The FBI’s Fitness Tests and Title VII—Does Gender Equality Require Lowering Standards?

BY DYLAN TUCKER*

INTRODUCTION

Many careers require specific abilities, ranging from intellectual to physical. Thus, prior to entry into a given position, employers often train and/or test new recruits to ensure that they have the requisite abilities to perform the job or complete training without injury. Gender-norming is a process by which employers allow an applicant’s sex to impact their scores on an employment test. This norming is used to account for the inherent differences between the sexes. However, because such norming is likely to violate Title VII, agencies that implement gender-norming standards in their employment testing often adopt these tests as a mechanism to determine overall fitness, rather than establish gender-normed abilities as a minimum requirement necessary to do the job.

In 2009, the FBI held a 22-week new agent training program (“NATP”) in Quantico, Virginia, which set out not only to prepare new agents for their new careers in the FBI, but also to limit injury during the physical training. The NATP subjected new agent trainees (“NAT”) to a physical fitness test (“PFT”), to ensure that the trainees were at a sufficient overall fitness level. After failing to successfully complete the push-up requirement, where male NATs were required to perform more push-ups than female NATs, Jay Bauer filed a Title VII action against the Attorney General. The primary claim was that the gender-normed standards of the PFT were facially discriminatory under two Title VII provisions.

At trial, both parties filed cross-motions for summary judgment. The district court agreed that the physical fitness test was facially discriminatory, relying heavily on the “simple test” outlined in City of Los Angeles Department of Water & Power v. Manhart as well as the plain language of Title VII. However, on appeal,

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3. Id.

4. Id.


7. Id. at 855–56.
the court vacated and remanded the district court’s decision due to a perceived error in legal analysis. The Fourth Circuit held that the question to consider on remand was whether the PFT, in light of inherent physiological differences, placed an “unequal burden” on an individual based on sex. Subsequently, on remand, the Eastern District of Virginia granted summary judgment in favor of the FBI, reasoning that the PFT did not impose an “unequal burden” on male NATs.

Part I will discuss Title VII and relevant case law dealing with gender-normed standards and testing. This section will outline the “simple test” used by some courts in gender-norming cases. The examination will focus on how courts look exclusively to the plain language used in Title VII and rely on “formal equality” to determine whether a policy is discriminatory. Moreover, examination of the “simple test” will underscore the lens through which the district court in Bauer v. Holder viewed the facts and will explore the implications of analyzing gender-normed fitness testing policies in this way. Part I will also discuss the origins and uses of the alternative “unequal burden” analysis employed by several courts, including the Fourth Circuit in Bauer v Lynch. This approach avoids interpreting Title VII as disallowing all differential standards outright, but rather interprets Title VII as disallowing differential standards that place “unequal burdens” on an individual based on sex.

Next, Part II will fully outline the facts and procedural history of Bauer as well as underline the arguments asserted by both parties at the district court and appeals court levels. Part III will provide an analysis of the Fourth Circuit’s ruling, and the implications it will have moving forward. Specifically, the focus will lie on the ambiguity left by the Fourth Circuit in how to define and analyze the term “burden” in gender-normed fitness testing cases. Additionally, this part will discuss the outcome of the case on remand and how that outcome could ease liability concerns for other employers. Lastly, Part IV will conclude with a summary of the article and a discussion on the possible future implications that the holding of Bauer might have for gender-based employment testing.

I. TITLE VII AND SEX

Established in 1964, Title VII protects against unlawful discrimination in the employment context by mandating that “[a]ll personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex.” In efforts to further increase employee protections, Title VII was amended through the Civil Rights Act of 1991, stating that “discriminatory use of test scores” as well as use of “different cutoff scores” for different groups on “employment related tests” is strictly forbidden. Courts have recognized two variations of discrimination—disparate impact and disparate treatment. The focus of this paper will remain with the latter. Disparate treatment

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9. Supra note 2.
occurs when an employer’s policy facially discriminates against certain employees because of their race, color, religion, sex, or national origin. Moreover, while evidence of discriminatory motive is important to a disparate treatment claim, such a motive can sometimes be inferred from the simple fact of difference in treatment: “[W]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.”

The issue that arises in Bauer is whether unlawful disparate treatment automatically arises when males and females are required to meet different marks (for example, thirty push-ups versus fourteen push-ups), or if reaching different marks may nevertheless represent the same level of achievement. In other words, the courts grapple with interpreting Title VII to require formal equality (requiring men and women to perform the same number of push-ups), or interpreting it in a way that allows for a more pragmatic understanding of equality through consideration of inherent physiological differences between sexes.

A. Foundational Cases

1. The “Simple Test”

While Bauer presents a relatively novel situation—gender-normed standards for employment fitness tests—there are several cases that helped lay the foundation for how the district court and court of appeals analyzed this case. The “simple test” for determining discrimination under Title VII was developed in Manhart. This case involved a class action filed on behalf of female employees, contending that the employer’s requirement that female employees make larger contributions to its pension fund than male employees violated Title VII. The employer used mortality tables showing that females lived longer than males, and thus made females contribute extra based on the assumption that it would be more costly to cover their retirement. The Court noted that while relying on sex stereotypes to make employment decisions is unlawful under Title VII, this case presented a different situation. That is, it was a fact that women, as a class, lived longer than men. Importantly, however, the Court reasoned that not all women in the class will live longer than every male employee, and therefore, it is unlawful to make gender-based policies based on average lifespan differences. In making its determination, the Court employed a “simple test,” looking at the plain language of Title VII and the legislative intent: “such a practice does not pass the simple test of whether the evidence shows treatment of a person in a manner

14. Id.
17. Id. at 705.
18. Id.
19. Id. at 707.
20. Id.
which but for that person’s sex would be different.” In other words, the simple fact that females were being treated unequally pointed to a violation of Title VII. Moreover, the court felt that no further analysis was needed and the fact that females, on average, lived longer than males made no difference to the determination.

Although the facts in Manhart are not on point with the facts in Bauer, the Court nevertheless provided a framework with which to interpret and apply Title VII in cases where employers treat male and female employees differently based on identifiable differences between them. As such, when examining the facts in Bauer, the district court analogized the FBI’s claim that different push-up requirements were needed because of the inherent differences between the sexes to the “life-expectancy” rationale used by the employer in Manhart. Under this more formal approach to equality, the district court was able to avoid considering physiological differences between the sexes, and instead stopped the analysis at the simple fact that men and women needed different scores to pass the PFT.

2. “Unequal Burdens”

Providing some nuance to the “simple test,” however, Gerdom v. Continental Airlines, Inc. established the “unequal burdens” test for Title VII violations. Here, flight attendants were required to remain under a certain weight in order to maintain employment. For example, an attendant five feet two inches tall could weigh no more than 114 pounds. Moreover, all flight attendants were weighed once a month to make sure they met the weight requirement. If an attendant was overweight, she would be required to lose two pounds per week. Failing to do so would lead to suspension and eventually termination. The majority held that the plaintiffs could show that they had been treated discriminatorily due to their sex if, upon remand, they could establish that men similarly situated had not been subjected to comparable burdens. Thus, here, the court emphasized the fact that different may not mean unequal, as there are inherent distinctions between the sexes. As such, the true measure of discrimination in these types of cases is the sex-based burdens that employment policies place on employees.

The desire to limit discrimination is a central tenant of the modern judicial system. However, tension arises when courts must balance the seemingly plain and strict language of Title VII with the often complex nature of inter-gender differences. Employing the “simple test” allows courts to bypass considerations about physical differences between men and women, holding gender-normed physical fitness tests facially discriminatory. However, the “unequal burdens” test allows courts to take a more substantive approach to equality, by providing a mechanism to take note of identifiable differences between men and women. Such approaches make room for gender-normed physical fitness testing, so long as they

21. Id. at 711.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id. at 605.
pose no greater burden on either sex. This tension between following the arguably plain and strict language of Title VII and acknowledging that different standards may be necessary to avoid true discrimination lies at the center of Bauer litigation.

B. The FBI’s History of Similar Tests and Litigation

While few cases touch on the precise issue outlined in Bauer, the FBI has faced litigation over the PFT before. In Powell v. Reno, a male NAT also alleged that the different physical fitness standards in the NATP were facially discriminatory towards men. The plaintiff asserted that he might have passed the PFT if the FBI did not have gender-normed performance standards. However, the court disagreed with the plaintiff’s contention that the different standards violated Title VII. The court, relying on Gerdom, held that Title VII allows employers to make distinctions based on inherent and clearly identifiable physical differences between men and women. In other words, gender-normed policies where “no significantly greater burden of compliance was imposed on either sex” are permissible under Title VII. The court went on to note that its decision is rooted in Supreme Court precedent. The court cites Michael M. v. Superior Court of Sonoma County, noting that it “has consistently upheld statutes where the gender classification . . . realistically reflects the fact that the sexes are not similarly situated in certain circumstances.” Moreover, for further support, the court looked to dicta in United States v. Virginia, which underscored the idea that admission of women to the previously all-male Virginia Military Institute would require the school to “adjust aspects of the physical training programs.”

The court in Powell reasoned that men and women are not “similarly situated” physically. Keeping this in mind, men and women at equal fitness levels may nevertheless perform differently on physical fitness tests. For example, the court notes that women have, on average, less upper body strength than men. As such, women may not be able to perform the same number of push-ups as men—at least not without extra time or training. After taking these differences into account, the court deemed that the requirements for males were comparably equal and no more burdensome than those for females.

In addition to Powell, the FBI faced yet another allegation in Hale v. Holder—a proceeding before the Equal Employment Opportunity Commission. Here, similar to in Powell, the plaintiff was a male NAT and also failed to satisfy the PFT

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29. Id.
30. Id.
31. Id. at *9–10.
32. Gerdom 692 F.2d at 606.
36. Id.
37. Id.
38. Id.
standards. Plaintiff alleged that the FBI held female trainees to a lower physical standard than the male trainees, thus violating Title VII. However, the administrative law judge disagreed, adopting the approach taken by the Powell court. The judge emphasized the basic physical differences between the genders, and held that the FBI’s recognition of those differences does not violate Title VII. Moreover, the judge found that the PFT was not unequally burdensome because it, “(1) screened out individuals of both genders who were not sufficiently fit to safely perform the duties of [a Special Agent]; and (2) did not screen out individuals of either gender who were sufficiently fit to safely perform as [a Special Agent].”

These cases, while not binding precedent, provided some guidance to the district and appeals courts in Bauer. Moreover, while previous cases establish a framework to analyze gender-norming cases, they do not provide a specific outline for cases dealing with gender-normed physical fitness tests. As such, Powell and Hale provide the best predictor of the analytical approach that future courts will, and should, take.

II. BAUER V. LYNCH: FACTS AND PROCEDURAL HISTORY

A. Case Facts

In 2008, Jay Bauer applied to the FBI, and passed the initial written tests and background checks. However, in addition to the initial screening process, he was also required to pass the PFT to gain entry to the NATP. One part of the PFT was the push-up test, requiring male trainees to complete thirty push-ups and female trainees fourteen push-ups. Although Bauer failed his first PFT, completing twenty-five pushups, he passed the first test on his second try. Once he was admitted to the NATP, he “passed all academic tests, demonstrated proficiency in his firearms and defensive tactics training, and met all expectations for the practical applications and skills components of the Academy.” However, despite his training successes, he failed the second PFT, completing 29 out of 30 push-ups. Subsequently, Bauer brought suit in the Eastern District of Virginia, alleging that the FBI’s PFT represented sex-based cutoff scores, which violate Title VII.
B. Physical Testing

The FBI requires new agents to have not only certain intellectual and analytical abilities, but also physical abilities. To that end, the FBI administers the NATP: a multi-week program which helps train agents to adequately perform the duties required of their positions. Additionally, the program is designed to ensure that agents are fit to participate throughout the training, beyond the initial testing.

According to the FBI, physical fitness training is vital to the program because “a basic level of fitness and conditioning is essential for a NAT to perform at his/her best in all aspects of training and to successfully complete the entire fast-paced training program without serious physical injury and undue mental stress.” Additionally, “a NAT’s level of fitness serves as a foundation for his/her ability to effectively apply principles and non-deadly force alternatives being taught in the program.” In other words, the program in its current form was developed because physically unfit trainees were increasingly sustaining injuries during the training.

When deciding which events to include in the PFT, the FBI relied on the Cooper Institute and a panel of experts, consisting of Supervisory Special Agents in the Training Division, who considered which events would most accurately and effectively measure the overall fitness needed to safely train for and perform the physical tasks of the training and job. Moreover, the FBI conducted a study with 322 subjects from seven NATP classes to determine an appropriate minimum passing score. Given the observed differences in physical abilities between male and female trainees, the FBI enacted gender-normed standards, with the intention of holding both genders to equal standards of overall fitness.

Lastly, it is interesting to note that from 2004 to 2012, less than one percent of all trainees failed to pass the PFT, and there was no statistically significant difference in the passing rates for men and women. However, in regard to the pass points for push-ups specifically, if the thirty push-up standard for males was used to test both genders, females would be over seven times more likely to fail in any one attempt to pass the PFT.

C. District Court Opinion

At trial, Bauer brought forth the argument that the FBI discriminated against male NATs by requiring them to do more push-ups than females to pass the PFT. The district court relied on two provisions to guide its analysis.

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52. Id.
53. Id.
54. Id.
55. Id.
56. Id. at 8.; supra note 2.
58. Id. at 10.
59. Id. at 12.
60. Id.
2000e-2(a)(1) provides that:

“It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . .”

Additionally, 42 U.S.C.A. § 2000e-2 (l) states:

“It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of . . . sex.”

Agreeing with the plaintiff’s arguments, the district court looked next to the Supreme Court for guidance on how to analyze this relatively novel issue. The court analogized Bauer to Manhart and UAW v. Johnson Controls.61 In Manhart, the Supreme Court acknowledged that while there are physical differences between males and females (average lifespan, for example), this did not serve as an adequate justification for the differential treatment with respect to payments into a pension fund.62 Thus, the Court held that disparate treatment discrimination may exist even if it is based on a “generalization that [is] unquestionably true.”63 Moreover, to make this determination, the Court applied a “simple test” that makes a discrimination finding turn on “whether the evidence shows treatment of a person in a manner which but for that person’s sex would be different.”64

Next, in Johnson Controls, an employer created a policy barring female employees capable of bearing children from jobs with a risk of lead exposure. The Supreme Court held that, even though the ability to have children is a clear physiological difference between the sexes, the policy was nevertheless facially discriminatory because it “create[d] a facial classification based on gender.”65 The “simple test” applied in these cases highlight the courts’ formal approach to equality: individual physical characteristics are irrelevant when making employment decisions, unless they are considered a bona fide occupational qualification.66 Thus, after comparing these cases to Bauer, this district court found that “the PFT clearly falls within § 2000e–2(a)(1)’s prohibition against discrimination on the basis of sex: plaintiff was treated in a manner which but for his sex would have been different.”67

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63. Id. at 707.
64. Id. at 711.
In addition to applying the “simple test,” the district court also considered the arguments outlined by former Attorney General Holder. Specifically, the court considered the “unequal burden” test underscored in Gerdom, Powell, and Hale. However, the court could not see past the plain language of § 2000e–2(a)(1), which made it unlawful “to discriminate against any individual . . . because of such individual’s . . . sex.”\(^{68}\) Because this language seems to make no accommodation for physiological differences between men and women, the district court reasons that the “unequal burden” test violates statutory mandate.\(^{69}\) Moreover, the court contends that Gerdom directly contradicts the precedent set by Manhart.\(^{70}\) That is, the formal approach to equality proscribed in Manhart will find that discrimination exists when an individual is treated “in a manner which but for that person’s sex would be different,” even if that differential treatment is based on a “generalization that [is] unquestionably true.”\(^{71}\) As such, after the district court’s determination that men and women are subject to any different requirements, the inquiry effectively stops, as the policy is automatically discriminatory under Title VII.

D. Fourth Circuit Court of Appeals Opinion

Unlike the district court, the court of appeals sought guidance from the limited case law that is directly on point. Specifically, the court looked to Powell and Hale, which specifically addressed, and approved of, the FBI’s use of gender-normed standards for the PFT. Moreover, the court notes that in those cases, the judges relied heavily on Gerdom and the “unequal burden” test.\(^{72}\) Looking to Powell, the court of appeals highlights that the court rejected the proposition that female trainees had less stringent standards, and explained that “Title VII allows employers to make distinctions based on undeniable physical differences between men and women . . . where no significantly greater burden of compliance [is] imposed on either sex.”\(^{73}\) Furthermore, because physiological differences between the sexes “result in males and females of similar fitness levels performing differently on physical tests,”\(^{74}\) the FBI’s gender-normed standards simply accounted for those differences and, therefore, do not violate Title VII. Additionally, in Hale, the plaintiff also contended that the FBI held females to less rigorous physical requirements than males. The administrative law judge adopted the approach taken by the Powell court and recognized that “distinctions based on the obvious physical differences between men and women” do not per se violate Title VII.\(^{75}\)

Next, the court of appeals went to the root of the Powell and Hale decisions by examining Gerdom. As opposed to the district court, the court of appeals seemingly believed that the “unequal burdens” test could coincide with the plain language

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\(^{69}\) Bauer, 25 F. Supp. 3d at 857.

\(^{70}\) Id.


\(^{74}\) Id. at 11.

\(^{75}\) Id.
of sections §2000e-2(a)(1) and §2000e-2(l); that is, that the FBI’s PFT does not lower the standards for women or raise the standards for men. Instead, the test measures overall fitness, and therefore treats men and women equally given their measurable physical differences. In fact, if the FBI were to have equal push-up requirements, women would suffer a disparate impact, as reaching thirty push-ups is more burdensome for females. Moreover, if the bar were lowered, requiring both males and females to reach fourteen push-ups, women would still face a higher burden because men would not need to achieve the same level of overall fitness as women. Thus, the court of appeals departed from the district court’s formal approach to equality, and instead applied a substantive approach wherein a policy is judged on its ability to grant equal outcomes for disadvantaged groups. Therefore, the Fourth Circuit concluded that the FBI’s gender-normed physical fitness benchmarks did not violate Title VII because they imposed equal burdens of compliance on men and women.

III. DECISION ON REMAND

A. Resolving Ambiguity Left by Fourth Circuit

The Fourth Circuit instructed the District Court for the Eastern District of Virginia to consider whether the gender-normed standards impose an “unequal burden” on male and female NATs. The FBI was successful in showing that the PFT “impose[s] an equal burden of compliance on both men and women, requiring the same level of physical fitness of each,” thus leading the court to grant summary judgment in favor of the FBI.

The court’s reasoning helps establish a new standard for cases involving physical fitness employment tests. The Fourth Circuit, however, left ambiguous the process by which courts should interpret “burden.” In other words, whether “burden” should be examined in terms of economic, physical, or emotional hardships (or a culmination of all three) was left unclear. For example, when employment policies require male and female employees to maintain different grooming standards, the time, cost, and overall effort required to meet those standards are the considerations used in examining the relative burdens for each gender. Similarly, in the context of physical fitness testing, the burden imposed by the PFT could be examined by looking at the time and effort spent practicing push-ups, the cost of joining a gym or hiring a trainer, and the emotional expenditure needed to reach the requirements of the PFT. Thus, the lower court’s reasoning helps resolve the ambiguity left by the Fourth Circuit, and sets a new standard of analysis for future courts.

On remand, the court did not openly discuss the ambiguity inherent in defining the term “burden.” The court, however, nevertheless underscored what approach it was taking: a statistical analysis of pass rates. The court notes that

76. Supra note 66.
78. Id. at 351.
79. Id.
80. Supra note 12.
81. Id.
Bauer’s argument fails because “[t]he only reliable way to attempt to select equivalent, gender-normed standards on a pushup test is to rely on metrics such as percentile ranks, based on either large databases or specific datasets. That is precisely what the FBI did here.” Thus, the court held that the studies conducted and relied upon by the FBI – which show that from 2004 to 2012, ninety-nine percent of both men and women passed the PFT (with no statistically significant difference between the sexes) – were sufficient to show that Bauer was not unequally burdened by the PFT.

This analysis of how to define “burden” is perhaps the most clear-cut solution to the ambiguity. Relying exclusively on data-metrics provides clarity for future employers and courts on how to judge whether an employment fitness policy is discriminatory. Although objective statistical measures likely require employers to hire outside consultants or research analysts to ensure that the fitness requirements lead to equal outcomes, such criteria promotes consistency in the courts. As such, the district court’s ruling underscores a reasonable interpretation of “burden,” and provides clear standards for establishing equal burdens.

B. Easing Liability for Employers with Physical Fitness Requirements

When implementing policy, employers sometimes face a Title VII “catch-22.” Employer action or inaction may result in discrimination allegations by a particular group; however, the alternative action is likely to disparately impact another group. In Ricci v. DeStefano, 557 U.S. 557 (2009), for example, the Supreme Court held that the New Haven Fire Department’s decision to throw out the results of a promotion test because minority candidates scored lower than white candidates violated Title VII. However, the Court noted that such action would be permissible if the employer could “demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.” While a disparate impact claim was not made in Bauer, the district court’s ruling nevertheless eases liability for employers who would otherwise be (1) forced to mount a Ricci defense when sued for having gender-normed fitness standards.

If, upon remand, the district court had ruled that the FBI’s gender-normed PFT created unequal burdens, and therefore violates Title VII, employers would be forced to amend fitness policies to require men and women to achieve identical scores. Such policies subject employers to disparate-impact liability, as women, on average, are unable to meet the same physical fitness standards as men. As such, by declaring that gender-normed fitness standards do not violate Title VII, so long as statistical data suggests equal burdens, the court avoids a future string of Ricci cases.

83. Id. at 5.
IV. CONCLUSION

The Fourth Circuit set a new standard of analysis for gender-normed fitness testing, departing from the reasoning of the district court. With scarce case law on point, the district court in Bauer v. Holder relied on plain-meaning statutory interpretation to determine that the FBI’s gender-normed PFT was discriminatory. The “simple test” used by the lower court highlighted a formal approach to equality, deemphasizing considerations of the physiological differences between men and women. While the district court did not suggest that the FBI should have no fitness standards at all, nor that there exist better ways to determine fitness levels than gender-normed testing, the district court nevertheless ruled in favor of the plaintiff, concluding that Title VII clearly and strictly forbids this type of testing. In other words, the district court took a rigid interpretive approach, asserting that discrimination occurs when there is any difference in physical fitness requirements—and that difference is based on sex.

However, the Fourth Circuit was not persuaded by this argument. Instead, the court of appeals contended that case law supports the idea that inherent physiological differences may require different standards for men and women. Furthermore, the court’s analysis pointed to the assertion that true equality is substantive equality. That is, a policy is not discriminatory if it allows equal outcomes without imposing an unequal burden on a particular group.

On remand, the district court was tasked with interpreting what the Fourth Circuit meant by “unequal burdens.” The court embraced a quantitative approach, relying primarily on pass-rate statistics to determine whether thirty push-ups for men represented the same burden as fourteen push-ups for women. Bauer provides newfound precedent for cases involving gender-normed fitness testing, and establishes a new standard of analysis for such cases. First, the Fourth Circuit does away with the “simple test” for analyzing gender-normed fitness standards, and contends that the “unequal burdens” analysis is appropriate for such cases. Next, on remand, the district court lays out a method for defining “burden.” That is, the district court relies on statistical data of pass rates between sexes, and uses it as evidence of equal or unequal burdens.

Lastly, Bauer eases liability for employers with gender-normed fitness standards by reasoning that such standards do not pose unequal burdens so long as they are supported by statistical data. Ruling in the alternative would have prompted employers to adjust policies to require universal standards. Such policies would inevitably prompt disparate-impact allegations due to the physiological differences between the sexes. Thus, employers would be forced to (1) subject themselves to disparate-impact liability, or (2) mount a Ricci defense when sued for having gender-normed fitness standards. Bauer establishes the “unequal burdens” test as the appropriate test to use for employment-based fitness testing cases, and clarifies that statistical data is sufficient to demonstrate equal or unequal burdens.

86. Id.