

Record No. 06-7157

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FOR THE D.C. CIRCUIT

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**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)**

**MOTION OF THE NATIONAL ASSOCIATION OF WOMEN LAWYERS'  
TO SUBMIT ON AMICUS BRIEF ON BEHALF OF APPELLANT,  
DAWN V. MARTIN**

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## **I. Issues on Appeal**

Dawn V. Martin, an attorney, appeals to this Court to reverse the District Court's rulings that resulted in the August 21, 2006 judgment for Howard University, on her claims of sexual harassment and retaliation, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.* and the D.C. Human Rights Act, as well as breach of contract.<sup>1</sup> *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), *reversed in part* 2003 U.S. Dist. LEXIS 18501, *reversed in part* 2006 WL 2850656, provides NAWL with an opportunity to address several important issues of sexual harassment/workplace violence, stalking, discrimination and retaliation issues in employment.<sup>2</sup>

Prof. Martin was sexually harassed in her workplace by a serial stalker, based on "gender profiling," or harassment on the basis of gender.<sup>3</sup>

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<sup>1</sup> Ms. Martin also appeals the 1999 dismissal of her claim of intentional infliction of emotional distress against former Law School Dean, Alice Gresham-Bullock, in both her official and individual capacities.

<sup>2</sup> Legal commentators recognizing the importance of this case include: 1) **Fair Employment Practice Reporter**, 81 FEP Cases (BNA) 964 (D.C. D.C. 1999); 2) **Individual Employee Rights Reporter**, 15 IER Cases 1587 (BNA) (D.C. D.C. 1999); 3) **EEOC Newsletter**, January 2000; 4) **BNA Daily Labor Report**, ISSN 0418-2693, January 11, 2000; 5) **Daily Labor Reporter**, ISSN 1043-5506, January 17, 2000; 6) 3-46 Larson on Employment Discrimination @46.05n.127; 7) 3-46 Larson on Employment Discrimination @46.034 n.62; 8) **The Twenty-Fourth Annual Law Review Symposium: Sexual Harassment in the Workplace: Fifteen Years after Meritor Savings Bank: Symposium Article: Have We Come Full Circle?** 27 Ohio N.U.L. Rev 439 (2001); 9) 5 No. 12 **Andrews Sex. Harassment Litig. Rep.** 5 (February 2000); 10) **WOL A.M. radio**, May of 2000; 11) **WPFW, F.M. radio**, June of 2000; 12) Holland and Knight, P.C. <http://www.hklaw.com/newsletters.asp?ID=95&Article=467>; 13) Lawroom, [www.lawroom.com/download/CR005.pdf](http://www.lawroom.com/download/CR005.pdf); 14) Venable Bates, P.C., <http://www.venable.com/newsletters/wlu/2003/newsltr1.pdf> (law firm now representing Howard University warned other universities not to act as Howard did) 15) <http://www.ncbl.com/archive/02-00labor.html>; 16) Hand Arendall, P.C. <http://www.handarendall.com/0400NLRev.htm>; 17) <http://www.michbar.org/publications/labor2000.html>; 18) College Publications, [www.collegepubs.com/ref/SfxNdx35.shtml](http://www.collegepubs.com/ref/SfxNdx35.shtml); 19) Presentation before American Association of University Professors, <http://www.cg2consulting.com/AAUP-Presentation.html>; 21) National Association of College and University Attorneys Annual Meeting, June 2006, "Keeping the Bad Ones Out and the Good Ones Safe," [nacua.org/meetings/VirtualSeminars/June2006/Documents/02I Lannon.DOC](http://nacua.org/meetings/VirtualSeminars/June2006/Documents/02I Lannon.DOC); *Mitchell v. AMTRAK*, 407 F. Supp. 2d 213, 218 (D.D.C. 2005); *Coles v. Kelly Servs.*, 287 F. Supp. 2d 25 (D.D.C. 2003).

<sup>3</sup> "Gender profiling" has been recognized in the context of police harassment (*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)). "Gender profiling" has also been recognized in a class action Customs Inspections case, *Anderson v. Cornejo*, 225 F.Supp.2d

## **II. Parties' Consent and Opposition to Amicus Participation**

Pursuant to the Fed. Rules App. Proc. R. 32, the National Association of Women Lawyers (NAWL) respectfully moves this Court to allow it to file an *Amicus Curiae* brief in support of Appellant, Dawn V. Martin, Esquire. Ms. Martin consents to the motion. Appellees, Howard University and Alice Gresham-Bullock, Esquire, have stated their intent to file an Opposition to (NAWL) *amicus* participation (*see* Exhibits A and B).

## **III. The National Association of Women Lawyers (NAWL)'s Interests in Martin v. Howard University**

The *National Association of Women Lawyers* (NAWL) consists primarily of women attorneys working to end discrimination and violence against women. NAWL also provides input to legislators, policymakers and the media with information about laws regarding women's rights including. NAWL members serve as delegates and liaisons to national and international organizations, including: the *ABA Commission on Women in the Profession*, the United Nations, the *National Conference of Women's Bar Associations* and *La Federation Internationale des Femmes Carrieres Juridiques*.

### **A. NAWL's Amicus Participation in Cases Affecting Women's Issues**

Since 2004, NAWL has authored or signed onto briefs in the following cases.

- *Kelly A. Ayotte v. Planned Parenthood of Northern New England, et al.*, 546 U.S. 320 (2006). This case involved a challenge to a New Hampshire statute requiring that the parents of a girl seeking an abortion must be given at least 48 hours advance notice of their minor daughter's intention to have an abortion. NAWL joined 31 other organizations in arguing that the Court should strike down the New Hampshire statute as unconstitutional because it fails to include an exception to protect the health of the mother. NAWL also argued that the standard of review for cases on the right to privacy and woman's right to choose should be the "undue burden" standard articulated in *Casey* rather than the weaker standard articulated in non-abortion cases, which allows a statute to stand if there is any reading of the statute that would render it constitutional. The First Circuit had ruled that the law was unconstitutional and an injunction against its enforcement was proper. The Supreme Court vacated this judgment and remanded the case, but avoided a substantive ruling on the challenged law or a reconsideration of prior Supreme Court abortion precedent. Instead, the Court only addressed the issue of remedy, holding that invalidating a statute in its entirety "is not

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

"always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief."

- *Roderick Jackson v. Birmingham Board of Education*, No. 02-1672 (U.S. Sup. Ct.) *Amici Curiae* Brief of the National Partnership for Women & Families and 31 Other Organizations and Individuals in Support of Petitioner, filed August 19, 2004. NAWL was one of the 31 other organizations. The court ruled in favor of the petitioner, as advocated by NAWL and other *amici*. Petitioner Roderick Jackson, a coach of a girls' high school team, was fired when he complained that the girls' basketball team he coached received unequal treatment. He complained to supervisors that the girls' team did not receive funding or access to athletic equipment or facilities equal to that provided to the boys. Mr. Jackson then began receiving negative evaluations and eventually lost his coaching job. The trial court dismissed Mr. Jackson's complaint, and the United States Court of Appeals for the Eleventh Circuit affirmed, finding no language in Title IX explicitly banning retaliation. NAWL joined an *amicus curiae* brief supporting Coach Jackson's position in the United States Supreme Court. NAWL argued that protection from retaliation is a necessary component of the protections promised by Title IX. The Supreme Court agreed, in a decision entered March 29, 2005, 125 S. Ct. 1497 (2005).
- *Gantt v. Security, USA, Inc.*, *Gantt v. Security USA*, 356 F. 3d 547 (4<sup>th</sup> Cir. 2004), *cert. denied*, 543 U.S. 814 (2004) *Motion for Leave to File Amicus Curiae Brief Out of Time*; and *Brief Amici Curiae* the Friends of Dominique K. Gantt in Support of Petitioner, filed September 24, 2004. NAWL, joined by five other public interest organizations, drafted and filed, as first *amicus*, an *amicus* brief on behalf of the Petitioner, Dominique Gantt, when she petitioned the United States Supreme Court for *certiorari* in a workplace violence/stalking case that stemmed from a domestic violence case.

Dominique Gantt had obtained an Order for Protection against her ex-boyfriend, Gary Sheppard because he had assaulted her, harassed her in attempts to re-establish their sexual relationship, and threatened her life. The restraining order was issued to protect and otherwise prevent Sheppard from having any contact with Gantt, at her home, place of employment or any other place. The Order for Protection specifically ordered that Sheppard "stay away from" Gantt's place of employment, as well her home and not to communicate with her by telephone or in any other manner.

Gantt provided her employer with a copy of the Order for Protection for the purpose of putting her employer, Security USA, Inc. ("Security USA"), on notice of Sheppard's threatened harassment and threats of bodily harm to her in the workplace. Security USA contracted with the United States government to provide security in federal buildings in various regions of the United States, including an Internal Revenue Service office building owned and operated by the United States Government located in Maryland, the site where Gantt was employed.

Security USA supervisors notified all personnel that Gantt was not to be assigned to an outside post due to the threat posed by Sheppard. Despite this order and the knowledge of the Order of Protection, a supervisor who worked with Sheppard at another security company and who was also friends with Sheppard arranged for Sheppard to have access to Gantt at the workplace, using her authority as a supervisor to ensure the contact took place. As a result of this access, Sheppard assaulted, kidnapped, raped, and tortured Gantt. Further, while Sheppard forcibly removed Gantt from the Security USA worksite, Security USA supervisors and employees did nothing.

As a result of the abduction and rape, Gantt experienced recurring nightmares, physical anxiety attacks and other physical and mental health issues. Gantt filed both constitutional and statutory claims against Security USA due to the above actions.

The lower court granted summary judgment to Security USA on all of Gantt's claims. A divided three-judge panel of the United States Circuit Court of Appeals for the Fourth Circuit concluded that Gantt's supervisor's intentional acts were an exception to the Maryland Workers' Compensation Act thus allowing Security USA to be held liable. However, the Court of Appeals limited that liability to the emotional distress suffered by Gantt while she was waiting in fear at the guard booth. The Fourth Circuit also ruled that the abduction and rape did not fall under the "intent to injure" exception of the Act, since the supervisor did not specifically intend for Gantt to be kidnapped and raped. Finally, the Fourth Circuit held that Gantt's Fourteenth Amendment equal protection clause claim failed because Gantt raised only a Fifth Amendment equal protection clause claim in the lower court and Gantt did not provide sufficient evidence that Security USA was a "state actor." NAWL drafted and joined in an amicus curiae brief supporting Gantt's position, but addressed only the narrow issue of whether Security USA could be held liable for the supervisor's actions, applying well-recognized principles of employer liability for sexual harassment of an employee by a non-employee under Title VII.

NAWL argued that Security USA unquestionably knew (or should have known) of the strong likelihood that Gantt would be the victim of such a shocking assault. Gantt herself informed Respondent of the protective order and of her fears about Sheppard. Gantt's supervisor who arranged Sheppard's access to Gantt knew of the protective order and knew the harm Sheppard was capable of inflicting. Despite this clear knowledge, Gantt was affirmatively placed in a situation where she was accessible to Sheppard through the affirmative acts of her own supervisor.

The Supreme Court ultimately denied *certiorari*, and the case returned to the trial court for a jury trial on the remaining issue in the case. In February 2005, a jury returned a \$2.25 million verdict in Gantt's favor for the fear that Gantt suffered prior to the attack, the sole issue on remand. The jury had not been informed of Gantt's rape or abduction as a result of the Fourth Circuit's decision.

- *Town of Castle Rock, Colorado v. Jessica Gonzales*, No. 04-278 (U.S. Sup. Ct.) Brief *Amici Curiae* of the *National Association of Women Lawyers* and the *National Crime Victim Bar Association* in Support of Respondent, filed February 10, 2005. NAWL listed as first *amicus*.

This case involved the tragic death of Jessica Gonzales's three daughters who were murdered by Mrs. Gonzales's estranged husband. Mrs. Gonzales sued the Town of Castle Rock under 42 U.S.C. § 1983 for failing to enforce a protection order against Mr. Gonzales; Mrs. Gonzales asserted a property interest in the protection order under a Colorado statute mandating enforcement of such orders entered to protect victims of domestic violence. The United States Court of Appeals for the Tenth Circuit found that Mrs. Gonzales had an enforceable property interest in the Order and, thus, the Town's failure to enforce the protection order gave her a cause of action under § 1983. The Town appealed, and the United States Supreme Court granted *certiorari*.

NAWL submitted a brief supporting Mrs. Gonzales's right to sue in federal court, in part because of the lack of an effective tort remedy against certain Defendant-Appellants, given Colorado's potentially broad immunity for state entities. NAWL argued, "The failure by police to undertake the enforcement promised by mandatory arrest statutes inevitably compounds the magnitude of

domestic violence and helps ensure its repetition. The costs of this violence are real and manifold." NAWL pointed to the state's failure to provide the procedural due process guaranteed by the United States Constitution when Castle Rock police failed to act in response to Mrs. Gonzales's repeated entreaties to enforce the protection order against her estranged husband on the afternoon, evening, and night – that Mr. Gonzales absconded with the children in violation of the Order. Among other things, "the police could have provided Respondent with an informal 'hearing'" to determine whether her husband was in violation of the Order. NAWL cited a 1972 Supreme Court case holding that "no later hearing and no damage award can undo the fact that [an action] that was subject to the right of procedural due process has already occurred. This Court has not embraced the general proposition that a wrong may be done if it may be undone."

In a *National Law Journal* article, NAWL counsel and *Amicus* Chair Lorelie S. Masters stated that "people feel very strongly that the system is not working for women." She explained that civil remedies for deprivation of one's protected property interest without due process, like the one Ms. Gonzales is seeking, is "a way historically to provide a remedy for situations where violence was continuing in states because local legal regimes were not doing their jobs." The Supreme Court rejected Mrs. Gonzales's position, 7-2.

- *Shawna J. Hughes v. Carlos A. Hughes and State of Washington*, No. 236137 (Wash. Ct. of Appeals) – *Amicus* Brief of the National Network to End Domestic Violence, National Advocates for Pregnant Women, Legal Momentum, and the National Association of Women Lawyers, filed March 31, 2005. NAWL is listed as third *amicus*. The trial court had ruled, in accordance with a state statute, that a pregnant woman could not divorce her husband or obtain an order of protection against her husband, until after the birth of their child. This ruling subjected the pregnant, already particularly vulnerable to abuse, to being battered during her pregnancy, placing both her life and the life of her unborn child in jeopardy.
- *Sandra and Roberta Cote-Whiteacre, et al v. Massachusetts Department of Public Health, et al.*, No. SJC (MA) 9436, filed March 11, 2005. NAWL was one of thirty-seven signatories forbidding same-sex marriages.
- *Muhamud v. Muhhamud* (Supreme Court of Washington State), filed February 23, 2004. NAWL was one of several *amici* joining Ms. Muhamud in challenging the trial court's holding that she was not entitled to marital property because she obtained a protective order against her husband that served as the basis for his termination from his employment as a law enforcement officer.

#### **B. NAWL's Previous *Amicus* Support Specifically for Victims of Workplace Violence/Sexual Harassment**

Domestic Violence does not stop at the front door of the victim's home. The abuser sometimes attacks the victim in other places, particularly her workplace. In fact, where the victim has left the home,

her workplace may be the easiest place for the abuser to find her and to gain access to her.<sup>4</sup> As NAWL wrote in its *amicus* brief in *Gantt*, at 8-9, fn 9:

... even when “conduct that affects both sexes may constitute sexual harassment if [the conduct] disproportionately affects [women].” *Turnbull*, 255 F.3d at 1244; *see also Crist v. Focus Homes*, 122 F.3d 1107, 1111 (8<sup>th</sup> cir. 1997) (“[It may be argued that [the harasser] had no intent to target women, but a finding that his conduct disproportionately affected female staff could support a determination that the harassment was based on sex.” *Ellison v. Brady*, 924 F.2d 872, 879 (9<sup>th</sup> Cir. 1991) (“Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.”))

Statistics on workforce violence clearly demonstrate that women are in fact disproportionately affected by rape and sexual assault in the workplace. For example, the National Crime Victimization Survey on Violence in the Workplace conducted by the Bureau of Justice Statistics, in the Office of Justice Programs, U.S. Department of Justice, reveals that the victims of 80% of all rapes and sexual assaults in the workplace 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](http://www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf).

Where a woman is stalked in her workplace, the disparate impact analysis should be applied to hold that the harassment is based on sex.<sup>5</sup> *Martin* will help define an employer’s legal duty to take preventative measures when on notice of potential danger to a woman in her workplace.<sup>6</sup>

In *Gantt*, NAWL also argued that the regulations of the United States Equal Employment Opportunity Commission (EEOC), 29 C.F.R. § 1604.11(e), adopted by several Circuit and numerous district courts, including the U.S. District Court for the District of Columbia, in Judge Hogan’s 1999 decision in the present case, *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), required the employer to take reasonable steps to prevent workplace sexual harassment and violence against the

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<sup>5</sup> Statistics compiled by the U.S. Department of Justice reflect that women are, in fact, disproportionately affected by workplace violence, such as sexual assault and stalking. 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](http://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](http://www.doc.sc.gov/VictimServices/WorkplaceStalking.doc).

<sup>6</sup> Men may also become “collateral damage” in workplace violence directed at women.

plaintiff. Since this issue is now before the U.S. Circuit Court for the District of Columbia, and may either set or change controlling precedent for the District of Columbia, as well as serve as instructive case law in other jurisdictions, NAWL has a vested interest in its outcome.

If not reversed, *Martin* will stand as precedent forcing a woman who is stalked at work to choose between her safety and her job. If she complains or asks for protection, she can be fired, without remedy.<sup>7</sup> In 1999, Judge Hogan adopted the EEOC Regulation, 29 C.F.R. § 1604.11(e), 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. 1999 U.S. Dist. LEXIS 19516. Howard argued that it could not be held liable for the harassment of an employee by a non-employee. Howard's position, if continued on appeal, jeopardizes the precedent set by Judge Hogan in 1999. The present case will add to this body of law, determining whether the employer took reasonable measures to stop the harassment where the harasser was a non-employee.<sup>8</sup>

There are additional issues regarding the definition of sexual harassment and sex discrimination and the definition of "protected activity," within the meaning of Title VII,<sup>9</sup> that are at issue in this case.

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<sup>7</sup> Although Harrison's harassment was motivated by "gender profiling," harassment could just as easily be based on racial profiling, or on the basis of national origin, color, religion, age or disability. A harasser could be obsessed with Dr. Martin Luther King and harass on African-American males; Mahatma Gandhi and profile Indian men, Helen Keller and profile blind, White women, or Fidel Castro and profile Hispanic men. Where the person targeted for harassment is a member of a discreet minority group, the employer majority member supervisors, not profiled, or personally threatened by the harasser, may callously refuse or fail to act to protect the person targeted. Title VII application is necessary to protect against such discriminatory profiling, on any protected basis.

<sup>8</sup> The EEOC has filed against a home health care company, where the company was on notice of sexual and racial harassment prior to sending African-American women health care workers to care for a dangerous patient. *EEOC and Childrey v. Spectrum Health Worth Home Care, Inc.*, No. 1:05-CV-466 (D.D. Mich. 2005). The patient eventually raped the plaintiff. The decision that this Court issues in *Martin* will help further develop the body of law that will be relied upon in *Spectrum*.

<sup>9</sup> Citing case law and Judge Hogan's own 1999 decision, Ms. Martin asked the court to instruct the jury that it is not necessary for a plaintiff to use the words "sexual harassment" or any other "magic words" in order to invoke Title VII protections. Trial Tr. 2282:2-2283:12, 2288:5-8, 2288:15-2298:1. Judge Hogan included the "no magic words" language, but refused to explain that phrase by telling the jury that it was not necessary to use the precise words "sexual harassment." Trial Trans. 2401:3-7. Throughout the trial, and in its closing (Trial Tr. 2459:13-16; 2502:16-24), Howard argued that Howard was not on notice that Prof. Martin was making a claim that constituted sexual harassment because she did not use the words

For example, in his October 4, 2006 decision, Judge Hogan justified the jury's finding that Harrison's harassment was not "sexual in nature" or "based on sex" because "[t]he 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." (Emphasis added) 2006 WL 2850656 at \* 4 (D.D.C. 2006). If the October 4, 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. This would be a major step backward for a woman's right to work free from sexual harassment.

### **C. NAWL'S Previous Amicus Support Actionable Retaliation under Title VII**

NAWL was also an *amicus* participant in *Burlington Northern v. White*, 548 U.S. \_\_\_, 126 S. Ct. 2405 (2006), along with twelve other women's advocate's groups that signed onto the *amicus* brief filed by *The National Women's Law Center*. In June of 2006, after the trial in this case, the Supreme Court decided *Burlington Northern v. White*, 126 S. Ct. 2405. The Supreme Court held that a suspension could constitute actionable retaliation under Title VII. *Burlington* held: "...the proper formulation requires a retaliation plaintiff to show that the challenged action 'well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 126 S. Ct. at 2410.

... Title VII's substantive provision and its anti-retaliation provision are not coterminous. The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards applied in the Courts of Appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provision and that have limited actionable retaliation to so-called "ultimate employment decisions."

126 S. Ct. at 2414.

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"sexual harassment," but used the word "stalking." Throughout the trial, Howard stressed that Prof. Martin's written complaints regarding Harrison were characterized as "stalking," as they had been characterized by the D.C. Metropolitan Police Department, in its criminal complaint. Ms. Martin also asked the Court to include the criminal definition of stalking in the instructions to the jury so that the jury would understand that, by definition, "stalking" is severe harassment. Judge Hogan refused to provide the jury with this definition. (Trial Tr.2279:18-2281:21, 2398:11-12).

Ms. Martin alleged that Dean Alice Gresham-Bullock cancelled, withdrew and/or concealed several vacant and advertised faculty positions in order to remove her from the faculty because she asked for reasonable steps to be taken to stop a delusional, serial stalker roaming in her workplace, from pursuing her to be his "wife." In 1999, Judge Hogan sustained these retaliation claims, holding that they could proceed to trial. 999 U.S. Dist. LEXIS 19516. On October 20, 2003, however, Magistrate Facciola, *sua sponte*, 2003 U.S. Dist. LEXIS 18501 at \* 31-32 (D.D.C. 2003) (Docket # 307),<sup>10</sup> actually reversed Judge Hogan's 1999 decision, in part, dismissing 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. They lack a direct and immediate impact upon Martin that would permit them to be characterized as causing objectively tangible harm. While these acts ultimately led, in Martin's view, to her departure from HU despite her desire to stay in any faculty position, they did not in themselves cause her any harm cognizable as retaliatory....

Title VII applies only to ultimate employment decisions such as hiring or discharging.... (Emphasis added)<sup>11</sup>

Even before *Burlington*, there was a stream of cases flowing from the D.C. Circuit clarifying, expanding and re-evaluating the definition of "adverse action" within the meaning of Title VII -- all of which Plaintiff cited in various motions for reconsideration of MJ Facciola's dismissal of her two strongest retaliation claims. *Holcomb v. Powell*, 433 F.3d 889 at 902 (D.C. Cir. 2006); *Rochon v.*

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<sup>10</sup> Judge Hogan adopted MJ Facciola's *Recommendation*, as the decision of the Court, on September 16, 2005 (Docket # 318), but he modified it on January 4, 2005 (Docket # 377), again on March 30, 2006 (Docket # 422), again on March 31, 2006 (Docket # 424), again at trial (Trial Tr. 2358:15-2359:21, 2354:8-2355:15) and again on October 4, 2006 (2006 WL 2850656, Docket # 504).

<sup>11</sup> Although MJ Facciola purportedly dismissed the claims because he found them not to qualify as a hiring, firing or denial of a promotion, he repeatedly referred to Prof. Martin's non-renewal as a "firing," "termination" and "denial of tenure. 2003 U.S. Dist. LEXIS 18501. Moreover, in *Bowie v. Ashcroft*, 283 F. Supp. 2d 25 (D.D.C. 2003), a month earlier, in direct opposition to that holding, *MJ Facciola* held: "... defendant seems to argue that the cancellation of a job vacancy announcement can never be an adverse action within the meaning of Title VII. However, this Circuit has recognized that no particular type of personnel action [is] automatically excluded from serving as the basis of a cause of action under [Title VII]," citing cases. MJ Facciola did not cite his own *Bowie* decision in *Martin*, nor did he mention other cases cited in *Bowie*, such as *Terry v. Gallegos*, 926 F. Supp. 679, 710 (W.D. Tenn. 1996), concluding that the cancellation or withdrawal of a job vacancy can constitute an adverse action. See discussion in Plaintiff's December 19, 2005, *Opposition to Defendant's Motion in Limine Clarifying that Plaintiff's Retaliation Claim is Limited to Decision not to Hire Plaintiff for EEO/Labor Law Position*, at 16.

*Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006), *Chappelle-Johnson v. Powell*, 440 F.3d 484 (D.C. Cir. 2006); *Mastro v. Potomac Electric Power Company*, 447 F.3d 843, 855 (2006).<sup>12</sup> *Burlington* expressly adopted the standard for proving actionable retaliation set forth by this Court in *Rochon v. Gonzales*, 438 F.3d 1211. 26 S. Ct. at 2411, 2413, 2415. Prior to *Burlington*, this Circuit had already held:

**[a]dverse employment actions are not confined to hirings, firings promotions or other discrete incidents**.... So long as a plaintiff meets the statutory requirement of being “aggrieved” by an employer’s action, 42 U.S. C. § 2000(e-16(c) (2000), we do not categorically reject a particular personnel action as nonadverse simply because it does not fall into a cognizable type.... Although “purely subjective injuries” such as dissatisfaction with a reassignment, public humiliation, or loss of reputation, are not adverse actions, the threshold is met when an employee “experiences materially adverse consequences affecting the terms, conditions, or privileges of employment of future employment such that a reasonable trier of fact could find objectively tangible harm.” (Emphasis added)

*Holcomb v. Powell*, 433 F.3d 889 at 902,<sup>13</sup> quoted in Pl.’s MJRet (Docket # 462) at 14. <sup>14</sup>

In his October 4, 2006 opinion, Judge Hogan dismissed Plaintiff’s arguments as bordering on the “frivolous,” without discussion of their merits, because she had previously raised similar arguments on these issues and lost. Judge Hogan did not address her arguments relying on the new, controlling case law set forth in *Burlington*.<sup>15</sup> If this Court affirms the decision below, dismissing Ms. Martin’s most compelling retaliation claims as non-actionable under Title VII, it would substantially limit, or cut back on, the protections afforded Title VII plaintiffs by *Burlington*, *Holcomb*, *Rochon*, *Chappelle-Johnson* and other applicable cases. NAWL, like the other *amicus* participants in *Burlington*, has a vested interest in preserving the integrity of *Burlington*, redefining and clarifying actionable retaliation under Title VII.<sup>16</sup>

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<sup>12</sup> See also *Mintz v. District of Columbia*, 2006 U.S. Dist. LEXIS 34446 at \*12-13 (D.D.C. 2006) (“unlawful employment practice[s]” include “[d]iscrete acts such as ...failure to promote, denial of transfer, or refusal to hire,” quoting *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Ms. Martin, through her law firm, represented the plaintiffs in *Mintz*. See [www.dvmartinlaw.com](http://www.dvmartinlaw.com).

<sup>13</sup> Although MJ Facciola’s *Report* is inconsistent with *Holcomb*, his decision only a month earlier, in *Bowie v. Ashcroft*, 283 F. Supp. 2d 25 (D.D.C. 2003) was consistent with *Holcomb*.

<sup>14</sup> Ms. Martin’s May 8, 2006 *Motion for Judgment on her Retaliation Claim*, hereinafter “Pl.’s MJ Ret.”

<sup>15</sup> *Burlington* was decided on June 22, 2006 and Plaintiff first cited it in her June 28, 2006 *Reply to Def.’s Opp. to Pl.’s MJRet*. (Docket # 489) Judge Hogan’s October 4, 2006 decision was therefore the first decision he had made on this issue since *Burlington* had been decided.

<sup>16</sup> Circuit courts now have to apply *Burlington Northern v. White*, 126 S. Ct. 2405, to various employer actions. On July 11, 2006, the D.C. Circuit’s neighboring sister Circuit, the U.S. Court of Appeals for the Federal Circuit, decided *Ruggieri v. Merit Systems Protection Board*, 2006 WL 1889897 (Fed. Cir. 2006),

NAWL also concurs in the arguments set forth in the amicus brief filed by *The Lawyers' Committee for Civil Rights under Law, The National Association for the Advancement of Colored People (NAACP)*<sup>17</sup> and the *Puerto Rican Legal Defense and Education Fund, Inc. in Burlington*. All of these amici in *Burlington* recognized the importance of expanding, rather than limiting, the definition of "adverse action" under Title VII.<sup>18</sup>

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involving the retaliation claim of an employee under the "Whistleblower Act" (The False Claims Act). *Ruggieri* held that if an employer cancelled a vacancy, or failed to fill a vacancy, in order to prevent the plaintiff from being appointed to the vacancy, the employer's conduct may constitute actionable retaliation. There is no indication that Congress intended to afford less protection against retaliation to plaintiffs under Title VII than it does to whistleblowers.

<sup>17</sup> As discussed in Plaintiff's *Objection to Magistrate Facciola's October 20, 2003 Report and Recommendation* (Docket # 308) at 4-5, *Pl.'s Reply to Def.'s Response to Pl.'s Objection to MJ Facciola's Report and Recommendation* (Docket # 312) Pl.'s MJRet (Docket # 462) at 12, the conversion and/or elimination of available positions for the sole purpose of refusing to hire a person causes that person an immediate adverse action, and is not an "intermediate" step toward an a possible adverse action. They constituted an immediate rejection for a position through converting/retracting positions that existed and fit Plaintiff's qualifications. If an African-American responded to a "Help Wanted" sign in a window of a store owner who refused to hire African-Americans, and the store owner snatched the sign down and said that no positions were available, this would certainly constitute an actionable, immediate rejection of him for the position. This would be so even if the store owner chose to remain short-staffed, hiring no one, rather than hire the African-American applicant. Similarly, if an African-American applied for a promotion, for which he was the most qualified candidate, and the employer cancelled that vacancy, or left it unfilled, to avoid filling the position with the African-American man, certainly, he should have a cause of action for discrimination. Similarly, the employer could decide not to "renew" or "rehire" the African-American where a written contract is expiring, but there was an expectation of renewal, or rehiring into another available position for which he is well qualified. This non-"renewal" is effectively a termination; yet, under the district court's opinion in this case, he would have no cause of action against his employer, no matter how clear the evidence was that the reason for canceling or failing to fill the vacancy was racial discrimination or retaliation for opposing illegal discrimination.

<sup>18</sup> In its opening statement, rather than summarize the evidence, Howard improperly invoked the name of the late Justice Thurgood Marshall and Howard's "civil rights legacy" and even tied itself to *the war in Iraq* (Trial Tr. 39) to seek a "free pass" for sexual harassment. Equally as offensive, in its closing statement, outside counsel, Brian Schwalb, of Venable, LLP, a nationally known employment discrimination defense firm, accused Ms. Martin of "[play]ing the sexual harassment card"-- even though it is undisputed that she was stalked in her workplace by a delusional, homeless stranger with a criminal record and a history of violence. (The trial transcript, at 2459:17, actually reads "Now, why did she go to the sexual harassment part?" The sentence, as written, does not make logical sense. There is no such thing as a "sexual harassment part." Ms. Martin quoted Ms. Schwalb's sexual harassment card" comment in her May 8, 2006 *Motion for Judgment on her Sexual Harassment Claim*, at 5, 15; Ms. Martin's May 23, 2006 *Opp to Def's MJSH*, at 16. Howard has never denied that Mr. Shwalb made this statement. The author has confirmed with persons who attended the trial that Mr. Shwalb did make this statement. The transcripts contain many obvious errors. See Ms. Martin's March 19, 2007 *Transcript Status Report, Regarding*

#### **IV. Facts Forming the Basis of Ms. Martin's Claims**

##### **A. Facts Forming the Basis of Ms. Martin's Sexual Harassment Claim**<sup>19</sup>

The Plaintiff, Dawn V. Martin, Esquire, was a law professor at Howard University from July 1996 through June 1998. It is undisputed that Prof. Martin was stalked on campus by a delusional, homeless stranger with a criminal record, Leonard Harrison, who was using the law school library. *Pl. 's MSJ* at 9-10, *Facts* ¶ 28-39, 62; *Pl. 's MJSH* at 3-7,<sup>20</sup> Docket # 461. Harrison stated that he was pursuing Prof. Martin to be his "wife." *Id.* According to the information in Harrison's letters to Prof. Martin, Harrison had been targeting African-American female professors since the mid-1980s, claiming that he was searching for his "natural wife." *Id.* Harrison described this "wife" as the physical embodiment of a fictitious female character, Geneva Crenshaw, in a book, written by NYU professor, Derrick Bell.<sup>21</sup> *Id.* Prof. Martin immediately turned over Harrison's letters to Howard's administration, as each one arrived. *Pl. 's MSJ* at 9-10; *Facts* ¶ 34, 63. Prof. Martin asked the administration to assist her with calling the police, but Associate Dean Newsom, acting in the absence of Dean Bullock, told her that it was up to her

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##### *Missing Direct Testimony and Transcript Errors.*

Howard's position is antithetical to its history of civil rights, the legacy of Thurgood Marshall and even the interests of its own graduates. See discussion in *Pl. 's Motion for Judgment on her Retaliation Claims* ("Pl.'s MJRet.," Docket # 462) at 5, fn. 1. Ironically, if Ms. Martin prevails, preserving, rather than retracting, the definition of actionable retaliation under Title VII to include the withholding and conversion of vacancies, Howard, its legacy, its graduates and its students will indirectly benefit from it. Howard's own graduates will be able to rely on *Martin v. Howard University* for protection against such adverse actions if they are based on retaliation for protesting illegal discrimination, including racial discrimination. In addition, Howard's graduates, as the "social engineers" envisioned by Charles Hamilton Houston, will be able to cite *Martin v. Howard University* as authority to protect those who stand up against illegal discrimination from retaliatory termination/non-renewal/failure to hire.

<sup>19</sup> The facts acts are set forth in great detail in *Pl. 's Motion for Summary Judgment* ("Pl. 's MSJ"), "paper filed" on November 27, 2002, Docket #289, prior to electronic filing, and re-filed, electronically, on November 1, 2005, Docket # 330. See also *Pl. 's Statement of Disputed Facts*, appended to *Pl. 's Opp. to Def's Motion for Summary Judgment* (Docket #283, paper filed and 313, re-filed electronically)

<sup>20</sup> Plaintiff's May 8, 2006 *Motion for Judgment on her Sexual Harassment Claim*, "Pl. 's MJSH."

<sup>21</sup> In an affidavit, Prof. Bell said that Harrison accosted him in 1990, at Harvard, demanding that he name the "real" Geneva Crenshaw. *Pl. 's MSJ* at 66, Ex. S; *Pl. 's MJSH* at 7, fn. 5. Harrison told Bell that he would return and "blow [his] head off" because he did not name this fictitious woman. *Id.* Bell described the confrontation as the "most frightening experience of my career." *Id.* Judge Hogan did not allow Prof. Bell to testify at trial (January 10, 2006 Order, Docket #377), but had ruled that Ms. Martin could testify as to what Prof. Bell and other professors who were pursued by Harrison told her; however,

to make the call. Pl.'s MSJ at 9-10; *Facts* ¶ 35, Pl.'s MJSJ at 22. Prof. Martin enlisted the cooperation of Campus Security Officer Sirleaf. Together, they met with the D.C. Metropolitan Police Department (MPD), to whom Prof. Martin reported Harrison's harassment. D.C. MPD reported Harrison's harassment as "stalking," in violation of 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. (Emphasis added)

(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.

Prof. Martin filed a criminal stalking complaint with MPD. *Pl.'s MSJ* at 2, 9-10; *Facts* ¶ 37; Pl.'s MJSJ at 15. MPD instructed Howard to ban Harrison from campus and to detain him for arrest if he returned to campus. *Pl.'s MSJ* at 48, *Facts* ¶ 39; Pl.'s MJSJ at 22-23. Prof. Martin documented Harrison's acts of harassment, including letters, phone calls and visits to her office. Pl.'s MSJ at 3, *Facts* ¶ 43-45, 55, 61, 61; *Pl.'s MJSJ* at 3-4. She provided memoranda detailing these events, as well as the actual documents and information that she received, from and regarding Harrison, to Dean Bullock. *Pl.'s MSJ* at 9-10, *Facts* ¶ 43-45, 54, 55, 61, 61, 64; *Pl.'s MJSJ* at 23. In a March 6, 1998 memo, Prof. Martin specifically informed Dean Bullock that Harrison was "targeting African-American women" as his stalking victims. *Pl.'s Reply to Def.'s Opp. to Pl.'s MJSJ* at 4-5; *Pl.'s Opp. to Def.'s Motion for Judgment re Retaliation* (Docket # 489); Pl.'s MSJ, Ex. XX, fn. 1.

Dean Bullock's own memoranda acknowledge that Prof. Martin immediately notified the administration and other Howard administrators and security personnel, as well as the D.C. Metropolitan Police Department of Harrison's harassment of her. *Pl.'s MSJ*, Ex. KKK-1 at 1; *MJSJ* (Docket # 461) at 20-22, and *Pl.'s Opp. to Def.'s MJSJ* (Docket # 472) at 8-12, and *Pl.'s Reply to Def.'s MJSJ* at 1-2; *Pl.'s Reply to Def.'s MJRet* at 3-4. According to Dean Bullock's 1999 memorandum to Howard's General Counsel, which Howard submitted to the EEOC as an exhibit to its Response to her EEOC charge of

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have misled the jury into believing that Howard was talking male and female professors equally.

sexual harassment and retaliation, both Dean Bullock 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. *Id.* Dean Newsom specifically told her that Harrison's stalking was not just "about you," but affected all other women on campus. *Facts* ¶ 38; Pl.'s MJSH at 8-9; Pl.'s MJRet at 4, fn. 1. *See also* Pl.'s MSJ at 12, *Facts* ¶ 85 (Dean Newsom's December 18, 1997 memorandum acknowledging that Harrison posed a threat to Prof. Martin and other *women*).

Dean Bullock and Associate Dean Newsom admitted that Howard took none of the actions recommended by police. Pl.'s MSJ at 7, 10-12. In a memorandum to Prof. Martin dated October 1, 1997, Dean Bullock stated that she was discussing the matter with Security Director, Lawrence Dawson. Pl.'s MSJ at 8, *Facts* ¶ 55; *Pl.'s MJSH* at 22-23; Trial Tr. 655:18-656:6. Dean Bullock's written statement was false. In her 2002 deposition and at trial, former Dean Bullock admitted that she *never* spoke to Mr. Dawson or any other security or police officer regarding Prof. Martin's complaints about Harrison. Pl.'s MSJ 7-8, *Facts* ¶ 5-58, 73; *Pl.'s MJSH* at 22-23; Trial Tr. 423:14-425:17. Mr. Dawson had already testified that Bullock never discussed the matter with him and that he did not learn about Harrison until Ms. Martin took his deposition, years after the stalking. *Id.*; Trial Tr. 423:14-425:17. Bullock did not discuss the issue with Howard's Campus Security personnel or the police, despite her ready access to them and their express purpose of protecting persons on campus. *Id.*

On October 2, 1998, Prof. Martin stayed in her office when Harrison announced that he would arrive, but, she insisted that Dean Bullock provide her some protection Harrison. Pl.'s MSJ at 10, *Facts* ¶ 48; *Pl.'s MJSH* 48.<sup>22</sup> Bullock delegated the job to a subordinate, without providing her or campus security the background information on Harrison. Pl.'s MSJ at 10, *Facts* ¶ 49; *Pl.'s MJSH* at 25; Trial Tr. 651:25-652:16. Because the information conveyed by Bullock was incomplete, campus security sent only one officer and did not notify MPD of Harrison's threatened arrival. Pl.'s MSJ at 10-12, *Facts* ¶ 50-53; Pl.'s MJSH at 23-25;

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<sup>22</sup> Since the afternoon session of Ms. Martin's testimony has still not been produced, no reference to the transcript can be made. When this testimony is produced and inserted into the entire trial transcript, presumably all transcript page numbers cited in this motion, beyond page 1676, will change.

Trial Tr. 468:7-478:24. When Harrison confronted Prof. Martin in her office, Howard Security Officer Dowdy, chased him down the stairwell, through campus, down Van Ness Avenue and into the woods. Pl.'s MSJ at 10, *Facts* ¶ 51-53; Pl.'s MJSH at 23-25; Trial Tr. 355:18-357:16. Officer Dowdy was the only officer sent to capture Harrison and was unable to do so. Pl.'s MSJ, *Facts* ¶ 50.

Even after this traumatic confrontation with Harrison, Howard never instituted its own campus security policies to bar Harrison from campus. Pl.'s MSJ at 8-9, *Facts* ¶ 90, 95, 96, 98, 99; *Pl.'s MJSH* at 28-29; Trial Tr. 432:12. Harrison was therefore free to roam Howard's law school premises and to harass Prof. Martin. She held office hours in the cafeteria to avoid being alone in her office and for the safety of her students. Pl.'s MSJ at 14, *Facts* ¶ 118; Trial Tr. 432:12-433:1; 468:7-21. She worked in fear of Harrison for the remainder of her tenure at Howard, even carrying mace on her keychain as she walked through the law school. *Pl.'s MSJ* 6, 15, *Facts* ¶ 65, 71, 98-100; *Pl.'s Reply to Def's Opp to Pl's MJSH* at 7-8. She was afraid to use the ladies' ROOM in her workplace without someone guarding the door. MSJ at 6; Trial Tr. 106:10-19. When attending faculty meetings in the evening, she disguised herself in her daughter's hooded parka jacket, as she walked through the parking lot to the law school building. Pl.'s MSJ at 6, *Facts* ¶ 99.

#### **V. Facts Forming the Basis of Prof. Martin's Retaliation Claim**

Howard admitted that it refused to renew Prof. Martin's contract, either as a permanent faculty member or even as a continued visitorship. *Pl.'s MSJ* at 2, 13-44, *Facts* ¶ 119, 236-258; *Pl.'s MJRet* 20-21 (Docket # 462) The Appointments Committee (APT) Chair, Prof. Isaiah Leggett, who, testified that Martin was "a very good teacher," "a good colleague," and someone who "contributed to the law school community," but that he was "confused" about her the status of her publications. *Pl.'s MSJ* at 31-32, *Facts* ¶ 155, 185-186; *Pl.'s MJRet* 14, 17-19; Trial Tr. 998:24-999:12 (collegiality); 1003:17-1009:71 1042:20-1043:15 (confusion). Three other professors on the APT Committee, Profs. J. Clay Smith, Laurence Nolan and Homer LaRue, independently gave similar assessments of Prof. Martin, describing her as "terrific," "excellent teacher" and a "friend." *Pl.'s MSJ* at 31-32, 39-40, *Facts* ¶ 155, 185-186; *Pl.'s MJRet* 18-20; *Pl.'s Reply to Def's Opp to Pl's MJRet* at 23-29. Trial Tr. 573:10-11.

Both Dean Bullock and Prof. Taslitz testified that Bullock had privately told Taslitz that she did not want Prof. Martin on the faculty and that Prof. Martin was “causing problems” for her office. *Pl.’s MSJ* at 19-20, *Facts* ¶ 208; *Pl.’s MJRet*. 34-35. Bullock specifically 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 it. *Pl.’s MSJ* at 16-17 (Dockets # 289 and 330, Ex. 2) *Facts* ¶ 190; *Pl.’s MJRet* at 34-35. Bullock did nothing to address Harrison’s stalking. Associate Dean Newsom also testified that Dean Bullock told him that “*she* had decided *not to select* Prof. Martin for a permanent position.” Trial Tr. 1384:14-16; *Pl.’s MSJ* at 19-20 *Facts* ¶ 218; *Pl.’s MJRet* at 34-35.<sup>23</sup> Dean Bullock’s animus toward Prof. Martin, as a result of her complaints about Harrison’s stalking in her workplace, was so great that she could not even contain it when she was interviewed by the EEOC investigator in 1999, in response to Plaintiff’s EEOC charge Bullock said:

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)<sup>24</sup>

*Pl.’s MJSH* at 28, *Pl.’s MJRet* at 34; *Pl.’s MSJ* at 16, Ex. H, *Facts* ¶ 187; Trial Tr. 1535:15-24.

In her *Answer to the Complaint*, Dean Bullock admitted that there were at least three vacant faculty positions for which Prof. Martin was “well qualified.” *Pl.’s MSJ* at 41-43, *Facts* ¶¶237-250; *Pl.’s MJRet* at 10-11; Trial Tr. 754:20-755:6. Howard students sent letters and petitions protesting Martin’s non-renewal and praising her as a professor. *Pl.’s MSJ* at 28, Exs. TT, UU, VV, WW; *Facts* ¶120-121;

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<sup>23</sup> Bullock contradicted her own statements in her memorandum to Howard’s General Counsel, provided by Howard to the EEOC. Bullock wrote that there was “no reason” why she would not want Prof. Martin on the faculty. *Pl.’s December 15, 2005 Motion in Limine to Exclude Irrelevant, Unduly Prejudicial Allegations of “Non-Collegiality” and “Bad Judgment”* (Docket # 342) at 6, fn. 6; *Pl.’s MSJ* at 19, *Facts* ¶ 207. Prof. Nolan even testified that Dean Bullock told her that she supported Prof. Martin and was trying to help her obtain teaching jobs elsewhere. *Pl.’s MJRet* at 19; *Pl.’s MSJ* at 21, *Facts* ¶ 221. It is undisputed, however, that Dean Bullock did not actually do anything to help Prof. Martin obtain a job.

<sup>24</sup> Prof. Martin never asked Dean Bullock to “wrestle” anyone. Her memoranda requesting protection from Harrison simply asked Dean Bullock to work with Campus Security and the D.C. police department to employ the procedures already set forth in Howard’s Security policies to ban Harrison from the workplace. *Pl.’s MSJ* 16, Exs. W, BB, FF; *Pl.’s MJSH* 22-23. These measures would have included posting/circulate notices to the University community that campus security should be notified if they saw Harrison on campus and call D.C. police if Harrison appeared on campus so that they could arrest him for stalking Prof. Martin, as well as for trespassing on Howard’s property. *Id.*

*Pl.'s MJRet* at 25; however, Dean Bullock ignored their requests to renew Prof. Martin and left positions vacant while students clamored for scarce courses, due to the shortage of necessary law professors.

### The Jury Verdict

In his 1999 decision, *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516. Judge Hogan reviewed the undisputed facts and then designated the questions to proceed to the jury for factual determinations. Judge Hogan stated that the case should proceed to a jury trial to determine:

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).

On April 18, 2006, the jury found, as Plaintiff alleged, that Harrison's harassment was severe and pervasive and *did* create a "hostile work environment" for her. The jury further concluded, as Ms. Martin alleged, that Howard administrators knew or should have known of the harassment and failed or refused to take reasonable steps to end it; nevertheless, the jury issued a verdict *for Defendant*. The jury dismissed Ms. Martin's claims because it concluded that that Harrison's harassment was *not* "sexual" in nature or *based on her gender*. This conclusion meant that Martin's complaints were not "protected activity" under Title VII of the Civil Rights Act or any other statute. The trial court's rulings of law leading to the jury verdict leave a woman with absolutely *no remedy at law for being stalked in her workplace or for being terminated in retaliation for complaining about it*.

Because the jury found that there was no statute to protect Prof. Martin from being retaliated against for asking for protection from the serial stalker, it did not proceed to make any factual findings as whether Howard's stated reasons for Prof. Martin's rejection/non-renewal were false or pre-textual or based on retaliatory motive. If this case is reversed on the sexual harassment claim and/or on the issue of whether Prof. Martin engaged in protected activity, either the Court, based on undisputed fact of record, or a new jury, in a new trial, will have to answer those questions.

## VI. NAWL's Amicus Participation will Benefit the Court, the Parties and the Public

If permitted to participate as *amicus*, NAWL will brief the following issues:

### A. Stalking as Sexual Harassment/Harassment on the Basis of Sex

- 1) whether an employer is liable for sexual harassment of an employee by a non-employee, as advocated by the United States Equal Employment Opportunity Commission (EEOC), 29 C.F.R. § 1604.11(e);
- 2) whether an employee must use the specific words “sexual harassment” when complaining of conduct that constitutes sexual harassment, to obligate the employer to take reasonable steps to end the harassment, under Title VII;
- 3) where a woman is targeted for harassment because she fits a “profile” of a *female* character or real person, whether this “gender profiling” constitutes harassment on the basis of gender;<sup>25</sup>
- 4) whether the plaintiff has established sex discrimination where the harassment victim is selected based on “sex *plus*” other factor(s);<sup>26</sup>
- 5) whether sex specific language, or sex specific targeting of a victims, where the harasser expressly targets the victim and other women as his potential “wife,” constitutes harassment

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<sup>25</sup> In 1999, Judge Hogan held: “**It is clear** from Mr. Harrison's own description of his search for ‘Geneva Crenshaw’ or ‘Valerie Edwards’ that **he targeted women** other than Plaintiff.” 1999 U.S. Dist. LEXIS 19516 at \*11 (emphasis added). Sexual harassers do not normally harass *all* women, but have their personal preferences. Harrison preferred African-American women law professors teaching and writing on issues of race. All men were safe from being targeted by Harrison to be his “wife” -- while *women* were targeted to the extent that they shared characteristics with “Geneva.” Harrison stalked “Prof. Dawn Martin,” but would not have stalked her had she been “Prof. Dan Martin.” “Geneva Crenshaw” is not a household name, but “gender profiling” to harassment based on an obsession with a more familiar female character, such as “Wonder Woman,” Halle Barry, Jennifer Lopez or Connie Chung. What happened to Prof. Martin could happen to other women of any race or ethnicity.

<sup>26</sup> The Supreme Court acknowledged the “sex-plus” concept in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (employer treated women with preschool children differently than men in similar circumstances). See also *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971) *cert. denied*, 404 U.S. 991(1971) (airline hired married male flight attendants but not married female flight attendants); *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) (Judge Hogan).

on the basis of sex/gender, *per se*;<sup>27</sup>

- 6) whether a harasser's targeting of a victim as his potential "wife," constitutes harassment that is inherently "sexual in nature;"
- 7) whether harassing language identifying the victim as "more voluptuous" and "prettier" than another woman, and referring to his "infatuation" with the other woman's legs, constitutes harassment that is sexual in nature;<sup>28</sup>
- 8) whether "typical" sexual harassment cases are defined by whether the harasser has "touched" or "groped" the victim;
- 9) whether the stalking of a woman in her workplace, constitutes a *prima facie* case of harassment based on sex, since stalking has a disparate impact on women;
- 10) clarifying the employer's duty to take "reasonable steps" to prevent violence against women in the workplace;

#### **B. Retaliation**

- 11) whether an employee must use the words "sexual harassment," when complaining of conduct that constitutes sexual harassment, to obtain protection against retaliation under Title VII;
- 12) whether an employer violates Title VII if it cancels a job vacancy to prevent a particular applicant, who has protested illegal discrimination, from being selected for that position, or renewed in that position;
- 13) whether an employer violates Title VII if it conceals, or withholds, job vacancies to prevent a particular applicant, who has protested illegal discrimination, from being selected for that

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<sup>27</sup> In 1999, Judge Hogan concluded: "**it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female.**" (Emphasis added) 1999 U.S. Dist. LEXIS 19516 at \*11; however, months *after the trial*, in his October 4, 2006 decision denying Ms. Martin's *Motion for Judgment*, Judge Hogan held that he *did not* hold that Harrison harassed Ms. Martin based on her sex, but that this was a question for the jury. 2006 WL 2850656 at \*3.

<sup>28</sup> In his 1999 decision holding that Harrison targeted Prof. Martin based on her sex, Judge Hogan quoted one of Harrison's letters, referencing Prof. Martin as "voluptuous," describing the physical characteristics and his sexual attraction to Prof. Martin and other women that he targeted. 1999 U.S. Dist. LEXIS 19516 at \*9-10.

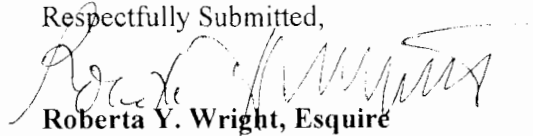
position, or renewed in that position; and

- 14) whether an employer violates Title VII if it converts an advertised vacancy to another position to prevent a particular applicant, who has protested illegal discrimination, from being selected for that position, or renewed in that position.

**CONCLUSION**

NAWL respectfully requests permission to participate as *amicus curiae*.

Respectfully Submitted,



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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

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

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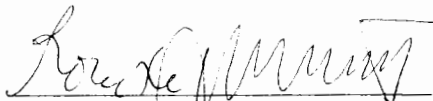
**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on this 5<sup>th</sup> day of April, 2007, a true copy of *The National Association of Women Lawyers' (NAWL) Motion for to Participate as Amicus Curiae*, was mailed to:

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# EXHIBIT A

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**From:** Lattimore, Phil [mailto:plattimore@Howard.edu]  
**Sent:** Tuesday, September 19, 2006 10:44 AM  
**To:** Cintra D. B. Geairn  
**Subject:** RE: Amicus for Martin v. Howard Univ.[Scanned]

Dear Ms. Geairn:

The University will not consent and will oppose any such motion.

With best regards,

PAL

Phillip A. Lattimore III  
Senior Associate General Counsel  
Howard University  
Office of the General Counsel  
Suite 321  
Washington, D.C. 20059  
(202) 806-2650  
(202) 806-6357 - fax

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**From:** Cintra D. B. Geairn [mailto:cgeairn@hwelaw.com]  
**Sent:** Tuesday, September 19, 2006 10:15 AM  
**To:** plattimore@howard.edu  
**Subject:** Amicus for Martin v. Howard Univ.

Mr. Lattimore:

My name is Cintra Geairn and I am the co-chair of the Amicus Committee for the National Association of Women Lawyers (NAWL). I am writing to request your consent to the filing of an amicus brief by NAWL on behalf of Dawn Martin in the above referenced case, in which a notice of appeal has been filed in the United States Court of Appeals for the D.C. Circuit. Your consent to this filing will obviate the need for motion practice before the D.C. Court of Appeals. As such, we are hopeful that Howard University will consent to the filing.

Thank you in advance for your consideration of this matter. I look forward to hearing from you.

Regards,  
Cintra Geairn

Cintra D. B. Geairn  
Attorney  
HOEPPNER WAGNER & EVANS LLP  
Twin Towers - South  
1000 East 80th Place, 6th Fl.  
Merrillville, Indiana 46410  
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# EXHIBIT B

**YAHOO! MAIL**

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**Subject:** FW: Martin vs. Howard University et al.[Scanned]  
**Date:** Wed, 20 Sep 2006 15:15:31 -0500  
**From:** "Cintra D. B. Geairn" <cgeairn@hwelaw.com>  
**To:** "Masters, Lorelie S" <LMasters@jenner.com>, drewmb@ucmail.uc.edu, laura.spitz@colorado.edu  
**CC:** "Dawn Martin" <dvmartinlaw@yahoo.com>

Fyi. See attached.

Cintra D. B. Geairn  
 Attorney  
 HOEPPNER WAGNER & EVANS LLP  
 Twin Towers - South  
 1000 East 80th Place, 6th Fl.  
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**From:** Frederick Cooke [mailto:cooke.frederick@gmail.com]  
**Sent:** Wednesday, September 20, 2006 3:06 PM  
**To:** Cintra D. B. Geairn  
**Subject:** Martin vs. Howard University et al.[Scanned]

Ms. Geairn, please see the attached pdf version of my letter/response to your letter to me of September 19, 2006.

Fred

Cooke

Frederick D. Cooke, Jr.  
 Rubin, Winston, Diercks, Harris & Cooke, LLP  
 1155 Connecticut Avenue, NW, Suite 600  
 Washington, D.C. 20036  
 202 861 0870  
 202 429 0657 (facsimile)

September 20, 2006

**VIA EMAIL AND REGULAR MAIL**

Cintra D.B. Geairn, Esq.  
Hoepfner Wagner & Evans, LLP  
1000 East 80<sup>th</sup> Place  
Sixth Floor  
Merrillville, IN 46411

Re: Martin vs. Howard University, et al.

Dear Ms. Geairn:

In response to your letter to me of September 19, 2006 in which you request my (and my client's) consent to the filing of an amicus brief by the National Association of Women Lawyers (NAWL) on behalf of the plaintiff-appellant in the above-referenced matter, please note that I do NOT consent to filing of an amicus brief by NAWL in this matter.

You should also know that I will oppose any motion that you file with the U.S. Circuit Court of Appeals for the District of Columbia Circuit for leave to file an amicus brief on behalf of the plaintiff-appellant. I see this litigation as essentially fact driven rather than legal issue driven. The trial judge gave plaintiff wide latitude to make out her claims and the jury found against plaintiff. In my humble opinion, there simply are no significant legal issues that any amicus brief could assist the appellate court in deciding. Plaintiff's effort to involve an amicus seems to me to be another attempt (in a very long list of attempts) by plaintiff to create legal significance for her claim where there is none.

Yours truly,

Frederick D. Cooke, Jr.

# EXHIBIT B

**YAHOO! MAIL**

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**Subject:** FW: Martin vs. Howard University et al.[Scanned]  
**Date:** Wed, 20 Sep 2006 15:15:31 -0500  
**From:** "Cintra D. B. Geairn" <cgeairn@hwelaw.com>  
**To:** "Masters, Lorelie S" <LMasters@jenner.com>, drewmb@ucmail.uc.edu, laura.spitz@colorado.edu  
**CC:** "Dawn Martin" <dvmartinlaw@yahoo.com>

Fyi. See attached.

Cintra D. B. Geairn  
 Attorney  
 HOEPPNER WAGNER & EVANS LLP  
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Fred

Cooke

Frederick D. Cooke, Jr.  
 Rubin, Winston, Diercks, Harris & Cooke, LLP  
 1155 Connecticut Avenue, NW, Suite 600  
 Washington, D.C. 20036  
 202 861 0870  
 202 429 0657 (facsimile)

September 20, 2006

**VIA EMAIL AND REGULAR MAIL**

Cintra D.B. Geairn, Esq.  
Hoepfner Wagner & Evans, LLP  
1000 East 80<sup>th</sup> Place  
Sixth Floor  
Merrillville, IN 46411

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Frederick D. Cooke, Jr.