible for shift designation, were appointed to shift designations far more often than Kline and Wedow. (App. 123-25, 129-30, 152, 254-55, 977.) Appellant's argument that Kline and Wedow cannot prevail because there was testimony that they occasionally did receive some shift designations does not bear scrutiny. (Def. Br. at 32-34.) Whether Wedow and Kline received fewer shift designations than men or none at all, a jury could conclude that the Fire Department still treated them less favorably than men because it wanted to punish them for resorting to remedies

under Title VII. As the trial court noted, "[d]uring trial, the jury was presented with conflicting evidence regarding the number of times [Kline] was assigned to shift positions . . . it was the jury's job to resolve this dispute." (Add. Tab B, p. 5). The jury did so in Kline's and Wedow's favor, and upon review of a Civil Rule 50 motion, this Court is obligated to do so as well. *Eich*, 350 F.3d at 761. The juries' verdicts should not be disturbed.

A. Kline and Wedow's Retaliation Claims at Trial Were Properly Before the Trial Courts

Appellant claims that Kline and Wedow failed to exhaust their administrative remedies regarding retaliation they suffered between 1998 and 2000 because such retaliation was not referenced in their 1997 EEOC charges, and those charges were never amended. (Def. Br. at 28.) Appellant also claims that all retaliation charges must be dismissed because Kline and Wedow did not include allegations of retaliation between 1998 and 2000 in their amended complaints. (Def. Br. at 29.) These arguments fail as a matter of law.

As to the EEOC charges, a party wishing to initiate a claim under Title VII must file a timely charge of discrimination with the EEOC, but a subsequent Title VII lawsuit "may extend to any discrimination like or reasonably related to the substance of the allegations in the charge and which can reasonably be expected to

grow out of the investigation triggered by the charge." *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668-669 (8th Cir. 1992).

Where a retaliation claim has "gr[own] out of" a discrimination charge filed with the EEOC, it is not necessary to file a separate and additional charge. *Wentz v. Maryland Cas. Co.*, 869 F.2d 1153, 1154 (8th Cir. 1989). At least two purposes are served by trying retaliation claims together with the original EEOC charges that gave rise to them: first, judicial and administrative economy, and second, to avoid "frustrat[ing] the remedial purposes of Title VII" by forcing complainants to file new charges at every fresh instance of discrimination. *Cobb*, 850 F.2d at 359.[9]

In the case at hand, Wedow's 1997 EEOC charge specifically referenced not being selected for the additional shift assignments to the Safety Officer and Interior Sector Officer positions as retaliation for her ongoing EEOC involvement since 1993. (App. 731-32.) Failure to assign her to other additional shift designations in the period 1997-2000 is exactly "like . . . the allegations in the charge," *Delight Wholesale,* 973 F.2d at 668, and under *Wentz*, any retaliation stemming from additional animus due to the 1997 charge would be considered to

[9] Appellant seems to suggest that damages should have been limited to those accruing before the charge was filed, but since *Wentz*, holds that a retaliation claim arising from an EEOC charge can be heard without filing another EEOC charge, clearly a plaintiff may recover damages for discrimination taking place after the EEOC charge is filed. *Wentz,* 869 F.2d at 1154.

have "grown out of" the original charge. Likewise, Kline also claimed retaliation for her prior EEOC complaints in her 1997 EEOC charge, and referenced working out of class. (App. 728, 758.) Finally, appellant argues that *Roark v. City of Hazen*, 189 F.3d 758, 761 (8th Cir. 1999) has supplanted the case law detailed above in its holding that a trial court properly dismissed a plaintiff's Title VII retaliation claims because they had not been presented in his EEOC charge. This case is factually distinguishable: Roark alleged retaliation that took place *before* he filed his EEOC complaint, not, as here, retaliation that occurred *because* of the complaint. Furthermore, *Roark* does not address, much less overrule, this Court's established law permitting litigation of later-arising claims that grow out of properly exhausted discrimination claims. Kline and Wedow exhausted their administrative remedies, gave the EEOC a chance to fulfill its investigative and conciliatory roles, and put appellant on notice of their grievances. Their claims deserved to go to the juries, and the juries found that appellant retaliated against Kline and Wedow.

B. Kline's Claim on Working Out of Class Was Properly Before the Court

Appellant claims that Kline's retaliation claim based on denial of opportunities to work out of class should not have been submitted to the jury because Kline dismissed those claims prior to trial. (Def. Br. at 35-36.) However,

Kline dismissed this charge only as to disparate treatment, not as to her retaliation claims. At trial, the Court properly ruled that there "might be a true working out of class claim . . . if, in fact, [Kline] was denied the opportunity to work as a deputy chief." (App. 32.) Kline argued at trial that the working out of class issue remained because of her work on the radio project and because she had not been given equal opportunities as men to work out of class during Chief Nelson's injury leave. (App. 127).

The evidence was sufficient to establish her claim. Kline testified she did not have nearly as many, or as lengthy, opportunities to work out of class as other captains and Battalion Chiefs did; she worked out of class as deputy once during Christmas week 1998, and was offered the job only once more in three years (App. 150), whereas several chiefs worked out of class as a deputy for months at a time. (App. 145.) Defendant put on no evidence of any legitimate nondiscriminatory reason as to why Kline was not permitted to work out of class. The City did not meet the standard for grant of judgment as a matter of law on this issue.

POINT V
KLINE WAS ENTITLED TO EQUITABLE RELIEF ON THE FACILITIES CLAIMS

A. Standard of Review

Upon finding that a defendant has engaged in intentional discrimination, the

court may order "any . . . equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1). A district court's decision regarding the award of equitable relief is reviewed for abuse of discretion. *Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999). Abuse of discretion occurs when the district court's judgment was based on erroneous legal conclusions or clearly erroneous factual findings. *Roark v. City of Hazen*, 189 F.3d 758, 761 (8th Cir. 1999). "The district court may not reject findings made by the jury," but has discretion to consider all the circumstances when fashioning its equitable relief order. *Bosley*, 165 F.3d at 639.

B. The Trial Court's Decision Was Marred by Errors of Law and Fact Amounting to Abuse of Discretion

A jury found that appellant intentionally discriminated against Wedow in its provision of facilities and awarded her $100,000 in damages (Def. Add. 10), and a separate jury similarly granted Kline damages of $40,000 on her clothing and facilities claims (Def. Add. 3). Nonetheless, the district court declined to order any equitable remedy for the facilities violations, and in doing so made errors of law and fact.

1. Errors of Law

a. Failure to Provide "The Most Complete Relief Possible"

The district court ruled that although Kline had shown that appellant had denied female firefighters equal access to facilities throughout the Fire Department, it would only consider equitable relief as to stations within Kline's district, and then failed to order any equitable relief at all. (Add. Tab D., p. 1, 5). Title VII vests broad equitable powers in the federal courts to fashion a decree which will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future. *Paxton v. Union National Bank*, 688 F.2d 552, 572 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983). A district court is obligated to grant the victim of discrimination the "most complete relief possible." *Tadlock v. Powell*, 291 F.3d 541, 548 (8th Cir. 2002); *EEOC v. M.D. Pneumatics, Inc.*, 779 F.2d 21, 23 (8th Cir. 1985). The Court of Appeals may modify the trial court's order "to ensure that the fullest relief appropriate is afforded to a deserving plaintiff." *Tadlock*, 291 F.3d at 548 (quoting *Maschka v. Genuine Parts Co.*, 122 F.3d 566, 572-73 (8th Cir. 1997)). The trial court's order ignored Kline's testimony that she frequently visited stations outside her district and was denied equal access to facilities, a claim supported by other female firefighters in the Department. (App. 405-433, 448-59). Given the physical discomfort and psychological embarrassment attendant to these violations, monetary damages are an inadequate form of redress.

b. Failure to Consider Certain Equitable Relief

The district court held that it would not address several of Kline's requests for equitable relief because they had not been pled specifically in the Second Amended Complaint. (Add.Tab D, at 2 n.1.) This was an error of law; in addition to the rule described above that successful Title VII plaintiffs are entitled to the most complete relief possible, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Fed. R. Civ. P. 54(c); *Goff v. USA Truck, Inc.*, 929 F.2d 429, 430 (8th Cir. 1991) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975). There was no surprise to appellant, as Kline's complaint had specifically requested an order that appellant provide appropriate facilities and "such other equitable relief as the Court deems appropriate." (Def. App. 51, 78.) Since the district court refused to order any equitable relief directly affecting the facilities themselves, its refusal to appoint Kline to the Fire Department's Labor/Management Steering Committee or Station Building Program is all the more damaging, as it denies her the opportunity to advocate internally for such changes. (App. 640, Add. Tab D., p. 2) The district court had authority to grant equitable relief beyond that specified in the pleadings and erred as a matter of law in holding otherwise.

2. Errors of Fact

In light of the juries' verdicts, the trial court's determination on equitable relief rested on clearly erroneous factual findings.

a. Number of Fire Stations Kline Uses

Even within its limited inquiry into the fire station facilities used by Kline alone, the district court held that it only needed to examine the facilities in District 105 (Add Tab D., p. 5); thus, it failed to consider whether to remedy the condition of numerous restrooms outside that district despite Kline's testimony that she could be assigned to any of the 34 fire stations in the city. (App. 93, 231.) Kline also testified that in the course of her duties she visited numerous stations outside her district where she had no access to a female restroom when needed. (App. 22, 99-107, 118, 119-21, 156, 233-37, 239-40, 247-51, 348.)

b. Appellant's 15-year Capital Improvements Plan

The District Court declined to order any equitable relief at all related to female firefighter facilities because it did not want to interfere with appellant's purported 15-year capital improvements plan. (Add Tab D, pp. 4-5.) However, the court below made no findings that since the jury verdicts, female facilities had been

improved or that appellant had any plan that prioritized improvement of women's facilities. Moreover, in crediting the City's plan, the court overlooked evidence that the City had repeatedly committed funds for the ostensible purpose of providing female firefighters with adequate sanitary facilities, only to put the funds to other uses. These omissions in the findings of fact, especially given testimony to the contrary (App. 67-68, 75-77, 290, 412-27, 448-59), amount to a negation of the juries' findings that the existing state of female facilities constituted discrimination in violation of Title VII, and denied Kline the full relief to which she is entitled. *Tadlock*, 291 F.3d at 548.

c. "Working" Locks on Restroom Doors

The district court found that Kline has access in every station in her district to a female or unisex restroom with working locks. This directly contradicts the testimony of Kline and other female firefighters that four of the five stations have no female restrooms and in several station restrooms the deadbolts had been reversed, a slidebolt was broken, one door handle was missing entirely enabling those outside to see in, and male firefighters often had keys to the female bathrooms. (App. 155, 284, 349, 351-52.)

d. "Unisex" Facilities

The district court found that several restrooms were "unisex" restrooms and

therefore that any problems with privacy or inadequate doors affect men and women equally. (Add. Tab D at 6.) Given that men vastly outnumber women at every station in the Kansas City Fire Department (App. 136, 147, 338, 410), the fact that stations have "gang showers" or other group facilities means that women will always have to shower last after a fire, if they are able to shower at all. (App. 99, 100.) For the same reason, the supposed "unisex" restrooms create a consistent delay or denial of access of women to the facilities, as men can use them simultaneously and are constantly going in and out. (App. 428.) Considering that this situation has persisted since 1977, the juries were entitled to make an inference that this continuing state of affairs amounted to intentional discrimination, and the district court should not have negated it by finding to the contrary.

Taken together, these errors of fact depart so far from the findings of the juries as to reject those findings altogether, and thus constitute an abuse of discretion. *Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999).

C. Relief Requested

Kline respectfully requests that this Court modify the trial court's order and order capital improvements throughout the system, starting with the 4 stations in Kline's district (Nos. 35, 39, 30 and 43). Money has been appropriated for such improvements. The City has in place a fifteen-year sales tax with anticipated

revenues in excess of $75 million dollars to be used for capital improvements. (App. 518). Such an order is necessary to provide the "most complete relief possible" for the discrimination found by the juries.

CONCLUSION

Appellees respectfully request that this Court affirm the verdicts of two juries that the Fire Department discriminated against them on the basis of sex and retaliated against them as prohibited by Title VII and the holdings of the court below that neither res judicata, collateral estoppel or the statute of limitations bars their claims. They further request that this Court order equitable relief to remedy the Title VII violations established by appellees.

Respectfully submitted,

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Certificate of Compliance

As required by Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief is proportionally spaced and contains 14,982 words. I relied on Microsoft Word to obtain the count.

Also pursuant to Eighth Circuit Local Rule 28A(d), accompanying this brief is a 3 ½ inch computer diskette containing full text of this brief. Undersigned counsel further states that a copy of the diskette has been provided to opposing counsel, that the diskettes have been scanned for viruses, and that the diskettes are virus-free.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Karen K. Howard
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Certificate of Service

Plaintiffs/Appellees-Cross Appellants hereby certify that two copies of their Brief and one copy of the Appendices were mailed this 26th day of June, 2004, along with a diskette of the brief, scanned for viruses to: Douglas McMillan and Saskia Jacobse, Assistant City Attorneys, 2800 City Hall, 414 East 12th Street, Kansas City, Missouri 64106, Attorneys for City of Kansas City, Missouri, attorneys for Appellant Cross Appellee.

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APPEALS BRIEF ADDENDUM

Tab No.	District Court #	Date	Description
A	DN124	11/28/00	Order Granting in Part and Denying In Part Defendant's Motions for Summary Judgment
B	DN212	6/6/01	Order Denying Defendant's Post Trial Motion
C	DN332	8/19/03	Order (1) Granting in Part and Denying In Part Defendant's Motion and Amended Motion to Dismiss Plaintiffs' Equitable Claims for Mootness and (2) Scheduling Hearing on Plaintiff Kathleen Kline's Motion for Equitable Relief
D	DN350	11/10/03	Order (1) Denying in Part and Granting in Part Plaintiff Kline's Motion for Equitable Relief, (2) Denying Plaintiff Kline's Motion for Permanent Injunction, and (3) Denying Defendant's Motion to Vacate Court's September 4, 2003 Order
E	DN376	2/2/04	Order Denying Plaintiff's Motion To Amend or Alter Judgment and Motion for Findings of Fact
F	Missouri Statute 292.150		
G	Missouri Statute 292.160		