

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

JAY J. BAUER,

Plaintiff,

v.

**ERIC H. HOLDER, JR., ATTORNEY
GENERAL, DEPARTMENT OF
JUSTICE**

Defendant.

Civil Action No.:

JURY TRIAL DEMANDED

Plaintiff, Jay J. Bauer, Ph.D., complains of Defendant, Eric H. Holder, Jr., Attorney General, Department of Justice, as follows:

NATURE OF THE CASE

1. The Federal Bureau of Investigation ("FBI") forced Plaintiff, a male, to resign from training as a Special Agent over a single push-up on a physical fitness test ("PFT"). Female new agent trainees, however, became Special Agents despite (i) completing fewer than half the number of push-ups than Plaintiff and (ii) scoring fewer overall points than Plaintiff on even the female version of the PFT. As addressed below, the FBI has arbitrarily selected, improperly validated and discriminatorily applied standards relating to the PFT. Plaintiff brings this action to remedy gender discrimination, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII").

THE PARTIES

2. Plaintiff, Jay J. Bauer Ph.D., resides in Mount Prospect, Illinois. He received his Bachelors of Science, Masters, and Ph.D. from Northwestern University in Evanston, Illinois, in 1996, 2001 and 2004, respectively. Desiring to use his skills and experience for the public good, he left an academic position at the University of Wisconsin-Milwaukee to join the FBI as a Special Agent

3. During New Agent Training at Quantico, Virginia, Plaintiff relocated his wife and two children (age 3 and 5 at the time) to Cook County, Illinois, after receiving his first office assignment to the FBI's Chicago Division. He is currently an Intelligence Analyst with the FBI's Chicago Division.

4. Defendant Eric H. Holder, Jr. is currently the United States Attorney General and may be served with process at his business address, Office of the Attorney General, Department of Justice, Constitution and 10th Avenue, N.W., Washington, D.C. 20530. A copy of this Complaint is also served on the United States Attorney for the Northern District of Illinois. "Defendant" and "the FBI" are used interchangeably in this Complaint.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3).

6. Venue is proper in this District pursuant U.S.C. § 2000e-5(f)(3).

EXHAUSTION OF ADMINISTRATIVE PROCESS

7. Plaintiff preferred to resolve this matter internally or at least through the administrative process and attempted to do so for over two years. He enjoys

his work as an Intelligence Analyst for the FBI's Chicago Division, but it is not the Special Agent position he was recruited for and trained to do for over twenty weeks. Plaintiff has more to offer the FBI and believes that his career should not be derailed by a single push-up.

8. Plaintiff filed a timely Equal Employment Opportunity Commission charge of discrimination with the Department of Justice on October 30, 2009, as well as a timely request for a hearing before an Administrative Law Judge ("ALJ"). During the administrative process, Defendant refused to respond to clearly relevant discovery requests, and the ALJ sanctioned Defendant, finding it had engaged in "discovery abuse". (Exhibit A).

9. After the ALJ quashed part of his own sanctions order and Defendant's discovery abuse continued, Plaintiff elected against proceeding with a hearing in front of the ALJ. (Exhibit B August 8, 2011 letter to ALJ: "Dr. Bauer has lost faith in his ability to receive a fair hearing next month....").

10. Plaintiff received the final Department of Justice decision denying his claim on March 13, 2012 and now timely files this current action. (A copy of the decision and right to sue notice is attached as Exhibit C).

BACKGROUND

Plaintiff Enters The New Agent Training Program And Exceeds All Proficiency Standards

11. Plaintiff joined the New Agent Training Program ("NATP") in Quantico, Virginia on or about March 1, 2009; he promptly signed a document entitled "Rules, Regulations, and Requirements at the FBI Academy for New

Agent Trainees.” (“Requirements Document”, cited portions of which are attached as Exhibit D).

12. According to Defendant, the NATP “is designed to ensure that, upon graduation, [a new agent trainee (“NAT”)] attained the necessary proficiencies in specialized knowledge, skills, and abilities needed to effectively perform the duties of a FBI Special SA.” (Exhibit D at 1.) Academic tests and firearms qualifications “will provide a quantitative measure of [a NAT’s] knowledge, skills, abilities, and overall proficiency level.” (*Id.* at 2.) Dismissal could result from “(a) the failure of two academic examinations; b) [the] failure to achieve a qualifying score on the Pistol Qualification Course (PQC) and Shotgun Qualification Course (SQC)....” (*Id.* at 13).

13. Plaintiff exceeded all proficiency standards, scoring between 86% and 100% on each of the firearms qualifications and between 95 and 100 on each of the academic tests during the NATP.

Plaintiff Consistently Demonstrates All Six Suitability Dimensions

14. “Suitability standards are measured concurrent with proficiency criteria in all areas of training,” per the Requirements Document, and are defined through the lens of six “suitability dimensions” i.e. conscientiousness, cooperativeness, emotional maturity, initiative, integrity, and judgment. (Exhibit D at 2-5.)

15. Deficiencies in the following training areas, the Requirements Document explains, *may* form the basis for a “suitability based dismissal”: Defensive Tactics, Practical Skills, and Physical Fitness (*Id.* at 14-15).

Plaintiff Meets The Defensive Tactics Requirements

16. Defensive Tactics “addresses the most dangerous part of law enforcement – the taking of another individual into custody.” “Throughout this training, each NAT’s ability to defend himself/herself and to effectively apply the DT principles to arrest situations is assessed” and “is a critical factor in determining the NAT’s overall suitability for the SA position.” (Exhibit D at 12).

17. Although there is no final assessment or score in Defensive Tactics, Defendant had no issue with Plaintiff’s ability to defend himself or others and effectively apply the Defensive Tactics principles to arrest situations at any time during the NATP.

Plaintiff Meets The Practical Skills Requirement

18. Defendant states that the Practical Applications/Skills Training assesses a NAT’s ability to demonstrate competency in the practical application of law enforcement skills (e.g., interviewing, collection and preservation of evidence, techniques and mechanics of arrest, operation of cooperating witnesses, defensive tactics, and law enforcement driving.) (Exhibit D at 12-13).

19. Plaintiff “met expectations,” which is the highest grade an NAT can receive in the Practical Applications/Skills’ assessments at all times during the NATP. In fact, Plaintiff’s instructors commended him on his practical interview, interrogation, and writing skills.

Plaintiff Falls One Push-Up Shy In The Physical Fitness Test And Is Forced To Resign

20. The Physical Training (PT) program, the FBI states, “is extremely important” because 1) “a basic level of fitness and conditioning is essential for a

NAT to perform at his/her best in all aspects of training and to successfully complete the entire fast-paced training program without serious physical injury and undue mental stress;" and 2) "a NAT's level of fitness serves as a foundation for his/her ability to effectively apply principles and non-deadly force alternatives being taught in the DT program." (Exhibit D at 11.)

21. Defendant also views the PT program – particularly the attitudes NATs display to improve their level of fitness and the actions they undertake – as "a very clear measurement of three of the core dimensions considered in evaluating the suitability of the NAT for the position of SA" i.e. "initiative, conscientiousness, and judgment." (*Id.*)

22. Despite the fact that NATs must pass the same physical fitness test before entering the NATP, Defendant requires NATs to pass an "Academy administered" physical fitness test in order to graduate. (*Id.*)

23. The Academy administered PFT (as well as the PFT administered at the various field offices at the applicant phase) consists of four events: sit-ups, push-ups, a 300-meter sprint, and a 1.5-mile run. In order to pass the PFT, each applicant and NAT must score at least one point in each event, as well as twelve points cumulatively.

24. The male PFT and female PFT consist of the same four events, and males and females must score at least one point in each event, as well as twelve points cumulatively. However, Defendant uses different gender-based scoring scales to calculate the points.

25. For example, males must complete a minimum of 38 sit-ups and females a minimum of 35 to score one point in the sit-up event. Males must complete a minimum of 30 push-ups, females a minimum of 14, to score one point in the push-up event. Males must run the 300 meter-sprint and 1.5-miles in 52.4 seconds and 12 minutes and twenty-four seconds, respectively, to score at least one point in those events to females' minimums of 64.9 seconds and 13:59.

26. Plaintiff passed the PFT at the applicant phase and scored over 12 points cumulatively each time he took the PFT during the NATP; however, he did not pass the PFT during the NATP each time solely due to his inability to score at least one point in the push-up event. FBI graders claimed he performed at most 29 push-ups (30 would have given him one point). Accordingly, Defendant forced Plaintiff to resign after completing 20+ weeks and passing all other aspects of training in lieu of terminating him from the NATP.

27. Females who scored fewer overall points, completed less than half the push-ups, and otherwise exhibited less overall physical fitness, suitability and proficiency than Plaintiff, graduated to become Special Agents - with the same operational and defensive tactic expectations as male Special Agents.

**Defendant Failed To Convene A New Agent Review Board and
Afforded a Female NAT One More Attempt than Plaintiff to Pass the
PFT**

28. The Requirements Document mandates that a New Agent Review Board (NARB) will convene to determine a NAT's suitability for continued participation in the NATP upon a failure of all scheduled PFTs. (Exhibit D at 14-15). In such an instance, "a totality of circumstances" is examined (Id.). Despite

that express agreement, Defendant failed to convene a NARB for Plaintiff to review the totality of the circumstances.

29. Defendant also afforded at least one female NAT one more attempt than Plaintiff to pass the female PFT, despite the fact such female was “at or near the bottom of the class in performance” in Firearms training, struggled in Academics training, and appeared “to lack the dedication and mental-toughness” for the Special Agent position. Plaintiff, on the other hand, was at or near the top of the class in performance in all other areas and, in fact, was voted by his peers during the NATP as the class leader, designating him to speak on their behalf at graduation.

The FBI Arbitrarily Selected the Minimum Standards for the PFT

30. The FBI arrived at the minimum standards for the PFT by collecting the scores of 300 new agent trainees (only 64 of whom were female) on the PFT, calculating the average score, and then arbitrarily selecting 1 standard deviation below the average score of each gender as the minimum ability required in each area of physical fitness to safely and effectively perform the job of a Special Agent. Notably, none of these new agent trainees had ever done the job of a Special Agent and the FBI had already pre-screened these candidates based on another physical fitness field test. The FBI then asked 11 “subject matter experts” (*i.e.* internal FBI personnel who have at one time or another performed the Special Agent job) whether they agreed with the minimums.

The FBI Failed To Properly Validate The PFT

31. Defendant's attempt to validate the PFT and the minimum standards selected is memorialized in two reports authored by Amy Grubb, Ph.D., Industrial Organizational Psychologist at the FBI, in 2003 and 2005. Defendant has pointed to those reports as its "Validation Study" supporting the standards of the PFT.

32. Dr. Grubb had never validated a physical fitness test prior to her attempt to validate the PFT in 2003, nor did she have any experience in exercise physiology or physical fitness prior to her attempt to validate the PFT in 2003.

33. Dr. Grubb did not perform any research regarding the proper validation technique to use when validating a physical fitness test as opposed to another form of employment assessment. However, experts in the field of exercise physiology and physical fitness testing state the only way to validate a physical fitness test and its standards for passing is through a *criterion-related* validity study *i.e.* one that demonstrates through empirical data that the selection procedure is predictive of or significantly correlated with important elements of job performance.

34. Dr. Grubb used solely a *content* validity study *i.e.* one that merely shows that the content of the selection procedure is representative of important elements of job performance. However, experts in the field of exercise physiology and physical fitness state that a content validity study alone cannot be used to validate physical fitness tests.

35. Other than 11 internal FBI employees' subjective beliefs regarding the minimum physical ability required to perform the job of a Special Agent, the FBI has no basis for linking the minimum standards selected for the PFT to any objective measure of performance as a Special Agent.

36. Defendant's "Validation Study" does not even attempt to link any standard of the PFT with any objective measure of performance of a Special Agent.

37. Defendant's "Validation Study" does not support attributing the minimums selected and scoring scales for each gender to the physiological differences between males and females.

**Defendant Ignored Data Suggesting Different
Standards Selected Are Not Equally Difficult**

38. Defendant's attempt to validate the PFT is likewise devoid of any effort to ensure the minimum standards are equally difficult between the genders. In fact, the FBI intentionally ignored signs that the male standard was more difficult.

39. In her reports of the "Validation Study," Dr. Grubb stated that the FBI compared the standards selected against the age and gender norms provided by the Cooper Institute, which she describes as "one of the foremost authorities on physical fitness and an entity with whom the FBI consulted in constructing the Physical Fitness Test." The Cooper Institute claims to have the largest and most valid databases in the world with respect to fitness norms for age and gender. Notably, the Cooper Institute contrasts its fitness "norms" with fitness standards. Cooper Institute states that fitness "norms" provide a

representation of how individuals compare to one another with regard to performance on physical fitness tests. Fitness “standards,” on the other hand, are supposed to represent the minimal score that must be attained on each physical fitness test to indicate that an individual can perform his/her job.

40. Despite the fact that 14 push-ups for females corresponded to between 27 and 29 push-ups for males in the Cooper Institute’s large database of fitness norms, Defendant failed to adjust the arbitrarily selected standard of 14 for females and 30 for males.

41. Dr. Grubb also stated that Defendant compared the new standards of the PFT with the standards of the prior PFT (that was used for years prior to the PFT that Plaintiff took in 2009, which was implemented in 2003). Similarly, however, despite the fact that the minimum 14 push-up standard for females equated with 25 push-ups for males under the prior PFT, Defendant failed to adjust the arbitrarily selected minimum of 30 push-ups for males.

42. Defendant similarly failed to adjust the arbitrarily selected minimum standard in the push-up event despite the fact the voluntary PFT administered to on-board Special Agents similarly uses the Cooper Institute norms and equates 14 female push-ups to between 27 and 29 push-ups for males.

43. The FBI also consciously failed to conduct an analysis to determine whether the arbitrarily selected minimum standards for males and females were equally difficult, despite having performed such an analysis for a previous physical fitness test.

44. Specifically, in 1997, the FBI used an outside expert to evaluate the previous 1.5-mile run test for applicants only. That outside expert determined that the standards selected at that time were not equally difficult -- *i.e.* they placed a greater burden of compliance on males -- and recommended that the FBI adjust the standards accordingly.

COUNT I
DISPARATE TREATMENT
(TITLE VII OF THE CIVIL RIGHTS ACT OF 1964,
as amended, 42 U.S.C. § 2000e, et seq.)

45. Plaintiff incorporates by reference the preceding paragraphs 1-44 as alleged above.

46. Defendant has discriminated against Plaintiff on the basis of his sex, in violation of Sections 703 (a)(1) and 703 (l) of Title VII, by, among other things:

- a. Using a different minimum cutoff score on an employment related test on the basis of sex to disqualify Plaintiff from becoming a Special Agent;
- b. Refusing to allow Plaintiff to become a Special Agent based upon an arbitrarily selected different minimum standard based on sex that does not measure in any way the minimum physical ability required to do the job of a Special Agent;
- c. Relying upon a scoring methodology on an employment related test that disqualified Plaintiff from becoming a Special Agent while allowing less qualified and less overall physically fit females to become Special Agents;
- d. Relying upon different minimum standards based on sex to disqualify Plaintiff from becoming a Special Agent that Defendant knew were not properly validated;
- e. Relying upon different minimum standards based on sex to disqualify Plaintiff from becoming a Special Agent without any attempt to ensure

the different standards were due to any claimed physiological differences between males and females;

- f. Relying upon different minimum standards based on sex to disqualify Plaintiff from becoming a Special Agent while intentionally ignoring data suggesting the arbitrarily selected standard placed an undue burden of compliance on males; and
- g. Treating a “similarly situated” female NAT differently than Plaintiff by providing her with an additional attempt to pass the PFT during the NATP.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court grant the following relief:

- a. Provide make-whole relief to Plaintiff, including backpay with interest, mileage for not having a company vehicle or more-favorable insurance premiums as a Special Agent, and reinstatement as a Special Agent with accompanying benefits including retroactive seniority, to compensate him for the loss he has suffered as a result of Defendant’s discriminatory conduct alleged in this Complaint.
- b. Award damages to Plaintiff to fully compensate him for pain and suffering caused by Defendant’s discriminatory conduct alleged in this Complaint, pursuant to and within the statutory limitations of Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a (b);
- c. Award attorneys’ fees and expert witness fees, costs and disbursements in this action, pursuant to 42 U.S.C. § 2000e-5(k); and
- d. Award such additional relief as justice may require.

JURY DEMAND

Plaintiff hereby demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

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