

Record No. 06-7157

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**DAWN V. MARTIN, ESQUIRE
Plaintiff-Appellant**

v.

**HOWARD UNIVERSITY, HOWARD UNIVERSITY SCHOOL OF LAW,
AND ALICE GRESHAM-BULLOCK, ESQUIRE
Defendant-Appellee**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(The Hon. Thomas F. Hogan)**

BRIEF OF APPELLANT

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September 18, 2007

Certificate as to Parties, Rulings and Related Cases

I. The Parties

A. **Appellant, Dawn V. Martin, Esquire**, is a solo civil rights practitioner, operating the *Law Offices of Dawn V. Martin, LLC*. Ms. Martin is representing herself in this litigation. Ms. Martin was a law professor at Howard University School of Law from July of 1996 through May of 1998. Howard recruited then Prof. Martin from her tenure-track faculty position at Cleveland-Marshall College of Law. Prior to teaching, Ms. Martin's career included serving as: a Special Assistant to a Commissioner at the United States Equal Employment Opportunity Commission; a Trial Attorney with the New York State Office of the Attorney General, Civil Rights Bureau; and a trial attorney with the United States Department of Justice, Civil Rights Division, Honors Program.

This litigation arose because Prof. Martin was harassed in her workplace by a serial stalker who pursued her to be his "wife." Ms. Martin filed claims of sexual harassment and retaliation for Howard's failure to renew her teaching contract after she complained about the stalker and requested security precautions.

Ms. Martin was the only Plaintiff in the above styled case, in the United States District Court for the District of Columbia. She is an individual and not a corporation. Ms. Martin's interests in the outcome of the case are for the restoration of her career as a law professor and financial compensation the injuries caused by the Defendant.

B. Appellees

1. **Appellee Howard University**. Appellee Howard University, is a corporation, incorporated in the District of Columbia. Howard University is an educational institution, comprised of numerous colleges and graduate schools, including a Howard

University Law School. Howard University was the primary defendant in the United States District Court for the District of Columbia; however, former Howard University Law School Dean, Alice Gresham-Bullock, and outgoing Howard University President Patrick Swygart, were also defendants, both in their professional and individual capacities. They were dismissed in their individual capacities for claims asserted under Title VII.

2. **Appellee Alice Gresham Bullock** is an individual and not a corporation. Ms. Bullock was the Dean of Howard University Law School during 1997-1998, which was the operative period of events resulting in the current litigation. Ms. Martin sued Ms. Bullock for intentional infliction of emotional distress, but that claim was dismissed. Appellant appeals the dismissal of her intentional infliction of emotional distress claim, and thus, the dismissal of Alice Gresham-Bullock as a defendant with respect to that claim.

II. Amici Curiae

The National Association of Women Lawyers (NAWL) has been granted amicus curiae standing in these appellate proceedings and will be filing a brief, no later than October 5, 2007. NAWL is a non-profit organization advocating for the interests of women.

III. Rulings under Review

- A. *Martin v. Howard University*, 2006 WL 2850656 (D.D.C. 2006) (Docket #504, JA__), October 4, 2006 decision denying Ms. Martin's Rule 59 and 60 Motions to Amend the August 21, 2006 Judgment, and grant her judgment, as a matter of law;
- B. *Martin v. Howard University*, 2003 U.S. Dist. LEXIS 18501 (D.D.C. 2003) (#307, JA__), Magistrate's *Report and Recommendation* denying Plaintiff's *Motion for Summary Judgment* and granting, in part, Howard University's *Motion for*

Summary Judgment, adopted as Court Order on September 16, 2005 (# 318, JA __), adopted by September 16, 2005 Order of Chief Judge Hogan (#318, JA__);

C. **Jury Verdict Form, # 1c (#459, JA__)**, requiring the jury to decide whether the stalker's harassment was based on sex, when the court's decisions in 1999 (# __, JA __), 2003 (#307) and 2005 (#325) had already decided the issue, as a matter of law, and held that it would not be a triable issue of fact for the jury;

D. **Jury Verdict Form, #6 and 7 (#459, JA__)**, restricting Ms. Martin's retaliatory rejection and non-renewal claims to one tenure-track position, on one date, when the Complaint alleged rejection for, and retaliatory withholding of several positions, and non-renewal of her visitorship and the court's 2003 decision (#307) did not restrict the decision to one position on one date.

E. **Jury Instructions**, from bench, failing to provide proper jury instructions, or supplemental instructions, when requested by jury, on issues of sexual harassment and harassment on the basis of sex. Trial Transcript at 2282:2-2283:12, JA __ - __, 2288:5-8, JA __ - __, 2288:15-2298:1 JA __ - __, Tr. 2401:3-7, JA __; 2350:17-21, JA __ - __; 2459:13-16 JA __ - __; 2502:16-24, JA __ - __; 2567:20-25, JA __; 2563:1-2, JA __ 2568:1-7. JA __; 2562:7-25, JA __

F. ***Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516; 81 Fair Empl. Prac. Cas. (BNA) 964; 15 I.E.R. Cas. (BNA) 1587 (D.D.C. 1999) (#24, JA__)**, only to the extent that it dismissed Ms. Martin's claim of intentional infliction of emotional distress;

- G. **Magistrate Judge Facciola's Court's May 30, 2001 decision (# __, JA __)**, holding Ms. Martin's Motion for Rule 37 sanctions in abeyance indefinitely, never to be decided, after Plaintiff prevailed on all of her *Motions to Compel Discovery*;
- H. **August 21, 2006 Order (#439, JA __)**, taxing Howard University's litigation costs to Ms. Martin; and
- I. **January 3, 2007 Order (#514, JA __)**, refusing to consider Ms. Martin's Opposition to Costs, including case law setting forth the appropriate factors to consider in determining whether costs should be imposed upon a Title VII plaintiff.

IV. Related Cases.

None.

V. REQUEST FOR ORAL ARGUMENT

Ms. Martin respectfully requests oral argument. This case will set precedent in several area of the law with respect to sexual harassment, retaliation and the circumstances under which costs should be assessed against public law plaintiffs. The participation of *The National Association of Women Lawyers* as *amicus curiae* highlights the importance of this case for women in the workplace – as well as on University and college campuses. Due to the number and complexity of the issues on review and the inability to adequately address them all in 14,000 words, oral argument is particularly important in this case.

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JURISDICTIONAL STATEMENT

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1291 and Fed. R. App. Proc., Rule 4(a). The District Court had subject matter jurisdiction of this case, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et seq.* The Court had pendent jurisdiction over Ms. Martin's D.C. Human Act claims and common law claims of intentional infliction of emotional stress and breach of contract.

On April 28, 2006, a jury returned a verdict for Defendant Howard University. The district court issued a judgment in favor of Howard on August 21, 2006. On October 6, 2006, the court denied the parties' motions for judgment and Ms. Martin's motion for a new trial. Appellant, Dawn V. Martin, Esquire, timely filed her Notice of Appeal on September 11, 2006.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Sexual Harassment

1) Did the district court violate the law of the case, constituting reversible error, when it submitted to the jury, *post trial*, the question of whether a campus stalker's harassment of Prof. Martin was based on sex, despite its previous decisions deciding the issue, as a matter of law?

2) Where a stalker harasses women, pursuing each one to be his "wife," has he harassed them on the basis of their gender, as "gender profiling?"

3) If a stalker harasses a woman based on her resemblance to a *female* character, real or fictitious, has he harassed her on the basis of her gender, as "gender profiling?"

4) Did the trial court err by failing to respond to the jury's request for additional instructions on issues of sexual harassment and the significance of Harrison's pursuit of a "wife?"

Retaliation

5) If an employer cancels or converts a job vacancy to prevent an applicant who has engaged in protected Title VII activity from being hired, has the employer committed actionable retaliation, under Title VII, pursuant to *Burlington Northern v. White*, 126 S. Ct. 2405 (2006)?

Intentional Infliction of Emotional Distress

6) Did the trial court usurp the province of the jury by dismissing Plaintiff's intentional infliction of emotional distress claim, finding that the conduct was not "outrageous," where the Dean of a national law school: a) subjected a law professor to stalking by a delusional, serial, campus stalker; b) lied, in writing, about her efforts to provide security for the stalked professor; c) privately took actions to remove the stalked professor from the faculty; and d) lied to an Appointments Committee member to conceal faculty vacancies to prevent the stalked professor from obtaining a renewed contract?

Breach of Contract

7) Did the trial court commit reversible error by allowing material facts to be determined by a jury, where the defendant had already admitted these facts, in discovery?

Procedural and Evidentiary Matters

8) Did the trial court abuse his discretion, in violation of Fed. R. Ev. 611(b), by allowing Defendant to put on its defense during Plaintiff's case in chief, allowing its

witnesses to testify regarding issues outside the scope of direct examination, and charging allotted time against the plaintiff to rebut issues raised by Defendant during her case in chief?

9) Did the trial court commit reversible error by allowing Defendant to present evidence to the jury that had been previously excluded, by court order, dated September 24, 2002?

10) Did the court abuse its discretion and unfairly damage a *pro se* plaintiff's credibility before the jury by making her talk to herself in the second person and about herself in the third person?

11) Did the trial court commit reversible error by excluding documents that would have rebutted defendant's false statements and innuendo during plaintiff's cross-examination?

Mandatory Sanctions against Howard Held in Perpetual Abeyance

12) May a court hold, in perpetual abeyance, the issue of assessing mandatory Rule 37(a)(4)(A) sanctions against Defendant for withholding discovery, in violation of three court orders, and close the case without deciding Plaintiff's motion for the mandatory costs?

Costs Taxed against Title VII Plaintiffs

13) Under what circumstances should Title VII plaintiffs be taxed with the litigation costs of the defendant?

STATUTES AND REGULATIONS

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et seq.*

District of Columbia Human Rights Act, D.C. Official Code, 2001 Ed. § 2-1401.01 *et seq.*

Age Discrimination in Employment Act (ADEA), 29 U.S.C. Section 621-634, *et seq.*

STATEMENT OF THE CASE

On May 14, 1999, Appellant Dawn V. Martin, Esquire, filed a Complaint in district court against Howard University (“Howard”), Howard University School of Law, Patrick Swygart and Alice Gresham Bullock, pursuant to Title VII of the Civil Rights Act of 1964 and the D.C. Human Rights Act, alleging employment discrimination on the basis of sex and retaliation, as well as claims for the tort of intentional infliction of emotional distress and breach of contract.

On December 16, 1999, district court Chief Judge Hogan set precedent in this jurisdiction by holding that an employer can be held liable for the sexual harassment of an employee, by a non-employee, if the employer knew or should have known of the harassment and failed to take reasonable steps to stop it. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516, 1999 WL 1295339; 81 Fair Empl. Prac. Cas. (BNA) 964; 15 I.E.R. Cas. (BNA) 1587 (D.D.C. 1999).¹

The court adopted the U.S. Equal Employment Opportunity Commission’s (EEOC) Regulation, 29 C.F.R. § 1604.11(e), as a matter of law, following the lead of the other jurisdictions that had considered the issue; however, *seven years later*, at trial, the court deviated from its 1999 decision, resulting in juror confusion on the definition of sexual harassment.

Prof. Martin’s workplace was a law school campus; therefore, the precedent set by this Court will help shape the way that colleges and universities address stalking and sexual

¹ This decision was reversed on other grounds by the Magistrate’s *Report and Recommendation*, 2003 U.S. Dist. LEXIS 18501 (two retaliation claims were dismissed), *adopted* as Court Order on September 16, 2005 (# 318, JA __), *reversed in part* by October 21, 2005 Order (#325, JA __), modified on January 4, 2005 (#377, JA __), again modified on March 30, 2006 (#422, JA __), *modified* on March 31, 2006 (#424, JA __), *modified* at trial (Tr. 2358:15-2359:21, 2354:8-2355:15, JA __), *modified* on October 4, 2006 (2006 WL 2850656, #504, JA __).

harassment on campus, irrespective of victim status. This Court's decision will also set precedent for hostile work environment cases on the basis of race, national origin, religion, age or disability.

Martin will also determine, for the D.C. Circuit, whether an employer commits actionable retaliation, under Title VII, if it cancels or converts an advertised job vacancy in order to prevent an employee who has protested discrimination from being hired, further defining "adverse actions," as set forth in *Burlington Northern v. White*, 126 S. Ct. 2405 (2006).

FACTS

Dawn V. Martin, Esquire, was a law professor at Howard University from July 1996 through June 1998. Prof. Martin was harassed on campus by a delusional, homeless stalker with a criminal record, Leonard Harrison, who was using the law school library.² Harrison stated that he was pursuing Prof. Martin to be his "wife." Harrison described this "natural

² Trial Transcript (hereinafter, "Tr.") 1659:20-1677:2; # 490 at 5:17-50:16; JA __; *Facts* ¶ 28-39, 62, JA __-__, __; discussed in *Pl. 's MSJ* (# 273, 289, re-filed electronically as 330-1) at 9-10, JA __, *Pl. 's Plaintiff's* May 8, 2006 *Motion for Judgment on her Sexual Harassment Claim*, "*Pl. 's MJSH*," #461 at 3-7, JA __.

The "official" transcript, omitted the bulk of Ms. Martin's direct testimony, which was docketed on June 28, 2006, # 490. See Appellant's March 18, 2007 *Transcript Status Report, Reporting Plaintiff's Missing Direct Testimony and Transcript Errors* (JA __) and her April 10, 2007 *Notice of Filing in District Court, Attached Plaintiff's Consent Motion to Integrate the April 19, 2006 Direct Testimony of Plaintiff (# 490) into Certified "Official" Trial Transcript, which Currently Omits Most of Plaintiff's Direct Testimony*, #535, JA __, denied per #536, JA __. Ms. Martin's trial testimony can only be obtained by requesting "Docket # 490." There are additional errors throughout the transcripts. E-mail correspondence between Howard's counsel and Judge Hogan's courtroom reporter, Cathryn Jones, was consulting with Howard's counsel to "complete the transcripts" while she withheld them from Ms. Martin. Pl's April 9, 2007 *Unopposed Motion to Integrate the April 19, 2006 Direct Testimony of Plaintiff (# 490) into Certified "Official" Trial*, particularly Ex. D, JA __, __. Neither Howard nor Ms. Jones has explained Howard's role in transcripts ordered and paid for in advance by Ms. Martin, who was responsible for ordering them and filing reports on their status, per this Court's rules and orders. There appears to be no means to correct transcripts since the court did not audiotape the trial. March 26, 2007 Order, Appellate Court. Ms. Martin's request that Ms. Jones provide copies of her audio-tapes of the trial was denied.

wife” as the physical embodiment of a fictitious female character, Geneva Crenshaw, in a book, written by NYU professor, Derrick Bell.³

D.C. MPD characterized Harrison’s harassment as “stalking” under the D.C. Code § 22-404 (b).⁴ Prof. Martin specifically informed Dean Bullock that Harrison was “targeting African-American women” as stalking victims.⁵ In an internal University 1999 memorandum, Dean Bullock acknowledged that both she and Associate Dean Newsom perceived Harrison as a threat to Prof. Martin and to “other women” that he might “stalk or otherwise harass” on campus.⁶

After her stalking complaints, Howard refused to renew Prof. Martin’s contract, either as a permanent faculty member or even as a continued visitorship. Dean Bullock told Prof. Taslitz, the Vice Chair⁷ of the Appointments (APT) Committee,⁸ that Prof. Martin had “bad

³ *Id.*, #490 at 33:8-12, 36:15-19, 38:15-39:43, JA __, __, __. In an affidavit, Prof. Bell said that Harrison confronted him in 1990, at Harvard, demanding that he name the “real” Geneva Crenshaw. *Pl.’s MSJ* Ex. S, JA __; discussed in *Pl.’s MSJ* at 66, JA __; *Pl.’s MJSH* #461 at 7 fn. 5, JA __. Harrison told Prof. Bell that he would return and “blow [his] head off” because he did not direct him to this woman. *Id.* Judge Hogan refused to allow Prof. Bell to testify (January 10, 2006 Order, #377, JA __).

⁴ *Pl.’s MSJ* at 2, 9-10, JA __, __-__; *Facts* ¶ 37, JA __; *Pl.’s MJSH* at 15, JA __, Tr. 1053:21-1056:10; 1670:13-1056, JA __-__; __-__.

⁵ *Pl.’s MSJ*, Ex. XX, fn. 1, JA __; see *Pl.’s Reply to Def.’s Opp. to Pl.’s MJSH* at 4-5, JA __; *Pl.’s Opp. to Def.’s MJRet*, JA __.

⁶ *Id.*

⁷ *Pl.’s MSJ* Ex. G at 239, 243, JA __, __. Taslitz acted as the instrument of Dean Bullock when he presented Profs. Martin and Cunningham’s credentials to his fellow members of the APT Committee about the status of the respective articles of Profs. Martin and Cunningham. He misled them into believing that Prof. Cunningham had the superior record of scholarship. Courts have referred to a person acting on the animus of another as the “cat’s paw.” *Poland v. Chertoff*, ___ F.3d ___, 2007 WL 2069651 (9th Cir. 2007); *EEOC v. BCI Coca Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 487-88 (10th Cir. 2006), *cert den.*, 2007 WL 1086301 (2007); *Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908, 917-918 (7th Cir. 2007); *Richardson v. Sugg*, 448 F.3d 1046 (8th Cir. 2006); *Laxton v. Gap*, 333 F.3d 572, 584 (5th Cir. 2003). The discriminating official is considered the “cat” and a person over whom the “cat” has influence is the “paw” of the discriminating official.

⁸ Prof. Isaiah Leggett (“Ike”) was the Chairperson of the APT Committee, but Prof. Taslitz wrote memoranda for Leggett’s signature and performed most of the duties of the Chair. *Pl.’s MSJ* Ex. G, at 143, 57, 64-65, 68-69, 87, 166-167, 351-352, JA __, __, __-__, __-__, __, __-__, __-__. Leggett is now the County Executive for Montgomery County, Maryland.

judgment”⁹ -- although she did not explain what she meant by the comment. Dean Newsom testified that Prof. Martin was “causing problems” for the law school.¹⁰

Associate Dean Newsom also testified that Dean Bullock told him that “*she had decided not to select Prof. Martin* for a permanent position;”¹¹ yet, APT Committee members testified that the Committee is independent of the Dean and that it would be *inappropriate* for the Dean to try to influence the Committee’s selection decisions.¹²

Bullock told Taslitz that she was “having a bad day” because of Prof. Martin’s complaints about the stalking and that she had “a lot to do” with respect to the stalking.¹³

Alice Gresham Bullock the EEOC investigator investigating Prof. Martin’s sexual harassment and retaliation charges:

Martin did not seem satisfied with my response. I was left with the impression that *she wanted me to wrestle the stalker down*. (Emphasis added)¹⁴

Dean Bullock admitted that, as of May, 1998, when Prof. Martin’s contract ended, there were at least three vacant faculty positions for which Prof. Martin was “well qualified.”¹⁵ No fewer than eighty Howard University Law School students sent letters and/or signed petitions protesting Martin’s non-renewal and praising her as a professor.¹⁶ Dean Bullock ignored their requests to renew Prof. Martin and left positions vacant while students

⁹ Talitz depo, MSJ Ex. G at 131-132, JA ___-___; Bullock depo, *Pl.’s MSJ* Ex. H at 124-125, JA ___-___.

¹⁰ Newsom depo, *MSJ* Ex. Y at 205, 243; Tr. 1384:8-13, JA ___; *Facts* ¶ 208, JA ___; discussed in *MSJ* at 19-20, JA ___; *Pl.’s MJRet*. 34-35, JA ___.

¹¹ Tr. 1384:15-17 ___, JA ___-___; *Facts* ¶ 218; see *Pl.’s MSJ* at 19-20, JA ___-___; *Pl.’s MJRet* at 34-35, JA ___-___.

¹² ___, JA ___.

¹³ *MSJ* Ex. G at 103, 237; JA ___; Tr. 1092:7-1093:2, JA ___; *Facts* ¶ 190; discussed in *MSJ* at 16-17, JA ___; *Pl.’s MJRet* at 34-35, JA ___.

¹⁴ Tr. 1535:15-24, JA ___-___; *Pl.’s MSJ* Ex. H, JA ___; *Facts* ¶ 187, JA ___; see *Pl.’s MSJ* at 16, JA ___.

¹⁵ Tr. 754:20-755: 755:24, JA ___-___; Bullock’s *Answer to First Amended Complaint*, (# 27) ¶ 326, JA ___; Tr. 754:20-755:6, JA ___; *Pl.’s MSJ* at 41-43, JA ___; *Facts* ¶258, JA ___; *Pl.’s MJRet* at 10-11, JA ___.

¹⁶ *Pl.’s MSJ* Exs. TT, UU, VV, WW, JA ___, ___, ___, ___, ___; *Facts* ¶120-121, JA ___; discussed in *Pl.’s MSJ* at 28, JA ___; *Pl.’s MJRet* at 25, JA ___.

protested the shortage of courses and professors.¹⁷

Dean Bullock also withheld from the APT Committee information that the advertised Civil Rights/Constitutional Law position was still unfilled. When Prof. Martin learned of this vacancy and reapplied, as the only candidate for the position, at the end of the academic year, Bullock immediately responded by converting the position to a tax position, believing that Prof. Martin would not qualify for it or want it, since tax was out of her field of expertise.

THE JURY VERDICT

The jury was asked a series of questions for each of Prof. Martin's claims. The Jury Verdict Form (# __, JA __), page 1, reads:

1. Did the Plaintiff prove by a preponderance of the evidence that:

a) Mr. Harrison subjected her to conduct that was sufficiently severe and pervasive to alter the terms and conditions of her employment?

YES NO

b) Mr. Harrison's conduct was unwelcome?

YES NO

c) Mr. Harrison's conduct was sexual in nature or because of Plaintiff's gender?

YES NO

d) Howard University knew or should have known of the alleged conduct?

YES NO

e) Howard University failed to take proper remedial action that was reasonably calculated to end the harassment?

YES NO

¹⁷ MSJ Ex WW, JA __.

The jury's answer to the question of whether Harrison harassed Plaintiff based on her sex disposed of this case, both with respect to Plaintiff's sexual harassment/hostile work environment case and her retaliation case. Because the jury found no "protected activity,"¹⁸ Title VII could not be invoked to prevent Howard from retaliating against Prof. Martin,¹⁹ even if Howard terminated her solely because she was stalked in her workplace.

SUMMARY OF ARGUMENT

The trial court violated the law of the case by placing before the jury the question of whether the stalker's harassment of Prof. Martin was based on her sex. In 1999, Chief Judge Hogan decided, as a matter of law, that Leonard Harrison's harassment of Prof. Martin was based on her sex; therefore, this question should not have been submitted to a jury as a question of fact. Since this was the pivotal question that resulted in a jury verdict for Defendant on Ms. Martin's Title VII claims, and the jury found in favor on all other aspects of her sexual harassment claim, she is entitled to judgment, as a matter of law, on her sexual harassment claim and a remand on the issues of compensatory and punitive damages.

The correction of her the jury's error on Ms. Martin's sexual harassment claim will resuscitate her retaliatory termination/non-renewal claim, which the jury did not reach. In 2003, MJ Facciola dismissed Ms. Martin's two most compelling retaliation claims, holding that they were not actionable adverse actions, within the meaning of Title VII. Particularly in light of the Supreme Court's decision in *Burlington Northern v. White*, 126 S. Ct. 2405 (2006), Ms. Martin's dismissed retaliation must be restored. Based on the undisputed evidence of record, Ms. Martin is entitled to judgment, as a matter of law, on her retaliation

¹⁸ Verdict Form (#459), page 3, questions # 5a-c, JA ___

¹⁹ Judge Hogan stated that "in addition to finding no protected activity, the jury also found that Defendants had not intentionally retaliated against Plaintiff" (2006 WL 2850656 at 6, JA ___); however, the jury made no findings as to *why* Prof. Martin was not renewed.

claims, reinstatement, back pay and a trial on the issues of compensatory and punitive damages. In the alternative, these claims should be remanded for trial.

The trial court usurped the province of the jury by dismissing Ms. Martin's intentional infliction of emotional distress claim. A jury could well find that Dean Bullock's conduct was "outrageous."

The trial court erred in denying Ms. Martin's breach of contract claim pursuant to her October 9, 2002 *Motion for Summary Judgment*, which set forth the undisputed facts of record, which MJ Facciola failed to address pre-trial. At trial, Howard was permitted to litigate questions of fact that it had already admitted. Numerous evidentiary rulings and comments from the bench unfairly prejudiced Ms. Martin before the jury.

On May 31, 2001, MJ Facciola placed the issue of mandatory Rule 37 sanctions against Howard "in abeyance." The sanctions due exceed \$364,000 in attorney time, for withholding discovery in violation of three court orders. Despite numerous requests to resolve this issue, Judge Hogan closed the case without ever deciding this "deferred" issue.

The trial court improperly taxed Howard's litigation costs against Ms. Martin without consideration of opposing legal arguments relevant to Howard's entitlement to them.

ARGUMENT

Standard of Review

Ms. Martin appeals the dismissal of two of her retaliation claims and her intentional infliction of emotional distress claim. She also appeals the denial of her motion for summary judgment, on all of her claims. An Appellate Court reviews both grants of dismissal and summary judgment *de novo*. *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). Pursuant to Fed. R. Civ. P. 56(c), a party is only entitled to summary judgment where the evidence in the

record shows that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255 (1986). Rule 56(c) requires that, for purposes of summary judgment, the evidence of the non-movant is to be believed and all justifiable inferences drawn in his/her favor. *Id.*; *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 148 (2000).

Ms. Martin also appeals the trial court's denial of a judgment notwithstanding the verdict. Where a jury has reached a verdict that is not supported by the evidence, or is inconsistent with the evidence, the verdict cannot stand. *Gallick v. Baltimore & O R Co*, 372 U.S. 108, 119 (1984), *Hundley v. District of Columbia*, -- F.3d --, 2007 WL 2089749 (D.C. Cir. 2007); *Smith v. District of Columbia*, 413 F3d 86, 97 (D.C. 2005); Fed. R. Civ. P. 50(b)(c)(d) and 59(a).

I. Ms. Martin is Entitled to Judgment on her Sexual Harassment Claim

A. The Trial Court Violated the Law of the Case by Placing Before the Jury the Question of whether the Stalker's Harassment of Prof. Martin was Based on her Sex

1. In 1999, Chief Judge Hogan Decided, as a Matter of Law, that Harrison's Harassment of Prof. Martin was Based on her Sex

Sexual harassment includes not only harassment that is "sexual in nature," but also harassment that is "based on sex." *Martin v. Howard University*, 1999 LEXIS 19516 at *10-11. In his 1999 decision, Chief Judge Hogan concluded, as a matter of law: "it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female"²⁰ and that Harrison "targeted women other than Plaintiff."²¹

²⁰1999 U.S. Dist. LEXIS 19516 at *10 (#23), JA __

²¹1999 U.S. Dist. LEXIS 19516 at *11, JA __.

Having dispensed with the legal issues that would *not* be put to a jury, Judge Hogan identified the factual jury questions as:

1) whether Harrison's harassment was severe and pervasive enough to constitute a hostile work environment (1999 U.S. Dist. LEXIS 19516 at *12-14); and

2) whether Howard took reasonable steps to end it (1999 U.S. Dist. LEXIS 19516 at *7-8).

The jury found in favor of Ms. Martin on both questions. Moreover, as set forth in her *Motion for Summary Judgment*, Ms. Martin's allegations on these issues were not disputed by any evidence of record. Moreover, based on the documents and witness depositions obtained from Howard in discovery, no reasonable jury could have reached contrary answers to these questions. Ms. Martin was therefore entitled to summary judgment, in 2002, on her sexual harassment claim and a trial on the issues of compensatory and punitive²² damages.

2. The Trial Court Twice Reaffirmed Judge Hogan's 1999 Holding that Harrison's Harassment of Prof. Martin was Based on her Sex

Magistrate Judge Facciola reiterated Judge Hogan's holding that Harrison's harassment was based on sex and that this issue would *not* be a triable issue of fact for the jury:

I. Issues Resolved by Chief Judge Hogan Will Not Be Revisited

... in 1999, Chief Judge Hogan ... specifically held that there were factual issues that precluded an award of summary judgment.... As hard as it is to believe, in its current motion, HU ignores that decision and once again advances the very arguments Judge Hogan rejected. ...[W]hat HU cannot do is ignore the Chief Judge's decision and

²² Judge Hogan refused to allow the issue of punitive damages to proceed to a jury (Tr. 2347:15-16, JA __ - __); however, punitive damages are appropriate, in Title VII cases where the violation is intentional or allowed through "reckless indifference." *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). See also Section VII, regarding Ms. Martin's claims for intentional infliction of emotional distress. Bullock's malice, deceit and intentional acts compel punitive damages.

expect me to ignore it as well.... I have any power to overrule the Chief Judge. Thus, his determinations control.

More specifically, the Chief Judge concluded:

1. The alleged harassment by Harrison of the plaintiff was based on her sex;

I will not permit HU, in its second motion for summary judgment, to re-litigate those issues that were resolved against it. Triable issues of fact in 1999 remain triable issues of fact in 2003.

2003 U.S. Dist. LEXIS 18501 at *6-7 (#307), JA __-__.

Judge Hogan adopted MJ Facciola's *Report and Recommendation*, as his own decision (#318, JA__); thereby reaffirming his 1999 holding that the issue of whether Harrison's harassment was based on sex *would not* be a triable issue of fact for the jury.

3. After the Trial, in 2006, Judge Hogan Denied that he had ever Held that Harrison's Harassment of Prof. Martin was Based on her Sex

After trial, Judge Hogan submitted to the jury the question of whether Harrison's harassment was based on sex.²³ This submission violated the doctrine of "law of the case," which states:

a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation

Williamsburg Wax Museum, Inc., v. Historic Figures, Inc. et. al. 810 F.2d 243, 251 (D.C. Cir. 1987).

The trial court's change of its pre-trial ruling, *after trial*, violates the law of the case and the right to procedural due process. It is fundamentally unfair to try a case, operating under court decisions identifying the facts to be proved at trial, and then *add a fact after trial*, when the plaintiff has lost any opportunity to prove it.

²³ Moreover, in his October 4, 2006 *post trial* decision, Judge Hogan stated that his 1999 decision *did not* hold that Harrison's harassment was based on sex. 2006 WL 2850656 at *3, JA __.

B. A Stalker's Harassment of a Woman, to Fulfill the Role of a "Wife" or Other Female Persona, Constitutes "Gender Profiling," or Harassment Based on Sex

1. "Gender Profiling" Constitutes Discrimination on the Basis of Sex

a) Where a Harasser Targets Women who Fit a "Profile" of a Female Character, the Harassment Constitutes "Gender Profiling"

Harrison targeted women fit the "profile" of the fictional *female* character, "Geneva Crenshaw" -- African-American professors and lawyers specializing in legal issues involving race. Where a woman is targeted because she fits a "profile" of a *female* character, this "gender profiling" constitutes harassment on the basis of gender. "Gender profiling" has been recognized in the context of police harassment²⁴ and Customs Inspections.²⁵

Sexual harassers do not normally harass *all* women. They have personal preferences. The plaintiff has established sex discrimination where the harassment victim is selected based on "sex plus" other factor(s). The "sex-plus" concept has been used in *Back v. Hastings on the Hudson*, 365 F.3d 107 (2d Cir. 2004); *Abraham v. Graphic Arts International Union*, 660 F.2d 811 (D.C. Cir. 1981); *Jefferies v. Harris County Community Action Association*, 615 F.2d 1025, 1033-34 (5th Cir. 1980); *Judge v. Marsh*, 649 F. Supp. 770 (D.D.C. 1980). *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (employer treated women with children of preschool age differently than men in similar circumstances); *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971) *cert. denied*, 404 U.S. 991(1971) (sex plus marriage violated Title VII, where airline hired married male flight attendants but not married female flight attendants).

²⁴ *Boston Police Patrolman's Association v. Police Department of Boston*, 841 N.E. 2d 1229 (Super. Mass. 2006); *Massachusetts Bay Transp. Authority v. MBTA Superior Officers Ass'n*, 20 Mass.L.Rptr. 213 9 Mass.Super.,2005); *Com.v. Sanchez*, 17 Mass.L.Rptr. 211 (Mass. Super. 2004).

²⁵ *Anderson v. Cornejo*, 225 F.Supp.2d 834, 850 (N.D.Ill. 2002), *mod on other grounds*, 284 F. Supp.2d 1008, *rev'd in part*, 355 F.3d 1021 (7th Cir. Ill. 2004).

Harrison harassed Prof. Martin based on “sex plus” race and profession. All women do not fit the profile, but *only women could* fit the profile. The key is whether the plaintiff would have experienced the adverse action if she had been a man. If Prof. Dawn Martin had been “Prof. *Don* Martin,” Harrison would not have “mistaken” her for Geneva Crenshaw, or his “wife.”

b) Where a Harasser Targets a Woman to be his “Wife,” the Harassment Constitutes “Gender Profiling” and is “Sexual in Nature”

A “wife” is “a married *woman*.”²⁶ Where a harasser pursues a *woman* to be his “wife,” i.e., a “*woman*” who is married, such harassment is, by definition, based on gender, or her status as a *woman*. In addition, it is “*sexual in nature*” because sex is an inherent part of marriage.²⁷ Courts may grant divorces, as constructive abandonment, if a spouse withholds sex. *Tedford v. Tedford*, 856 So.2d 753 (Miss App. 2003); *Sullivan v. Sullivan*, 180 Misc.2d 433, 689 N.Y.S.2d 378, N.Y.Sup. (NY 1999); *George M. v. Mary Ann M.*, 171 A.D.2d 651, 567 N.Y.S.2d 132 (NY 1991).

2. A Plaintiff Need not Prove “Touching,” “Groping,” or Sexual Assault to Establish a Sexual Harassment Claim

In his October 4, 2006 decision, Judge Hogan defended the jury’s finding that Harrison’s harassment was not “sexual in nature” or “based on sex” by stating:

²⁶ Cambridge University Press Dictionary, 2006, the Merriam-Webster On line Dictionary, 2006 and The American Heritage Dictionary of the English Language, Fourth Edition, copyright 2006 (collectively submitted as Ex. B of Pl.’s June 6, 2006 *Reply to Def’s Opp to MJS* at 12 (#483), JA __; Tr. 2561:12-15, JA__. This quote is correct, based on the docketed jury note, #457, JA__; however the trial transcript, at 2160:19-20 and 2867:19-25, *twice* omits the first part of the jury’s note, “Wives are typically female.” Either Judge Kessler did not read the entire jury note or the transcript is again inaccurate. See fn. 2.

²⁷ Tr. 1847:11-20, JA__

The jury did not hear or see evidence that Mr. Harrison's conduct involved conduct typical of sexual harassment such as groping, touching or making sexual advances.²⁸

This decision is an affront to *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (1986) and its progeny.²⁹ If the 2006 decision is not reversed, it could serve as precedent to require women to prove a *sexual assault* in order to establish a workplace sexual harassment claim under Title VII. It "sets the clock back" by more than *twenty years* for working women.

3. Title VII Disparate Impact Analysis: Stalking has a Disparate Impact on Women

In 1999, Judge Hogan noted that Ms. Martin argued that "she was being stalked by Mr. Harrison and that stalking is primarily a crime against women, with sexual connotations." 1999 U.S. Dist. LEXIS 19516 at 10. Because women are disproportionately stalked,³⁰ the disparate impact theory of Title VII should be applied to establish that stalking in the workplace constitutes discrimination, or harassment, on the basis of gender. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Wards Cove v. Atonio*, 490 U.S. 642 (1989). Howard could not demonstrate any business justification for failing to follow either its own security procedures or the recommendations of the D.C. police department in order to protect a faculty member, from a delusional, criminal stalker on campus.

²⁸ 2006 WL 2850656 at *4, JA __. Howard argued that there was no sexual harassment because the stalker did not actually touch Prof. Martin. Tr. 1848:1-23, JA-__

²⁹ In fact, it is an affront to Judge Hogan's own 1999 decision, in which he held that even "compliments" could constitute sexual harassment. 1999 U.S. Dist. LEXIS 19516 at *12-13 and cases cited therein.

³⁰ Statistics compiled by the U.S. Department of Justice reflect that 80% of stalking victims are women. See Bureau of Justice Statistics, *National Crime Victimization Survey, Violence in the Workplace*, 1993-1999 (December 2001), at www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf; *Workplace Stalking*, published by the U.S. Department of Justice, 2002, www.doc.sc.gov/VictimServices/WorkplaceStalking.doc.

C. Prof. Martin Complained of Conduct that Constituted Sexual Harassment, Entitling her to Title VII Protection

1. The Trial Court Erred by Refusing to Instruct the Jury that an Employee Need not Use the Words “Sexual Harassment” to Invoke Title VII Protections

Howard accused Ms. Martin of “play[ing] the sexual harassment card”³¹ and of fabricating a sexual harassment claim only after she was rejected for a permanent position on December 18, 1997.³² Howard did not produce any evidence to dispute that Harrison committed the conduct alleged; instead, Howard argued that, since Prof. Martin’s memoranda detailing this conduct were entitled “a security problem on campus,” she did not complain of “sexual harassment;”³³ however, as Judge Hogan held, in 1999, an employee need not use the words “sexual harassment” to obligate the employer to take reasonable steps to end the harassment or to protect her against retaliation. 1999 U.S. Dist. LEXIS 19516 at 17-18.

Judge Hogan cited *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025 (D. Nev. 1992), which held that the plaintiff had engaged in “protected activity” when she told her employer simply, “I don’t have to take this” because her employer observed customer behavior that he should have recognized as sexual harassment. *Powell* held that a simple request to the employer to “do something” was enough to invoke Title VII. *Howard U. v. Green*, 652 A.2d 41, 46 (D.C. App., 1994). Judge Hogan continued: “There are no ‘magic words’ which must be chanted in order to invoke Title VII protection, citing *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012-1013 (9th Cir. 1983). It is well documented that

³¹ The transcript, at 2459:17, JA___, reads “Now, why did she go to the sexual harassment part?” The transcripts contain many obvious errors. See fn. 2.

³² Tr. 2457:15-2460:8, JA___.

³³ Tr. 2549:13-2460:6, JA___-___; 810:6-8, JA___; 1848:15-1853:6, JA___-___; 785:23-788:10, JA___-___

Prof. Martin promptly reported Harrison’s conduct, in detail, and that she asked Howard Law School’s administrators, Deans Bullock and Newsom, to “do something” to keep Harrison out of her workplace.³⁴

Ms. Martin requested that Judge Hogan instruct the jury using language from his own 1999 decision, stating that it is not necessary for a plaintiff to use the words “sexual harassment” in order to invoke Title VII protection.³⁵ He denied her request.³⁶

Where an employee focuses on the *solution* to the harassment, as opposed to *naming* it, she should not be deprived of Title VII protection. Because the harasser was a non-employee, Prof. Martin could not ask Howard to *discipline* Harrison for sexual harassment. The *only* solution was to ask Howard to provide security to keep Harrison out of the workplace and/or to assist with his arrest. Howard University operates an armed campus police force, with policies and procedures to address stalkers who are not part of the campus community.³⁷ Prof. Martin therefore reasonably requested protection on campus for a “security problem.”

A recent Howard County, Maryland case, *Maupin v. Howard County*, No. 13C05062062 (verdict for plaintiff, July 2, 2007), involved, *inter alia*, an employer’s failure to provide security to a teacher who received a threatening phone call from someone claiming to be a member of the Ku Klux Klan. A reasonable person would recognize threats from the KKK would create a hostile work environment for an African-American teacher. Similarly, law professors and Deans of a national law school recognized that a stalker pursuing a female professor to be his *wife* was pursuing her because *she is a woman*. Dean

³⁴ Pl’s MSJ at W, BB, T, KKK-1, KKK-2, JA ___, PL’s MSH at ___, JA ___

³⁵ Tr. 2282:2-2283:12, 2288:5-8, 2288:15-2298:1, 2297:16-2298:1, JA ___ - ___, ___, ___ - ___. ___ - ___.

³⁶ Tr. 2400:2-2401:7, JA ___.

³⁷ Tr. 411:2-414:6, 425:24-434:5, JA ___ - ___, ___ - ___.

Bullock's July 1, 1999 internal University memorandum,³⁸ demonstrates that she *did*, in fact, recognize Harrison's stalking as a specific threat to *women*.

2. The Trial Court Erred by Refusing to Instruct the Jury on the Legal Definition of Criminal "Stalking," which is Defined as "Harassment"

Ms. Martin repeatedly requested that the jury instructions include the definition of criminal stalking, as set forth in the D.C. Code Ann. § 22-404 (b):

(b) Any person who on more than one occasion ... willfully, maliciously, and repeatedly follows or harasses another person, is guilty of the crime of stalking.

(e) For purposes of this section, the term "harassing" means engaging in a course of conduct either in person, by telephone, or in writing, directed at a specific person, which seriously alarms, annoys, frightens, or torments the person, or engaging in a course of conduct either in person, by telephone, or in writing, which would cause a reasonable person to be seriously alarmed, annoyed, frightened or tormented.

Ms. Martin's "stalking" complaint was a harassment complaint, by legal definition.

In fact, courts have long recognized that stalking is one of the most severe forms of sexual harassment.³⁹

Mr. Schwalb told jurors that Ms. Martin was *not credible* when she claims that she complained of "harassment," because memoranda referred to Harrison's conduct as "stalking;"⁴⁰ yet, Judge Hogan refused to provide the jury with the stalking statute.⁴¹ Without the legal definition of "stalking," the jurors were misled by Howard's misrepresentation that "stalking" is different from "harassment."⁴²

³⁸ Pl's Tr. Exhibit 8b, page 1, JA ___, admitted at Tr. 758:25-760:2, JA ___; Pl's MSJ, Ex. KKK-2 at 1, JA ___; see also companion Ex. KKK-1, Howard's Position Statement to the EEOC, JA ___, both discussed in Pl's Reply to Def's Opp. to Pl.'s Pl's MJRet at 2-4, JA __-___.
Tr. Ex. 8B, JA ___.

³⁹ See, Pl's Opp to Def's Motion to File Reply to Pl's Opp to Def's Motion for Summary Judgment, *Nunc Pro Tunc*, #, #300 at 3-5, JA __-__.

⁴⁰ Tr. 2477:21-2478:5, JA __-__.

⁴¹ Tr. 2350:17-21, JA __-__.

⁴² Tr. 2459:13-16; 2502:16-24, JA __-__, ___.

3. The Trial Court Violated its Duty to Respond to Jury Questions

A Court of Appeals should reverse a jury verdict where the trial court failed to respond to jury questions in a manner that provided clarity on a material issue.

Generally, decisions on how to re-instruct a jury are within the trial court's discretion and will not be reversed absent an abuse of that discretion.... (Citations omitted) "When the jury explains specific difficulties, the trial court 'should clear them away with concrete accuracy.' [T]he "trial court is under an obligation to respond to a jury's confusion, particularly where the jury made explicit its difficulties.... "[W]here a jury shows confusion about a central aspect of applicable law, and the general instruction did not provide the legal information needed, reversible error occurs when the court does not respond to the jury's note." If the jury demonstrates its confusion before the final verdict is taken in open court, the court is required to take some action in an effort to "clear away that confusion."⁴³ (Citations omitted)

At least some of the jurors instinctively understood that Harrison's pursuit of Prof. Martin as his "wife" necessarily meant that Harrison targeted only women; however, there was confusion on this point, as a matter of law. Four hours before the verdict was issued, the jury sent the court a note:

Wives are typically female. Is the answer to 1c an automatic yes simply because the plaintiff is female?⁴⁴

Judge Hogan was absent for the crucial jury questions. Judge Kessler substituted for him. Ms. Martin pointed out that Judge Hogan had decided this question, a matter of law, in 1999 and that the answer may well be an automatic "yes."⁴⁵ Instead, Judge Kessler told the

⁴³ *Preacher v. United States*, -- A.2d -- 2007 WL 2436762 at *3 (D.C. App. 2007)

⁴⁴ Jury Note # 2 (#457), JA __

⁴⁵ Tr. 2561:1-2562:5, JA __ - __.

jury that the answer was “No.”⁴⁶ She then simply instructed the jurors to base their answer on the evidence before them.⁴⁷

The jury note also read: “Please define sexual harassment.”⁴⁸ Ms. Martin suggested language directly out of Judge Hogan’s 1999 decision that was more specific on this subject, but Judge Kessler declined to add anything to any instruction that Judge Hogan had provided,⁴⁹ saying that Judge Hogan’ must have already considered it.⁵⁰ Judge Hogan’s absence, then, effectively left the jurors with no one to answer their questions. The trial court therefore violated its duty to respond to the jury’s specific questions and provide clarity where jury notes indicated confusion.

D. The Jury Relied on Perjured Testimony to Conclude that Dean Bullock did not Understand that Harrison’s Conduct Constituted Sexual Harassment

1. Since the Jury’s Verdict was Based on Former Dean Bullock’s Perjured Testimony, it Must be Vacated, Pursuant to Rule 60(B)

A party may obtain relief from a judgment based upon the adverse party’s fraud, misrepresentation or other misconduct. Fed. R. Civ. P. 60(b). Dean Bullock’s perjured testimony constitutes a fraud upon the court and the jury.

The only evidence offered at trial to prove that Dean Bullock did not perceive Harrison’s conduct as harassment based on sex was her own self-serving testimony that, when she read Prof. Martin’s November 25, 1997 five page memorandum complaining of Harrison’s stalking, she did not perceive it to be a complaint of “sexual harassment;”⁵¹

⁴⁶ “No” is not recorded in the transcript (see fn. 2), but Judge Hogan quoted Judge Kessler as saying, “No.” 2006 WL 2850656 at *4, JA ___. Judge Kessler’s “No,” resounded in the courtroom. Some jurors responded physically.

⁴⁷ Tr. 2567:20-25, JA ___

⁴⁸ Tr. 2563:1-2, JA ___; Jury Note #2, # 457, JA ___.

⁴⁹ Tr. 2568:1-7, JA ___; 2562:7-25, JA ___

⁵⁰ Tr. 2563:1-2566:23, JA ___ - ___

⁵¹ Tr. 785:22-786:824, JA ___ - ___; Tr. 678:18-19, JA ___; Tr. 1532:11-24, JA ___

however, in a July 1, 1999 memorandum to Howard's General Counsel, *Bullock admitted that she perceived Harrison as a threat to "women on campus" whom he might "stalk or otherwise harass."*⁵² Dean Bullock therefore clearly understood, from Prof. Martin's first memorandum regarding Harrison, that his harassment of her was "based on sex," or because she was a woman.

Howard has never denied that Bullock committed perjury; instead, it *argued that the Court should ignore it* because the jury did not uncover it.⁵³ Certainly, perjury is a serious offense that should be *punished*, not *rewarded* by a court of law.

2. The Jury Overlooked Bullock's 1999 Memorandum Admitting that she Knew that Harrison was only Targeting Women on Campus for Harassment

Where the jury's verdict is not supported by the evidence, or is inconsistent with the evidence, the verdict must be set aside. *Gallick v. Baltimore & O R Co*, 372 U.S. at 119; *Hundley v. District of Columbia*, 2007 WL 2089749; *Smith v. District of Columbia*, 413 F3d at 97; Fed. R. Civ. P. 50(b)(c)(d) and 59(a). Since the jury had Bullock's 1999 written admission before it, its conclusion that Bullock did not understand Harrison's conduct to be directed at Prof. Martin based on her gender is not supported by the evidence. If the jurors believed Bullock's testimony, as they apparently did, they overlooked a determinative document before them. The jury's verdict must therefore be set aside.

⁵² Pl's Tr Exhibit 8b, page 1, JA__ ; see fn. 38.

⁵³ *Def.'s Opp to MJSH* (#476) at 16, JA__ ; see *Pl's MJRet* (#461) at 20-22, JA__ ; *Opp. to Def's MJRet* at 8-12, JA__ and *Pl's Reply to Def's Opp. to Pl MJRet* (#489) at 2-4, JA__.

II. *Martin* Will Set Precedent in Racial Profiling and Other Protected Group Harassment, Including Security Cases

This Court's decision on "gender profiling" will set precedent on harassment issues for protected groups other than women. Harassment can also be based on *racial* profiling. A harasser focused on Martin Luther King or Barack Obama would target only African-American males. A stalker could be obsessed with any character, real, living, dead or imagined -- from "Wonder Woman," to Hillary Clinton, Jennifer Lopez, Helen Keller or George Burns.

In targeting a "prototype" -- or a "look alike" -- of any character, the stalker limits the harassment to people resembling the character, whether it is based on gender, ethnicity, religion, disability and/or age group. This creates a hostile work environment on the basis of the class membership. Anti-discrimination laws should prevent the employer from ignoring threats to the targeted group members -- particularly the threat of physical harm.

*Maupin v. Howard Co.*⁵⁴ raises a scenario to which Ms. Martin has alluded earlier in this litigation. If the KKK harasses an African-American employee, the employee should not be fired for asking for security -- nor should Title VII protection depend upon whether the employee used the words "racial harassment" in the security request.

III. Wrongful Discharge: Termination for Complaining about Stalking Violates Public Policy and the State's Interests

The law offers alternative theories to remedy workplace stalking and to protect against retaliation for reporting it. Recent litigation in the area of wrongful discharge is instructive and is an appropriate alternative theory of liability in this case.⁵⁵ Retaliation and wrongful discharge actions are necessary to enforce laws that regulate the workplace. If an

⁵⁴ See Section I, C, 1.

⁵⁵ This Court may consider an issue belatedly raised "where injustice might otherwise result." *IRS v. Murphy*, 2007 WL 1892238 at * 2 (D.C. Cir. 2007).

employer can fire an employee for attempting to correct an illegal or unsafe workplace environment, employees will be afraid to report or otherwise oppose those illegal or unsafe conditions.

Wrongful discharge claims are permitted where there is no statutory basis for a claim, but the discharge violates public policy. In *Franklin v. Monadnock Co.*, 151 Cal.App.4th 252 (Cal. 2007), the plaintiff's co-worker threatened to have him and three other co-workers killed. The plaintiff reported the threats to his employer, but the employer did nothing. The co-worker then assaulted the plaintiff, outside of the workplace. The plaintiff reported the assault to the police and the employer. The employer then fired the plaintiff.

The *Franklin* court held that the plaintiff was wrongfully terminated, in violation of public policy. The plaintiff's reports to the police and his employer benefited the public and the state, since it was the state's policy to protect employees against termination for complaining about unsafe conditions in the workplace.

Martin provides this Court with an opportunity to adopt the *Franklin* and *Maupin v. Howard Co.*⁵⁶ rationales to protect stalking victims, as well as other victims of crimes or threats of violence in the workplace – and in this case, on university campuses, where stalking is a particular problem for women and violence has become alarmingly more familiar.

IV. Ms. Martin is Entitled to Judgment on her Retaliation Claims

A. The Trial Court Erroneously Limited Ms. Martin's Retaliation Claims, in Violation of Burlington

Retaliation claims are necessary to enforce Title VII. If an employer can deprive an employee from a job for opposing sexual harassment -- or any other Title VII violation -- the

⁵⁶ See Section I, C, 1.

statute would be virtually meaningless.

Judge Hogan identified Ms. Martin's retaliation claims:

Plaintiff asserts that Dean Bullock took five separate actions against her because she complained about a hostile work environment and requested protection from Mr. Harrison. Specifically, Plaintiff alleges that Dean Bullock retaliated against her by: (1) denying her application for a permanent EEO position at the Law School on December 18, 1997; (2) failing to authorize the Appointment Promotion and Tenure ("APT") Committee to fill vacant positions in January, 1998, because she believed the ATP Committee would recommend Plaintiff for one of these positions; (3) converting a Constitutional Law/Civil Rights position into a Tax/Trusts and Estates position in April 1998 so that the APT Committee could not consider her for the position; (4) leaving a tenure-track position vacant in the Spring of 1998, so that the APT Committee would not consider Plaintiff for the position; (5) ordering Plaintiff on May 26, 1998, to vacate her office by Friday, May 29, 1998, and actually "forcing" her out of the office in early June 1998.

1999 U.S. Dist. LEXIS 19516 at 2-3.

In 1999, Judge Hogan sustained Ms. Martin's retaliation claims. 1999 U.S. Dist. LEXIS 19516 at 17-18; JA___. On October 20, 2003, however, Magistrate Facciola, *sua sponte*,⁵⁷ dismissed Ms. Martin's strongest retaliation claims:

It is ... clear that the other acts of which she complains, the conversion of the Constitutional Law/Civil Rights position into a Visiting Tax, Trust position and the decision to leave certain faculty positions vacant, do not qualify as adverse actions.....

Title VII applies only to ultimate employment decisions such as hiring or discharging....⁵⁸

⁵⁷Fed. Rule Civ. P. 8(c) requires the defendant to assert its own defenses or waive them; accordingly, it is an error of law for a judge to dismiss a case based on a *sua sponte* waivable defense. *Erline Co. S.A. v. Johnson*, 2006 U.S. App. LEXIS 6621 at *24 (4th Cir. 1996); *Haskell v. Wash. Twp.*, 864 F.2d 1266, 1273 (6th Cir. 1988); *Wagner v. Fawcett Publ'ns*, 307 F.2d 409, 412 (7th Cir. 1962).

⁵⁸ 2003 U.S. Dist. LEXIS 18501 at *31-33, JA___. The opinion is internally inconsistent. While dismissing Ms. Martin's claims as *not* qualifying as ultimate employment actions, MJ Facciola actually refers to Prof. Martin's non-renewal as a "firing" (at *25), a loss of her job (at *31) and a tenure turn down (at *22) (which it was not).

In June of 2006, the Supreme Court decided *Burlington Northern v. White*, 126 S. Ct. 2405 (2006), adopting this Court’s analysis in *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006), directly contradicting MJ Facciola’s analysis. *Burlington* and *Rochon* held that actionable retaliation under Title VII was *not* limited to *hiring, discharging or other ultimate employment actions*;⁵⁹ accordingly, MJ Facciola’s dismissal of these claims constitute clear, reversible error.

Even prior to *Burlington* and *Rochon*, Title VII protected employees from retaliation in the form of vacancy cancellations. *Terry v. Gallegos*, 926 F.Supp. 679, 709-10 (W.D.Tenn.1996). In its simplest form, canceling a vacancy has always been actionable under Title VII. For example, where an African-American sees a “Help Wanted” sign in a window, applies for the job, and the employer takes the sign down. This “cancelled vacancy” is an adverse employment action, as a rejection for hire.

Dean Bullock “pulled down” the “Help Wanted” sign, so to speak, withdrawing an advertised vacancy for a Constitutional Law/Civil Rights position and leaving three additional undesignated positions vacant – all of which Prof. Martin was, as Howard admits, “well qualified” to fill. Similarly, in *Ruggieri v. Merit Systems Protection Board*, 454 F.3d 1323, 1326-1327 (Fed. Cir. 2006), the court upheld plaintiff’s retaliation claim, under the “Whistleblower Act,” where the employer cancelled/failed to fill a vacancy, in order to prevent the plaintiff from being selected to fill it.

In *Mintz v. District of Columbia*, 2006 U.S. Dist. LEXIS 34446 at *12-13 (D.D.C. 2006), as in *Martin*, the employer “declined to renew” the plaintiff’s employment contract

⁵⁹126 S. Ct. at 2414.

and the court upheld his Title VII retaliation claim. If the district court's dismissal of these claims is affirmed, *Burlington* will be sorely limited for all employees facing discrimination.

With the dismissed retaliation claims are restored, Ms. Martin is entitled to judgment, as a matter of law. Where the only competition facing Prof. Martin were three "empty chairs," Howard's stated reason for her rejection, e.g., another candidate was more qualified, is clearly false and pre-textual. It could not be in the law school's best interest to leave vacancies unfilled where the students sorely needed them, particularly since they were also protesting Prof. Martin's non-renewal.

B. Had the Jury Found "Protected Activity," it would have been Compelled to Find that Howard did not Produce Evidence of a Legitimate Reason for Prof. Martin's Non-Selection/Non-Renewal

Howard had enough vacancies to convert *both* Profs. Martin and Cunningham to permanent faculty status. They had been colleagues at Howard for two years and taught different courses. There was no reason to "pit" them against each other to compete for *the EEO course* that *Prof. Martin had been teaching for two years*; however, even if the jury had reached the unduly restricted interpretation of Ms. Martin's retaliation claims, as phrased on the Verdict Form, it would have been compelled to find for Ms. Martin.

Question # 6, page 4, JA __, asks:

Did Howard University produce evidence of legitimate, non-retaliatory reasons for the APT Committee's decision not to recommend Plaintiff for the EEO/Labor position but to instead recommend Professor Cunningham?

The jurors left these questions blank. Had the jury answered them, it would have been compelled to answer "No" – which would have resulted in a verdict for Ms. Martin.

Howard claimed that it hired the junior ranked *Assistant* Prof. Cunningham over the

incumbent *Associate* Prof. Martin to teach EEO law because Prof. Martin had not "complete[d]" a particular article prior to the Committee's December 18, 1997 decision to reject her for a tenure track position and that the selectee, Prof. Cunningham, had already "publish[ed]" her article.⁶⁰

Howard did not produce *any* evidence to support its purported legitimate, non-retaliatory reason for Prof. Martin's non-renewal. It *could not* do so, since *the publications themselves* prove that Howard's purported "reason" is *undeniably false*. Prof. Cunningham's article was *not* published until *a full year* after the Committee's December 18, 1997 decision, in the *Winter of 1998*.⁶¹ Prof. Martin's article, which was more than twice as long, involving substantially more research and cases citations than Prof. Cunningham's article,⁶² was *also* published in the *Winter of 1998*.⁶³ Prof. Martin had not only "completed" the article "prior to the Committee's December 18, 1997 decision," but the APT Committee members *knew* that it was accepted for publication prior to that date.⁶⁴

Since Howard's stated non-retaliatory reason for not renewing Prof. Martin is supported by absolutely no evidence, and is irrefutably rebutted by the evidence presented by Howard itself, no reasonable juror could answer "yes" to Question # 6.

⁶⁰ *APT Committee's May 11, 2001 Position Statement*, JA ___, Pl's *MSJ Ex. B, MJRET* at 23-24, Ex. X, JA ___. Judge Hogan actually indicated to Ms. Martin's counsel, Ms. Taylor, that she should not admit this crucial document. Tr. 2009:25-2011:23, 2036:14-2041:19, JA ___, JA ___. See Section IX, regarding comments from the bench affecting Ms. Martin's credibility with the jury.

⁶¹ *Pl's Opp to Def's MJRet*, #474 at 15-16, JA ___, Ex. Y (#474-27), JA ___, Tr. 1983:8-25; 2526:5-9, 2040:14-2041:4, JA ___, ___, ___.

⁶² Compare *Pl's MSJ*, Ex. MMMM, JA __ (Martin) with JA __ *Pl's Opp to Def's MJRet*, #474 at 15-16, JA ___, Ex. Y (#474-27), JA __ (Cunningham).

⁶³ *Pl's Opp. to Def's MJRet* at 13, JA ___, Ex. Z, JA __; *Pl's Reply to Def's Opp to Pl's MJRet* (#489) at 17, JA __.

⁶⁴ *Pl's MSJ* at 25, JA __; *Facts* ¶130, JA __; JA __.

C. Howard's Admissions Constitute *Per Se* Violations of the Age Discrimination in Employment Act

Even as of its closing statement, Howard could not make up its mind as to its defense. For nine years since her termination, Howard attempted to portray Prof. Martin as the candidate who was less accomplished than Prof. Cunningham. At trial, however, Prof. Leggett acknowledged that it was *Prof. Martin* who had the superior accomplishments in the legal profession, publications and teaching, including the fact that she had helped developed national policy in EEO law at the EEOC and had taught EEO law for four years and Prof. Cunningham had never taught it;⁶⁵ Leggett then resorted a football analogy, comparing Martin to an *aging*⁶⁶ “veteran” *football player*. Howard’s counsel told the jurors that the “team” decided to go with the “rookie quarterback” (Cunningham) even though she had “less experience” because “that rookie” might be the team’s “franchise player one day.”⁶⁷

Howard’s desperate closing argument amounts to an admission of a *per se* violation of the *Age Discrimination in Employment Act* (ADEA), 29 U.S.C. Section 621-634, et seq. Because Howard engaged in litigation conversion, at the end of the trial, Ms. Martin requests that this Court adversely construe Howard’s admissions under the ADEA.

D. The Trial Court Erred by Ignoring Plaintiff's Motion Strike Defendant's Motion for Summary Judgment, which Relied on Precluded Testimony

On November 13, 2002, Ms. Martin filed a *Motion to Strike Defendant's Motion for Summary Judgment and to Preclude Defendant's "Eleventh Hour" Defense, Alleging "Bad Judgment,"* because it relied on precluded testimony.⁶⁸ Howard filed an *Opposition* to the

⁶⁵ Tr. 1010:11-1011:24, JA__-__; 1015:11-1016:5, JA__-__.

⁶⁶ Prof. Martin was 40. Only two years earlier, when recruiting her, the APT Committee described Prof. Martin as a “*young*” scholar.⁶⁶

⁶⁷ Tr. 2501:13-24, JA___. Howard failed to explain how playing *football* is like teaching law.

⁶⁸ *Pl's MTS #280, 290*, re-filed electronically as 313-4, JA__.

motion⁶⁹ and Ms. Martin filed a *Reply*,⁷⁰ however, the trial court never decided Ms. Martin's motion.

In blatant violation of the September 24, 2002 Order,⁷¹ in its *Motion for Summary Judgment*⁷² and its *Opposition to Plaintiff's Motion for Summary Judgment*⁷³ Howard built its defense around the nebulous allegations of Prof. Andrew Gavil that the court had specifically excluded. In its *Opposition to Pl's MTS*, Howard claimed that it violated the Court's order because, in an *ex parte communication*, Judge Hogan told Howard's counsel that it did not have to obey its order.⁷⁴

Judge Hogan has not sanctioned Howard, either for its violation of the Order or for its accusation that "the court" privately told Howard it could violate the September 24, 2002 Order—a claim that, if true, would constitute judicial misconduct.

V. The Trial Court Erred by not Deeming Plaintiff's Statement of Facts Admitted, where Defendant Refused to File a Statement of Disputed Facts

Pursuant to Local Rule 56.1, a party opposing a *Motion for Summary Judgment* must file, with its *Opposition*, a statement of disputed facts with specific references to the evidence of record that prove the each fact asserted. Where the opposing party has failed to file a disputed statement of facts, the court may deem the facts asserted by the moving party admitted.

MJ Facciola avoided applying Rule 56.1 against Howard by *claiming that Plaintiff too, did not file a Statement of Disputed Facts*. In fact, Ms. Martin properly filed a detailed,

⁶⁹ #291, JA__

⁷⁰ #539 JA__

⁷¹ #267, JA__

⁷² #265, JA__

⁷³ #292, JA__

⁷⁴ #291 at 6-7, JA__; see *Pl's Reply to Opp. MTS* at 1-3, JA__; *Pl's Opp. to Def's Motion for Reconsideration of September 24, 2002 Order*, #539, JA__.

16 page, 44 paragraph *Statement of Disputed Material Facts* (JA__), as an attachment to her *Opposition to Def's Motion for Summary Judgment* (#281, 313, 330-4, JA__). Based on MJ Facciola's material misrepresentation of the record, he wrote that he could "say a plague on both your houses and strike both motions," but that he would, instead, "*divine*" the facts.⁷⁵ This purported "divin[ation]" resulted in what the parties actually agree is a published decision that is *replete with material factual errors*.⁷⁶ It would be defamatory, but for judicial immunity.⁷⁷

VI. The Jury was not Properly Instructed on "Protected Activity" or "Adverse Actions" to Address the Issue of Prof. Martin's Premature Eviction from her Office

Question # 8(c) asked whether Howard's premature eviction of Prof. Martin from her office constituted an "adverse action." This question was moot, since the jury had found no "protected activity" under Title VII, there could be no actionable retaliation. The jury repeated its previous error in #8(a)(b) and (d).

Based on that determinative finding, the jury had no reason to focus on the question of whether the eviction constituted an "adverse action," or actionable retaliation under Title VII. It is a legal concept, defined, redefined and refined -- by judges, as it was, in *Burlington*, after this trial. If this question is a jury question at all, jurors need examples of what actions that could be considered "materially adverse," under current case law, particularly since actionable retaliation is now clearly distinguished from the civil service definition of an "adverse action."

⁷⁵ 2003 U.S. Dist. LEXIS 18501 at 5.

⁷⁶ *Pl's Objection to MJ Facciola's October 20, 2003 Report and Recommendation* (#311), JA__; *Pl's Reply*, #463, JA__; *Pl's Motion to Recuse MJ Facciola* (#312), JA__; *Pl's Unopposed Motion to Vacate Facciola's October 20, 2003 Report and Recommendation*, #326, JA__.

⁷⁷ In addition to the false accusations regarding her scholarship, collegiality, rank, application status and use of a "curse word" in a private conversation with Prof. Gavil about a student, the decision falsely indicates that she mal-practiced in her own case.

The blurred legal definition was confounded by the fact that Howard's witnesses were permitted to evade questions on cross examination. *See* Section IX, D. Judge Hogan did not permit Ms. Martin's counsel to get clear answers to her questions to Dean Newsom regarding his eviction of Prof. Martin from her office while he allowed other exiting visiting professor to stay in her office with no "vacate" date.⁷⁸

VII. The Trial Court Erred by Dismissing Ms. Martin's Intentional Infliction of Emotional Distress Claim against Howard and Alice Gresham Bullock

To establish a claim for intentional infliction of emotional distress, a plaintiff must prove that the defendant engaged in: (1) extreme and outrageous conduct that (2) intentionally or recklessly caused (3) severe emotional distress to another.

1999 U.S. Dist. LEXIS 19516 at 19-20.

Judge Hogan dismissed Ms. Martin's claim of intentional infliction of emotional distress, holding that no jury could find that Howard's conduct was "outrageous. *Id.* In defining "outrageous," the court should consider the nature of the activity, the relationship between the parties, the duties of the parties, and the prevailing norms of society. *Woodner v. Breeden*, 665 A.2d 929, 935 (D.C. Ct. App. 1995). "The extreme and outrageous character of the Defendant's actions may arise from his abuse of a position of authority over him, or power to affect Plaintiff's interests." *Harris v. Jones*, 281 Md. at 560, 566 (Md. 1977). Dean Bullock had control over Prof. Martin's workplace and livelihood. Bullock's conduct violates public policy; therefore, it may be considered "outrageous."

Bullock's failure to follow Howard's own security procedures to protect Prof. Martin from a campus stalker, her retaliatory removal of Prof. Martin from the faculty and her malicious "cover up" could certainly meet a jury's standard of "outrageous" conduct.

⁷⁸ Tr. 1385:18-24, JA __-__.

VIII. Ms. Martin is Entitled to Summary Judgment for on her Breach of Contract Claim, which the Trial Court never Considered

In his October 20, 2003 *Report and Recommendation*, at 23, MJ Facciola wrote:

Chief Judge Hogan has already rejected her breach of contract claim, Martin, 1999 U.S. Dist. LEXIS 19516 at * 20-22, and I cannot and will not accept plaintiff's demand that I reach a contrary conclusion.

Contrary to MJ Facciola's assertion, Judge Hogan *actually upheld* the breach of contract claim.⁷⁹ Ms. Martin filed an *Objection* (#308). Howard agreed that many of MJ Facciola's factual conclusions were contradicted by the undisputed facts of record;⁸⁰ yet, Judge Hogan did not vacate it. Instead, after two years of dormancy, Judge Hogan adopted MJ Facciola's *Recommendation* as his own decision (#318). After a conference in which both parties again brought this and other errors to Judge Hogan's attention, he corrected the Order on this point (#325), but Ms. Martin was deprived of consideration of her motion for summary judgment.

Ms. Martin alleged that, in negotiating her hiring contract as a Visiting Associate Professor, recruiting her from her tenure track position at Cleveland-Marshall College of Law, and dissuading her from continuing interviews with other schools, Prof. Taslitz promised her that her visitorship would be renewed until a permanent position opened up and then she would be "slid" into this position.⁸¹

There were no genuinely disputed material facts to allow the case to proceed to a jury. In his 2002 deposition, Taslitz admitted that he intended to convey to Prof. Martin that, if she

⁷⁹ 1999 U.S. Dist. LEXIS 19516 at 20-22, JA __ - __.

⁸⁰ *Def's Response to Pl's Objection to MJ Facciola's October 20, 2003 Report and Recommendation*, #311, JA __; discussed in *Pl's Reply to Def's Response* (#312), JA __. See also *Pl's Unopposed Motion to Vacate October 20, 2003 Report and Recommendation of MJ Facciola*, # 326, JA __.

⁸¹ PL's MSJ at 45-46, JA __ - __

accepted the visitorship, she would be “well placed” for a permanent position when one opened up.⁸²

Taslitz claimed that he “[could] not recall” his “exact words.”⁸³ If Prof. Taslitz “cannot recall” the precise words that he said, no reasonable juror could conclude that he did not say the words that Prof. Martin *does* recall.

The jury found that Prof. Taslitz did not make the promises that Prof. Martin claimed he did, despite the weight of evidence to the contrary. As justification for the jury’s verdict, Judge Hogan relied on Prof. Leggett’s testimony “that Professor Taslitz did not make the alleged promise to Plaintiff;”⁸⁴ however, *Leggett was not present* when Martin and Taslitz negotiated her hire, nor did he even *see* the correspondence or personnel actions that were part of her contract.⁸⁵ If the jury based its decision on Leggett’s *speculation* about what Taslitz said in conversations that did not include him, then it surely did *not* have sufficient evidence to conclude that there was no contract.

Because Taslitz claimed to “recall” more about the precise words he used in Martin’s 1995 contract negotiations, at trial in 2006, than he did in his deposition in 2002, credibility determinations became critical to this claim. As set forth below, the procedural and

⁸² Pl’s MSJ *Ex. G*, at 84, JA___; Taslitz denied this admission at trial and had to be confronted with his deposition testimony Tr. 1077:9-1081:25, JA___-___. The inordinate amount of time that it took to get Prof. Taslitz to make the same admission that he had made in his 2002 deposition was charged to Ms. Martin’s 25 allocated hours for her case. See Section IX, A.

⁸³ Pl’s MSJ, 45 *Ex. G* at 84, JA___; Facts ¶18, JA___; Pl’s *MJBCon* at 7, JA___. In his deposition, Andrew Taslitz responded “I don’t recall” or “I don’t remember” no less than 388 *times*. Where a witness responds to a material question by stating, “*I don’t recall*,” this response “*is not a serious challenge*” to the allegation asserted. *Moodie v. Federal Reserve Bank of New York*, 862 F.Supp. 59, 66 (S.D.N.Y.1994). It is evasive. *Teano v. Electrical Const. Co.*, 849 So.2d 714, (1 Cir. 2003); *SS&J Morris, Inc. v. I. Appel Corp.*, 2000 WL 1028680 (S.D.N.Y. 2000); *Calmelet v. Eluhu*, 2006 WL 2091385 (Tenn. Ct. App. 2006); *Com. v. Saint Louis*, 59 Mass. App. Ct. 928, 798 N.E.2d 333, 336, fn. 3 (Mass. 2003); *In re Kids Creek Partners, L.P.* 212 B.R. 898, 906 (Bkrcty.N.D.Ill. 1997); *In re Donald Sheldon & Co., Inc.*, 191 B.R. 39, 44 (Bkrcty. S.D.N.Y. 1996).

⁸⁴ 2006 WL 2850656 at *7, JA___

⁸⁵ Tr. 976:4-12; 1052:13-1056:10, JA___, ___-___ JA___.

evidentiary rulings of the court hindered the jury's ability to make fair credibility determinations.

IX. The Trial Court Violated Rules of Procedure and Evidence, Abusing its Discretion and Causing Undue Prejudice to Ms. Martin

The trial court abused its discretion and erred, as a matter of law, in numerous evidentiary rulings. Howard was permitted to raise irrelevant, prejudicial allegations to confuse⁸⁶ and distract the jury, repeatedly violate Fed. R. Civ. P. 11 by making false accusations and innuendo, to “trick” the jury into believing that Ms. Martin was lying – about anything.⁸⁷

The allotted space does not permit a recitation of all of the prejudicial trial rulings and comments, but many are discussed in *Plaintiff's Motion for Judgment, or, in the Alternative, for a New Trial, on her Breach of Contract Claim (#463)* and *Reply (#487)*. A few examples are highlighted below.

A. The Court Violated Rule 611(b) by Permitting Howard to Present its Defense in Ms. Martin's Case in Chief

Over repeated objections, Howard was permitted to put on its defense, *during Ms. Martin's case in chief*.⁸⁸ Howard wasted much of the 25 hours allotted for Ms. Martin's case by testifying, in long *narratives*,⁸⁹ on *cross examination*,⁹⁰ although she had no control over

⁸⁶ E.g. Howard misled the jury on the law with respect to the statute of frauds. Tr. 2514:22-25:2, JA ___ - ___

⁸⁷ *Pl's Motion for Sanctions and Time*, #439, JA ___; Tr. 1913:16-1929:8, JA ___ - ___; 1769:15-18, JA ___ - ___; 1800:23-1803:20, JA ___ - ___

⁸⁸ E.g., Tr. 1913:16-1929:8, JA ___ - ___; *Pl's Motion for Extension of Time to Complete Trial, from 25 hours allotted # 432*, JA ___; *Plaintiff's Motion for Sanctions and Time (#439)*; Tr. 128:13-129:6, JA ___ - ___; 149:22-150:20, JA ___ - ___; 784:5-811:3, JA ___ - ___; 1048:9-1052:6, JA ___ - ___; 519:4-520:17, JA ___ - ___; 176:10-177:11, JA ___ - ___; 488:23-489:6, JA ___ - ___

⁸⁹ E.g, Tr. 176:10-177:11, JA ___ - ___; 1506:6-1519:10, JA ___ - ___; 1142:9-1170:20, JA ___ - ___; 767:11-779:22 ___; 830:17-833:4, JA ___ - ___.

⁹⁰ The direct examination of an adverse witnesses is conducted as cross examination. Fed. R. Ev. 611(c).

how long Howard’s witnesses talked. Ms. Martin was forced to rebut Howard’s “defenses,” and even irrelevant false accusations, while she was still trying to present evidence to establish her prima facie case on *each one* of her claims.⁹¹

Pursuant to Fed. R. Ev. 611(b), the court must exercise sound discretion when allowing a defendant to present its case in the plaintiff’s case in chief. *MDU Resources Group*, 14 F.3d 1274, 1277 (8th Cir. 1994). To the extent that any discretion was exercised, it was abused. Ms. Martin’s right to a fair trial was sorely trampled upon – for no other reason than the purported convenience of professors who were witnesses for Howard, so that they would not have to come back to court to testify in Howard’s defense – although they were only coming from across town.

Ms. Martin’s case in chief was completely usurped by Howard’s simultaneous defense. Moreover, on the day that Howard’ called the only witness for its defense that it had not questioned in Ms. Martin’s case in chief, Judge Hogan insisted that the trial end that morning, leaving Ms. Martin only one hour to get her witnesses to court and put on a rebuttal.

Judge Hogan rushed Ms. Martin through her case, purportedly because jurors were being charged vacation days for their jury duty and because he had to attend a conference.⁹² Since Judge Hogan told jurors that the case had been bifurcated and that they would “take care of” damages depending on the verdict,⁹³ they knew that if they returned verdict for Ms. Martin, they would have to return for the second part of the trial – a fact that would cost them additional vacation days and/or actual salary. *A verdict for Howard meant that they could go*

⁹¹ See *Pl’s Mot. for Additional Time*, #432, JA__ ; *Pl’s Motion for Sanctions and Time*, #439, JA__ ; see also #436, JA__ . Ms. Martin had moved to bifurcate the trial, by issue, for clarity (#364, JA__ ; denied, per #377, JA__). Instead, Judge Hogan bifurcated the trial into liability and damages stages.

⁹² Tr.1681:8-1682:2, JA__ -__

⁹³ Tr. 2533:4-13, JA__

home.

B. The Court Accommodated Howard’s Witnesses, but not Ms. Martin’s Witnesses – not even Howard’s own Most Senior Faculty Member

In contrast to the extreme deference that Judge Hogan paid to Howard’s witnesses, he made no accommodation for Ms. Martin’s witnesses – not even the most senior member of Howard’s faculty, Prof. Spencer Boyer.⁹⁴ Howard actually moved to *preclude* Prof. Boyer from testifying,⁹⁵ although he was one of the very professors who helped build the civil rights legacy that Howard touted. Prof. Boyer now wears an oxygen tank and needed a day’s notice of when he would be called to obtain permission to take it into the courthouse. Prof. Boyer wanted to testify on Ms. Martin’s behalf, particularly to rebut Howard’s allegations of “non-collegiality” and to impugn the credibility of Bullock, Gavil and Taslitz, as he did in his deposition in 2002.⁹⁶

In addition, a former student, who has been listed as a potential witness throughout this litigation, was expected to testify that *Dean Newsom* told him that Howard did not renew Prof. Martin because she was being stalked and therefore attracted a danger to Howard.⁹⁷ This witness had been in a car accident, almost died and could not walk, but had called her the night before to explain why he had been unavailable.

Because Newsom’s admission would be the “smoking gun” in Ms. Martin’s retaliation case, and impugn the credibility of Deans Newsom and Bullock, she asked if an accommodation could be made for this witness. Judge Hogan simply said that she had 35 *minutes* to get any witnesses she had to court, saying that he had told her to have her

⁹⁴ Tr. 2241:22-2243:14, JA ___ - ___; *contrast* with 2014:4-2015:9, JA ___ - ___.

⁹⁵ *Def’s Motion in Limine to Preclude Prof. Boyer from Testifying as Rebuttal Witness*, #445, JA ___

⁹⁶ *Pl’s MSJ*, Ex. L, JA ___

⁹⁷ Tr. 2251:16-2252:19, JA ___ - ___, 2254:7-23, JA ___.

witnesses in court that morning;⁹⁸ however, he actually had told her that her rebuttal witnesses, including Prof. Boyer, might not be called until “*next week*.”⁹⁹ Judge Hogan’s sudden change in the schedule precluded rebuttal witnesses.

C. The Trial Court Excluded Material Rebuttal Evidence

Judge Hogan refused to allow Ms. Martin to present documents that irrefutably rebutted false claims and inferences made by Howard on cross examination.¹⁰⁰ Ms. Martin pleaded with Judge Hogan to admit the documents, saying that, if not permitted to show them to the jury, “I will look like a liar up here.”¹⁰¹ This was Howard’s goal and it was unfairly accomplished.

One document improperly excluded, and which could have been material to a credibility determination on the crucial facts underlying the breach of contract claim, is the memo that Prof. Martin wrote to Prof. Cunningham in response to Prof. Cunningham’s memo discussing her hiring own negotiations with Prof. Taslitz.

Mr. Schwalb alleged that Prof. Martin concealed Prof. Cunningham’s memo from Dean Bullock. When Ms. Martin testified that she wrote to Cunningham disputing her assertions, and provided Bullock with a copy, Howard objected to admitting *Prof. Martin’s memo, through Prof. Martin*, as *hearsay*, saying, “This is a memo that the plaintiff wrote not received. It’s hearsay.”¹⁰²

⁹⁸Tr. 2241:20-2244:10, JA ___ - ___

⁹⁹Tr. 2014:4-2015:9, JA ___ - ___.

¹⁰⁰ See *Pl’s Motion for Sanctions and Reapportionment of Time for Defendant’s Deliberate Misrepresentations to the Court and Jury*, #439; *Pl’s MJBCon* at 9-16, JA ___ - ___; *Reply to Def’s Opp to Pl’s MJBCon* at 16-18, JA ___ - ___.

¹⁰¹Tr. 2022:20-2026:13; JA ___ - ___; see also 2015:12-2026:3, JA ___ - ___.

¹⁰²Tr. 2045:3-6, JA ___.

Judge Hogan excluded Martin’s memorandum.¹⁰³ Pursuant to Fed. R. Ev. 901, a document is authenticated through its *author* – not any person who received it. The memo was also admissible under Rule 801(d)(1)(B), which permits the admission of a prior consistent statement of a witness to rebut a charge of recent fabrication. This error was particularly egregious since Howard had just admitted the *Cunningham* memo through Ms. Martin.

D. The Trial Court Allowed Howard’s Witnesses to Evade Answers under Cross Examination

Ms. Martin was denied the right to meaningful cross-examination. She Martin was often prohibited from asking leading questions or having them answered.¹⁰⁴ Howard’s witnesses were permitted to make up and answer their own questions, rather than answer the question asked¹⁰⁵ and to ask its own witnesses leading questions.¹⁰⁶ Judge Hogan flatly refused to direct Howard’s witnesses to answer “yes” or “no,” on cross;¹⁰⁷ however, Ms. Martin and her witnesses were repeatedly interrupted or forced to answer only “yes” or “no” even on direct examination.¹⁰⁸ Judge Hogan even rephrased Ms. Martin’s answer to a “yes”¹⁰⁹ and joined in Howard’s cross examination of her.¹¹⁰ Howard also engaged in irrelevant “mudslinging”¹¹¹ often hearsay, with no foundation.¹¹²

¹⁰³ Tr. 2044:21-2047:2, JA ___ - ___.

¹⁰⁴ E.g., Tr. 1386:4-8, JA ___; Tr. 2236:1-2237:25, JA ___ - ___; 1534:9-1535:3; 1563:5-1564:24, JA;

¹⁰⁵ E.g., Tr. 2236:1-2237:25, JA ___ - ___.

¹⁰⁶ E.g., 784:5-811, JA ___ - ___.

¹⁰⁷ Tr. 1386:4-8, JA ___.

¹⁰⁸ Tr. 511:12-19, JA ___.

¹⁰⁹ Tr. 1721:25-1722:11, JA ___ - ___.

¹¹⁰ Tr. 1831:20-1832:18, JA ___.

¹¹¹ Tr. 1699:8-1988:24, JA ___ - ___, 2213:22-2241:12, JA ___ - ___; see also *Pl’s Motion in Limine to Exclude Irrelevant, Unduly Prejudicial Allegations*, #342, JA ___.

¹¹² E.g., Tr. 213:11-13, JA ___; 1090:7-1194:2, JA ___ - ___; 1190:7-1194:2, JA ___ - ___.

E. The Trial Court Repeatedly Erred in Hearsay Rulings

Fed. R. 803 defines hearsay and Rule 804 provides exceptions to the hearsay rule. The court repeatedly violated these rules by improperly construing testimony by Ms. Martin's witnesses, as well as documents that she offered, as hearsay,¹¹³ while improperly admitting clear hearsay offered by Howard.¹¹⁴ Howard also tried to impeach Ms. Martin by questioning her about documents to which she had no connection and which were authored by witnesses who had testified and left.¹¹⁵

F. The Trial Court Abused its Discretion by Requiring Ms. Martin to Talk to herself on the Witness Stand and about herself in the Third Person

Once Ms. Martin was *pro se*, at Howard's behest,¹¹⁶ Judge Hogan required Ms. Martin to *ask herself questions on the stand*¹¹⁷ and to *talk about herself in the third person*,¹¹⁸ making her appear ridiculous to the jury. Courts have noted when litigants speak of themselves "in the third person," indicating that the person is not rational or well grounded in reality. *See, e.g., Soto v. Runnels*, 2006 WL 183706 *7, fn.5 (E.D.Cal. 2006); *People v. Hill*, 732 Ill.App.3d 691 (Ill.App. 1999); *Howard v. State*, 697 So.2d 415 (Miss., 1997); *State v. Johnson*, 551 N.W.2d 742 (Neb.App., 1996). One court even called it "*jarring*." 2006 WL 183706 *7, fn.5.

¹¹³E.g. Tr.1669:9-1671:12, JA__ ; Tr. 191:1-192:21, JA__ ; # 490 at 2:4-5:1, JA__ -__ ; 517:2-518:2, JA__ -__ ; 517:2-518:2, JA__ -__ ; 187:10-190:9, JA__ -__ ; 195:21-196:25, JA__ -__ ; 269:2-271:7, JA__ -__ ; 318:4-7, JA__

¹¹⁴E.g., testimony of Bullock, JA__ -__ ; Taslitz, JA__ , Gavil, JA__ -__ and Newsom.

¹¹⁵Tr. 1872:17-1889:10, JA__ -__

¹¹⁶Tr. 2207:24-2208:6, JA__ -__

¹¹⁷Tr. 2246:9-2251:9, JA__ -__.

¹¹⁸2200:1-12, JA__ ; 2207:23-2708:6, JA__ -__ ; 2196:3-12, JA__ ; Tr. 2246:4-6, JA__ , 2248:22--2249:6, JA__ -__ ; 2249:25-2250:9, JA__ -__ ; 2224:20-2241:12, JA__ -__ .

Ms. Martin's cross examination of Prof. Gavil was "jarring."¹¹⁹ She had to ask him questions referring to *herself* as "Prof. Martin." Gavil responded to her as "you," since *he* was not required to speak of her in the third person, so that the exchange was incongruous.

Ms. Martin's direct examination of herself was *comical*. The *spectacle* of a person talking to herself conjures up concepts of mental instability. It distracted the jury from the substance and seriousness of Ms. Martin's testimony, damaging her credibility. This spectacle provided "demonstrative" evidence of Howard's otherwise unsupported allegation of "bad judgment" and inflamed the jury's sensibilities, in violation of Fed. R. Ev. 403 and 404.

G. The Trial Court Improperly Cut Off Ms. Martin's Closing Argument, but Allowed Howard's Counsel to "Pander" to the Jury regarding Irrelevant Matters

Judge Hogan sustained a meritless objection during Ms. Martin's closing argument, *leaving her closing unfinished* with approximately eight allotted minutes unused, and told the jury that what she was saying was "irrelevant."¹²⁰

In contrast, Howard's attorneys were free to "preach" about irrelevant matters, including Thurgood Marshall, Charles Hamilton Houston and the war in Iraq,¹²¹ This pandering was apparently intended to convince the jury that it would thwart civil rights or would be *downright Un-American* to return a verdict against Howard, *irrespective* of the evidence.

¹¹⁹ Tr. 2224:20-2241:12, JA ___ - ___

¹²⁰ Tr. 2529:14-2530:6, JA ___ - ___.

¹²¹ E.g., Tr. 36:23-39:25, JA ___ - ___; 42:20-43:6, JA ___ - ___; Tr. 1734:1735:9, JA ___ - ___

H. The Court's Comments and Jury Instructions Unfairly Damaged Ms. Martin's Credibility

Judge Hogan pressured Ms. Martin's second counsel, Ms. Taylor, to exclude a material document from evidence, forcing Ms. Martin to argue with her own counsel and Judge Hogan, from the witness stand to get it admitted.¹²²

Judge Hogan ridiculed Ms. Taylor¹²³ and even refused to grant her a recess to use the ladies' room, saying that she could leave, but the trial would continue in her absence.¹²⁴ Since Ms. Martin would have been left without counsel in the midst of being cross examined, she asked whether she could make her own objections from the stand.¹²⁵ Judge Hogan quipped, "You've been doing it anyway,"¹²⁶ causing the jurors to laugh. Mr. Schwalb even told jurors that Ms. Martin was improperly "coaching" witnesses¹²⁷ and her attorney.¹²⁸

On April 25, 2006, Judge Hogan threatened to dismiss Ms. Martin's case if she did not arrive within ten minutes.¹²⁹ Ms. Martin was twenty minutes late for trial on *one day* of the three and a half week trial, due to a misunderstanding about the arrival time, in the havoc of the release of Ms. Taylor, the previous day.¹³⁰

¹²² Tr. 2009:25-2011:23, 2036:14-2041:19, JA __ - __, JA __ - __. See fn. 60.

¹²³ E.g., 1854:24-1855:1, JA __ - __.

¹²⁴ Tr. 1895:9-16, JA __.

¹²⁵ Tr. 1895:17-18, JA __.

¹²⁶ This comment is not recorded in the transcript. See fn. 2.

¹²⁷ E.g., Tr.2466:6-17, JA __ - __. There was no basis for this accusation.

¹²⁸ 2466:6-17, JA __ - __; Tr.1895:2-6, JA __ Ms. Martin never withdrew as her own counsel. Judge Hogan was well aware that she *needed* to coach Ms. Taylor since she arrived in the middle of trial to take over for Mr. Otey; yet, Judge Hogan did not instruct the jury that such "coaching" was not improper.

¹²⁹ Tr. 2191:15-16, JA __ - __ Contrast with fn. 136.

¹³⁰ Tr. 2192:1-21, JA __.

Judge Hogan told the jury that Ms. Martin had fired two lawyers during the trial¹³¹ – a claim that he repeated in his published October 4, 2006 decision.¹³² Although he indicated that the instruction was for Ms. Martin’s benefit, it was *Howard* that requested it --over Ms. Martin’s vehement objection.¹³³ Howard did not want jurors to have “sympathy” for Ms. Martin or believe that she had been “abandoned” by her attorneys;¹³⁴ but that is precisely what happened.¹³⁵

To call the trial a sad “circus” and/or “a travesty of justice” would be a grossly understated cliché. The bizarre circumstances of this trial merit a new one – before a different judge.

X. The Trial Court Erred by Withholding Mandatory Rule 37(A) Sanctions against Howard by Leaving the Issue Forever in “Abeyance”

In *Cobell v. Norton*, 213 F.R.D. 16, 28 (D.D.C. 2003), this court held:

The mandatory language of the Rule dictates that the Court must require the party ... to reimburse the moving party for reasonable expenses incurred in making the motion to compel, unless the Court finds that one of the specified conditions for not making an award exists.

The purposes of Rule 37(a)(4)(A) sanctions are to deter future misconduct and compensate the victimized party for the resources expended to obtain the discovery. On June 18, 2002, in response to Howard’s repeated violations of his orders to produce discovery, MJ Facciola ordered Howard to show cause why it should not be precluding “from presenting a defense altogether,” warning that continued violations of his

¹³¹ Tr. 2397:11-17, JA ___

¹³² 2006 WL 2850656 at *1, fn. 1, JA ___

¹³³ Tr. 2278:17-2279:15, JA ___ - ___

¹³⁴ 2208:#-2209:11, JA ___ - ___

¹³⁵ Mr. Otey quit, under pressure from “lawyers all over town,” urging him to withdraw. *Pl’s Motion for an Extension of the 25 Hour Time Limitation to Complete Trial*, #432, at 8-12, JA ___ - ___; Tr. 1109:77-1138:5, JA ___ - ___. Ms. Taylor was not competent to continue with the trial due to health issues. Tr. 2164:12-23, JA ___ - ___; 2183:7-2186:8, JA ___ - ___; 2195:4-2209:3, JA ___ - ___.

discovery orders would result in serious sanctions.

204 F. Supp. 2d 1, 1-3 (D.D.C. 2002), #221, JA ___ - ___.

Despite MJ Facciola's harsh words for Howard, he never ordered any sanctions against Howard.¹³⁶ Ms. Martin repeatedly implored the Court to take this issue out of abeyance, but the court held it in "limbo" for years and then *closed the case without ever deciding it*.

Howard's thwarting of discovery cost Plaintiff her May 1, 2001 trial date, caused her to expend more than \$364,120.00 in attorney time attempting to obtain discovery that she timely requested in 1999 – much of which *Howard still has never produced*.¹³⁷ This injustice needs – finally -- to be remedied.

XI. The Trial Court Erred by Taxing Howard's Litigation Costs to Plaintiff

The trial court ordered Ms. Martin to pay *Howard's costs of litigation*. Howard submitted a *Bill of Costs* totaling \$ 11,448.80. Ms. Martin filed an *Opposition to Howard's Bill of Costs*,¹³⁸ citing Supreme Court law characterizing the Title VII plaintiff as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest

¹³⁶ Howard's repeated misconduct was so severe and prejudicial that a default judgment would have been an appropriate sanction. *But see* Pl's August 2, 2001 *Motion for a Default Judgment against Howard University and Alice Gresham Bullock for Defendants' Production of Late, Incomplete and Falsified/Tainted Evidence* (#143) and cases relied on therein; *see also Oliver v. Mustafa*, 2007 WL 2436762 (D.C. App. 2007) (default judgment upheld). *Contrast* with fn. 129, regarding Judge Hogan's threat to dismiss Ms. Martin's case.

¹³⁷ Pl's *Motion for Leave to File Motion to Increase \$1,000 Contempt Sanction on Defendant Howard University and Other Relief* (#236), at 13-15, JA ___ - ___; *Pl's Assessment of Discovery Produced*, #510-8, JA ___.

¹³⁸ #510, JA ___

priority.”” *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 418 (1978).¹³⁹

In *County of Suffolk v. Secretary*, 76 F.R.D. 469 (E.D.N.Y. 1977), the court set forth factors to be considered when determining whether costs should be awarded in public law litigation. Judge Hogan refused to consider these factors, holding that the arguments were not “appropriate” for an *Opposition* (#514). This matter is now in abeyance, pending this appeal (#536).¹⁴⁰

To penalize Ms. Martin by forcing her to pay the litigation costs for the mammoth Howard University, is unconscionable. It is contrary to the case law, equity and public policy.

CONCLUSION

Ms. Martin respectfully asks this court to vacate the jury verdict and MJ Facciola’s October 2003 *Report and Recommendation*. She further requests judgment on her claims, reinstatement, as a tenured, full professor, with back pay (including benefits and sabbatical), and remand for a trial on compensatory and punitive damages. Finally, Ms. Martin requests that this Court order Howard to immediately pay \$364,120.00, pursuant to Rule 37(A), for its discovery violations.

Respectfully Submitted,



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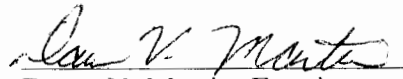
¹³⁹ *Accord, Evans v. American Import Merchants Corp.*, 82 F.R.D. 710 (S.D.N.Y. 1970) and *Dual v. Cleland*, 79 F.R.D. 696, 697 (D.C.1978). These courts were unwilling to “chill” the pursuit of the objectives of Title VII.

¹⁴⁰ #510, JA__

CERTIFICATE OF COMPLIANCE WITH FED. R. App. P. 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This reply brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,993 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14 point Times New Roman font.


Dawn V. Martin, Esquire
Appellant

Dated: September 18, 2007

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

....

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

...

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

...

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

A. District of Columbia Statute Prohibiting Sexual Harassment and Age Discrimination

The D.C. Human Rights Act, D.C. Code, § 2-1402.11 provides, in pertinent part:

(a) General. -- It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, disability, matriculation, or political affiliation of any individual:

(1) By an employer. -- To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Dawn V. Martin,)	
Appellant,)	
v.)	Appeal No. 04-5417
Howard University,)	
Howard University Law School)	
and Alice Gresham-Bullock)	
Appellees.)	

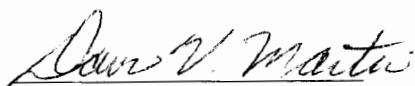
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 18th day of September, 2007, a true copy of *Appellant's Brief* was mailed, *via* first class mail, to:

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