

Record No. 06-7157

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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)**

APPELLANT'S MOTION FOR SUMMARY REVERSAL

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BACKGROUND

In 1999, District Court Chief Judge Hogan set precedent in this jurisdiction Circuit by adopting EEOC Regulation, 29 C.F.R. § 1604.11(e): 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 This case did not proceed to trial until April of 2006. Due to a series of erroneous rulings, a verdict was rendered for Defendant.

Appellant, Dawn V. Martin, Esquire, respectfully moves this Court for *Summary Reversal* of the district court's orders of October 6, 2006, denying *Appellant's Motions for Judgment, as a Matter of law, or in the Alternative, for a New Trial*, on her claims of sexual harassment and retaliation, under Title VII of the Civil Right Act of 1964, as well as on her claims of breach of contract and intentional infliction of emotional distress. Ms. Martin also appeals from the district court's October 20, 2003 Order, holding the issue of mandatory sanctions

¹ This decision was reversed on other grounds by the Magistrate's *Report and Recommendation*, 2003 U.S. Dist. LEXIS 18501 (re: whether several alleged acts of retaliation are actionable under Title VII), *adopted* as Court Order on September 16, 2005 (Docket # 318), *reversed in part* by October 21, 2005 (#325) Order, modified on January 4, 2005 (#377), again modified on March 30, 2006 (#422), *modified* on March 31, 2006 (#424), *modified* at trial (Tr. 2358:15-2359:21, 2354:8-2355:15), *modified* on October 4, 2006 (2006 WL 2850656, #504).

against Howard University, pursuant to Fed. R. P. 37(a), and leaving it forever in abeyance, as well as the court's August 21, 2006 Order, *sua sponte*, requiring Plaintiff to pay Howard University's litigation costs.

STANDARD FOR SUMMARY REVERSAL

On appeal, summary disposition is appropriate where the merits of the appeal are so clear that expedited action is justified. *Taxpayer Watchdog, Inc. v. Stanley*, 819 F.2d 294, 289 (D.C. Cir. 1987).² The errors of the district court are so clear that this Court can reverse the district court's orders based on the expedited process of abbreviated review.

FACTS

Appellant, 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* (# 273, 289, re-filed electronically at 330-1) at 9-10, *Facts* ¶ 28-39, 62; *Pl.'s MJSH* (#461) at 3-7,³

² See also *Miller v. Bank of America*, 2004 App. LEXIS 8943 (D.C. Cir. 2004); *Cooper v. District of Columbia*, 2004 U.S. App. LEXIS 8135 (D.C. Cir. 2004); *Moore v. Reno*, 2000 U.S. App. LEXIS 35425 (D.C. Cir. 2000); *Pray v. Reno*, 1996 U.S. App. LEXIS 33607 (D.C. Cir. 1996).

³ Plaintiff's May 8, 2006 *Motion for Judgment on her Sexual Harassment Claim*, "Pl.'s MJSH (#461)."

Trial Transcript (hereinafter, "Tr.") 1659:20-1677:2, Tr. Dkt # 490 at 5:17-50:16.⁴

Harrison stated that he was pursuing Prof. Martin to be his "wife." *Id.* According to Harrison's letters, he 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.⁵ *Id.*, Tr. Dkt #490 at 33:8-12, 36:15-19, 38:15-39:43.

Prof. Martin immediately turned over Harrison's letters to Howard's administration, as each one arrived. Pl.'s MSJ (#330-1) 9-10; *Facts* ¶ 34, 63, Tr.

⁴ The "official" transcript, certified by Judge Hogan's court reporter, Cathryn Jones, on February 20, 2007, was not complete. It omitted the bulk of Ms. Martin's direct testimony, which had been completed and docketed on June 28, 2006, # 490. See Appellant's March 18, 2007 *Transcript Status Report, Reporting Plaintiff's Missing Direct Testimony and Transcript Errors* 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*. On May 2, 2007, Judge Hogan *denied* Ms. Martin unopposed motion (#536) even though Howard specifically agreed, in writing, that Ms. Martin's direct testimony was improperly excluded from the certified official transcript and should be integrated into it; accordingly, if the court, or members of the public, requests the "official transcript," they will be handed 16 volumes of trial transcripts that exclude the bulk of Ms. Martin's direct testimony – the crux of this case.

⁵ 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* (#330-1) at 66, Ex. S; *Pl.'s MJSJ* (#461) at 7, fn. 5. Harrison told Prof. Bell that he would return and "blow [his] head off" because he did not name this woman. *Id.* Prof. Bell described the confrontation as the "most frightening experience of my career." *Id.* Judge Hogan did not allow Prof. Bell to testify (January 10, 2006 Order, #377).

#490 at 50:19-51:8. 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 to make the call. Pl.'s MSJ (#330-1) at 9-10; *Facts* ¶ 35, Pl.'s MJSH (#461) at 22, Tr. Dkt # 490 at 1667:2-14. Prof. Martin enlisted the cooperation of Campus Security Officer Sirleaf. They met with the D.C. Metropolitan Police Department (MPD), to whom Prof. Martin reported Harrison's harassment. D.C. MPD characterized Harrison's harassment as criminal "stalking," in violation of D.C. Code § 22-404 (b). *Pl.'s MSJ* (#330-1) at 2, 9-10; *Facts* ¶ 37; Pl.'s MJSH (#461) at 15.

MPD instructed Howard to ban Harrison from campus and to detain him for arrest if he returned to campus. Pl.'s MSJ (#330-1) at 48, *Facts* ¶ 39; Pl.'s MJSH (#461) at 22-23. Prof. Martin documented Harrison's acts of harassment, including letters, phone calls and visits to her office. Pl.'s MSJ (#330-1) at 3, 9-10 *Facts* ¶ 43-45, 55, 61, 61; *Pl.'s MJSH* (#461) at 3-4, 23. In a March 6, 1998 memo, Prof. Martin specifically informed Dean Bullock that Harrison was "targeting African-American women" as stalking victims. *Pl.'s Reply to Def.'s Opp. to Pl.'s MJSH* (#461) at 4-5; *Pl.'s Opp. to Def.'s MJRet* (# 489); Pl.'s MSJ (#330-1), Ex. XX, fn. 1.

Dean Bullock's own internal 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 (#330-1)*, Ex. KKK-1 at 1; *MJSH* (Docket # 461) at 20-22, and *Pl.'s Opp. to Def's MJSH* (Docket # 472) at 8-12, and *Pl's Reply to Def's MJSH* at 1-2; *Pl's Reply to Def's MJRet (#489)* at 3-4. According to Dean Bullock's 1999 memorandum to Howard's General Counsel, which Howard submitted to the EEOC, 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.* Associate Dean Newsom specifically told her that Harrison's stalking was not just "about you," but affected all other women on campus, including Profs. Christi Cunningham and Lisa Crooms, who also taught race and the law courses. *Facts* ¶ 38; *Pl.'s MJSH (#461)* at 8-9; *Pl's MJRet* at 4, fn. 1. *See also* *Pl.'s MSJ (#330-1)* at 12, *Facts* ¶ 85 (Dean Newsom's December 18, 1997 memorandum, stating that Harrison posed a threat to *women*,).

Dean Bullock and Associate Dean Newsom admitted that Howard took none of the actions recommended by police. *Pl.'s (#330-1)* 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 (#330-1)* at 8, *Facts* ¶ 55; *Pl.'s MJSH (#461)* at 22-23; Tr. 655:18-656:6. In her 2002 deposition and at trial, however, 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 (#330-1) 7-8, *Facts* ¶ 5-58, 73; *Pl.'s MJSH (#461)* at 22-23; Tr. 423:14-425:17.

Mr. Dawson did not learn about Harrison until Ms. Martin took his deposition, years after the stalking. *Id.*; Tr. 423:14-425:17. Bullock did not discuss the issue with Howard's Campus Security personnel or the police. *Id.*

On December 2, 1997, Prof. Martin stayed in her office when Harrison announced that he would arrive, but she insisted that Dean Bullock provide her some protection. *Pl.'s MSJ (#330-1)* at 10, *Facts* ¶ 48; *Pl.'s MJSH (#461)* 48. Bullock delegated the job to a subordinate, without providing her or campus security the background information on Harrison. *Pl.'s MSJ (#330-1)* at 10, *Facts* ¶ 49; *Pl.'s MJSH (#461)* at 25; Tr. Tr. 651:25-652:16. Because Dean Bullock did not convey material information to campus security, security sent only one officer and did not notify MPD of Harrison's threatened arrival. *Pl.'s MSJ (#330-1)* at 10-12, *Facts* ¶ 50-53; *Pl.'s MJSH (#461)* at 23-25; 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 (#330-1)* at 10, *Facts* ¶ 51-53; *Pl.'s MJSH (#461)* at 23-25; Tr. Tr. 355:18-357:16. Officer Dowdy was the only officer sent to capture Harrison and was unable to do so. *Pl.'s MSJ (#330-1)*, *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 (#330-1)* at

8-9, *Facts* ¶ 90, 95, 96, 98, 99; *Pl. 's MJSH (#461)* at 28-29; Tr. 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 (#330-1)* at 14, *Facts* ¶ 118; 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 (#330-1)* 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. *Pl. 's MSJ (#330-1)* at 6, 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 (#330-1)* at 6, *Facts* ¶ 99 .

After her stalking complaints, Howard refused to renew Prof. Martin's contract, either as a permanent faculty member or even as a continued visitorship. *Pl. 's MSJ (#330-1)* at 2, 13-44, *Facts* ¶ 119, 236-258; *Pl. 's MJRet* 20-21 (Docket # 462). 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 (#330-1)* 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 (#330-1)* at 16-17 (Dockets # 289 and 330, Ex. 2) *Facts* ¶ 190; *Pl.’s MJRet* at 34-35. Associate Dean Newsom also testified that Dean Bullock told him that “*she had decided not to select Prof. Martin for a permanent position.*” *Tr.* 1384:14-16; *Pl.’s MSJ (#330-1)* at 19-20 *Facts* ¶ 218; *Pl.’s MJRet* at 34-35. 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)

Pl.’s MSJ (#330-1) at 16, Ex. H, *Facts* ¶ 187; *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 (#330-1)* at 41-43, *Facts* ¶ 237-250; *Pl.’s MJRet* at 10-11; *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 (#330-1)* at 28, Exs. TT, UU, VV, WW; *Facts* ¶ 120-121; *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

The jury verdict form (**Exhibit A**), 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

The jury's answer to the question of whether Harrison harassed Plaintiff based on her sex determined the disposition of this case, both with respect to Plaintiff's sexual harassment/hostile work environment case and her retaliation case, since both are based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) and the D.C. Human Rights Act, which prohibit employment discrimination on the basis of sex. 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, or no "protected activity" (**Exhibit A**, page 3, questions # 5a-c), it did not proceed to answer the remaining factual findings that would be necessary to determine whether Howard had committed illegal retaliation.

ARGUMENT

I. The Trial Court Violated Principles of *Res Judicata* and 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

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

In his 1999 decision, Chief 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 *10 (#23). 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." (Emphasis added) 1999 U.S. Dist. LEXIS 19516 at *11.

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

1. In 2003, Magistrate Judge Facciola Held that the Question of whether Harrison's Harassment of Prof. Martin was Based on her Sex was not a "Triable Issue of Fact" for a Jury since Judge Hogan Answered this Question in 1999

In its *Motion for Summary Judgment* (MSJ, #268, admitted by # 284),

Howard attempted to revive the question of whether Harrison's harassment was based on sex. Ms. Martin responded:

In violation of the principles of *res judicata*, Defendant repeats numerous failed arguments, made in its July 22, 1999 *Motion to Dismiss*. The Court concluded that Harrison's harassment of Plaintiff, as alleged, was both sexual and based on sex. Defendant could only prevail on a motion for summary judgment if no jury could find Plaintiff's material allegations to be true.

Pl's November 20, 2002 Opp. to Def's MSJ (#283) at 2.

Magistrate Judge Facciola, to whom Judge Hogan assigned the case, agreed with Ms. Martin:

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

Before turning to my analysis, I must note that in 1999, Chief Judge Hogan denied HU's motion for summary judgment and specifically held that there were factual issues that precluded an award of summary judgment. *Martin v. Howard Univ.*, 1999 U.S. Dist. LEXIS 19516 (D.D.C. Dec. 16, 1999). 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 expect me to ignore it as well. I cannot reconsider a decision I did not issue, nor do 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.

(Emphasis added)

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

2. On September 16, 2005 (Docket # 318), Judge Hogan Adopted MJ Facciola's Conclusion that his 1999 Decision Held that Harrison's Harassment of Prof. Martin was Based on her Sex and that this Issue was not a "Triable Issue of Fact" for a Jury

On September 16, 2005, Judge Hogan adopted MJ Facciola's *Report and Recommendation*, as his own decision; accordingly, he adopted the chastising words for Howard as his own, stating, in no uncertain terms, that the issue of whether Harrison's harassment was based on sex had been decided in 1999 and *would not* an issue of triable fact posed to a jury.

C. After the Trial, Judge Hogan Erroneously Held that he had Never Held that Harrison's Harassment of Prof. Martin was Based on her Sex; this Ruling Violated the Law of the Case and Deprived Ms. Martin of an Opportunity to Prove a Fact Placed before the Jury, Violating her Right to Due Process

Judge Hogan included the question of whether the harassment was based on sex on the jury verdict form—thus placing before the jury the very question that both judges held *would not* be placed before a jury. Contrary to his *pre-trial*

decisions, in his October 4, 2006 *post trial* decision, Judge Hogan stated that he *did not* hold that Harrison's harassment was based on sex (2006 WL 2850656 at *3); yet, *this was precisely what he ruled* in 1999 and again affirmed, on September 16, 2005, when he adopted MJ Facciola's 2003 *Recommendation*. In *Williamsburg Wax Museum, Inc., v. Historic Figures, Inc. et. al.* 810 F.2d 243, 251 (D.C. Cir. 1987), this Court refined the doctrine of *res judicata*, adapted specifically to apply to an earlier ruling in the same case.

Under the law of the case doctrine, 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,

The trial court's change in its pre-trial rulings, *after trial*, violates principles of *res judicata*, the law of the case and the right to procedural due process.⁶ It is fundamentally unfair to try a case, operating under court decisions on the facts that a plaintiff must prove, and then *change* the issues to be proved *after trial*, when the plaintiff has lost any opportunity to prove it; accordingly, the jury's determination that Harrison did not harass Prof. Martin on the basis of her sex should be nullified and vacated. Removing the question of whether Harrison's conduct was based on

⁶ During Howard's oral argument motion for judgment, Howard *again* argued that Harrison's harassment was not based on her gender. Ms. Martin responded that Howard should not be permitted to make arguments, over and over, that it lost in 1999 (Tr. 2134:9-2152:2) and that the 1999 decision concluded, as a matter of law, that Harrison harassed her on the basis of her sex and that this question was not

sex from the jury verdict form leaves all of the remaining questions on Ms.

Martin's sexual harassment claim, decided in her favor.

II. Judge Hogan's 1999 Decision, Holding that Harrison's Harassment of Prof. Martin was Based on her Sex, Sets Appropriate Standards for Sexual Harassment Cases in Workplaces and Campuses

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

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

Prof. Martin was sexually harassed in her workplace by a serial stalker, based on "gender profiling," or harassment on the basis of gender. Where a woman is targeted because she fits a "profile" of a *female* character, this "gender profiling" constitutes harassment on the basis of gender. It therefore constitutes sex discrimination, as a matter of law. "Gender profiling" has been recognized in the context of police harassment⁷ and Customs Inspections.⁸ Harrison targeted her for harassment because she fit the "profile" of the fictional *female* character, "Geneva Crenshaw."⁹ In 1999, Judge Hogan specifically recognized that Harrison

properly a jury question. Tr. 2561:1-2562:5.

⁷ *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).

⁸ *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).

pursued women other than Prof. Martin in his search for “Geneva Crenshaw.”

1999 U.S. Dist. LEXIS 19516 at *11.

The plaintiff has established sex discrimination where the harassment victim is selected based on “sex plus” other factor(s).¹⁰ Harrison targeted particular women – African-American law professors who taught courses addressing issues of race. Male law professors meeting all of the same criteria, but for gender, were not targeted by Harrison as potential marriage partners.

⁹ This harassment could also be based on racial profiling, for example, if a harasser targeted people who fit the profile of Martin Luther King, and targeted only African-American males. Such profiling, of any character, real or imagined -- from “Wonder Woman,” to Hellen Keller, to Osama Bin Laden -- could be based on race, national origin, religion, disability and/or age. See discussion in *Pl’s Opposition to Taxation of Defendant’s Costs against Plaintiff* (#510) at 14-15.

¹⁰ 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) (Judge Hogan). *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). Sexual harassers do not normally harass *all* women. They generally have their own preferences. Harrison preferred African-American women law professors teaching and writing on issues of race and racial discrimination.

2. Where a Harasser Targets a Woman to be his "Wife," the Harassment Constitutes "Gender Profiling"

Harrison pursued Prof. Martin to be his "wife." "Wife" is defined as "a married woman."¹¹ Where a harasser targets female victims looking for a wife, the profiling is necessarily gender based. Apparently, 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.¹² The jury note, issued shortly before the verdict was issued, read: "Wives are typically female. Is the answer to 1c an automatic yes simply because the plaintiff is female?" Judge Hogan was absent for the jury's determining questions. Judge Kessler substituted for him when the jury note was delivered. Ms. Martin pointed out that Judge Hogan had decided this question, a matter of law, in 1999 (Tr. 2561:1-2562:5) and that if the question was included on the verdict form, the jury should be instructed that Judge Hogan the answer is an automatic "yes," as a matter of law. Instead,

¹¹ 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*H at 12 (Dkt #483), Tr. at 2561:12-15.

¹² This quote is correct, based on the docketed jury note (#457) (**Exhibit B**), 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 that the transcript is inaccurate, as Ms. Martin has repeatedly alleged. See Appellant's March 19, 2007 *Transcript Status Report* at 4.

Judge Kessler answered “No”¹³ and then instructed the jury to base its answer on the evidence before it, without addressing the apparent jury confusion. Tr. 2567:20-25; see also Judge Kessler’s rationale at 2562:7-25, stating that Judge Hogan “certainly” did not decide the issue in 1999 or he would not have put the question on the verdict form. When Ms. Martin offered Judge Kessler a copy of the 1999 decision, Judge Kessler replied, “I don’t think I need it.” Tr. 2561:1-6.

B. Stalking has a Disparate Impact on Women

In his 1999 decision, in concluding that Harrison harassed Prof. Martin on the basis of sex, Judge Hogan bolstered his conclusion by noting Ms. Martin’s argument 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

¹³ “No” is not recorded in the transcript, but Judge Hogan’s decision correctly quoted Judge Kessler as saying, “No.” 2006 WL 2850656 at *4. Correspondence between Howard’s counsel and Judge Hogan’s court reporter, Cathryn Jones, documents that, while withholding completed, paid for transcripts from Ms. Martin, Ms. Jones was consulting with Howard’s counsel *to help her “complete” the transcripts*. Pl’s April 9, 2007 Unopposed 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) at 9-10, fn. 11, Ex. H (#539-9). Even with documentation of this collusion and potential for corruption of the transcripts, there appears to be no remedy or means to correct the transcripts, since the court did not maintain an audiotape of the transcripts or order the court reporter to turn over her tapes, as Ms. Martin requested.

at 10. Because women are disproportionately adversely affected by stalking,¹⁴ 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).

C. As a Matter of Law, a Plaintiff Need not Prove "Touching," "Groping," or Sexual Assault to Establish a Sexual Harassment Claim

In his October 4, 2006 decision, 2006 WL 2850656 at * 4 (D.D.C. 2006), Judge Hogan defended the jury's finding that Harrison's harassment was not "sexual in nature" or "based on sex" by stating:

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. (Emphasis added)

The court did cite *any* authority for its conclusion that "typical" sexual harassment cases involve touching or groping, or any type of sexual assault or battery and there is none. 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

¹⁴ 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.

a workplace sexual harassment claim under Title VII. This precedent would be an affront to *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (1986) and its progeny; it would set the clock back by more than *twenty years* for working women.

D. As a Matter of Law, Harassment is “Sexual in Nature” where the Harasser Targets a Woman to be his “Wife”

Where a harasser targets a woman for harassment and pursues her to be his “wife,” such harassment is inherently *sexual in nature* because sex is an inherent part of marriage. 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).

During trial, Judge Hogan interrupted the examination of former Howard Security Officer Sirleaf (now “Dr.”), to whom Prof. Martin reported Harrison’s conduct and asked for help. Dr. Sirleaf was testifying that he understood Prof. Martin’s complaint of Harrison’s pursuit of her to be his “wife” as a complaint of sexual harassment, since marriage is expected to include sex. Judge Hogan cut off Officer Sirleaf’s testimony, saying, “That’s obvious.” *Pl.’s MJSH (#461)* at 10; *Pl.’s Opp. Def.’s MJSH* at 10; 2006 WL 2850656 at 4, fn. 3; Tr. 310-311. Judge

Hogan's statement appeared to be judicial notice, *again* reaffirming his 1999 adjudication that the harassment was sexual in nature or based on sex.¹⁵

III. The Jury's Determination that Prof. Martin's Complaints of Stalking did not Constitute Complaints of Sexual Harassment is Unsupported by the Law and the Undisputed Facts

A. In a 1999 Internal University Memorandum, Dean Bullock Admitted that she Understood that Harrison's Harassment and Stalking was Directed only at Women

In a July 1, 1999 memorandum to Howard's General Counsel Bullock **admitted** that she immediately understood Prof. Martin's November 27, 1997 memorandum description of Harrison's stalking to constitute a threat that Harrison he might "stalk or otherwise **harass**" Prof. Martin and "**other women**" on campus.¹⁶ (Emphasis added)

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

Former Dean Bullock perjured herself at trial by testifying that she did *not* perceive Harrison's stalking or Prof. Martin on campus as "sexual harassment." Tr.

¹⁵ As part of the basis for his conclusion, in 1999, that Harrison's harassment was "sexual in nature," or 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.

¹⁶ Pl.'s Trial Exhibit 8b, page 1, admitted at Tr. 758:25-760:2; Pl.'s MSJ, Ex. KKK-2 (# 330-72) at 1; *see also* discussion in Pl.'s June 28, 2006 Reply to Def's Opp. to

1532:11-24. 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). A judgment based on a jury award derived from perjured testimony constitutes fraud, misrepresentation and misconduct. Howard makes absolutely no apology or excuse for Dean Bullock's blatant perjury,¹⁷ but argues that the Court should ignore it. Def.'s Opp to MJSH (#476) at 16.¹⁸ The jury's verdict must therefore be set aside.

C. 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

An employee need not 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 or to protect her against retaliation. Although Chief Judge Hogan acknowledged this rule of law in his

Pl's MJRet (#489) at 2-4.

¹⁷ Neither counsel for Howard or for Alice Gresham Bullock has denied that she committed perjury; accordingly, it is deemed admitted. *Smith v. Niles Tp. High School Dist.* 219, 2006 WL 756071 at *9 (N.D.Ill. 2006); see also *United States v. Lilley*, 581 F.2d 182, 187 (8th Cir.1978) (when an accusatory statement against a party and that party has an opportunity to deny it and does not do so, the statement is deemed admitted).

¹⁸ See discussion in Pl's MJRet (# 461) at 20-22, *Opp. to Def's MJRet* (#472) at 8-12 and her *Reply to Def's Opp. to Pl MJRet* (Dkt #489) at 2-4.

1999 decision,¹⁹ he refused to instruct the jury that it is not necessary for a plaintiff to use the words "sexual harassment" in order to invoke Title VII protections.²⁰

Ms. Martin vehemently argued for this instruction (Tr. 2282:2-2283:12, 2288:5-8, 2288:15-2298:1), but Judge Hogan excluded it. Tr. 2401:3-7.

D. 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. (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,

¹⁹ 1999 U.S. Dist. LEXIS 19516 at 17-18, citing *Brandau v. State of Kansas*, 968 F. Supp. 1416, 1421-22 (D. Kansas 1997) (plaintiff engaged in protected opposition to discrimination because she spoke directly with the alleged harasser and reported his conduct to her supervisors); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025 (D. Nev. 1992) (protected opposition under Title VII includes the statement to the employee, "I don't have to take this," or a simple request to the employer to "do something."); *Howard U. v. Green*, 652 A.2d 41, 46 (D.C. App., 1994) (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).

²⁰ As Judge Hogan instructed the jury, the actions of an employee for a corporation, performed within the scope of his employment, are the acts of the corporation. Tr. 2397:6-10. Officer Sirleaf's understanding of the complaint should be imputed to his employer, Howard. Officer Sirleaf testified that he understood the pursuit of a woman as a "wife" to be "sexual in nature." Tr. 311:3-6.

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.

Without the legal definition of “stalking,” the jurors could not intelligently evaluate Howard’s repeated, artificial and misleading purported distinctions between “stalking” and “harassment” or Howard’s specific accusations that Prof. Martin never raises issues of sexual harassment prior to Howard’s December 18, 1997 decision not to offer her a permanent position. Tr. Tr. 2459:13-16; 2502:16-24. In fact, in closing arguments, Howard’s outside counsel, Mr. Shwalb, accused Ms. Martin of “*play[ing] the sexual harassment card*”²¹ – and of fabricating a sexual harassment claim only after she was rejected for a permanent position on December 18, 1997, never having previously mentioned “sexual harassment.” Tr. Tr. 2457:15-2460:8. The jury was misled into believing Mr. Schwalb’s argument that, by using the term “stalking” and asking the administration to address

²¹ The 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 transcripts contain many obvious errors. See Ms. Martin’s March 19, 2007 *Transcript Status Report, Regarding Missing Direct Testimony and Transcript Errors*. By Order dated March 7, 2007, this Court stated that there is no court audiotape the trial; therefore, errors might never be corrected.

“security problem on campus” in her memoranda, Prof. Martin admitted that she was not sexually “harassed” – but rather, “stalked” – as if they are different. The jury’s confusion and need for clarification was reflected in the jury note, sent four hours before the verdict, asking the court to “Please define sexual harassment.” Tr. 2563:1-2, Jury Note # 2 (# 457). Judge Kessler, substituting for Judge Hogan, denied the jury’s request for the requested additional guidance. Tr. 2568:1-7; *see discussion* at Tr. 2563:21-2566:9.

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

Ms. Martin is entitled to judgment, as a matter of law, on her sexual harassment claim and a remand of this case to try the issue of compensatory and punitive²² damages for sexual harassment. Judge Hogan specifically identified the specific questions that would be put to the jury as:

²² Judge Hogan refused to allow the issue of punitive damages to proceed to a jury; 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). Bullock knowingly and callously subjected Prof. Martin to a workplace threatened by a violent, serial stalker, with a history of violence and a criminal record and then *mocked* Prof. Martin’s experience to the EEOC, joking that Prof. Martin wanted her to “wrestle the stalker down.” Bullock even lied, in writing, to Prof. Martin and to Howard’s own General Counsel, stating that she immediately contacted the Director of Security in response to Prof. Martin’s November 25, 2007 memo reporting Harrison’s stalking; however, as she admitted at trial, she never consulted with campus security or MDP regarding the stalking. In addition, Bullock actually lied to APT Committee member, Prof. Nolan, telling her that there were no faculty

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).

As set forth in her MSJ (#330-1) at 5-6, all of Howard's witnesses, including Deans Bullock and Newsom, as well as all of Howard's own security officers and all involved D.C. Metropolitan Police Department officers, agreed that Harrison's stalking of Prof. Martin was a serious matter that posed a threat to Prof. Martin and that her fear of Harrison in her workplace was reasonable. This evidence compels a finding that the harassment was "severe and pervasive" and not a mere annoyance or inconvenience. No reasonable jury could conclude otherwise. In fact, the jury *did* conclude that the harassment was severe and pervasive, creating a hostile work environment for Prof. Martin. Verdict Form (Exhibit A) at 1.

The answer to the second question was equally compelled by the evidence cited in Ms. Martin's MSJ (#330-1) at 7-12. Deans Bullock and Newsom admitted that they did not post notices banning Harrison from campus, as advised by the D.C. police department, they did not keep the campus security or the police department updated as to Harrison's additional acts, nor did they consult with

vacancies left, when Prof. Nolan specifically asked so that the Committee could consider Prof. Martin to fill a vacancy. The totality of this conduct makes punitive

either of these law enforcement departments or take any reasonable to keep Harrison off campus, despite security procedures and policies that were established precisely to handle stalking cases on campus. In the face of this undisputed evidence, no reasonable juror could have concluded that Howard took reasonable steps to end the hostile work environment. Again, the jury *did* find the facts in favor of Ms. Martin, concluding that Howard *did* fail to take reasonable steps to end the harassment. Verdict Form (**Exhibit A**) at 1.

Ms. Martin was entitled to summary judgment, based on the undisputed facts of record, in 2002. There was no need for this case to continue for another five years to proceed to trial, while Ms. Martin's career, finances, health and family suffered. Ms. Martin respectfully asks this court to leave justice no longer delayed and denied. She asks the Court to grant to her the summary judgment that she should have obtained five years ago, or to grant judgment, as a matter of law, based on the jury's conclusions on the two factual issues that were actually identified by the court, three times, over the seven years prior to trial.

V. The Trial Court Erred by not Striking Defendant's Motion for Summary Judgment, which Relied Primarily on Excluded Testimony

On September 24, 2002 (#276), MJ Facciola ordered Howard not to include, in its MSJ (#268-1, 288), any testimony of Prof. Andrew Gavil, raised, for the first time,

damages particularly appropriate.

her employment opportunities – particularly those in teaching.²⁹ The harm to Ms. Martin’s reputation is perpetual, extending even beyond her lifetime. If not vacated, it will be an eternal disgrace to her memory and an embarrassment to her family. Ms. Martin’s accomplishments and career certainly merit a better legacy. Justice demands that this baseless decision be vacated.

VI. Howard’s Closing Argument Constitutes an Admission that Prof. Martin’s Qualifications were Superior to that of Prof. Cunningham

Prof. Isaiah Leggett (“Ike”) was the Chairperson of the APT Committee when it made the decision to select Prof. Cunningham for the vacant EEO/Labor position.³⁰ When confronted with Prof. Martin’s superior work experience, publications and Equal Employment/Civil Rights expertise, as listed on her resume and application, as compared to those of Prof. Cunningham, Prof. Leggett acknowledged that it was Prof. Martin, not Cunningham, who had the superior experience, publications and background to fill the advertised EEO/Labor position. He then attempted to justify the decision with a *football* analogy.

²⁹ In its closing statement, Howard’s counsel, Mr. Schwalb, actually pointed at Ms. Martin and asked the jurors, “Would you want *that woman* teaching *your* children?!” (The transcript reads: “... would you want Ms. Martin to teach your children law. Would you want her to teach you law?” Tr. 2463: 4-5, but, as previously discussed, the transcript contains errors. See fn. 4.

³⁰ Ike Leggett is now the County Executive for Montgomery County, Maryland, was a County Council Councilman, and was the *Director* of the County’s *Human Rights Commission* for ten years.

If you look at people at a certain point, it is easier to see that in my estimation one may be slightly above the other in terms of tenure, that is the length of time that you've actually worked in the profession, your potential for progress in the future, your commitment to the university and its mission. All of those things. You can have at that point candidates not quite equal on paper as well as experience. But part of the judgment that I make and part of the judgment as a committee, you have to say were they would they be -- what was what is the likelihood of their progress five, ten years from now? That's the crucial point in terms of judgment. And it goes back to the question of the standards for publications and scholarship and the work ethic. It's the equivalent, again, to staying you drafted **a young quarterback** with great potential. But if you look at that person in the first year or two of the game, you may say that the veteran has better experience, but the quarterback that you see -- that you got for the future, in five years is going to elevate you and/or the institution in a much higher level. That was the discretion, that was the distinction that I saw. It goes precisely to the publication. So you're correct that I said in my deposition that if you looked at the two at that point in time, one would be elevated slightly above the other. But the consideration and the discretion that we have as a faculty and as a committee is to not only say where are they today, but what is likely to be the future of a particular applicant. (Emphasis added)

Tr. Tr. 1015-1016.

In closing, Howard's outside counsel, Brian Schwalb, argued:

And what about the testimony, undisputed, that Ms. Martin worked for a lot of years as a lawyer before teaching, and Christi Cunningham worked for less. But you remember what Professor Leggett talked about that very point, remember he talked about the fact that the APT committee sometime has to make a judgment on future potential. And he used that analogy about when a quarterback is a rookie and the team decides that they're going to go with the rookie quarterback even though you've got a veteran, on the theory that that rookie quarterback might be your franchise player one day. So you invest in the rookie, even though the rookie has less experience, because you see potential.

Tr. Tr. 2501.

Even as of its closing statement, Howard could not make up its mind as to its defense. For years, Howard attempted to portray Prof. Martin as the candidate who was less accomplished than the selectee. At the end, Howard used a football analogy, comparing Martin to an aging “veteran” football player whose time it was to “step aside” for the “rookie,” Cunningham, to give her “a chance.”³¹

A *football* analogy could not be less applicable to any position in the legal position – from law professor to judge. It is ridiculous to imply the same qualifications that make a football star – primarily physical strength, agility and youth -- are reasonable requirements for law professors.

VII. Howard’s Closing Argument Constitutes a *Per Se* Violation of the Age Discrimination in Employment Act (ADEA)

After Howard’s stated legitimate reason for its non-renewal was demonstrated to be false, Howard became so desperate for a defense that it

³¹ Howard’s opening statement, given by in house counsel, Phillip Lattimore, characterized Ms. Martin as “a very talented lawyer” who “needs to move on with her life.” Tr. 54:17-19. Howard’s closing, contrasted with its opening, raises the question of what Howard expects Ms. Martin to “move on” to in her life. Clearly, as a law professor and a former civil servant, e.g., working for the U.S. Department of Justice, the EEOC, the Legal Aid Society of New York and the New York State Office of the Attorney General (Civil Rights Division), Ms. Martin did not have the history of multi-million dollar contracts that enable young *football players* who can afford to “move on” to finance new careers at age 40.

essentially claimed that the real reason for its non-renewal of Prof. Martin was *age discrimination*. Howard's argument appears to be that it is advisable to hire the youngest candidate for any job because that candidate has an expectancy of more working year ahead of him/her and presumes that this new hire will remain loyal to and employed by the hiring employer for all of those years. 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 621-634.³²

Prof. Martin, at age 40, was neither "ready for pasture" nor eligible for retirement.³³ She was in her professional *prime*.³⁴ Howard should finally be

³² Prof. Martin turned 40 in May of 1997 and was therefore newly covered by the ADEA. Based on Howard's closing argument, Prof. Martin should be permitted to amend her complaint to conform to the evidence produced at trial, to add a claim under the ADEA.

³³ Under the facts of this case, even age discrimination would not completely explain Howard's decision. Although Prof. Martin graduated from law school (1981) eleven (11) years before Prof. Cunningham (1992), according to her personnel records, Prof. Cunningham is only four (4) years younger than Prof. Martin. Prof. Martin was born in 1957. See Pl's Reply to Def's Opp to Def's MJRet (#489), Ex. I at 22-23, fn. 21, 489-10. Prof. Cunningham was born in 1961. *Id.* It appears that Prof. Cunningham's resume does not account for seven years, before her graduation from college, between the expected college graduation age and her own. When Prof. Martin was Prof. Cunningham's age, four years earlier, she had thirteen years of legal experience, with this nation's top civil rights agencies, including the U.S. Department of Justice, the U.S. Equal Employment Opportunity Commission, and the New York State Office of the Attorney General and had published in the area of employment discrimination.

³⁴ In fact, the July 26, 1996 APT Committee memorandum recommending Prof. Martin for a position at Howard, only two years earlier, described her as a "young" scholar. Pl's October 9, 2002 MSJ, #330, Ex. D, # 330-10.

required to restore whatever can be restored of the “years that the locusts have eaten” and restore the teaching career that she could enjoy for another 20-30 years.

VIII. Had the Jury Determined whether Howard Produced Evidence of a Legitimate, Non-Retaliatory Reason for Prof. Martin’s Non-Renewal, or that the Stated Reason was False, it would have been Compelled to Render a Verdict for Ms. Martin

Had the jury found protected activity, it would have proceeded to answer the Question # 6 (**Exhibit A**, page 4):

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 jury would have been compelled to answer “No” – which would have resulted in a verdict for Ms. Martin, as stated on the verdict form. The APT Committee’s official position statement, prepared for this litigation and signed by Prof. Isaiah Leggett, on July 11, 2001, stated that the reason for Prof. Martin’s non-selection/non-renewal was that 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.³⁵

³⁵ APT Committee’s July 11, 2001 Statement, Pl’s MSJ (#330-1) at 24-27, Ex. B, Pl’s Opp to Def’s MJRet (#474) at 15-16, Ex. X (#474-26).

Howard's purported non-retaliatory reason is undeniably false. Prof. Cunningham's article was *not* published in December of 1997, when the Committee made its decision, but was published a full year later, in the *Winter of 1998*. Pl's Opp to Def's MJRet (#474) at 15-16, Ex. Y (#474-27), Tr. 1983:8-25; 2526:5-9, 2040:14-2041:4. Prof. Martin's article, which was more than twice as long as the selectee's article, was also published in the *Winter of 1998* and had been accepted for publication on December 17, 1997. Pl's Opp to Def's MJRet (#474) at 15-16, Ex. Z (#474-28), Tr. 2041:7-17. The irrefutable evidence is that both articles accepted for publication, but not yet published, when the Committee made its decision, on December 18, 1997.

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. Ms. Martin is therefore entitled to judgment, as a matter of law.³⁶

³⁶ Judge Hogan incorrectly concluded 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); however, the jury made no finding with respect to intentional retaliation independently – it only determined that there was no retaliation for "protected activity." This conclusion was compelled by the jury's conclusion that there was no "protected activity."

Even if the jury had answered "Yes," to Question # 6 and proceeded to answer Question # 7, it would have been compelled to render a verdict for Ms.

Martin. Question # 7 asks:

Did the Plaintiff prove ... that the legitimate, non-discriminatory reasons offered by Howard University were false and pre-textual or that the real reason for the APT Committee's recommendation of Professor Cunningham as opposed to Plaintiff was retaliation?

Again, the actual publication dates of the candidates' articles would compel any jury to answer "Yes;" Howard's stated reason for Prof. Martin's rejection was, undeniably, false and pre textual. Howard perpetuated a fraud upon the district court for eight years. It is time to finally put an end to it.

IX. The Trial Court Erroneously and Artificially Limited and Re-Characterized Plaintiff's Retaliation Claims

A. The Trial Court Erroneously Dismissed Plaintiff's Most Compelling Retaliation Claims, in Violation of Fed. Rule Civ. P. 8(c)

Judge Hogan succinctly described 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. (Emphasis added)

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

In 1999, Judge Hogan sustained Ms. Martin's retaliation claims based on these actions, holding that they could proceed to trial. 1999 U.S. Dist. LEXIS 19516. On October 20, 2003, however, Magistrate Facciola, *sua sponte*, 2003 U.S. Dist. LEXIS 18501 at * 31-3 (#307), effectively reversed Judge Hogan's 1999 decision, in part, dismissing Ms. Martin's strongest retaliation claims:³⁷

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.... (Emphasis added)

³⁷ Fed. 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). Although MJ Facciola's Report stated that Howard raised this argument in its (#330-1), as a new argument, not raised in its 1998 *Motion to Dismiss* (2003 U.S. Dist. LEXIS 18501), this argument was nowhere in Howard's (#330-1). See discussion in Pl's October 30, 2002 *Objection to MJ Facciola's October 20, 2002 Report and Recommendation* (#308).

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 and were protesting Prof. Martin’s non-renewal.

Even prior to *Burlington* and *Rochon*, canceling a vacancy has always been actionable under Title VII. In its simplest, classic form, where an African-American sees a “Help Wanted” sign in a window, applies for the job, and the employer takes the sign down.⁴¹ 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. There was *never* any basis for the dismissal of Ms. Martin’s retaliation claims. With the dismissed retaliation claims are restored, Ms. Martin is entitled to judgment, as a matter of law.

⁴¹ Ironically, if this Court adopts MJ Facciola’s analysis, adopted by Judge Hogan, Howard University will have betrayed its “civil rights legacy” by establishing precedent that will set the clock back many years for African-Americans and other minorities in employment discrimination cases. If employers can discriminate or retaliate against persons opposing discrimination, “Help Wanted” signs, so to speak, or job vacancies, will be discriminatorily and retaliatorily “pulled down”

B. Judge Hogan Limited Ms. Martin's Retaliation Claims even Beyond MJ Facciola's 2003 Limitation and Dismissal

On December 16, 2005, Howard filed a *Motion in Limine to Clarify that Plaintiff's Retaliation Claim is Limited to the Decision not to Hire Plaintiff for the EEO/Labor Law Position (#343)*. There was never any basis for such a motion. MJ Facciola's October 20, 2003 *Recommendation* did not limit Ms. Martin's retaliation claims to the decision that the APT Committee made on December 18, 1997, when it selected Prof. Cunningham over her to fill the EEO position. MJ Facciola specifically upheld Ms. Martin's additional retaliation claims based on "the decision, formalized in Bullock's letter of April 8, 1998, rejecting Martin's application for **any position on the HU faculty.**" 2003 U.S. Dist. LEXIS 18501 at * 31-32. (Emphasis added)⁴²

Judge Hogan granted Howard's motion (#377), erroneously limiting Ms. Martin's claims to one specific tenure track position, on one date, was contrary to all previous rulings in the case; it therefore violated the principles of *res judicata* and the law of the case. This limitation erroneously limited and prejudiced Ms. Martin, both

with impunity, to avoid hiring minorities and women.

⁴² See Pl's Opp to Def's Motion in Limine to Clarify that Plaintiff's Retaliation Claim is Limited to the Decision not to Hire Plaintiff for the EEO/Labor Law Position (#358) and Pl's Motion for Leave to File Rule 59(B) Motion for Reconsideration of January 10, 2006 Order Granting Def's Motion in Limine to Clarify that Plaintiff's Retaliation Claim is Limited to the Decision not to Hire

respect to her motion for summary judgment, and again, at trial.

X. The Jury was not Properly Instructed on “Protected Activity” or “Adverse Actions” to Address Prof. Martin’s Premature Eviction from her Office

As discussed above, the jury incorrectly determined that Prof. Martin did not engage in “protected activity” within the meaning of Title VII. The jury repeated this error in Question # 8 regarding Howard’s premature eviction of Prof. Martin’s eviction of her office.

In *Burlington*, the U.S. Supreme Court expressly adopted the ruling and analysis in *Rochon*. *Rochon* specifically adopted, for Title VII, the definition of actionable retaliation that it had set forth in *Passer v. American Chemical Society*, 935 F. 2d 322 (D.C. Cir. 1991), an *Age Discrimination in Employment Act* (ADEA) case. *Passer* held that an employer had illegally retaliated against the plaintiff – a *retired* employee, when it cancelled a symposium that was to be held in his honor. Certainly, if the cancellation of an honorary symposium for a *retiree* constitutes actionable retaliation under Title VII, ordering Prof. Martin to vacate her office, while she is using it to grade exams, and while the similarly situated exiting Visiting Professor who had not protested sexual harassment, was not required to vacate her office, is actionable retaliation.

Plaintiff for the EEO/Labor Law Position (# 395); see also Pl’s MJRet (#462) Reply (#489).

XI. 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:

Each motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support the statement. An opposition to such a motion shall be accompanied by a separate, concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement.... In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is converted in the statement of genuine issues filed in opposition to the motion.

Both the Circuit and trial courts have required strict adherence to Local Rule 56.1. *Jackson v. Finnegan*, 101 F.3d 145, 150 (D.C. Cir. 1996); *Twist v. Meese*, 854 F.2d 1421, 1425 (D.C.Cir. 1988); *Gardels v. CIA*, 637 F.2d 770, 773 (D.C. Cir. 1980).⁴³ Defendant refused to comply with Rule 56.1 and offer citations to the record that conflict with Ms. Martin's *Statement of Undisputed Facts* because it *could not cite credible evidence of record to dispute them.*

Plaintiff's *Statement of Undisputed Material Facts* is supported by the record and compels summary judgment for Ms. Martin. Without a *Statement of*

⁴³ There is no distinction between plaintiffs and defendants with respect to this rule. Where the Defendant did not file a contravening statement of facts in dispute in accordance with Local Civ. R. 56.1; the plaintiffs' *Statement of Undisputed Material Facts* is deemed admitted by defendant. *Mintz v. District of Columbia*,

Disputed Facts filed by Howard, all of the material issues of fact to be decided by a jury, stated in *Plaintiff's Statement of Undisputed Material Facts*, should have been deemed admitted; accordingly, there would have been no issues of fact for a jury to decide and no need for a trial.

MJ Facciola avoided applying Rule 56.1 against Howard and granting summary judgment to Plaintiff by *claiming that Plaintiff too, did not file a Statement of Disputed Facts*. In fact, **Ms. Martin had filed a detailed, 16 page, 44 paragraph Statement of Disputed Material Facts**, as an attachment to her *Opp. to Def's* (#330-1), precisely as required by Rule 56.1. Based on this serious misrepresentation of the record, MJ Facciola wrote that he could “say a plague on both your houses and strike both motions” for summary judgment (sanctioning both parties), but that he would, instead, “*divine*” the facts. (2003 U.S. Dist. LEXIS 18501 at 5.) This “divin[ation]” resulted in what the parties actually agree is a *Report and Recommendation* (#307), adopted by the Court (#318), that is *replete with material factual errors*.

What MJ Facciola presented as an equal treatment, to both parties, for equal violation of Rule 56.1, was actually egregiously *unequal* treatment, since **Ms. Martin had complied with Rule 56.1 and only Howard committed sanctionable**

conduct. MJ Facciola improperly punished the innocent party along with the guilty and deprived Ms. Martin of the Rule 56.1 benefit of having her *Statement of Undisputed Material Facts* deemed admitted.⁴⁴

Judge Hogan had already set forth the legal analyses of the issues before the court by in his 1999 decision. Applying those analyses to the facts that should have been deemed admitted, *Plaintiff was entitled to summary judgment on all of her claims.*

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

In his 1999 decision, Judge Hogan dismissed Ms. Martin's claim of intentional infliction of emotional distress, brought against both Howard University and Alice Gresham Bullock personally.

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. Generally, these claims are reserved for behavior that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized

⁴⁴ MJ Facciola further harmed Ms. Martin's reputation, in a published decision, by indicating that she had mal-practiced in her own case. Since Ms. Martin was forced into private practice after Howard destroyed her teaching career, a published decision indicating that she did not handle her own case in a competent manner could certainly dissuade potential clients from retaining her and demean her in the eyes of opposing counsel and/or judges in other cases.

community." Even assuming all of the allegations in Plaintiff's complaint are true, this Court cannot find that a reasonable juror would deem them to be sufficiently outrageous or extreme to rise to the level of intentional infliction of emotional distress.

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

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 566, quoting *Restatement of Torts*, Section 46. Because Dean Bullock had control over Prof. Martin's workplace and livelihood, the emotional distress that she could and did inflict upon Prof. Martin was severe. The same conduct that constitutes sexual harassment in the workplace may also constitute a claim for intentional infliction of emotional distress. *Howard University v. Best*, 484 A.2d 958, 985 (D.C. App. 1984), *modified on other grounds*, 547 A.2d 144 (D.C. App. 1988). "Actions which violate public policy may constitute outrageous conduct sufficient to state a cause of action for infliction of emotional distress." *Id.*

Specific intent to cause harm is not required. Reckless infliction of emotional distress is sufficient...Liability "extends to situations in which there is no certainty, but merely a high degree of probability,

that the mental distress will follow, and the defendant goes ahead in conscious disregard of it."

Restatement, supra, § 46 comment i.

Dean Bullock allowed a stalker with a criminal record and a history of violence to freely roam Howard Law School's premises, refusing to take even the smallest of measures repeatedly requested by Prof. Martin, the D.C. Metropolitan Police Department and even Howard's own security officers – such as posting a notice in the security office and the library – to bar the known stalker from the premises. At a minimum, Dean Bullock acted with reckless disregard for the foreseeable emotional distress – and fear of physical harm -- inflicted upon Prof. Martin by the stalker. Dean Bullock's callousness is highlighted by her sarcastic comment to the EEOC that Prof. Martin was "dissatisfied" with her response and seemed like she wanted Dean Bullock to "wrestle" the stalker down.

Former Dean Bullock committed additional intentional acts to terminate Prof. Martin, a single mother, leaving her without a means to support her daughter. Bullock's actions against Ms. Martin are more egregious than the actionable conduct committed against in other cases in this jurisdiction that have been permitted to proceed to trial as intentional infliction of emotional distress claims.⁴⁵

⁴⁵ In *Mintz v. District of Columbia*, 2006 U.S. Dist. LEXIS 34446 at *6, the district court permitted the plaintiff's intentional infliction of emotional distress claim to proceed to jury where plaintiff had one year renewable contracts, instead

Finally, Dean Bullock *lied* to “cover up” her malicious intent and misconduct, both with respect to her decision not to address the stalking issues and with respect to the vacancies on the faculty.

A jury should have determined whether former Dean Bullock’s conduct met the “outrageous” standard and if, so, what remedy should be awarded. Bullock's actions were outrageous, and violated the current norms of our society.

XIII. The Undisputed Facts of Record Compelled Summary Judgment for Ms. Martin on her Breach of Contract Claim

A. Ms. Martin’s Motion for Summary Judgment was Never Considered because MJ Facciola Erroneously Held that her Breach of Contract Claim was Dismissed in 1999

Inexplicably, 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 strange assertion, however, Judge Hogan specifically and clearly *upheld* Ms. Martin’s breach of contract claim in his 1999 decision. 1999

of permanent employee status, was denied certain training benefits and had his desk placed in an undesirable, isolated location). The court’s 1999 dismissal of Ms. Martin claim must be reversed to be reconciled with *Mintz*. More on point to the current case is a Fourth Circuit case, *Gantt v. Security, USA*, 356 F.3d 547, 84 Empl. Prac. Dec. (CCH) P41585, 20 I.E.R. Cas. (BNA) 1618 (4th Cir. 2002).⁴⁵ Like Ms. Gantt, Ms. Martin’s supervisor forced her to work in an environment

U.S. Dist. LEXIS 19516 at 20-22. Ms. Martin repeatedly raised this issue, as well as numerous other errors in MJ Facciola's *Recommendation*. Howard agreed that many of the factual conclusion in MJ Faccila's *Recommendation* were in error and that the court should decide the cross motions for summary judgment *de novo* (*Def's Response to Pl's Objection to MJ Facciola's October 20, 2003 Report and Recommendation* (#311) (*see discussion in Pl's Reply to Def's Response, #312*); yet, Judge Hogan adopted MJ Facciola's *Recommendation*, with no discussion of the unopposed arguments in favor of vacating it. September 24, 2005 Order (#318)

On October 21, 2005, after a pre-trial conference the previous day, Judge Hogan issued an Order correcting MJ Facciola's statement, but refused to address the fact that neither party's motion for summary judgment was ever considered on this claim (#325), despite both parties' requests that the court do so;⁴⁶ instead, Judge Hogan set the issue for trial without a decision on the dispositive motions. Ms. Martin was entitled to consideration of her motion for summary judgment on her breach of contract claim. Had it been considered, she should have prevailed, based on the undisputed evidence of record and Howard's admissions.

where she feared a violent predator who had targeted her for harassment.

⁴⁶ See also Pl's **Unopposed Motion to Vacate October 20, 2003 Report and Recommendation of MJ Facciola** (# 326), denied by Judge Hogan, without explanation (November 8, 2005 Minute Order, no docket number)

B. The Questions Identified for Jury Determinations were Answered in Discovery, Prior to the Filing of Motions for Summary Judgment

In 1999, Judge Hogan denied Defendant's *Motion to Dismiss* in to allow the jury to decide : 1) whether Professor Taslitz had the authority to bind the University; 2) whether Taslitz actually led Plaintiff to believe that the Visiting Associate Professor position that she was being offered was expected to become a tenure-track position. 1999 U.S. Dist. LEXIS 19516 at 22. Judge Hogan also held that Howard could not prevail on a Statute of Frauds Defense if the contract could conceivably have been performed in one years, even if was not actually performed in one year. *Id.*

1. Howard Admitted that Taslitz had the Authority to Bind the University when he Made an Offer to Plaintiff in 1996

The issue of whether Prof. Taslitz had the authority, or the apparent authority, to bind the University should not have even been tried before a jury. Howard had already admitted that Taslitz had the authority to bind the University. *Def.'s July 11, 2001 Answers to Interrogatories*, ¶ 18 (#330-1) Ex. B; Plaintiff's Exhibit 26b; *see also* Taslitz deposition at 68-69, 75, 87. Howard wasted the Court's, jury's and Ms. Martin's time and energy on this issue at trial and confused the jury by asserting this defense at trial.

2. Defendant should not have been Permitted to Assert a Statute of Frauds under the Undisputed Facts

In her *Statement of Undisputed Material Facts*, Ms. Martin asserted, unchallenged, that a tenure-track could have become available at any moment, based on the resignation of a tenured or tenure-track faculty member, or the allocation of additional funds for faculty hiring.⁴⁷ Ms. Martin testified that both Prof. Taslitz and Dean Ramsey represented to her that if Prof. Argrett did not return from sabbatical, but relinquished her tenure-track slot, that this was an example of a "slot" that Prof. Martin could fill.⁴⁸ Neither Prof. Taslitz nor Dean Ramsey could predict when Prof. Argrett would resign, but represented that she could resign at any moment, freeing up a faculty slot that Prof. Martin could fill. Prof. Argrett could have resigned a week after Prof. Martin joined Howard's faculty and Howard could have filled the slot with her, as agreed. No one disputed Ms. Martin's testimony on these facts.

Under these undisputed facts, there is no question that the contract could have been fulfilled in less than a year. The Statute of Frauds defense therefore does not apply to the facts of this case. Again, Howard has wasted the years of the court's and Ms. Martin's time, energy and resources.

⁴⁷ Pl's MJS (#330-1) at 44 (#463); Pl's MJBCon (#463) at 6-7; Reply (#489) at 4-6.

⁴⁸ Tr. 1621:2-1622:12.

3. The Totality of the Circumstances Demonstrates a Meeting of the Minds and a Binding Contract

Evidence produced both in discovery and at trial demonstrates that Prof. Taslitz negotiated with candidates, including Prof. Martin, wrote letters making offers and orally made offers, at the direction of Howard officials who delegated that authority to him.⁴⁹ Ms. Martin testified that Prof. Taslitz made representations to her, at the time of her hire in early 1996, that: 1) if a tenure track position had been available at the time of the offer, Howard would have offered it to Prof. Martin;⁵⁰ 2) Howard was offering her a visiting position only because no tenure-track positions were available;⁵¹ 3) Howard generally has visitorships available and has renewed visitors for many years, including Prof. Patricia Worthy and others;⁵² and 4) Howard could offer her a multiple year contract, if that would make her more inclined to accept the offer;⁵³ 5) Howard would just keep renewing Prof. Martin as a visitor until a tenure-track position opened up and then they would “slide” her into it (6) the visitorship being offered to her was a “visitorship only in

⁴⁹ Pl’s MJS (#330-1) at 44-45, Facts ¶ 16-17; Pl’s MJBCon (#463) at 6; *Def.’s July 11, 2001 Answers to Interrogatories*, ¶ 18; Taslitz deposition at 68-69, 75, 87; Tr. 1073:4-8.

⁵⁰ Pl’s MJS (#330-1) at 45, Facts ¶ 17; Pl’s MJBCon (#463) at 6-7.

⁵¹ Pl’s MJS (#330-1) at 44-45, Facts ¶ 17; Pl’s MJBCon (#463) at 6-7.

⁵² Pl’s MJS (#330-1) at 45, Facts ¶ 17; Pl’s MJBCon (#463) at 6-7, Tr. 1608:4-1609:1, 1083:2-1084:3.

⁵³ Pl’s MJS (#330-1) at 38, Facts ¶ 17; Pl’s MJBCon (#463) at 6-9, Reply (#489)

name,” and “for all practical purposes, a tenure-track position.”⁵⁴ Prof. Martin also testified that she told Taslitz that her daughter was starting high school that year and that she would not move her back to D.C. from Ohio, then “rip her out of high school” to move somewhere else.⁵⁵ In his deposition, Prof. Taslitz claimed that he “[could] not recall” his “exact words,”⁵⁶ but he *acknowledged* that he intended to convey the message that, if Prof. Martin accepted the visitorship, she would be “well placed” for a permanent position as soon as one became available.⁵⁷ In the cross-motions for summary judgment, Ms. Martin’s recollection of the

at 9, r. 1609:10-16; 1622:22-1623:8.

⁵⁴ Pl’s MJS (#330-1) at 44-45, Facts ¶ 17; Pl’s MJBCon (#463) at 7-8, Reply (#489) at 13-14; Tr. 1608:4-1609:16.

⁵⁵ Pl’s MJS (#330-1) at 45, Facts ¶ 17; Pl’s MJBCon (#463) at 7-8, Tr. 1609:5-7, 1626:22-1627:1.

⁵⁶ 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). The response of “I don’t recall” on material issues that the witness should be able to recall 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) (court found witnesses’ five “I don’t recall” answers were insincere and deliberately “evasive or incomplete” within the meaning of Rule 37(a)(3)). *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) (numerous “I don’t recall” responses re perceived as evasive); *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). In his deposition, Prof. Taslitz responded with the answer I “don’t recall” or “don’t remember” no less than 388 times.

⁵⁷Pl’s MJS (#33-1) at 45, Facts ¶18; Pl’s MJBCon (#463) at 7, Reply (#489) at 8, 13, 23.

conversation was left completely undisputed. Prof. Taslitz did not *deny* the statements, but evasively claimed not to recall the details of the conversation.

The differences between Prof. Martin allegations and Prof. Taslitz' admissions are ones of degree, rather than substance. 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 "meeting of the minds," irrespective of the precise words used or "recalled" was that Plaintiff was being hired in the only position available for the longest period of time possible, to allow time for a permanent position to become available for her to officially become a permanent member of the faculty.

4. Howard's Grievance Committee Findings Constitute Admissions that Howard Breached its Contract with her

Howard University's own Grievance Committee determined that the Law School had violated Prof. Martin's procedural rights, under the Faculty Handbook, to avail herself of the grievance process to avoid her non-renewal or termination from the University.⁵⁸ The Grievance Committee determined that Prof. Martin's rights to due process and academic freedom had been violated. By

⁵⁸ See Pl's MJBCon (#463) at 26-28, Opp. to Def's MJBCon (#455) at 5-8 and Reply (#489) at 6-7, 32-33; Tr. 2035:24-2036:13.

denying Prof. Martin the procedural rights that even the Grievance Committee held she was entitled to, Howard further breached its contract with Prof. Martin.

Ms. Martin specifically alleged that now outgoing President Swygart acted with callous disregard and breached his duty to students and faculty by permitting Dean Bullock to remove her from the faculty in retaliation for her complaints about stalking and refusing to allow Plaintiff any means of addressing these issues within the University. Comp. ¶ 295, 317-324. The Grievance Committee determined that Prof. Martin was being deprived of her right to participate in the Grievance process, that there was evidence to indicate that the law school had acted in a manner that was arbitrary and capricious, and that the law school had violated Prof. Martin's rights to academic freedom.

The University's conclusion constitutes an admission of a party and should have been admitted at trial, but Judge Hogan specifically instructed the jury not to consider it. Tr. 2400:5-11. This ruling was based on Howard's misrepresentation to the Court that the Grievance Committee had no jurisdiction over sexual harassment claims. Even once Ms. Martin proved to the Court that Howard had misrepresented the Committee's authority, based on the Committee's own Constitution, Judge Hogan did not correct the error. Tr. 2544:14-2547:8.

Howard has not produced evidence to establish a genuine dispute of facts to survive Plaintiff's *Motion for Judgment*, under *Reeves v. Sanderson*, 530 U.S. 133, 142 (2000) and *Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003) *Holcomb v. Powell*, 433 F.3d at 896. There were therefore no genuine disputed material facts to be determined by a jury on Ms. Martin's breach of contract claim and her motion for summary judgment should have been granted, in 2002.

C. The Jury was Subjected to Prejudicial Testimony that had no Probative Value, in Violation of Fed. R. Ev. 803

After eight years of waiting to try this case, Howard was permitted to litigate facts that it had admitted, raise irrelevant, prejudicial allegations to confuse 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 misrepresenting facts in order to impugn Ms. Martin's character and to force her to waste her limited and restricted trial time, during her case in chief, on Howard's irrelevant "mudslinging."⁵⁹ See Pl's *Motion in Limine to Exclude Irrelevant*,

⁵⁹ Credibility determinations were critical to the breach of contract claim, since the negotiations at issue involved private conversations between Prof. Taslitz and Prof. Martin only (despite Judge Hogan's references to Prof. Leggett and Dean Bullock's testimony regarding their speculation about those negotiations in his October 4, 2006 decision, 2006 WL 2850656 at 7). Judge Hogan refused to allow Ms. Martin to present documented, irrefutable evidence to rebut claims false claims and inferences made by Howard's counsel, Mr. Schwalb, during cross examination. See Pl's MJBCon at 9-16; Reply (#489) at 16-18; Pl's *Motion for*

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Unduly Prejudicial Allegations (#342) and Pl's April 24, 2006 *Motion for Sanctions and Reapportionment of Time for Defendant's Deliberate*

Misrepresentations to the Court and Jury (#439) In sharp contrast, Ms. Martin's testimony was repeatedly and improperly interrupted and stopped.⁶⁰ Judge Hogan ridiculed Ms. Martin's "last minute" counsel, in the presence of the jury,⁶¹

MR. SCHWALB: I don't think this exhibit can come in through this witness, your Honor. This is a memo that the plaintiff wrote not received. It's hearsay.

THE WITNESS: I wrote it.

Tr. 2045:3-6.

Judge Hogan sustained the objection. See discussion, Tr. 2044:21-2047:2.

⁶⁰ At the request of Mr. Schwalb (Tr. 2208:3-4), Judge Hogan even forced Ms. Martin to ask herself questions, as if talking to herself. Tr. 2246:4-6, 2248:22-2249:6, 2249:25-2250:9. Judge Hogan required Ms. Martin to talk to herself in the second person and about herself in the third person, repeatedly disrupting the flow of her testimony and making her appear ridiculous to the jury. 2246:9-2251:1.

⁶¹ Judge Hogan refused to grant Ms. Martin's attorney a recess to use the ladies' room. In the presence of the jury, Judge Hogan told counsel that she could leave, but *the trial would continue in her absence*, leaving Ms. Martin without her counsel during her cross-examination by Mr. Schwalb. Tr. 1895:9-19. Judge Hogan also loudly chastised Ms. Martin's counsel, demanding that she "stand up" when she made an objection and chastised her for "yell]" (Tr. 1701:8-9), although Howard's counsel did not always stand for objections and was often equally as loud, or louder, when shouting "objection. While Judge Hogan heard Howard's argument for judgment, as a matter of law, advocating removing the case from the jury, he continually nodded his head in agreement, implying that he would grant the motion, even before hearing Ms. Martin's rebuttal. Ms. Martin's counsel, a young Howard law graduate conducting her *first* trial ever, then stood up and gave a personal speech, denouncing her client's trial strategy in open court and stating that she wanted to withdraw, but that she knew that the court would not let her. Tr. 2179:1-2180:13. Even after her attorney's betrayal of her in open court, Judge Hogan attempted to force Ms. Martin to continue with this counsel rather than

although he knew that it was her first trial and Ms. Martin retained her, in desperation, after her first attorney quit.⁶² To call the trial a sad “circus” and/or “a travesty of justice would be both cliché and a gross understatement.”⁶³

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

Fed. R. Civ. P. 37(a)(4)(A) states:

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording

allow her to give her closing argument *pro se*. Tr. 2183:7-2186:8, 2195:4-2207:22. Ms. Martin was then forced to reveal what she had learned, during the trial, regarding her counsel’s disabilities and medication to demonstrate to the court that she was not competent to continue in the trial. *Id.* In fact, *Ms. Martin’s counsel actually hugged, and cried with, former Dean Bullock* after her betrayal of her client in open court, but while Judge Hogan was refusing to release her as counsel.

⁶² Ms. Martin’s first counsel, also a young Howard law graduate, quit, stating that he was “not comfortable” cross-examining his former Dean and was getting calls from “lawyers all over town” telling him to withdraw from the case – during trial. Pl’s April 17, 2006 *Motion for Extension of Time to Complete Trial, from 25 Hours Allotted to Plaintiff* at 9,11-13, Tr. 955:23-957:21, 991:2-995:14, 1109:7-1138:8; yet, at Howard’s request and over Ms. Martin’s vehement objection, Judge Hogan told the jury that Ms. Martin had fired two lawyers during the trial – a claim that he repeated in his published October 4, 2006 decision. The circumstances of this trial clearly merited a mistrial.

⁶³ Judge Hogan also threatened to dismiss Ms. Martin’s case because she was twenty minutes late, on one day of the trial, due to a misunderstanding about the arrival time if she did not arrive in ten minutes. Tr. 2195:13-2192:21. Fortunately, she did arrive within those ten minutes. Judge Hogan had also threatened Ms. Martin with a “severe” penalty, implying dismissal three weeks into the trial (as Howard threatened), *holding Ms. Martin responsible for her attorney’s medical treatment and written medical excuse*. April 18, 2006 Order (#433)

an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's non-disclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

In *Cobell v. Norton*, 213 F.R.D. , 213 F.R.D. 16, 28 (D.D.C. 2003), the 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 sanctions are specifically to deter future misconduct, as well as to compensate the victimized party from being abused, overburdened, delayed and unfairly drained of his/her resources. "[I]t would be unjust not to sanction defendants ... for wasting plaintiffs' time and resources" where the defendant has "stonewalled" in response to valid discovery requests and Orders of the Court to produce that discovery. *Cobell v. Norton*, 213 F.R.D. at 28. Such sanctions are also necessary to protect the integrity of the judicial process and avoid a waste of time by the courts. *Id.* If a defendant withholding evidence is not forced to pay for the money, time and effort it has cost the innocent plaintiff, the plaintiff could be forced to abandon the litigation, simply for lack of money, drained by a wealthy defendant. In order to deter such conduct and to provide the

injured party with resources lost due to the opponent's misconduct, the sanction/compensation must be immediate.

In a published June 18, 2002 decision (#221), MJ Facciola specifically warned Howard, quoting his own May 31, 2001 Order (#106):

Once more into the breach. I wonder if the parties and the court will ever wake up from the nightmare discovery has become in this case.

Staring a contempt citation in its face for its failure to comply with my April 11, 2001 order, Howard University ("HU") and its counsel ask me to reconsider and correct that order. I hasten to add that in responding to my order to show cause why they should not be held in contempt, neither HU nor its counsel is arguing that the supposed errors in my April 11, 2001 order vitiate my instruction that they show cause why they should not be held in contempt. To the contrary, they defended themselves by first conceding that they failed to comply with that order.

The May 1st discovery deadline set by this Court passed without any indication from defendant that it could not meet this deadline. Defendant did not take any measures to seek relief from the May 1st deadline. Rather, the defendant merely allowed the deadline to lapse without any response whatsoever. Defendant filed no pleadings in this case until May 18, 2001, when it sought leave to file a late response to plaintiff's motion for reconsideration.

Defendant's flagrant disregard for this Court's Order is unacceptable. Accordingly, Howard University shall show cause in writing within ten (10) days of the date of this order why Howard University and its counsel should not be held in contempt for failure to comply with this Court's order of April 11, 2001, directing defendant to provide plaintiff with answers to her interrogatories and document requests as compelled by the Order, and why defendant University should not be precluded from presenting a defense in this case altogether.

204 F. Supp. 2d 1, 1-3; (D.D.C. 2002). MJ Facciola further characterized

Defendant's "defense" by stating:

It is hard to imagine a process that more trivializes the obligation a litigant has to comply with a court's orders.

204 F. Supp. 2d at 3.

In his May 30, 2001 decision (#106), MJ Facciola granted Ms. Martin's *Motion to Compel Discovery*; however, instead of granting Ms. Martin's request to compensate her for her attorney time and costs necessary to obtain the withheld discovery, MJ Facciola held her Rule 37 costs in "abeyance" or "*limbo*." May 31, 2001 Order at 22.

Despite MJ Facciola's harsh words for Howard, he has never ordered any sanctions against Howard or otherwise addressed Plaintiff's Rule 37 motion. Even after being held in Contempt of Court, on June 27, 2002 (#231), Howard continued to withhold discovery, including and through trial.⁶⁴ Plaintiff has repeatedly implored the Court to take this issue out of abeyance, both to ease the financial hardship caused by Howard's misconduct and to deter future misconduct by

⁶⁴ Howard's withholding of discovery, changing of defenses and repeated misconduct was so severe and so prejudiced her, that a default judgment would have been a fair and appropriate sanction. 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). For example, Howard never produced Ms. Martin's personnel file – even through trial. Particularly since Howard changed its defenses repeatedly, it was particularly important for Ms. Martin to have her personnel file early in this litigation so that it could not be altered along with Howard's defenses. *Id.*

Howard. There is no authority for holding Rule 37 sanctions in abeyance and the court cited none. The court held this issue in "limbo" for years and then *closed the case without ever deciding it.*

Howard's thwarting of discovery cost Plaintiff her May 30, 2001 trial date and caused her to wait five (5) additional years for her day in court. On June 25, 2002, Howard was held in Contempt of Court (#231) for violating the court's repeated Orders granting Ms. Martin's motions to compel discovery. Ms. Martin detailed the attorney time her firm spent in pursuit of the requested discovery, totaling more than **\$364,120.00**, as of June 25, 2002, applying the appropriate *Laffey* rate, not including the fees of consulting attorneys, of counsel attorneys or her paralegal. Pl's July 8, 2002 *Motion for Leave to File Motion to Increase \$1,000 Contempt Sanction on Defendant Howard University and Other Relief* (#236), at 13-15 and supporting Exhibit A).

Howard has never disputed Ms. Martin's stated *Laffey* rate, the number of hours she claimed that she spent on attempts to obtain the improperly withheld discovery, nor has Howard challenged her entitlement to payment. The unresolved issue of Rule 37 sanctions is of paramount importance since Ms. Martin, a struggling civil rights lawyer, solo practitioner and single mother, was denied the compensation that Rule 37(a) guaranteed her and allowed Howard to abuse her and the judicial process, with impunity. Howard continued its abusive

tactics throughout the remainder of this litigation – and while Howard paid *five* outside equal employment defense law firms,⁶⁵ with a countless number of attorneys, to do it. This injustice needs – finally -- to be remedied.

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

In addition to withholding Rule 37 sanctions from Ms. Martin, the trial court ordered Ms. Martin to pay Howard University *Howard's costs of litigation*. The Court has prematurely taxed costs in a case where no “final judgment” has been issued. *Machesney v. Bruni*, 905 F. Supp. 1122, 1136-1137 (D.D.C. 1995)

Pursuant to Local Rule 54.1(c), the Clerk of the Court may only tax costs once the

⁶⁵ In its closing, Howard's outside counsel, Mr. Schwalb referenced Howard's expenditure of “a lot of money” to oppose Ms. Martin's claim. Tr. 2460:12-14. Indeed, Howard has likely spent *millions* of dollars to these nationally known civil rights/EEO defense firms on this case, against Ms. Martin, *pro se*, over the past nine years, at the EEOC and court levels. It is a sad irony that government funds and private contributions intended to benefit Howard's students with financial aid, upgrade academic programs and promote civil rights and equal employment, have been used to further enrich wealthy law firms that specialize in *opposing* civil rights and EEO cases to destroy the career, reputation and livelihood of a dedicated and “talented lawyer” (in the words of Howard's then in house counsel, Mr. Lattimore, Tr. 54:17-19), who performed her teaching duties in an “above average” manner even while being stalked by a delusional, serial stalker at the law school. It is disgraceful that Howard repeatedly invoked the names of Charles Hamilton Houston, Thurgood Marshall and other civil rights icons, during trial, as if these great men would want Howard to escape liability in this case. Charles Hamilton Houston, whom Howard so touted, said that if lawyers were not “social engineers for justice,” they were “parasites.” If Howard had any defense to its actions, on its merits, why would it resort to arguing to limit the definitions of actionable sexual

judgment is final, the parties agree to an earlier date, or the Court so orders.⁶⁶ A judgment is final when the time for appeal has expired and no appeal has been taken, or when the court of appeals issues its mandate. Local Rule 54.1(c).

Howard submitted a *Bill of Costs* totaling \$ 11,448.80 Ms. Martin filed an *Opposition to Howard's Bill of Costs* (#510). In her *Opposition*, Ms. Martin cited controlling Supreme Court law characterized the Title VII plaintiff as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 98 S. Ct. 694, 699 (1978), quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402.⁶⁷ In *County of Suffolk v. Secretary*, 76 F.R.D. 469 (E.D.N.Y. 1977), the court set forth factors that should be considered to determine whether costs should be awarded in public law litigation:

- 1) whether the action was brought and carried forward in good faith; 2) whether the prosecution of the action provided direct benefits to the public; 3) whether the action resulted in direct or indirect benefit to the defendant; 4) whether novel and substantial issues of law or fact were resolved; 5) whether costs were required to reimburse needy defendants; 6) whether costs would unduly

harassment and retaliation, under Title VII? Who is "engineering" this train?

⁶⁶ Howard University did not move the court for costs, but the Clerk taxed them, *sua sponte*; Howard then itemized its costs for payment.

⁶⁷ District courts have specifically adopted the *Christianburg* rationale to deny Title VII defendants costs when they prevailed. *Evans v. American Import Merchants Corp.*, 82 F.R. D. 710 (S.D.N.Y. 1970) and *Dual v. Cleland*, 79 F.R.D. at 697. These courts were unwilling to "chill" the pursuit of the objectives of Title VII by individuals who believed they were injured by illegal discrimination.

burden non-affluent plaintiffs; and 7) whether the imposition of costs would unduly inhibit future similar challenges.

In her *Opposition* (#510), Ms. Martin methodically applied each factor to this case to demonstrate that it was inappropriate, unjust, and contrary to public policy to assess Howard University's litigation costs against her. Judge Hogan refused to consider Ms. Martin's *Opposition*, holding that the arguments were not appropriate for an *Opposition* (#510). It appeared that Judge Hogan would only accept, as appropriate, a challenge to the accuracy of Howard's math, as opposed to the case law that Ms. Martin cited in her *Opposition*. This matter is now on hold, due to this appeal (#510).

The undisputed facts demonstrate that Ms. Martin had a good faith basis for her lawsuit. The fact that the National Association of Women Lawyers (NAWL) has moved to participate as amicus. Numerous legal and other websites, articles, symposia and even treatises on employment discrimination law have cited and discussed this case demonstrates that it addresses substantive issues of law affecting the public. It is Ms. Martin who has struggled to finance this litigation and even to survive over these last nine years – not Howard. To further penalize Ms. Martin for bringing this case 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

For the foregoing reasons, Appellant respectfully requests that this Court reverse the judgment of the trial court, vacate the jury verdict and grant her judgment on all of her claims.

Respectfully Submitted,


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**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.)	

Order

Upon consideration of Appellant's *Motion for Summary Reversal*, Appellees' Opposition, and the entire record in this case, Appellant's motion is hereby **GRANTED**.

It is hereby **ORDERED** that: the Jury Verdict in favor of Defendant is nullified and **VACATED**.

It is **FURTHER ORDERED** that: judgment is issued in favor of Appellant, Ms. Martin, on her claims of sexual harassment, retaliation and breach of contract.

It is **FURTHER ORDERED** that: the trial court's taxation of Howard University's litigation costs to Ms. Martin is hereby reversed.

It is **FURTHER ORDERED** that: Appellee Howard University and Alice Gresham-Bullock, being held jointly and severally liable, shall pay to the Appellant, Ms. Martin, reasonable compensation for attorney time and

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It is **FURTHER ORDERED** that: the trial court's taxation of Howard University's litigation costs to Ms. Martin is hereby reversed.

It is **FURTHER ORDERED** that: Appellee Howard University and Alice Gresham-Bullock, being held jointly and severally liable, shall pay to the Appellant, Ms. Martin, reasonable compensation for attorney time and

costs necessary to litigate this appeal, as well as the litigation in the district court.

It is **FURTHER ORDERED** that:

- 1) the district court's order of October 4, 2006 is reversed and vacated;
- 2) Magistrate Judge Facciola's October 20, 2003 *Report and Recommendation*, adopted as an Order of the court on September 16, 2005 (Dkt # 307) is reversed and vacated;
- 3) Magistrate Judge Facciola's October 20, 2003 *Report and Recommendation*, adopted as an Order of the court on September 16, 2005 (Dkt # 307), shall, forthwith, be immediately removed from all federal court websites, as well as independent reporting services, including, but not limited to, LEXIS and WESTLAW, upon written notice to said reporting services;
- 4) Howard University shall immediately reinstated Appellant, Dawn V. Martin, as, as a full professor, with tenure and seniority dating back to July of 1996, restoring her to the place where she would have been absent her retaliatory non-renewal and rejection for a tenure-track position, as a remedy for her retaliatory non-renewal and/or her breach of contract claim;
- 5) Howard University shall immediately pay to Ms. Martin the full back

- pay and benefits that she would have received absent her retaliatory non-renewal and rejection for a tenure-track position, as a remedy for her retaliatory non-renewal and/or her breach of contract claim;
- 6) within ten days of the date of this Order, the trial court will set for trial the issues of compensatory and punitive damages on Ms. Martin's claim of sexual harassment, for a trial date to take place within three months of the date of this Order;
 - 7) within ten days of the date of this Order, the trial court will set for trial the issues of compensatory (in addition to back pay, pursuant to # 3, above) and punitive damages on Ms. Martin's retaliation claims;
 - 8) set for trial the issues of compensatory damages on Ms. Martin's breach of contract claim for a trial date to take place within three months of the date of this Order;
 - 9) within ten days of the date of this Order, the trial court will set for trial the issue Ms. Martin's claim, against both Howard University and Alice Gresham Bullock individually, the issue of intentional infliction of emotional distress, reinstating Alice Gresham Bullock as a Defendant;
 - 10) within thirty (30) days of the date of this Order, Howard University and/or Alice Gresham Bullock, held jointly and severally liable, will

to pay to Ms. Martin the attorneys fees and costs due her for their improper withholding of discovery and violation of court orders to produce it, in an amount no less than \$387,000, pursuant to Fed. R. Civ. P. 37(A), which were held in abeyance and never decided by the district court;

It is **SO ORDERED**.

U.S. Circuit Judges for the
U.S. Court of Appeals for the District of Columbia Circuit

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Appellant,)	
v.)	Appeal No. 04-5417
Howard University,)	
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Appellees.)	

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 7th day of May, 2007, a true copy of *Appellant's Motion for Summary Reversal* was mailed, via first class mail, to:

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