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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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The State of Arizona, et al.,

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No. CV-11-1576-PHX-GMS

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Plaintiffs,

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ORDER

11

-and-

)

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Monica Kuhlt,

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Intervenor-Plaintiff,

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vs.

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City of Cottonwood, et al.,

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Defendants.

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Pending before the Court are Plaintiffs’ Motion for Partial Summary Judgment (Doc.

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22), Defendants’ Motion for Summary Judgment (Doc. 24), and Defendants’ Motion to

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Strike the Declaration of Roger E. Millsap (Doc. 36). For the reasons stated below, Plaintiffs’

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motion is granted and Defendants’ motion is granted in part and denied in part.¹

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BACKGROUND

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In or around the year 2000, Fitness Intervention Technologies (“FIT”) conducted a

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statewide study on police officers for the purpose of developing a physical fitness test for

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¹ The parties’ requests for oral argument are denied because the parties have had an adequate opportunity to discuss the law and evidence and oral argument will not aid the Court’s decision. *See Lake at Las Vegas Investors Group, Inc. v. Pac. Malibu Dev.*, 933 F.2d 724, 729 (9th Cir. 1991).

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1 Arizona law enforcement officers. (Doc. 23 ¶ 9). The study was conducted pursuant to
2 agreements with the Arizona Peace Officers Standards and Training Board (“AZ POST”) and
3 a number of law enforcement agencies within the state. (*Id.*) According to a later-prepared
4 validation study, FIT tested 632 police officers’ ability to perform job-specific tasks, such
5 as clearing a car from a roadway, pursuing a suspect, or extracting a person from a vehicle.
6 (Doc. 25-7, Ex. 4b at E3). It then tested the officers’ performance on a battery of physical
7 tests, and correlated the officers’ performance on the job-specific tasks with their
8 performance on the physical fitness tests. (*Id.* at E4–E6). Based on the study, FIT
9 recommended that police officers within the City of Phoenix, where the test was to be
10 implemented, be able to meet the following standards on a battery of seven physical tests:
11 1) complete an agility run in 18.2 seconds or faster, 2) bench press either 175 pounds or 79%
12 of the officers’ body weight one time, 3) jump sixteen inches vertically, 4) run 300 meters
13 in 60 seconds or faster, 5) do 30 push-ups in succession, 6) do 34 sit-ups in one minute, and
14 7) run 1.5 miles in 15 minutes and 4 seconds or faster. (Doc. 23 ¶ 3). FIT recommended that
15 Phoenix require both incumbent officers and officer applicants to meet all of these standards,
16 and made no recommendations regarding promotions. (Doc. 25-7, Ex. 4b at G16–20).

17 FIT presented the results of its study to the board of AZ POST, but AZ POST’s
18 Executive Director, Lyle Mann, rejected the standards before the board took any steps to
19 adopt them. (Doc. 23-1, Ex. E at 33:19–34:8). One issue of concern was that the use of
20 absolute benchmarks for all officers could potentially have an adverse impact on women. (*Id.*
21 at 40:11–17). More important to the decision, however, was the fact that FIT had assumed
22 during its testing that officers who did not meet FIT’s standards for the job-specific tasks
23 were not qualified to be police officers, when in fact there was “no indication that everybody
24 wasn’t doing their job just fine.” (*Id.* at 41:17–18). Because Mann found that the failure was
25 “a problem with the methodology in the establishment of a cut line,” he “simply shelved” the
26 proposal from FIT. (*Id.* at 41:18–22).

27 In February of 2005, Douglas Bartosh, who had been Chief of Police in Scottsdale
28 during the period in which FIT conducted its study, was hired as the Chief of Police in

1 Cottonwood, Arizona (“the City”). (Doc. 25 ¶ 3). In December of 2006, the Cottonwood
2 Police Department (“CPD”) adopted General Order 206 (“GO 206”). (Doc. 25-16, Ex. 10).
3 The order required that CPD sworn officers meet or exceed the standards recommended by
4 FIT in the earlier study. (*Id.*). Under GO 206, applicants were required to meet or exceed the
5 FIT standards before being hired, and incumbent officers were tested twice annually.
6 Incumbent officers were given three years to meet the FIT standards, and officers who could
7 not pass the FIT standards had the opportunity to pass a job task simulation test (“JTST”)
8 instead. (*Id.*). GO 206 did not require that officers seeking promotion meet the FIT standards;
9 in fact, it does not mention promotion in any way.

10 At around the same time that CPD issued GO 206, however, it announced that it was
11 hiring for two sergeant positions. (Doc. 23-1, Ex. C). In the announcement, CPD stated that
12 following a written and oral exam, “candidates will be required to successfully complete the
13 minimum standard outlined in the new fitness policy, General Order 206.” (*Id.* at 2). The
14 requirement was added to the promotion materials by Bartosh, who said that “[t]he details
15 of the promotional process is my decision, and I put those requirements together.” (Doc. 23-1
16 at 137:9–10). When asked at his deposition why candidates were required to pass the FIT
17 standards to be promoted when GO 206 provided them, as incumbent officers, with three
18 years to meet the standards, Bartosh said that “[i]f you’re going to promote somebody,
19 generally you want somebody who is going to set the example, be a leader, have credibility
20 with the people that they’re going to lead.” (Doc. 23-1 at 14–17).

21 Detective Monica Kuhlt applied for a promotion to sergeant during the January 2007
22 promotion process. (Doc. 23 ¶ 20). Det. Kuhlt had been employed by CPD since 1997, and
23 had held various positions, including as a patrol officer, a special assignment on a narcotics
24 task force, and as a detective. (Doc. 23 ¶ 22). In her three most recent annual evaluations,
25 Det. Kuhlt had received two summary evaluations of “Exceeds Job Standards,” the fourth-
26 highest of five ratings, and one summary evaluation of “Superior Performance,” the highest
27 of five ratings. (Doc. 23-2, Exs. M–O). In 2004, she was evaluated as having a “Good Solid
28 Performance” in the subcategory of “Has necessary physical conditioning to safely perform

1 assigned duties.” (Doc. 23-2, Ex. M at 5). Although this sub-category was discontinued in
2 the 2005 and 2006 evaluations, she was evaluated as “Exceeds Job Standards” and “Superior
3 Performance” in the broad category of “Work Habits and Physical Factors” in those two
4 years respectively. (Doc. 23-2, Exs. N, O). Kuhlert took the written and oral portions of the
5 sergeant’s exam, and received the second-highest score of those who took the test. (Doc. 23
6 ¶ 28).

7 Det. Kuhlert took the physical test on April 25, 2007 and did not meet the FIT
8 standards; she again took the test on July 10, 2007 and did not pass it. (Doc. 23 ¶ 32). Each
9 time she took the test, she met the standards for the bench press, the push-ups, and the sit-
10 ups. She failed to meet the standards for the agility run, the 300-meter run, and the 1.5-mile
11 run. She passed the vertical jump on one occasion and failed it on the other. (Doc. 23 ¶ 32).
12 At some point in 2007, Det. Kuhlert presented CPD with a letter from her doctor stating that
13 she was being treated for “re-exacerbation of low back pain,” and that “intense physical
14 activity [should] be avoided until Oct. 31, 2007.” (Doc. 25-19, Ex. 17). On October 17, CPD
15 placed Det. Kuhlert on light duty “until you have been cleared by your physician for full duty
16 including the fitness testing.” (Doc. 23-3, Ex. T). On the same day, Bartosh wrote a
17 memorandum to Det. Kuhlert stating that he was skipping her on the promotional list because
18 she had not met the FIT standards and because “[y]ou also stated that you were unsure when
19 you would be prepared to participate in fitness training.” (Doc. 23-3, Ex. S). On January 16,
20 2008, Kuhlert again took the test; she again met the FIT standards on some of the parts of the
21 test and not on others. (Doc. 23 ¶ 37). In February of 2008, Bartosh became the City
22 Manager of Cottonwood, and Jody Fanning became the Interim Chief of Police; Fanning
23 became Chief of Police in June of 2008.

24 On April 4, 2008, Det. Kuhlert wrote Fanning a memorandum in which she expressed
25 her concerns about the FIT test. (Doc. 25-19, Ex. 22). In the memo, she noted that of the
26 three women in CPD, only one had passed the test, and that the woman who passed it had
27 subsequently failed it. (Doc. 25-19, Ex. 22). She wrote that “[t]he physical fitness standard
28 has a disparate impact on women when compared to how the same standard affects men.”

1 (*Id.*). She concluded that she believed that “the issues I have encountered while trying to get
2 promoted are like the ‘glass ceiling’ affect [*sic*].” (*Id.*). On April 21, 2008, Det. Kuhlt was
3 provided with a letter from Deputy Chief Fanning. (Doc. 25-19, Ex. 23). The letter stated that
4 “[y]our perception that the tests are difficult for women to pass is well founded,” and noted
5 that a study conducted by FIT “found that there is a disparate impact on women with these
6 standards.” (Doc. 25-19, Ex. 23). The letter also stated that, according to FIT, the standards
7 “are established to guarantee *minimal* fitness to perform the strenuous tasks of the job.” (Doc.
8 25-19, Ex. 23) (emphasis in original). In his deposition, Fanning acknowledged that the letter
9 was written entirely by the City Attorney, and that he had not edited or amended the letter
10 after it had been provided to him. (Doc. 30-3, 122:20–23). Fanning stated in his deposition
11 that he did not understand how the FIT standards were developed or validated, that he had
12 not seen charts showing the pass rates of women and men on the various elements of the test,
13 and that he had no specific knowledge of any facts that suggested that Det. Kuhlt could not
14 meet the minimal standards of being a law enforcement officer. (Doc. 30-3, 124:8–125:11).

15 In May of 2008, two more sergeant positions became available; for the 2008 hiring
16 process CPD revised its application procedure so that applicants were required to take the
17 FIT test before taking the written and oral exam, and those who failed the FIT test were not
18 permitted to take the oral and written exams. (Doc. 23 ¶¶ 40–41). During the physical fitness
19 test, Det. Kuhlt injured her back, and therefore did not take the oral or written portions of the
20 promotional exam. (Doc. 25 ¶ 76; Doc. 23 ¶ 43).

21 Kuhlt filed a charge of discrimination on May 6, 2008 with the Arizona Attorney
22 General’s Office Civil Rights Division (“CRD”), alleging that the physical fitness test
23 constituted sex discrimination because of its disparate impact on women. (Doc. 25-23, Ex.
24 41). On February 13, 2009, CRD dismissed Kuhlt’s complaint. (Doc. 25-23, Ex. 42). On
25 March 9, 2009, Det. Kuhlt wrote CRD and asked that it re-open her case. (Doc. 30-3, Ex. P-
26 1). In her letter, Kuhlt stated that two recent applicants—a female state-certified Phoenix
27 police officer and a male civilian—had both failed one portion of the FIT test, and the female
28 officer had been sent home, while the male officer had been allowed to retake the portion of

1 the test that he had failed. (*Id.*). On April 1, 2009, CRD re-opened the case, and issued a
2 Reasonable Cause Determination on April 28. (Doc. 30-3, Ex. P-2–4). In its response to the
3 Reasonable Cause Determination, the City’s attorney wrote, “[t]o be clear, the City does not
4 dispute the fact that the physical fitness standards set forth in General Order 206 have a
5 disparate impact on women.” (Doc. 30-3, Ex. P-4). In April of 2009, Kuhlth provided the
6 officer conducting fitness training with a note from her doctor stating that she could take the
7 fitness test, but that she should not run, and suggesting that instead she walk for two miles.
8 (Doc. 25-19, Ex. 26). Officers from the CPD contacted the doctor, who confirmed that his
9 only concern was the 1.5 mile run, and suggested that Det. Kuhlth’s aerobic ability be tested
10 by a non-impact activity such as walking or riding a stationary bike. (Doc. 25-19, Ex. 28).
11 The CPD then scheduled an appointment for Det. Kuhlth with another doctor, who determined
12 on May 13, 2009 that Det. Kuhlth was not fit for duty as a police officer. (Doc. 25 ¶ 117).
13 Kuhlth filed another charge of discrimination in June of 2009, alleging, among other things,
14 that the evaluation was scheduled and her duty was modified in retaliation for her sex-
15 discrimination complaint. (Doc. 25-19, Ex. 21). Kuhlth was placed on light duty until October
16 21, 2009, when she was approved for full duty by another doctor. (Doc. 25 ¶ 136).

17 In October of 2010, CPD changed the test that it uses to evaluate the physical fitness
18 of its officers, substituting the Peace Officers Physical Aptitude Test (“POPAT”) for the FIT
19 test. (Doc. 23 ¶ 46). The POPAT requires officers to climb over a solid fence, climb over a
20 chain-link fence, run a 99-yard obstacle course, drag a 165-pound dummy, and run 500
21 yards. (Doc. 23 ¶ 47). Although POPAT is commonly used in police academies, AZ POST
22 does not recommend using it for in-service evaluations because of the risk that officers will
23 be injured taking the test and because building and maintaining a course is costly. (Doc. 23-1,
24 22:20–23:13).

25 This lawsuit was originally filed by the CRD in Maricopa Superior Court on May 5,
26 2009, alleging violations of state civil rights law. (Doc. 1-1). After over two years of
27 litigation, Det. Kuhlth filed an Amended Complaint asserting federal claims for the first time.
28 Defendants removed the suit to federal court on August 8, 2011. (Doc. 1). The Amended

1 Complaint contains claims of disparate impact, disparate treatment, and retaliation under
2 Arizona state civil rights law, Title VII, and 42 U.S.C. § 1983. (Doc. 1-7).

3 Both parties have moved for summary judgment on the disparate impact claim.
4 Defendants have moved for summary judgment on all claims.

5 DISCUSSION

6 I. Legal Standard

7 Summary judgment is appropriate if the evidence, viewed in the light most favorable
8 to the nonmoving party, demonstrates “that there is no genuine dispute as to any material fact
9 and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). Substantive
10 law determines which facts are material and “[o]nly disputes over facts that might affect the
11 outcome of the suit under the governing law will properly preclude the entry of summary
12 judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “[A] party seeking
13 summary judgment always bears the initial responsibility of informing the district court of
14 the basis for its motion,” including identifying portions of the record that demonstrate the
15 absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
16 (1986).

17 Once the moving party has detailed the basis for its motion, the party opposing
18 summary judgment “may not rest upon the mere allegations or denials of [the party’s]
19 pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial.”
20 FED. R. CIV. P. 56(e); *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
21 586-87 (1986); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995);
22 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). “A fact issue is genuine ‘if the evidence
23 is such that a reasonable jury could return a verdict for the nonmoving party.’” *Villiarimo v.*
24 *Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson*, 477 U.S. at
25 248). Thus, the nonmoving party must show that the genuine factual issues “‘can be resolved
26 only by a finder of fact *because they may reasonably be resolved in favor of either party.*’”
27 *Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th
28 Cir. 1987) (quoting *Anderson*, 477 U.S. at 250; emphasis in original). “[A]t the summary

1 judgment stage the judge's function is not himself to weigh the evidence and determine the
2 truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477
3 U.S. at 249.

4 A principal purpose of summary judgment is "to isolate and dispose of factually
5 unsupported claims." *Celotex*, 477 U.S. at 323–24. Summary judgment is appropriate against
6 a party who "fails to make a showing sufficient to establish the existence of an element
7 essential to that party's case, and on which that party will bear the burden of proof at trial."
8 *Id.* at 322; *see Citadel Holding Corp. v. Roven*, 26 F.3d 960, 964 (9th Cir. 1994). The moving
9 party need not disprove matters on which the opponent has the burden of proof at trial. *See*
10 *Celotex*, 477 U.S. at 323.

11 **II. Analysis**

12 This order will first consider the disparate impact claim, on which both parties have
13 moved for summary judgment, and then consider the remaining claims, on which only
14 Defendants have moved for summary judgment.

15 **A. Disparate Impact**

16 Plaintiffs have filed disparate impact claims under both Title VII and the Arizona
17 Civil Rights Act ("ACRA"). *See* 42 U.S.C. § 2000e-2(k)(1)(A)(I); Arizona Revised Statutes
18 ("A.R.S.") § 41-463(B)(1). The claims will be analyzed under the federal framework,
19 because "federal case law is persuasive in interpreting the state statute." *Sees v. KTUC, Inc.*,
20 148 Ariz. 366, 368, 714 P.2d 859, 861 (App. 1985). Courts analyze claims of disparate
21 impact in three steps. First, a plaintiff must show "that an employer uses a 'particular
22 employment practice that causes disparate impact on the basis of race, color, religion, sex,
23 or national origin.'" *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009) (quoting 42 U.S.C. §
24 2000e-2(k)(1)(A)(i)). Although this first step is described as making a "prima facie" case,
25 the burden on the plaintiff is higher during the first step of a disparate impact claim than the
26 "prima facie" case in a disparate treatment case—the plaintiff must "demonstrate[]" that the
27 practice causes a disparate impact, with "demonstrate" defined by statute to mean "meets the
28 burdens of production and persuasion." 42 U.S.C. §§ 2000e(m), 2000e-2(k)(1)(A)(I). The

1 Ninth Circuit has held that the Plaintiff must “prove any such charge by a preponderance of
2 the evidence.” *Paige v. California*, 291 F.3d 1141, 1145 n.4 (9th Cir. 2002).

3 Once the plaintiff has established a prima facie violation by a preponderance of the
4 evidence, a defendant bears the burden of “demonstrating that the practice is ‘job related for
5 the position in question and consistent with business necessity.’” *Ricci*, 129 S. Ct. at 2673
6 (2009) (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(I)). Should the employer meet this burden, a
7 plaintiff “may still succeed by showing that the employer refuses to adopt an available
8 alternative employment practice that has less disparate impact and serves the employer’s
9 legitimate needs.” *Ricci*, 129 S. Ct. at 2673. The Court will discuss these factors in turn.

10 **1. Prima Facie Case**

11 To meet their initial burden, Plaintiffs must identify “1) a specific employment
12 practice that 2) causes a significant discriminatory impact.” *Paige*, 291 F.3d at 1145. Here,
13 no party disputes that Plaintiff has identified the specific practice of using the fitness
14 standards set forth in the FIT test as a requirement for promotion to sergeant.

15 Plaintiff offers four pieces of evidence that the test causes a discriminatory impact:
16 a declaration by Roger E. Millsap that the results of FIT’s own validation study demonstrate
17 that the test has a disparate impact on women (Doc. 36), the results of people who took the
18 test as administered by CPD, the letter from Chief Fanning stating that the FIT study “found
19 that there is a disparate impact on women with these standards,” (Doc. 25-19, Ex. 23) and
20 the letter from the City stating that “[t]o be clear, the City does not dispute the fact that the
21 physical fitness standards set forth in General Order 206 have a disparate impact on women.”
22 (Doc. 30-3, Ex. P-4).

23 **a. Millsap Declaration**

24 In its validation study, FIT reported some of the results of the initial tests in Phoenix.
25 (Doc. 23-2, Ex. I at G28–29). Defendants argue that Plaintiffs may not rely on these alleged
26 results to show that females pass the test at a lower rate than males, because the results are
27 inadmissible hearsay. (Doc. 24 at 3–4). Plaintiffs note that Defendants have previously
28 acknowledged that the results show that women pass the test at much lower rates than men,

1 and claim that the results themselves are therefore admissible as a statement against interest
2 or an admission by a party-opponent. *See* FED. R. EVID. 801(d)(2), 804(b)(3). Although the
3 parties' statements regarding the test, as discussed below, are admissible as statements
4 against interest, they do not serve to render the FIT report to which they refer admissible. FIT
5 is not a party to this action and therefore its report is not a "party's own statement." Rule
6 801(d)(2) is not applicable. Rule 804(b)(3) is only applicable if the declarant is unavailable;
7 Plaintiffs have not argued that the declarant for the FIT report is unavailable. The results of
8 the 2001 test, as reported in the validation study, are inadmissible hearsay.

9 Nevertheless, Plaintiffs' expert, Roger Millsap, has submitted a declaration evaluating
10 the results of the FIT study. Dr. Millsap calculated the likelihood that, despite the results of
11 the FIT study, females could be expected to pass the elements of the battery of tests at 4/5ths
12 the rate of men. He found that on six of the seven tests, the probabilities that women would
13 pass at such rates was two-one-thousandths of a percent. (Doc. 33-1, Ex. 1-A).

14 Defendants' motion to strike Dr. Millsap's declaration was denied, and they were
15 offered the opportunity to submit any evidence rebutting his conclusions. (Doc. 40). They
16 declined to do so, instead submitting a "response" to the declaration challenging its
17 admissibility. (Doc. 41). Defendants contend that because Cottonwood administered the test
18 "under circumstances that are fundamentally dissimilar to the City's testing program" and
19 because Dr. Millsap "has no knowledge of how the FIT study participants would perform if
20 they were re-tested following a training regimen," Dr. Millsap's conclusions regarding the
21 FIT results are not admissible as evidence that women pass the City's testing regimen at a
22 disparate rate from men. (Doc. 41 at 2). They further contend that the underlying FIT
23 study—the very study upon which they otherwise rely to claim that the City's testing
24 program has been properly validated—is not "the type of trustworthy material that is
25 reasonably relied upon by experts in the field." (*Id.*). Both arguments lack merit.

26 It is true that the participants in the FIT study were not given an opportunity to train
27 for the test, and were not told what benchmarks were considered passing. They were,
28 however, all police officers who were recruited to take a physical fitness test; they were not

1 a random population sample. To the extent that Defendants argue that the disparities between
2 women and men's performance on the test would disappear with training, only a month
3 elapsed between the time that GO-206 was issued and Det. Kuhlert took the test as part of her
4 application. The fact that officers were granted three years to pass the test is not relevant to
5 the use of the test with regards to the promotional process, as discussed in greater detail
6 below. Given the similar populations that took the FIT test and the City's test and the
7 identical requirements for passing the test, the fact that Det. Kuhlert could have trained for a
8 month prior to the test does not reduce the reliability of Dr. Millsap's conclusions.

9 Nor are the underlying data so unreliable that Dr. Millsap's report must be excluded.
10 When an expert gives testimony based on statistics "of a type reasonably relied upon by the
11 experts in the particular field in forming opinions or inferences on the subject, the facts or
12 data need not be admissible in evidence in order for the opinion or inference to be admitted."
13 FED.R. EVID. 703. Defendants cite one case in which expert testimony was excluded because
14 the underlying information on a document was described by its creator as a "a reverse
15 guesstimate," and the expert had admitted that "he did not know what the document was, who
16 created it, or how it was created." *Montgomery Cty. v. Microvote Corp.*, 320 F.3d 440,
17 448-49 (3d Cir. 2003). In *TK-7 Corp. v Estate of Barbouti*, 993 F.2d 722, 732 (10th Cir.
18 1993), also cited by Defendants, a purported expert opinion was rejected when the court
19 determined that the person "professed no expertise" with regards to the subject matter of his
20 testimony but merely "assumed the validity" of another's report "despite the fact that he
21 knew little or nothing at all" about its author. Such problems are not present here. Defendants
22 themselves rely on the FIT study when they claim that the test has been properly validated.
23 (Doc. 25 ¶ 20-22). It was proper for Dr. Millsap to rely upon it as well.

24 Dr. Millsap's declaration regarding the FIT study is admissible. Dr. Millsap's analysis
25 of the FIT study is "sufficient to show that the practice in question has caused the exclusion
26 of applicants for jobs or promotions because of their membership in a protected group."
27 *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988).

28 **b. Actual Test-takers**

1 The results of the test as it was actually administered by the City also support a claim
2 of disparate impact. The City administered the test to ten women (three incumbent officers
3 and seven applicants) and to ninety men (thirty-eight incumbent officers and fifty-two
4 applicants). Two women passed the test, for a passage rate of 20%, and seventy-one men
5 passed, for a passage rate of 79%. (Doc. 30-5, Exs. BB–DD). Defendants argue that “the City
6 employed only four female officers during the period that the test was used, and that two of
7 the females passed the test.” (Doc. 2). They arrive at this figure, apparently, by counting the
8 three incumbent females who took the test (one of whom passed), along with the one
9 applicant female who passed the test and thereby became an incumbent. The record shows
10 that this female took the test a total of one time, on July 12, 2008, as an applicant. (Doc. 30-5,
11 Ex. BB). Defendants offer no reason why the test this person took as an applicant should be
12 included, while the six female applicants who failed the test should not. When considering
13 whether a certain employment practice has a disparate impact, the Ninth Circuit disfavors
14 artificially limiting the data available for analysis. *See Hemmings v. Tidyman’s, Inc.*, 285
15 F.3d 1174, 1187 (9th Cir. 2002) (“Federal courts have rejected defendant’s arguments that
16 statistical analysis should be limited to a pool of ‘qualified applicants’ where the job
17 qualification standards are themselves discriminatory”). The best available statistics of actual
18 test-takers include the results of everyone who took the test as administered by CPD.

19 To establish disparate impact by statistical disparities, “the statistical disparities must
20 be ‘sufficiently substantial that they raise . . . an inference of causation. The statistical
21 evidence may not be probative if the data are ‘small or incomplete.’” *Shutt v. Sandoz Crop*
22 *Protection Corp.*, 944 F.2d 1431, 1433 (9th Cir. 1991) (quoting *Watson v. Fort Worth Bank*
23 *& Trust*, 487 U.S. 977, 995–97). While courts should therefore regard studies made up of
24 small samples with caution, “[b]y necessity, courts sometimes must rely on statistics derived
25 from small sample groups,” because otherwise employees of small organizations would be
26 denied “some of the protections that Title VII provides.” *Shutt*, 944 F.2d at 1434.

27 The Ninth Circuit’s approach to analyzing statistics involving limited numbers of
28 applicants is demonstrated in *Stout v. Potter*, 276 F.3d 1118 (9th Cir. 2002). There, thirty-two

1 men and six women applied for a promotion within the Postal Service. The Postal Service
2 first screened the applicants, and then interviewed those whom it had selected. The screening
3 process (rather than the final selection) was targeted as an employment practice with a
4 disparate impact based on sex. *Id.* at 1122–23. The court expressed caution at considering
5 such a small sample size, but nevertheless proceeded to analyze the results of the screening
6 process. *Id.* at 1123 (“We observe initially that the probative value of any statistical
7 comparison is limited by the small available sample.”). In *Stout*, two of the six women, or
8 thirty-three percent, who applied for the promotion made it through the screening stage,
9 while thirteen of the thirty-two men, or forty-one percent, did. The court found that this
10 discrepancy was simply too small to state a prima facie case, particularly in light of the small
11 sample size. *Id.* In some cases the Ninth Circuit has rejected data outright when it is “derived
12 from an extremely small universe.” *Morita v. Southern California Permanente Medical*
13 *Group*, 541 F.2d 217, 220 (9th Cir. 1976) (holding that a sample size of eight people who
14 were promoted over a seventeen-year period was too small from which to draw any
15 inference). It has found that a small sample size can “call[] into question the statistical
16 significance of the 80 percent rule.” *Bouman v. Block*, 940 F.2d 1211, 1226 (9th Cir. 1991).
17 Nevertheless, when parties dispute the significance of a small sample size, “the district judge
18 may accept some statistical inferences and reject others based upon his perception of the oral
19 and documentary evidence placed before him.” *Contreras v. City of Los Angeles*, 656 F.2d
20 1267, 1273 (9th Cir. 1981).

21 Here, although the sample size is relatively small, the disparities are large. The small
22 sample size here suggest that relying on the eighty percent rule alone would not suffice to
23 find disparate impact. However, the men who took the test passed it at a rate of nearly four
24 times that of the women who took it. For the rates to be comparable, six more women, out
25 of ten who took the test, would have needed to have passing scores. Stated another way,
26 although women made up ten percent of those who took the test, they made up less than three
27 percent (two out of seventy-one) of those who passed it. (Doc. 30-5, Exs. BB–DD). Even
28 considering the small sample size, disparities of this magnitude establish Plaintiffs’ prima

1 facie case.

2 **c. Other Factors**

3 In addition to Dr. Millsap's declaration and the results of actual test-takers, other
4 evidence demonstrates that the test had a disparate impact, and that Defendants were aware
5 of this fact. Chief Fanning wrote a letter to Detective Kuhlert that the FIT study "found that
6 there is a disparate impact on women with these standards." (Doc. 30-3, Ex. P-4). The City
7 itself wrote a letter to the CRD stating that "[t]o be clear, the City does not dispute the fact
8 that the physical fitness standards set forth in General Order 206 have a disparate impact on
9 women." (Doc. 25-19, Ex. 23). As discussed above, while neither of these statements renders
10 the FIT report a statement against interest, because FIT is not a party, the statements
11 themselves about what the FIT report shows are admissions by party-opponents, and
12 therefore are not hearsay. FED.R.EVID. 801(d)(2).

13 Defendants do nothing to argue that the test as administered has not had an disparate
14 impact on female test-takers. They merely argue, without any evidentiary support, that the
15 actual numbers do not give rise to a result that is statistically significant for establishing a
16 disparate impact. They provide no expert or other testimony from which this court could
17 conclude that Dr. Millsap's analysis or the results of the actual test as administered do not
18 demonstrate a disparate impact. At least twice they have acknowledged that the test has a
19 disparate impact on women, and they disputed the issue for the first time at the summary
20 judgment stage of this litigation.

21 Plaintiffs have presented admissible evidence that the test administered under GO 206
22 had a disparate impact on women. Defendants have offered no evidence that challenges
23 Plaintiffs' evidence. Summary judgment is therefore appropriate in favor of Plaintiffs on the
24 question of whether the test has a disparate impact on women. *See Celotex*, 477 U.S. at 322.

25 **2. Business Necessity**

26 Employment tests that have a disparate impact on members of a protected class "are
27 impermissible unless shown, by professionally acceptable methods, to be predictive of or
28 significantly correlated with important elements of work behavior which comprise or are

1 relevant to the job or jobs for which candidates are being evaluated.” *Ass’n of Mexican-*
2 *American Educators v. California*, 231 F.3d 572, 584 (9th Cir. 2000) (quoting *Albemarle*
3 *Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). “Unless and until the defendant pleads and
4 proves a business-necessity defense, the plaintiff wins simply by showing the stated
5 elements.” *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2198 (2010).

6 Defendants used the standards set forth in the FIT validation study when devising
7 their own test. The validation study determined, based on extensive analysis of job-related
8 skills, that the FIT standards measured the “minimum underlying physical ability or fitness”
9 for performing the physical tasks of being a police officer. (Doc. 25-6, Ex. 4a at B-1). The
10 validation study recommended that all incumbent officers and applicants meet the standards
11 developed in the testing, because by “having absolute job-related standards for all applicants,
12 Academy recruits and incumbents, Phoenix should have a measure of certainty that personnel
13 can meet the strenuous and critical physical demands of the job.” (Doc. 25-7, Ex. 4b at G-
14 30).

15 The test standards were designed to measure the minimal fitness requirements for law
16 enforcement officers in Phoenix. Defendants themselves note that the study “took place
17 under circumstances that were fundamentally different from the manner in which
18 Cottonwood utilized the test,” but have presented no evidence that they modified the test in
19 any way to make it applicable to Cottonwood. (Doc. 27 at 5). For example, Det. Kuhl stated
20 in her deposition that she ran a mile and a half in Phoenix while applying for other law
21 enforcement positions, she ran nearly a minute faster than in Cottonwood, which she
22 attributes to the difference in altitude, “because Phoenix is much lower.” (Doc. 25-17, Ex.
23 11 at 26:2–3). There is no evidence that CPD considered adjusting the target time for the 1.5
24 mile run based on Cottonwood’s elevation.

25 There are material issues of fact as to whether the test accurately measures the
26 minimal standards necessary to be a Cottonwood police officer. Dr. Millsap challenges the
27 test’s methodology, but “[t]he question of whether a test has been validated properly is
28 primarily a factual question, which depends upon the underlying factual determinations

1 regarding the content and reliability of the validation studies.” *Ass’n of Mexican-American*
2 *Educators*, 231 F.3d at 585. In response to Dr. Millsap’s critique, FitForce acknowledged
3 that no different standards were set forth for different departments, but stated that “our
4 experience and feedback from the ALEA (Arizona Law Enforcement Academy) lead to the
5 conclusion that municipal police work in the state of Arizona does not vary significantly
6 from agency to agency.” (Doc.23-2 at 6–7). If the only question were whether the study tests
7 for a business necessity for hiring police officers, summary judgment would be inappropriate.

8 Plaintiffs are not arguing, however, that the test fails to measure the minimal standards
9 needed to be a police officer in Cottonwood. They argue instead that requiring passing scores
10 of only those officers applying to be sergeants serves no business necessity. Defendants
11 claim that the test measures the physical capacity necessary to be a sergeant because
12 sergeants in Cottonwood are patrol officers, and Bartosh stated that in Cottonwood, sergeants
13 are “doing the same kind of job duties as the officers.” (Doc. 25-3, Ex. 2 at 40:7–8). Even
14 granting that the duties of a sergeant and a police officer in Cottonwood are identical,
15 Defendants have pointed to no business necessity that required sergeants to pass the test
16 when incumbent officers were not required to. Under GO 206, incumbent officers were
17 granted three years in which to meet the fitness standards; Det. Kuhl was not fired for failing
18 the test. (Doc. 25-16, Ex. 10 ¶ B). Nevertheless, passing the test was made a requirement in
19 the promotional process for the sergeant position. (Doc. 23-1, Ex. C). The only statement
20 from any defendant as to why sergeants must pass the test while police officers need not do
21 so is Bartosh’s statement that “[i]f you’re going to promote somebody, generally you want
22 somebody who is going to set the example, be a leader, have credibility with the people that
23 they’re going to lead.” (Doc. 23-1 at 14–17). Defendants have not argued that the FIT
24 standards measure the ability to set examples, lead, or establish credibility. The Ninth Circuit
25 has held that the California Highway Patrol did not meet its burden of production to show
26 that a promotional exam met a business necessity when “it did not present any evidence
27 regarding how the examinations actually test for the skills identified by the CHP as critical
28 to performing well *in a particular supervisory rank.*” *Paige v. California*, 291 F.3d at 1145

1 (emphasis added). Defendants' argument that sergeants must pass the test because their job
2 requirements are the same as patrol officers fails because police officers were not required
3 to pass the test for three years after the implementation of GO-206.²

4 Plaintiffs have met their burden of showing a prima facie case, and Defendants have
5 not shown that there was a business necessity for using the test as a promotional tool when
6 officers were not required to pass it. Plaintiffs are granted summary judgment on their
7 disparate impact claim.

8 **B. Other Claims**

9 Defendants claim that Plaintiffs are time-barred from challenging any action that took
10 place prior to July 11, 2007, and that Plaintiffs' claim for injunctive relief is moot. Moreover,
11 they move for summary judgment on Plaintiffs' disparate treatment claim, their retaliation
12 claim, and their § 1983 claim.³ These issues will be discussed in turn.

13 **1. Timeliness**

14 Title VII requires an employee to file a charge within three hundred days after an
15 alleged unlawful employment practice occurred when the employee initially instituted
16 proceedings through a state agency. 42 U.S.C. § 2000e-5(e)(1) (2006). Plaintiffs filed this
17 charge on May 6, 2008, and Defendants argue that they therefore cannot challenge any
18 actions that took place prior to July 11, 2007. (Doc. 24 at 8). Defendants do not deny,
19 however, that the claim regarding Kuhl's 2008 application is timely, or that in the Ninth
20 Circuit, plaintiffs "are permitted to offer evidence of the pre-limitations [discrimination] in
21 the prosecution of their timely claims." *Lyons v. England*, 307 F.3d 1092, 1108 (9th Cir.
22 2002). Moreover, Title VII and ACRA allow plaintiffs to recover damages incurred up to two
23

24 ² In addition, GO-206 provides that officers who fail the fitness battery can instead
25 take a "job task simulation test" ("JTST"). (Doc. 25-16, Ex. 10 ¶ D(4)(d)).

26 ³ Additionally, they argue that punitive damages are not available. Plaintiffs concede
27 that punitive damages are not available, and state that Kuhl "inadvertently" pled punitive
28 damages in her First Amended Complaint. (Doc. 29 at 17). Any claim for punitive damages
is therefore dismissed.

1 years prior to the filing of a claim, which Defendants also do not dispute. 42 U.S.C. § 2000e-
2 5(e)(3)(B); A.R.S. § 41-1481(G).⁴

3 2. Mootness

4 In 2010, Defendants stopped administering the FIT test, using the POPAT test
5 instead.. (Doc. 25 ¶¶ 154–55). In *Los Angeles Cty. v. Davis*, 440 U.S. 625 (1979), a disparate
6 impact claim against a fire department challenging a civil service exam, the Supreme Court
7 set forth a two-part test for whether a claim is rendered moot when a department stops using
8 a challenged test during the course of litigation. Such a case is moot when “(1) it can be said
9 with assurance that there is no reasonable expectation that the alleged violation will recur,
10 and (2) interim relief or events have *completely and irrevocably eradicated* the effects of the
11 alleged violation.” *Id.* at 631 (emphasis added). The Court emphasized that “[t]he burden of
12 demonstrating mootness ‘is a heavy one.’” *Id.* (quoting *United States v. W. T. Grant Co.*, 345
13 U.S. 629, 632–33 (1953)). The Ninth Circuit has found that a complaint against a public
14 agency was rendered moot following a policy change when the new policy “addresses all of
15 the objectionable measures that [the agency] took against the plaintiffs in this case, and even
16 confesses that this case was the catalyst for the agency’s adoption of the new policy.” *White*
17 *v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000).

18 Citing to *Davis* and *White*, Defendants argue that because they have replaced the FIT
19 test with POPAT, “there is no need for an injunction.” (Doc. 24 at 17). Defendants rely
20 merely on the first prong of the *Davis* test, and do not argue that they have “completely and

21
22 ⁴ Defendants state that the two-year provision is only applicable in cases involving
23 equitable tolling, relying on a Supreme Court dissent noting that to the two year period is a
24 “limitation on backpay” in cases where equitable considerations would otherwise allow for
25 more than two years of backpay. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101,
26 125 (2002) (O’Connor, J. dissenting). The statute’s text provides that liability may accrue for
27 “back pay for up to two years preceding the filing of the charge, where the unlawful
28 employment practices that have occurred during the charge filing period are similar or related
to unlawful employment practices with regard to discrimination in compensation that
occurred outside the time for filing a charge.” 42 U.S.C. § 2000e-5(e)(3)(B). This language
does not limit the two-year recovery period to cases in which the filing deadline was
equitably tolled.

1 irrevocably eradicated the effects of the alleged violation” or that switching to another test
2 “addresses all of the objectionable measures” of which Defendants complained. *Davis*, 440
3 U.S. at 631; *White*, 227 F.3d at 1243. *Davis* involved a challenge to a county’s proposal to
4 use the results of a 1972 civil service exam to fill temporary emergency firefighter positions.
5 *Davis*, 440 U.S. at 631. The county never followed through on the plan, and in the seven
6 following years implemented a hiring plan in which hiring of minority applicants
7 “consistently, though by varying amounts, exceeded 50%.” *Id.* at 632. In *White*, officers of
8 the Department of Housing and Urban Development (“HUD”) launched Fair Housing Act
9 (“FHA”) investigations against people who had engaged in protected First Amendment
10 activity. Subsequently, HUD issued a memo specifically discussing limits on FHA
11 investigations for protected First Amendment activity, and implemented its new policy
12 through a field handbook and training for officers, “address[ing] all of the objectionable
13 measures” complained of and rendering the future injunctive relief moot. *White*, 227 F.3d at
14 1243.

15 In their Second Amended Complaint, Plaintiffs noted that Defendants had switched
16 to using POPAT, but claimed that Defendants had not performed or asked any outside agency
17 to perform a study correlating performance on POPAT with performance as a CPD sergeant
18 or any CPD law enforcement position. (Doc. 1-7 at 141, ¶ 88–89). Defendants do not claim
19 that POPAT has been validated as a promotional tool, but have only stated that it is used “as
20 a graduation requirement” in Arizona police academies. (Doc. 24 at 17). Plaintiffs have not
21 sought an injunction barring Defendants merely from using the FIT test; they ask that
22 Defendants be enjoined “from engaging in any employment practice, including applying
23 invalid and unnecessary physical fitness performance standards that are known to have a
24 disparate impact on women.” (Doc. Doc. 1-7 at 145, ¶ B).

25 In *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991), a district court found that
26 promotional tests in a law enforcement agency in 1975 and 1977 had a disparate impact on
27 women, but that a 1980 test had no such impact. It nevertheless issued an injunction ordering
28 “the County to develop a ‘validated’ sergeant examination and to hire female sergeants

1 consistent with their percentage representation as deputies.” *Id.* at 1232. The Ninth Circuit
2 held that prospective injunctive relief was not rendered moot by the 1980 test results, because
3 “[e]ven though the performance of women may have improved on the 1980 examination,
4 there is still no showing that it is a valid, job-related test.” *Id.* at 1233. Likewise, although
5 police academies use POPAT as a graduation requirement, Defendant has had offered no
6 evidence that passing the POPAT is specifically related to the job of being a CPD sergeant.
7 Plaintiffs’ claim for injunctive relief is not moot, and Defendants will be enjoined from using
8 any physical fitness test as a prerequisite for promotion unless the test has been specifically
9 validated to measure the job requirements of the position to which the incumbent officer is
10 seeking promotion. This suit does not involve disparate impact claims with regards to the
11 tests as administered to applicants, and Defendants are not enjoined from using POPAT in
12 its hiring, rather than promotional, process.

13 **3. Disparate Treatment**

14 A plaintiff can establish a prima facie case of disparate treatment either by introducing
15 direct evidence that an employer expressly discriminated against a job applicant or employee
16 because of his or her gender, or by presenting indirect evidence that the plaintiff “(1) was a
17 member of a protected class, (2) she applied and was qualified for a position which she
18 sought, (3) despite being qualified, she was rejected, and (4) after she was rejected, the
19 position remained open and the employer continued to seek applications from people with
20 comparable qualifications.” *Mondero v. Salt River Project*, 400 F.3d 1207, 1211 (9th Cir.
21 2007) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). When the
22 plaintiff meets her initial burden, the burden shifts to the defendant “to articulate some
23 legitimate, nondiscriminatory reason for the employee’s rejection.” *McDonnell Douglas*, 411
24 U.S. at 802. Should the defendant meet this burden, the plaintiff may nevertheless prevail if
25 she can “show that petitioner’s stated reason for [defendant’s] rejection was in fact pretext.”
26
27
28

1 *Id.* at 804.⁵

2 For the purposes of summary judgment, “the City will assume that Plaintiffs can
3 create a factual dispute as to [the prima facie case].” (Doc. 24 at 4). Likewise, Plaintiffs make
4 no effort to counter Defendants’ well-documented argument that CPD had a long interest in
5 establishing a fitness program and chose the FIT test after an officer reviewed the validation
6 study issued in connection with the 2001 test. (Doc. 24 at 5).⁶ Thus, Plaintiffs bear the burden
7 of showing that Defendants’ stated reason for using the FIT standards during the promotional
8 process is mere pretext.

9 An employee may show that an employer’s stated criterion is mere pretext if it is not
10 “applied alike to members of all [sexes].” *McDonnell Douglas*, 411 U.S. 804.⁷ A reasonable
11 jury could find that there is sufficient evidence that Plaintiffs have met their burden based

12
13 ⁵ Plaintiffs do not cite to *McDonnell Douglas* or mention the burden-shifting analysis.
14 Instead, they ask the Court to consider whether the challenged action would qualify as
15 disparate treatment under regulations issued by the E.E.O.C. (Doc. 29 at 8). For this
16 proposition, they cite to a 1975 Supreme Court case that considered whether an application
17 test had been properly validated according to E.E.O.C. guidelines. *Albemarle Paper Co. v.*
18 *Moody*, 422 U.S. 405, 434 (1975). Although the E.E.O.C. guidelines may be a proper
19 barometer from which to measure whether a particular test has been validated, they are not
20 a substitute for the *McDonnell Douglas* framework in a disparate treatment case, which the
21 Court will use to evaluate Plaintiffs’ claim.

22 ⁶ Plaintiffs again cite to E.E.O.C. regulations for the proposition that an employer has
23 not satisfied its burden of putting forth a non-discriminatory reason when it states that it
24 relied upon a study purporting to validate a test under E.E.O.C. guidelines. (Doc. 29 at 8 n.2).
25 The burden on the defendant at this stage is “satisfied if he simply ‘explains what he has
26 done’ or ‘produc[es] evidence of legitimate nondiscriminatory reasons.’” *Texas Dept. of*
27 *Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (quoting *Bd. of Trustees of Keene*
28 *State College v. Sweeney*, 349 U.S. 24, 25 n.2 (1978)).

29 ⁷ Defendants claim that Plaintiffs rely on circumstantial evidence of discrimination
30 in their prima facie case, and that therefore Plaintiffs must put forward “specific and
31 substantial” evidence of pretext. *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 642 (9th Cir.
32 2003). In fact, much of the evidence of pretext, such as the fact that a man was given the
33 opportunity to re-take only the item on the test that he did not pass, while women, including
34 Det. Kuhl, were not, also doubles as direct evidence from which a jury could find Plaintiffs
35 have met their prima facie burden.

1 upon the evidence in the record. Defendants have stated reasons for using the FIT test that
2 differ from those promulgated in the validation study and contain some inconsistencies, there
3 is evidence that men were given leeway in passing the test while women were not, and there
4 is evidence in the record from which a reasonable jury could conclude that CPD failed to
5 discipline sufficiently an officer who repeatedly stated that women should not be allowed to
6 serve in law enforcement.

7 Although the FIT standards say nothing regarding promotion, and CPD allowed
8 incumbent officers to test up to the standards over three years, incumbent officers were
9 denied the opportunity to advance if they did not meet the standards. At his deposition,
10 Bartosh stated that the reason that the test was implemented for the promotional scheme was
11 that “[i]f you’re going to promote somebody, generally you want somebody who is going to
12 set the example, be a leader, have credibility with the people that they’re going to lead.”
13 (Doc. 23-1 at 14–17). When Chief Fanning was asked why the promotional process was
14 revised so that a candidate had to pass the FIT test before being allowed to take the written
15 and oral portion of the exam, the following exchange took place:

16 A: If we had a candidate that failed the PFT or did not take the
17 PFT—or we had a candidate that did not take the PFT, they
18 could, in turn, hold up the entire process for several years. And,
19 therefore, the candidates that were taking all the tests and
20 passing would not be able to be promoted because we had a
21 candidate that was not taking the PFT.

22 Q: Monica Kuhlt?

23 A: Right.

24 (Doc. 30-3, Ex. O at 152:9–20)

25 Defendants do not contest the fact that in July of 2007, both Lori Carver, a woman,
26 and Clint Combs, a man, applied to join the CPD, and each failed one of the seven tests in
27 the FIT battery.⁸ They further do not contest that when Ms. Carver failed the bench press, the
28 CPD officer administering the exam “told her she had failed the physical fitness test and that
she was able to come back and contact [a CPD officer] to find out when she could retest with
us.” (Doc. 25-12, Ex. 7a at 175:16–19). Nor do they contest that Mr. Combs was given the

⁸ Ms. Carver failed the bench press while Mr. Combs failed the 1.5 mile run.

1 opportunity to return to the CPD three weeks later and perform only the 1.5 mile run, which
2 he then passed. (Doc. 25 ¶ 67). The same officer who provided Mr. Combs the opportunity
3 to re-take one portion of the fitness test without having to exert himself by performing the
4 other portions of the test acknowledged that he did not offer Ms. Carver the same
5 opportunity, and has never offered Det. Kuhlert this opportunity, despite the fact that “I know
6 that Monica has passed almost every one [of the tests], but at different times.” (Doc. 25-12,
7 Ex. 7a at 185: 21–22). Moreover, records show that at least one male officer was excused
8 from taking the FIT test entirely. (Doc. 30-5, Ex. BB at COT/AZ 00398). Defendants argue
9 that this officer was “excused from taking the fitness test . . . for medical reasons” but do not
10 state whether this officer was thereafter placed on modified duty because he was unable to
11 take the test, as Det. Kuhlert was. (Doc. 35-1, Ex. 1). Defendants argue that Mr. Combs had
12 nearly passed the 1.5 mile run on his first try, and may make this argument to the jury.⁹ At
13 summary judgment, however, there is enough direct evidence in the record from which a
14 reasonable jury could find that CPD in fact administered the test differently to male officers
15 than it did to female officers.

16 Finally, Plaintiffs present evidence that Commander Jody Makuch, who supervised
17 Det. Kuhlert, repeatedly stated, at times in connection with this lawsuit, that women should not
18 serve as law enforcement officers. (Doc. 30-2, Ex. J at 89:17–22; Doc. 30-5, Ex. EE at
19 81:18–24, Doc. 30-5, Ex. FF at 62:10–12). Moreover, there is evidence that Chief Fanning,
20 upon verifying that Commander Makuch made such statements, ordered Commander
21 Makuch to apologize to Det. Kuhlert, but issued no other discipline and made no annotations
22 in Commander Makuch’s personnel file, even though CPD protocol requires, at minimum,
23 that a “letter of instruction” be filed in the personnel file of any officer who makes
24 derogatory comments based on sex. (Doc. 30-2, Ex. I-4). Defendants argue that Commander

25
26 ⁹ It appears from the record that performing all of the tasks on a single day is a key
27 element to the test. Defendants’ expert stated in his deposition that he had previously written
28 an expert report for the Commonwealth of Pennsylvania defending the Commonwealth for
dismissing a police academy recruit who had asked to take the 1.5 mile run on a separate day
from the other elements of the test. (Doc. 25-10, Ex. 6 at 51:12–22).

1 Makuch's comments that women should not be law enforcement officers constitute only
2 "[s]tray remarks" and therefore cannot be sufficient to establish pretext. *Mondero*, 400 F.3d
3 at 1213. In *Mondero*, the circuit found that the fact that two employees had rhetorically asked
4 "[t]hey bring a woman to do a man's job?" could not establish pretext for an employment
5 decision made later by officers who were unaware that the remarks had been made. *Id.* at
6 1212. The court noted, however, that there was no evidence that "SRP's decision makers
7 were influenced or even aware of the alleged gender bias of some of its agents." *Id.* at 1213.
8 Here, there is evidence that the comments were drawn to the attention of the Chief of Police,
9 who issued a punishment that a reasonable jury could find fell short of that required by CPD
10 policy.

11 Defendants mount many arguments to Plaintiffs' claims regarding pretext. They note
12 that Mr. Combs came relatively close to passing the 1.5 mile run on his first attempt, and that
13 being forced to apologize to a subordinate is "a significant event in paramilitary
14 organization" (Doc. 34 at 7 n.5). They will be free to make these arguments to the jury, but
15 "at the summary judgment stage the judge's function is not himself to weigh the evidence
16 and determine the truth of the matter but to determine whether there is a genuine issue for
17 trial." *Anderson*, 477 U.S. at 249. A reasonable jury could find that Plaintiffs have provided
18 evidence that the stated reason for adopting the FIT test for promotion to sergeant was
19 pretext, and summary judgment is therefore denied.

20 **4. Retaliation**

21 To establish a prima facie retaliation claim, a plaintiff must show "1) her involvement
22 in a protected activity, 2) an adverse employment action taken against her, and 3) a causal
23 link between the two." *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969 (9th Cir.
24 2002). Plaintiff filed her initial claim on May 6, 2008, and claims that, starting in May of
25 2009, she was denied a training opportunity, subjected to an unnecessary medical
26 examination, and placed on light duty in retaliation for her participation in the claim. (Doc.
27 1-7 at 15).

28 Kuhlert filed her initial action nearly a year before the alleged adverse action. "The

1 cases that accept mere temporal proximity between an employer’s knowledge of protected
2 activity and an adverse employment action as sufficient evidence of causality to establish a
3 prima facie case uniformly hold that the temporal proximity must be ‘very close.’” *Clark Cty.*
4 *School Dist. v. Breeden*, 532 U.S. 268, 273 (2001); *see also Soares-Haae v. Roche*, 220 Fed.
5 Appx. 695, 697 (9th Cir. 2007) (“The suspension occurred almost a year after Soares-Haae
6 filed a series of EEO complaints, so there is not a sufficient temporal proximity between the
7 events to establish the required causality.”) (internal quotations omitted). However, on March
8 12, 2009, after her charge had been dismissed, Kuhl wrote CRD a four-page letter urging
9 that the case be re-opened. (Doc. 30-3, Ex. P-1). The letter detailed additional alleged
10 discrimination, including the fact that a male applicant had been allowed to re-take one
11 portion of the FIT test after failing it, while a female officer had been sent home after failing
12 one portion of the test. (*Id.*). It moreover responded to the argument in Chief Fanning’s
13 original letter that the test was valid under the standards in *Lanning v. SEPTA*, 308 F.3d 286
14 (3d Cir. 2002), in which a 1.5 mile run had been approved as a fitness requirement for a
15 transit police force, by detailing the difference in responsibilities between a Cottonwood
16 police officer and a Philadelphia transit officer. (*Id.*).

17 Plaintiffs allege that the retaliatory activity consisted of CPD’s denying Kuhl a
18 training opportunity, forcing her to undergo a physical examination, and placing her on
19 modified duty. Det. Kuhl has received over 3,000 hours of “continuous training, proficiency
20 training and specialized training” during her tenure with CPD. (Doc. 25-23, Ex. 46). In light
21 of these substantial training opportunities, being scheduled for a medical appointment that
22 required missing a single training course cannot be viewed as more than a “trivial harm[.]”
23 that does not qualify as a materially adverse employment action. *Burlington Northern and*
24 *Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). Being scheduled for such an appointment
25 does not qualify as behavior that “might have ‘dissuaded a reasonable worker from making
26 or supporting a charge of discrimination.’” *Id.* (quoting *Rochon v. Gonzales*, 438 F.3d 1211,
27 1219 (C.A.D.C. 2006)). Plaintiffs’ claim regarding the loss of a training opportunity is
28 dismissed.

1 Plaintiffs have shown that the mandatory medical test was adverse, and that it
2 happened soon enough after the letter asking that her case be re-opened that a reasonable jury
3 could conclude there was some causation. *Little*, 301 F.3d at 969. Although her doctor had
4 cleared her for all police activity except for the 1.5 mile run, and had recommended that she
5 take some other aerobic test, CPD sent her to another doctor who found that her
6 contraindication to running disqualified her from serving as a police officer at all. (Doc. 25-
7 19, Ex. 28; Doc. 25-19, Exs. 33, 35). A reasonable jury could accept Defendants' argument
8 that Kuhl was sent to the doctor based on the language in the release from her initial doctor,
9 but it could also conclude that the examination and subsequent duty modification was
10 retaliatory.

11 Defendant is therefore granted only partial summary judgment on the retaliation claim.
12 Although Plaintiffs may argue that CPD sent Kuhl for the physical examination and
13 subsequently put her on light duty in retaliation for her letter asking that CRD re-open her
14 case, claims that CPD retaliated based on her initial complaint are dismissed, as is the claim
15 that denying Kuhl the training opportunity was a materially adverse employment action.

16 5. Section 1983

17 Plaintiffs have brought a claim under Section 1983 of Title 42 of the U.S. Code, which
18 provides a cause of action for persons who have been deprived of rights "secured by the
19 Constitution or laws" of the United States. 42 U.S.C. § 1983 (2006). Section 1983 "is not
20 itself a source of substantive rights" but only provides a cause of action "for vindicating
21 federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

22 Plaintiffs' Section 1983 claim seeks relief for the "[d]enial of equal opportunity to
23 employment based on sex in violation of 42 U.S.C. § 1983, as well as retaliation for her
24 participation in making a charge, testifying, assisting or participating in an investigation."
25 (Doc. 1-7 at 15). As such, it appears that the Section 1983 claim seeks relief for rights
26 guaranteed by Title VII itself. Section 1983 claims, however, are pre-empted "where
27 Congress has evinced an intent to preclude such claims through other legislation." *Ahlmeier*
28 *v. Nevada Sys. of Higher Educ.*, 555 F.3d 1051, 1056 (9th Cir. 2009) (holding that the ADEA

1 pre-empts Section 1983 claim based on violations of the ADEA). “When the remedial
2 devices provided in a particular Act are sufficiently comprehensive, they may suffice to
3 demonstrate congressional intent to preclude the remedy of suits under § 1983.” *Middlesex*
4 *County Sewerage Auth. v. Nat’l Sea Clammers Assn*, 453 U.S. 1, 19–20, (1981). Title VII
5 does not, of course, pre-empt claims brought under Section 1983 to vindicate rights not
6 granted by Title VII, such as the Fourteenth Amendment’s guarantee of equal protection. *See,*
7 *e.g., Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246, 256 (2009) (Title IX does not
8 pre-empt a Section 1983 claim alleging violations of the Equal Protection Clause because
9 “the protections guaranteed by the two sources of law diverge”). Plaintiffs have, however,
10 brought no Equal Protection claim, and may not use Section 1983 as a vehicle to bring claims
11 for which Title VII provides a complete remedy. *See Great American Federal Savings &*
12 *Loan Association v. Novotny*, 442 U.S. 366 (1979) (holding that a plaintiff may not avoid the
13 procedural requirements of Title VII by bringing the action under 42 U.S.C. § 1985(c)).

14 Plaintiffs’ Section 1983 claim is pre-empted by Title VII, and is therefore dismissed.

15 CONCLUSION

16 The actual results of those who took the test as administered by CPD show a
17 significant disparity by gender. Although the sample size is small, the discrepancy is large
18 enough for Plaintiffs to establish their prima facie case. Moreover, other evidence in the
19 record, including Dr. Millsap’s declaration and a written statement from Defendants that they
20 do not contest that the test has a disparate impact on women, assures that Plaintiffs have met
21 their initial burden. Defendants have offered no evidence as to why police officers had to
22 pass the test in order to be sergeants, when they were not required to pass the test to remain
23 on the force. Their argument that sergeants perform the same duties as police officers does
24 not explain why the test was required only for promotion. Plaintiffs are granted summary
25 judgment on their disparate impact claim.

26 The claim is timely with regards to the May 2008 promotional process, and evidence
27 regarding the earlier processes may be presented as Plaintiffs prosecute their timely claim.
28 The fact that CPD switched to another test during the course of this lawsuit does not render

1 the injunctive relief moot, since Defendants do not allege that the test they are currently using
2 has been validated for promotion to the position of sergeant in the CPD.

3 The record indicates that at least one man was allowed to re-take a portion of the test
4 that he had previously failed, while no woman has been. Moreover, a CPD officer who made
5 repeated statements that women should not be allowed to serve as law enforcement officers
6 was disciplined in a manner that a reasonable jury could find fell short of written CPD
7 standards. CPD's stated reason for using the test for promotions differs from the reasons
8 given in the FIT validation study, which makes no recommendations regarding using the test
9 for promotions. As a result, a reasonable jury could find that CPD's stated reasons for using
10 the test as a promotional tool are pretext for gender discrimination.

11 Det. Kuhl's initial charge was filed too long before the alleged retaliation for a
12 reasonable jury to find causation from temporal proximity alone. Moreover, even though she
13 was denied one day of training, she received numerous other training opportunities, and the
14 training loss was therefore not adequately adverse to be cognizable as retaliation for
15 protected activity. The retaliation claim therefore survives only to the extent that Plaintiffs
16 allege that Defendants retaliated against Kuhl for her March letter asking CRD to reconsider
17 her complaint by sending her for a physical evaluation and putting her on modified duty.

18 Plaintiffs' Section 1983 claim relies entirely on the law undergirding Title VII, and
19 is therefore pre-empted. Plaintiff does not allege a constitutional violation in her Section
20 1983 claim.

21 **IT IS THEREFORE ORDERED:**

- 22 1. Plaintiffs' Motion for Partial Summary Judgment (Doc. 22) is **granted**.
23 2. Defendants' Motion for Summary Judgment (Doc. 24) is **granted in part** and
24 **denied in part**.

25 a) Plaintiffs' retaliation claims (Count III and Count V) survive only to the
26 extent that they claim that CPD retaliated against Det. Kuhl for writing her March 9, 2009
27 letter asking CRD to re-open her case by sending her to a doctor for a medical evaluation and
28 subsequently putting her on modified duty.

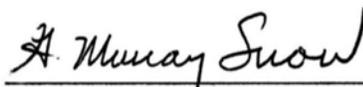
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b) Plaintiffs' claim under 42 U.S.C. § 1983 (Count IV) is **dismissed**.

c) All other claims survive.

3. Defendants are hereby **enjoined** from requiring officers seeking promotion within the Cottonwood Police Department from passing a physical fitness exam as a prerequisite to promotion unless the exam in question has been validated as job-related specifically to the job for which the applicant is applying.

DATED this 20th day of July, 2012.



G. Murray Snow
United States District Judge