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9 on behalf of themselves and all others similarly situated

10 **UNITED STATES DISTRICT COURT**  
11 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

12 ERIN SNOW and LISA DARLING, )  
13 individuals, on behalf of themselves and )  
14 all others similarly situated, )  
15 Plaintiffs, )  
16 v. )  
17 CITY OF SAN DIEGO; and DOES 1 through 20, )  
18 inclusive, )  
19 Defendants. )

CASE NO: 03 CV 0527 LAB(BLM)  
[Complaint Filed: 3/17/03]  
PLAINTIFFS'  
TRIAL BRIEF

Trial Date: April 19, 2005  
Time: 9:00 a.m.

20 Plaintiffs Erin Snow and Lisa Darling respectfully submit this trial brief in their disparate  
21 impact gender discrimination lawsuit against the City of San Diego, which has no women among  
22 the top 26 positions among its lifeguard employees, and only six women among its 93 permanent  
23 employees. (Exhibit 1 [“Exh. 1”]; Revised Pretrial Order, Admitted Facts, III(C), (E)-(F).) In  
24 this case, the plaintiffs challenge the City’s lifeguard promotional policies and practices which  
25 have resulted in effectively shutting women out from employment past part-time summertime  
26 positions (Lifeguard I) and the lowest (and least paying) entry-level position (Lifeguard II).

27 Specifically, the plaintiffs challenge the City’s longstanding practice of refusing to give  
28 women the highest rating of “outstanding” in employees’ annual performance reviews.  
Incredibly, although complaints of lack of diversity in the City’s lifeguard workforce were  
acknowledged by City personnel as far back as 1997, in the five-year period from January, 1999

1 to December, 2003, male Lifeguard IIs received 76 outstanding ratings, while *female Lifeguard*  
2 *IIs did not receive a single outstanding rating*. Over that same period, male Lifeguard Is  
3 received 82 outstanding ratings and female Lifeguard Is received only 8.

4 Given the importance of employee performance ratings in the promotional process, the  
5 City's practice of refusing to rate women fairly has discriminated against women, and the  
6 plaintiffs are entitled to damages an injunctive relief pursuant to both 42 U.S.C. section 2000e-2  
7 (Title VII) and California Government Code section 12940(a).

8 **I.**  
9 **FACTUAL BACKGROUND AND NATURE OF THE CASE**

10 **A. The Higher Paying Supervisorial Positions in the City of San Diego's**  
11 **Lifeguard Service All Belong to Men.**

12 In 1918, prompted by the drowning of 13 people on a single day in Ocean Beach, the  
13 City of San Diego began employing lifeguards to enhance public safety to users of San Diego's  
14 coastline and ocean waterways. (Revised Pretrial Order, Admitted Facts, III(A).) Women were  
15 not hired at all by the City's Lifeguard Service until the 1970s. (Revised Pretrial Order,  
16 Admitted Facts, III(B).)

17 The San Diego City Lifeguard Service administration includes one chief, five lieutenants,  
18 13 sergeants, 68 permanent lifeguards (the positions are either "Lifeguards II" or "Lifeguard  
19 III"<sup>1</sup>), and approximately 200 seasonal temporary lifeguards (called "Lifeguard I"). (Revised  
20 Pretrial Order, Admitted Facts, III(C).<sup>2</sup>) The compensation paid to employees increases with  
21 each rank, and there is a substantial increase in compensation between the temporary or seasonal  
22 Lifeguard Is and the permanently employed Lifeguard IIs, who receive full year-round salary

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23  
24 <sup>1</sup> Lifeguard IIIs are "Lifeguard IIs with some additional certification." (Wurts Depo.,  
25 June 9, 2004, pp. 78:1-18, 79:8-10.) An employee does not have to become a Lifeguard III to be  
promoted to Sergeant. (Wurts Depo., June 17, 2004, p. 152:1-3.)

26 <sup>2</sup> The number of permanent employees (Lifeguard II and higher) fluctuate depending  
27 on conflicting data provided by the City (cf. Exh.1 with Admitted Fact III(C)). One fact, however  
28 never changes—the City has only six females among its entire permanent employee workforce, and  
those at the lowest rank of Lifeguard II.

1 and benefits, including full vesting in the City's defined benefit pension plan. Employees of the  
 2 City's Lifeguard Service can also earn extra pay (of approximately 10%) if they are assigned to  
 3 the cliff, river, or dive rescue teams. (Revised Pretrial Order, Admitted Facts, III(D).) Only one  
 4 female is so assigned compared to 35 males. (Revised Pretrial Order, Admitted Facts, III(G).)  
 5 Approximately 15 lifeguards at higher ranks also receive substantial overtime payments,  
 6 sometimes exceeding \$30,000 in extra compensation, and overtime opportunities are restricted to  
 7 males (with perhaps one exception).

8 Lifeguard Is perform the bulk of the water rescues and any other physical labor.  
 9 Lifeguard IIs and employees of higher rank have ever increasing supervisory responsibilities,  
 10 with sergeants, lieutenants and the chief rarely performing water rescues or other physical tasks.

11 Promotions within the City's Lifeguard Service are from within the department.  
 12 (Deposition of Lieutenant Richard Warren Wurts, taken June 9, 2004, at page 77, lines 21 to 23  
 13 ["Wurts Depo., p. 77:21-23."]: "It's our current practice and has been for many years now that  
 14 it's a promotional process from within the department.") Thus, Lifeguard IIs are hired from the  
 15 pool of Lifeguard Is. (Wurts Depo., p. 77:15-25.) Lifeguard IIIs (Wurts Depo., p. 78:19-23) and  
 16 sergeants (Wurts Depo., pp. 83:11-13, 84:6-7) are hired from the pool of Lifeguard IIs.  
 17 Lieutenants are hired from the City's existing group of lifeguard sergeants. (Wurts Depo., p.  
 18 84:8-10.)

19 Pay also increases with each step to a higher rank. The information from the following  
 20 table is taken from data provided by the City (Exh. 1), as of calendar year end 2003:

21 <b>Position</b>	<b>Number of employees</b>	<b>Percentage female (number of females)</b>	<b>Average Pay (2003)</b>
22 Chief	1	0% (0 females)	\$114,142.53
23 Lieutenant	5	0% (0 females)	\$82,491.22
24 Sergeant (not including 25 seasonal sergeants)	13	0% (0 females)	\$78,615.75
26 Lifeguard III	7	0% (0 females)	\$69,080.08

Lifeguard II (lowest full-time position)	61	9.84% (6 females)	\$55,917.08
Lifeguard I (entry level/summertime position)	187	23.53% (44 females)	\$10,555.93

Importantly, as “part-time” employees, Lifeguard Is do not receive pension, health or other valuable employment benefits. (Wurts Depo., p. 29:5-13.)

Thus, there exists a severe drop off in the percentage of females promoting to Lifeguard II from the pool of Lifeguard Is (23.52% to 9.84%) and a complete elimination of females (0%) in supervisorial positions thereon up the chain of command.

**B. Plaintiff Erin Snow.**

Plaintiff Erin Snow, a graduate of San Diego State University (a member of the swim team and communication major) became a Lifeguard I in 1999. Although always highly rated, she was unable to obtain the necessary certifications and the highest rating needed to promote to Lifeguard II. Frustrated by the continual lack of promotional opportunities, and after several instances of sexual harassment and retaliation, she resigned her temporary employment on November 12, 2003.

**C. Plaintiff Lisa Darling.**

Plaintiff Lisa Darling, biology major at the University of California San Diego (one class shy of graduation) has been employed as a City lifeguard since 1992. In 1998, she became one of only four female Lifeguard IIs, but like the other female Lifeguard IIs, has never received an outstanding performance rating, a key to promotion.

**D. The City’s Lifeguard Promotional Policies Have Adversely Impacted Women Who Rarely Receive “Outstanding” Annual Employee Performance Ratings, a Key to Obtaining a Promotion.**

**1. All employees have their performance rated annually.**

Each year, all employees, including Lifeguard Is, have their performance rated. These ratings are commonly referred to as an “EPR,” for “employee performance rating.” The highest

1 rating is “outstanding.” The intermediate rating is “above standard.” The lowest rating is  
2 “satisfactory.”<sup>3</sup>

3 To obtain these ratings, Lifeguards Is and Lifeguard IIs are rated on a set of “standards,”  
4 which measure an employee’s yearly performance on various criteria, such as “reports to work as  
5 scheduled.” Typically, employees are rated on two or three pages of standards, with as many as  
6 17 standards per page. On each individual “standard,” employees are rated with a minus (for  
7 weak), a check (average), a plus (strong), or an “N.O.” (not observed). However, no objective  
8 standards exist regarding what performance merits a “plus,” “check” or “minus.” (Wurts Depo.,  
9 Dec. 3, 2004, pp. 19:20-25, 23:1-8.)

10 A rating (outstanding, above standard, or satisfactory) is then given on the bottom of each  
11 individual page of standards. Again, no objective standard exists regarding how to rate an  
12 employee bases on the number of “pluses,” “checks,” or “minuses.” “[A] person could . . . get  
13 all pluses and still get an above standard [while another employee] could get all checks and  
14 [receive] an outstanding.” (Wurts Depo, Dec, 3, 2004, p.24:6-15.) Finally, an overall rating is  
15 provided based on the standards rated, and employees are given an overall rating of outstanding,  
16 above standard, or satisfactory.

17 The City concedes that there is nothing in these annual evaluations which should favor  
18 men over women. (Hewitt Depo., p. 48:9-16; Wurts Depo., Dec. 3, 2004, pp. 17:4-7, 17:22-  
19 18:11 [reason man would have any advantage over a woman in employee performance review];  
20 Bender Depo, pp. 27:12-28:2.)

21 **2. Ratings weigh heavily in the promotional process**  
22 **and an outstanding rating dramatically improves**  
23 **an employee’s chance of promotion.**

24 Quite understandably, the EPRs weigh heavily in the promotional process, as they have  
25 for at least a decade. (Harris Depo., p. 15:3-11 [“common knowledge amongst Lifeguards that if  
26 you did a good job and received a higher EPR, in other words, outstanding, that you stood a

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27 <sup>3</sup> Technically, there are also ratings for “below standard,” and “unsatisfactory”  
28 (Exh. 2-10) but these ratings are not used. (See Exh. 22, listing of all Lifeguard I, II, and III  
ratings from period 1999 through 2003).

1 better chance of being [promoted]”; Hewitt Depo., pp. 47: 24-48:1 [“the higher the ranking . . .  
2 on their performance rating is a positive thing”]; Wurts Depo., Dec. 3, 2004, pp. 13:15-14:10 [“I  
3 would say that we more often than not are interested in hiring the person with the best  
4 performance”].) Both plaintiffs, and other employees, are discouraged from even seeking a  
5 promotion without having received an “outstanding” EPR. During the actual promotional  
6 process, Lieutenant Wurts prepares a list of the candidates and their recent EPRs, with apparent  
7 emphasis on the most recent EPR.<sup>4</sup> (Exh. 16.) Historically from 1999 to 2004, Lifeguard Is and  
8 Lifeguard IIs were in fact much more likely to be promoted if that employee had received an  
9 outstanding rating in the year prior to the promotion. (Exh. 15 [24 of 31 Lifeguard Is and 8 of 12  
10 Lifeguard IIs promoted during period had outstanding rating in the year prior to the promotion].)

11  
12 **3. Females rarely, if ever, receive the highest rating and men frequently do.**

13 Despite the importance of receiving an outstanding EPR, the City has a practice of  
14 refusing to give this rating to females. In the five-year period from 1999 to 2003, male  
15 Lifeguard IIs and IIIs (the pool from which Sergeants are chosen) were given outstanding ratings  
16 76 times, while female Lifeguard IIs were never given that rating. (Exh. 22.) During the same  
17 period, male Lifeguard Is received an outstanding rating 82 times, while female Lifeguard Is  
18 received that highest rating only eight times. (Exh. 22.)

19 These disparities are more alarming because in the mid to late 1990’s, there were

20  
21 <sup>4</sup> Lieutenant Wurts, who was designated by the City as its Rule 30(b)(6) witness on  
22 the topic of the City’s lifeguard hiring and promotion policies and practices since March 17, 2000,  
23 testified:

24 “[f]or Lifeguard II, in the promotional process, once they’re done  
25 with the interview, one advantage that we have over Lifeguard II  
26 from Lifeguard I is I have a work history for Lifeguard I applying for  
27 Lifeguard II. So now the next part of the process is an evaluation of  
28 their personnel jacket . . . I pull their personnel jackets and I go  
through them. I highlight what their EPR . . . rankings were [and] I  
list those . . . call it a matrix, where it has the names and an  
evaluation of their employee performance, overall EPR rankings.”  
(Wurts Depo., June 9, 2004, pp. 92:10-94:21.)

1 complaints and investigations regarding the lack of gender diversity in the lifeguard service.  
2 While acknowledging an affirmative obligation to provide a workplace free of discrimination,  
3 both Chief Hewitt and Lieutenant Wurts, the Lifeguard Service EEO officer, claim to have been  
4 unaware the females had never been given the highest ratings on their EPRs during this period  
5 well after the complaints were made. (Hewitt Depo., pp. 48:3-6, 51:13-17, 59:9-14; Wurts  
6 Depo., Dec. 3, 2004, pp. 14:14-17, 16:9-12.)

7  
8 **II.**  
**LIABILITY**

9 Disparate impact gender discrimination in violation of Title VII, i.e., regardless of  
10 motive, a facially neutral employer practice or policy, bearing no relationship to job  
11 requirements, in fact has a disproportionate adverse impact on members of a protected class.  
12 (International Brotherhood of Teamsters v. United States (1977) 431 U.S. 324, 335; Griggs v.  
13 Duke Power Co. (1971) 401 U.S. 424, 431.) Unlike disparate treatment, the disparate impact  
14 theory does not require proof of intent to discriminate. (International Brotherhood of Teamsters,  
15 431 U.S. at p. 335; and see Wards Cove Packing Co., Inv. v. Atonio (1989) 490 U.S. 642, 646.)

16 In order to meet their prima facie burden in a disparate impact case, plaintiffs must  
17 demonstrate: (1) the existence of the employer's practice or policy, (2) that the policy has  
18 significant adverse impacts on persons of a protected class, (3) that the impact of the policy is on  
19 terms, conditions or privileges of employment of the protected class, and (4) that the employee  
20 population in general is not affected to the same degree. (Garcia v. Spun Steak Co. (9<sup>th</sup> Cir.  
21 1993) 998 F.2d 1480,1486.)

22 Once the plaintiff has met this burden, the employer bears the burden of persuasion as to  
23 the business necessity of the employment practice in question. (Segar v. Smith (DC Cir. 1984)  
24 738 F.2d 1249, 1267.) There is no valid reason to consistently rate women lower than men.  
25 There can be no valid business necessity of adhering to employment policies and practices that  
26 have consistently selected men for promotion at a vastly higher rate than women for the coveted  
27 permanent and higher compensation supervisorial levels enjoyed predominantly by men for  
28 almost a century.

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**A. The Existence of the Employer’s Practice or Policy**

As discussed above, the City concedes that it has a promotional policy heavily weighted by employee performance reviews. In truth, the City has in practice refused to provide women lifeguards the highest EPR ratings, and those ratings have a very high correlation to those receiving promotions.

**B. The Policy Has Significant Adverse Impacts on Persons of a Protected Class**

The City’s practice of refusing to give women the highest EPR rating has had a significant adverse impact on women who have not been able to break through to lowest-level permanent position of Lifeguard II *because no female Lifeguard II has ever received an outstanding* rating while male Lifeguard IIs have received that rating 76 times from 1999 to 2003.

In the typical disparate impact case, plaintiffs prove discriminatory impact by showing statistical disparities between the number of protected class members in the qualified group and those in the relevant segment of the workforce: “A prima facie case of disparate impact is usually accomplished by statistical evidence showing that an employment practice selects members of a protected class in proportion smaller than their percentage in the pool of actual applicants.” (Stout v. Potter (9<sup>th</sup> Cir. 2002) 276 F.3d 1118, 1122.) Where an employer fills higher management jobs by internal promotions, the potential applicant pool – and thus the appropriate comparison pool – is the current employees in lower positions. (Hemmings v. Tidyman’s Inc. (9<sup>th</sup> Cir. 2002) 285 F.3d 1174, 1185-1186.)

The statistical analysis must show a disparity that is “sufficiently substantial that [it] raises[s] such an inference of causation.” (Watson v. Fort Worth Bank & Trust (1988) 487 U.S. 977, 995.) Guidelines adopted by the EEOC and California’s Department of Fair Employment and Housing Commission suggest a standard 80% rule: i.e., a test or other selection device is generally considered to have an adverse impact if it results in a selection rate for any race, sex, or ethnic group that is less than 80% of the rate of the group with the highest rate. (29 C.F.R. §§ 1607.1-1607.18; Stout, supra, 276 F.3d at 1124 [“the four-fifths rule states that a selection practice is considered to have a disparate impact if it has a ‘selection rate for any race, sex, or



1 ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate of the group with  
2 the highest rate”].)

3 Statistical analysis demonstrates a substantial disparity, as will be addressed by Professor  
4 Jim Lackritz, Ph.D., a statistician and Associate Dean of the Graduate School of Business at  
5 San Diego State University. Professor Lackritz has extensive experience in discrimination  
6 statistical analysis (typically on the defense side) and will explain that it would be extremely  
7 unlikely that the City’s lifeguard employment, EPR and promotional makeup could ever occur at  
8 random. Professor Lackritz (but not the City’s expert) has performed standard deviation  
9 analysis,<sup>5</sup> probability analysis, and analyzed the data under the 80 percent, rule and will testify  
10 that all tests demonstrate discrimination.

11 **C. The Impact of the Policy Is on Terms, Conditions or Privileges of**  
12 **Employment of the Protected Class**

13 The impact of receiving lower ratings has led to fewer women being promoted.  
14 Therefore, the City’s practice of rarely awarding an outstanding rating to a female Lifeguard I  
15 and never to a female Lifeguard II has taken its toll—the City has females whatsoever in the top  
16 26 positions in the Lifeguard Service, even though women consist of 23.5 percent of the  
17 Lifeguard I workforce.

18 **D. The Employee Population in General Is Not Affected to the Same Degree.**

19 Again, as demonstrated by the City’s own evidence, male lifeguards are not affected by  
20 the refusal to rate woman lifeguards fairly.

21 **E. The City Cannot Demonstrate a Business Necessity to**  
22 **Constantly Rate Men Higher Than Women in the Subjective**  
23 **EPR Process.**

24 Once the plaintiffs have met their burden, the employer bears the burden of persuasion as

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25 <sup>5</sup> The standard deviation is the “measure of the predicted fluctuations from the  
26 expected value [and] is defined for the binomial distribution as the square root of the product of the  
27 total number in the sample . . . times the probability of selecting [men] times the probability of  
28 selecting [women].” (Castaneda v. Partida (1977) 430 U.S. 482, 496, fn. 17.) The challenged  
employer action is suspect “if the difference between the expected value and the observed number  
is greater than two or three standard deviations.” (Hazelwood School Dist. v. United States (1977)  
433 U.S. 299, 308, fn. 14.)

1 to the business necessity of the employment practice in question. (Segar v. Smith (DC Cir.  
2 1984) 738 F.2d 1249, 1267.) If a facially neutral employment practice operates to exclude  
3 members of a protected group, the employer must show legitimate, nondiscriminatory reasons  
4 for the employment policy or standard imposed. Otherwise, the practice is prohibited. (Griggs,  
5 supra, 401 U.S. at p. 431.) Subjective criteria, such as the EPR rating process, may adversely  
6 affect a particular group: “[i]f an employer’s undisciplined system of subjective decision making  
7 has precisely the same effects as a system pervaded by impermissible intentional discrimination,  
8 it is difficult to see why Title VII’s proscription against discrimination actions should not apply.”  
9 (Watson, supra, 487 U.S. at pp. 990-991.)

10 Here, the City cannot meet its burden. There is simply no valid reason to routinely rate  
11 men better than women in the EPRs. Nor has the City offered an explanation. There can be no  
12 valid business necessity of adhering to employment policies and practices that have consistently  
13 selected men for promotion at a vastly higher rate than women for the coveted permanent and  
14 more highly compensated positions enjoyed predominantly by men since 1918.

15 Additionally, it is an unlawful employment practice in California for an employer to “fail  
16 to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”  
17 (Government Code § 12940(k)). This provision creates a statutory tort action with the usual tort  
18 elements (duty of care to plaintiffs, breach of duty, causation and damages). (Trujillo v. North  
19 Co. Transit Dist. (1998) 63 Cal.App.4th 280, 286.)

### 20 **III. DAMAGES**

21 Plaintiffs seek damages for backpay under both Title VII and the California Government  
22 Code. (42 U.S.C. § 2000e-5(g); Gov’t Code § 12965.) Backpay awards normally reflect lost  
23 wages or salary as well as other benefits lost as a result of the discrimination. (EEOC v.  
24 Hacienda Hotel (9<sup>th</sup> Cir. 1989) 881 F.2d 1504, 1518 [“in awarding backpay under Title VII, the  
25 district court is required to attempt to make victims of discrimination whole”].) Although  
26 backpay is not an automatic or mandatory remedy, there is a strong presumption in favor of  
27 backpay awards to victims of discrimination. (Albermarle Paper Co. v. Moody (1975) 422 U.S.  
28 405, 415.)

1 In Ms. Snow's case, she also seeks damages for lost compensation as the result of her  
2 constructive discharge as the result of specific discriminatory treatment she suffered. (See  
3 Satterwhite v. Smith (9<sup>th</sup> Cir. 1984) 744 F.2d 1380, 1381, fn. 1; Cloud v. Casey (1999) 26  
4 Cal.App.4th 895, 908 [front pay award in denial of promotion case].) During the last two years  
5 of Ms. Snow's employment, she was constantly ridiculed and retaliated against after filing an  
6 internal City complaint. She was told an employee masturbated and placed semen in her hair  
7 condition; that another employee had used her loofah shower sponge to clean his anus; told she  
8 was too attractive to be taken seriously; had a used tampon removed from the employee restroom  
9 garbage and waved about; made the brunt of a "best tits" contest; required (along with other  
10 females but not males) to report any restroom break, dubbed a "Code Red" on radio channels ( a  
11 reference to a woman's menstruation cycle. Most importantly, over a period of more than one  
12 year her complaints were never investigated by the City, despite two formal complaints and the  
13 City's asserted "100% response policy." Ms. Snow mitigated her damages by obtaining  
14 alternative employment.

15 Plaintiffs also seek "front pay." In Ms. Snow's case reinstatement is not a realistic  
16 alternative. (Pollard v. E.I. du Pont de Nemours & Co. (2001) 532 U.S. 843, 846 [court may  
17 order front pay as substitute for reinstatement to compensate plaintiff for future earnings in cases  
18 of hostility between plaintiff and employer or its workers, or because of psychological injuries  
19 plaintiff suffered as result of discrimination]; Cassino v. Reichhold Chemicals, Inc. (9<sup>th</sup> Cir.  
20 1987) 817 F.2d 1338, 1347 [award of damages for future lost pay and benefits in lieu of  
21 reinstatement furthers remedial goals of anti-discrimination laws 'by returning the aggrieved  
22 party to the economic situation he would have enjoyed but for the defendant's illegal conduct . . .  
23 Thus, front pay is an award of future lost earnings to make a victim of discrimination whole"].)  
24 In Ms. Darling's case there are no positions open at the sergeant level. (Pollard, 532 U.S. at p.  
25 846 )

26 Alternatively, plaintiffs seek compensatory damages for "future pecuniary loss." (42  
27 U.S.C. § 1981a [Civil Rights Act of 1991]; Commodore Home Systems, Inc. v. Superior Court  
28 (Brown) (1982) 32 Cal.3d 211, 221 [allowing all relief generally available in non-contract

1 actions in civil actions under California Fair Employment and Housing Act].)

2 Plaintiffs will call economist Vickie M. Wolf, CPA, who has calculated Ms. Snow's  
3 economic damages for past and future wage loss to be \$583,902 (Exh. 30), and Ms. Darling's  
4 economic damages to be \$268,664 (Exh. 31).

5 Finally, both plaintiffs seek emotional distress damages in a reasonable amount to be  
6 determined by the court. (42 U.S.C. § 1981a(b)(3) [allowing recovery for 'emotional pain,  
7 suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary  
8 losses"].) As both plaintiffs will testify, they have suffered varying degrees of substantial and  
9 enduring emotional distress. Ms. Snow is presently being treated by a psychiatrist, Dr.  
10 Blumenstein. Ms. Darling has been prescribed medication in the past to help with her emotional  
11 distress.

#### 12 **IV. INJUNCTIVE RELIEF**

13 Courts also may order injunctive relief where appropriate. Title VII explicitly authorizes  
14 courts to "enjoin the [employer] from engaging in an unlawful employment practice, and order  
15 such affirmative action as may be appropriate." (42 U.S.C. § 2000e-5(g); Gov't Code §  
16 12970(a) [California FEHA]; Johnson v. Civil Service Comm'n (1984) 153 Cal.App.3d 585,  
17 591.) This authorization gives district courts broad equitable power to fashion remedies to make  
18 discrimination victims whole by putting them where they would have been but for the  
19 employer's unlawful conduct. (See League of United Latin American Citizens (LULAC),  
20 Monterey Chapter 2055 v. City of Salinas Fire Dept. (9<sup>th</sup> Cir. 1991) 654 F.2d 557, 559  
21 [retroactive promotion appropriate remedy where discrimination was cause of fireman's failure  
22 to be promoted and City failed to prove he would not have obtained position even absent  
23 discrimination].) Such relief may include requiring the employer to conduct training programs  
24 for all employees regarding equal opportunity requirements, the rights and remedies of those  
25 who allege discrimination, and the employer's internal grievance procedures. (Gov't Code §  
26 12965(c).)

27 Upon finding a Title VII or FEHA violation, the court has a "duty to render a decree  
28 which will so far as possible eliminate the discriminatory effects of the past as well as bar

1 discrimination in the future.” (Albermarle Paper Co. v. Moody (1975) 422 U.S. 405, 418; see  
2 also Donald Schriver, Inc. v. Fair Employment & Housing Comm’n (1986) 220 Cal.App.3d 396,  
3 409-410 [FEHA’s express purpose is “to provide effective remedies” to eliminate discriminatory  
4 practices].)

5 **V. CONCLUSION**

6 Even after this complaint was filed, the City continued to fairly treat women in the EPR  
7 process. Even in the face of this litigation, as if to defy the power of this court, the City provided  
8 21 male Lifeguard IIs an outstanding rating, and failed to provide even one to a female. (Exh.  
9 16.) Even Carrie Houlihan, the 2003 Lifeguard of the Year, failed to receive an outstanding EPR  
10 like 21 of her male counterparts. (Bender Depo., pp. 34:20-39:21.) All seven employees  
11 promoted to Sergeant in 2003 and 2004 were men, five of whom had an outstanding EPR in at  
12 least one of the two years prior to promotion. (Exh. 15.)

13 In the fall of 2003, even after this complaint was filed, the City provided 33 outstanding  
14 ratings to male Lifeguard Is and only three to female Lifeguard Is (an 11 to 1 ratio although the  
15 ratio of male Lifeguard Is to females was only about 3 to 1). (Exh. 16.) In October 2003, all five  
16 employees promoted to Lifeguard II were male, and all had outstanding ratings each of the past  
17 two years (and all but one had an outstanding three years prior to the promotion). (Exh. 15.) If  
18 anything, the City’s discrimination of women has only gotten worse since the litigation was  
19 commenced.

20 Plaintiffs respectfully request this court to find in favor of the plaintiffs and discharge its  
21 “duty to render a decree which will so far as possible eliminate the discriminatory effects of the  
22 past as well as bar like discrimination in the future.” (Albermarle Paper, supra, 422 U.S. at 418.)

23  
24 Dated: April 9, 2005

**LAW OFFICES OF MICHAEL A. CONGER**

25  
26 By: \_\_\_\_\_

Michael A. Conger  
Attorney for Plaintiffs