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FOR THE D.C. CIRCUIT

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

DAWN V. MARTIN, ESQUIRE
Plaintiff-Appellant

v.

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

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

APPELLANT'S PETITION FOR REHEARING *EN BANC*

Dawn V. Martin, Esquire
Law Offices of Dawn V. Martin
1725 I Street, Suite 300
Washington, D.C. 20006
(202) 408-7040/(703) 642-0207 telephone
(703) 642-0208 *facsimile*
dvmartinlaw@yahoo.com
www.dvmartinlaw.com

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STATEMENT OF COUNSEL, PURSUANT TO FED. R. APP. P. 35(B)(1)

Appellant, Dawn Martin, Esquire, respectfully petitions this Honorable Court for a Rehearing *En Banc*, of the Panel's March 31, 2008 decision affirming the district court's decisions of October 6, 2006, October 20, 2003 and December 16, 1999. Prof. Martin lost this case because her memos asking Howard University to ban a serial stalker from campus who was sexually harassing her referred to him as a "stalker," rather than as a "sexual harasser." *Amicus Curiae*, the *National Association of Women Lawyers (NAWL)* detailed the consequences of the precedent in this case for working women.

The full Court's consideration of *Martin* is necessary because the Panel's decision conflicts with several decisions of the Supreme Court, creates inter-and intra-jurisdictional conflict, and involves questions of exceptional national importance, including:

- 1) how courts define sexual harassment, pursuant to Title VII of the Civil Rights Act of 1964;¹
- 2) how courts define "based on sex;"²
- 3) "gender profiling" in employment cases, i.e., "working while female;"³
- 4) the sexual harassment of employees by non-employees in the workplace, pursuant to EEOC Regulation 29 CFR 1104.11(3);⁴

¹ The Panel left intact the district court's October 6, 2006 decision holding that a serial campus stalker's harassment of Prof. Martin was not "sexual in nature" or based on her sex because he did not "grope" or "touch" her, which the court deemed "typical" of sexual harassment. This holding conflicts with the definition of sexual harassment set forth in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

² The Panel's decision conflicts with *Oncale v. Sundower Offshore Services*, 523 U.S. 75, 118 (1998) (sexual harassment includes harassment to which members of only one sex are subject) and *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917) (the court should give effect to the plain meaning of words used "in their ordinary and usual sense).

³ The Panel's failure to acknowledge that a "sex-plus" case constitutes discrimination on the basis of sex conflicts with *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

⁴ **EEOC Regulation 29 CFR § 1604.11(e)** interprets Title VII has holding that an employer liable for the sexual harassment of an employee by a non-employee, where the employer knew or *should have known* of the harassment in the workplace and failed to take reasonable measures to stop it. The Panel affirmed the district court's decision not to instruct the jury that a plaintiff need not use the words "sexual harassment" to invoke Title VII. This holding creates a split in the Circuits. Other jurisdictions have held that, as long as the employee is aware of the specific conduct that constitutes sexual harassment, the employee need only ask the employer to "do something" to invoke Title VII. *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025 (D. Nev. 1992); *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012-1013 (9th Cir. 1983). *Id.*

- 5) stalking in workplaces and on campus, which disproportionately victimizes women;⁵
- 6) whether a pre-*Burlington* dismissal of retaliation claims involving the cancellation, conversion and withholding of job vacancies, can be affirmed, post *Burlington*, creating a split in the circuits;⁶
- 7) when and how the “cat’s paw” theory should apply in retaliation cases where the decision-maker is influenced by a supervisor with a retaliatory motive;⁷
- 8) whether a defendant can escape liability in a Title VII retaliation case by admitting to *age discrimination* in its closing argument, without subjecting itself to a claim under the Age Discrimination in Employment Act (ADEA);
- 9) the circumstances under which an employee can sustain a claim of intentional infliction of emotional distress against an employer;⁸
- 10) whether the tort of “wrongful termination,” in violation of public policy, should be applied where employees are fired for reporting stalking or other acts of crime or violence in the workplace;⁹
- 11) whether a district court can place in abeyance, indefinitely, and close the case without deciding, a motion for mandatory Rule 37 sanctions, after prevailing on several motions to compel discovery;
- 12) the factors to be considered before assessing defendant’s costs against plaintiffs in Title VII cases, filed in good faith; and
- 13) due process issues that materially affect the administration of justice and the integrity of the judicial system.

⁵ Eighty (80%) of stalking victims are female. Martin Brief at 16, fn. 30; *Amicus* at 14, 10.

⁶ The Panel left undisturbed the district court’s dismissal of several retaliation claims, holding that they were not “ultimate employment decisions such as hiring, firing and promotion;” however, this holding conflicts with *Burlington Northern*, 548 U.S. 53 (2006).

⁷ In the appeal of *Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908, 917-918 (7th Cir. 2007), in the upcoming term, the Supreme Court will define the “cat’s paw” theory of retaliation. Ms. Martin presented evidence of the “cat’s paw” theory in that the Vice Chair or the Appointments Committee, Prof. Taslitz, acted as the instrument of Appellee, former Dean Alice Gresham Bullock, and misrepresented her credentials and those of a junior professor to convince other Committee members that the selectee had the superior record of scholarship. Martin Brief at 6, fn. 7.

⁸ The Panel’s decision conflicts with *Khan v. Parsons Global Services, Ltd.*, 2008 WL 996510 (D.C. Cir. 2008) and *Kassem v. Washington Hospital Center*, 513 F.3d 251 (D.C. Cir. 2008).

⁹ The Panel’s decision conflicts with *Elemery v. Holzmann*, 2008 WL 316376 (D.D.C. 2008) at 14, citing *Kassem*, 513 F.3d at 254-255.

STATEMENT OF THE FACTS¹⁰

Dawn V. Martin was a law professor at Howard University from July 1996 through June 1998. Beginning on November 20, 1997, she was harassed on campus by a delusional, homeless stalker with a criminal record, Leonard Harrison, who roamed freely through Howard Law School buildings, pursuant to its "open campus" policy. Harrison stated that he was pursuing Prof. Martin to become his "wife." Harrison described this "*natural wife*" as the physical embodiment of a *fictional female character*, Geneva Crenshaw, in a book, written by NYU professor, Derrick Bell, *And we are not Saved*. Harrison *roamed freely through the law school buildings*, pursuant to Howard's "open campus" policy.

Prof. Martin immediately reported Harrison's conduct to the Dean's office, providing it with Harrison's actual letters and voicemail messages. She also filed a complaint with the D.C. Metropolitan Police Department (MPD), after the Dean's Office refused to assist her. Prof. Martin enlisted the assistance of a campus police officer who participated in the meeting with the police and took a campus police report. MPD characterized Harrison's harassment as "stalking" under the D.C. Code § 22-404 (b). On November 25, 1997, *five days* after Prof. Martin's initial request that Harrison be barred from campus, Harrison continued to roam the law school. Prof. Martin therefore wrote her first memo to Dean Bullock detailing Harrison's precise conduct and all information that she had collected about him, again asking the administration to bar Harrison from the law school; however, *Harrison was never barred*. He continued to enter the buildings unfettered, causing tremendous emotional distress for Prof. Martin.

In an internal University July 1, 1999 memorandum, Dean Alice Gresham Bullock acknowledged that both she her Associate Dean, Michael Newsom, perceived Harrison as a threat to Prof. Martin and "other women" that he might "stalk or otherwise harass" on campus. Dean Bullock told the EEOC:

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)

¹⁰ See Martin Brief at 5-8 for citations to the record; *see also Martin v. Howard University*, 1999 U.S. LEXIS 19516 at 2-4, 9-10 (D.D.C. 1999). The Panel decision omits most of the relevant facts.

Prof. Martin was the incumbent, teaching EEO law and other courses for four years, including two at Howard, as a full-time Visiting Associate Professor. On December 18, 1997, while Prof. Martin was continuing to request campus security protection from the stalker, Howard made its first decision to reject Prof. Martin for a tenure-track faculty position teaching equal employment opportunity (EEO) law or even a one-year renewal as a visiting professor. In a private meeting shortly before the Appointments Committee's decision, Dean Bullock told Prof. Taslitz, the Vice Chair of the Appointments (APT) Committee, that she was having a "bad day" because she had just received Prof. Martin's memorandum regarding the stalking by Harrison and that she had "a lot to do" with respect to the stalking. In fact, Dean Bullock did *absolutely nothing* with respect to the stalking. Instead, she engaged in private discussions regarding Prof. Martin's status at Howard.

Associate Dean Newsom testified that Dean Bullock told him that "*she had decided not to select Prof. Martin* for a permanent position;" yet, APT Committee members testified that it would be *inappropriate* for the Dean to influence the Committee's selection decisions. Prof. Martin was replaced by a junior Visiting Assistant Professor who had never previously taught EEO law.

Dean Bullock admitted that, as of May, 1998, when Prof. Martin's contract ended, there were at least three vacant faculty positions for which Prof. Martin was "well qualified." No fewer than eighty law students sent letters and/or signed petitions protesting Martin's non-renewal and praising her as a professor. Dean Bullock ignored their requests to renew Prof. Martin and left positions vacant while students protested the shortage of courses and professors.

Dean Bullock also withheld from the APT Committee information that the advertised Civil Rights/Constitutional Law position was still unfilled. When Prof. Martin learned of this vacancy, she reapplied for it and any other available faculty position. Prof. Martin was the only candidate for the advertised Con Law/Civil Rights position during the spring of 1998. Bullock immediately responded to her application by converting the Civil Rights position to a tax position. Dean Bullock even *lied* to an APT Committee member, Prof. Nolan, telling her there were not vacant positions and that Prof. Martin

could not be considered for one.¹¹ Prof. Martin's teaching career therefore ended in June of 1998.¹²

THE JURY VERDICT

The jury answered a series of questions for each of Prof. Martin's claims. (#459, JA9,707) at 1:

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 Prof. Martin based on her sex disposed of both her sexual harassment and retaliation claims. If the jury's verdict is vacated on this issue, Ms. Martin is entitled to judgment, notwithstanding the verdict, since she has prevailed on all other determinative of her sexual harassment claims. *See* Opinion ("Op.") at 4, Section IV; Martin Brief at 12-23; Reply Brief at 7-15. Because the jury found that Harrison's harassment was not based on sexual in nature or because of Prof. Martin's gender, complaints about the harassment were not "protected activity," Title VII could not be invoked to prevent Howard from retaliating against her -- even if Howard terminated her *solely* for asking for protection from Harrison.

¹¹ Reply Brief at 20-21.

¹² The District Court characterized Prof. Martin's non-renewal as a "firing" (JA8,287), a "dismissal" and "loss of her job" (JA8,291) and a tenure turn down (JA8,285) (2003 U.S. Dist. LEXIS 18501) -- despite both parties' representations to the contrary. The harm that Howard *and the district court* did to Prof. Martin's reputation destroyed her teaching career. She had to establish her own solo practice. She represents plaintiffs in EEO cases, but she seeks to restore her teaching career.

DISCUSSION

I. The Panel Violated *Oncale*, *Martin-Marietta*, *Meritor* and *Harris*, by Holding that the Jury had Sufficient Evidence to Find that the Harassment was not “Based on Sex”

A. Since the Word “Wife” is Gender-Specific, *Oncale* Compels the Judicial Finding that Harrison’s Harassment of Prof. Martin to be his “Wife” was Based on Sex

Sexual harassment includes not only harassment that is “sexual in nature,” but also harassment that is “based on sex” – or harassment to which only members of one sex are subject. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 118 (1998). The Panel’s decision (Op. at 3, Section III) conflicts with *Oncale*. Where a stalker prowls *University campuses*, studying *female* professors in search of a *woman* to fulfill his vision of a fantasy “wife,” his harassment is based on sex. Martin Brief at 14-15.

The Panel’s analysis also conflicts with *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917), which requires that courts give effect to the plain meaning of words used “in their ordinary and usual sense.” “Wife” is defined as “a married *woman*.” Martin Brief at 15. This gender specific language and conduct compel the finding that Harrison pursued Prof. Martin on the basis of her sex. Where a harasser targets a woman because he fantasizes that she is related to him in any gender specific terms, such as “wife,” “mother,” “sister,” “aunt,” “grandmother,” the target can only be a woman. *Id.*; *Amicus* at 11.

In addition, marriage is, by law, inherently “sexual in nature.” *See* Martin Brief at 15. Harrison’s pursuit of Prof. Martin to make her his “wife” is therefore “sexual in nature,” as a matter of law.

B. The Panel’s Decision Conflicts with the Supreme Court’s “Sex-Plus” Analysis Set Forth by the Supreme Court in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971)

Harrison harassed *women* lawyers and professors on the basis of “sex *plus*” profession. The Panel failed to acknowledge that a “sex-plus” case constitutes discrimination on the basis of sex. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). Martin Brief at 14-15; Reply Brief at 14-15; *Amicus* at 11-12. Howard’s counsel, Brian Schwalb, *conceded* that, anytime a person is targeted for harassment based on resemblance even to a *real* person, *gender is necessarily part of the criteria used to target the person*. 3-17-08 Tr. at 16:20-24. As Judge Henderson commented, “**if she had been a man, he wouldn’t have misidentified her as he did.**” 3-17-08 Tr. at 15:25-16:4.

C. Contrary to *Meritor*, *Harris* and their Progeny, the Panel Left Intact the District Court's Holding that a Sexual Harassment Claim can be Defeated when the Harasser did not "Grope" or "Touch" the Victim

Though not repeating it, the Panel left intact the district court's October 6, 2006 decision holding that a serial campus stalker's harassment of Prof. Martin was not "sexual in nature" or based on her sex because he did not "grope" or "touch" her, which are "typical" in sexual harassment cases. *Martin v. Howard University*, 2006 WL 2850656 at 4 (D.D.C. 2006). This holding directly conflicts with the Supreme Court's definition of sexual harassment in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) and their progeny. See also *Martin Brief* at 15-16; *EEOC Policy Guidance on Current Issues of Sexual Harassment*, N-915-050, particularly Section C, 3, *Non-physical Harassment*, <http://www.eeoc.gov/policy/docs/currentissues.html>. The decision arguably requires women to be sexually *assaulted* before they can sustain sexual harassment claims.

II. The Panel's Decision Violates the Law of the Case and Due Process

A. Pre-Trial, the Court Decided the "Based on Sex" Question, Based on the Undisputed Facts, and Specified that it would not be a Jury Question

In his 1999 decision, Chief Judge Hogan properly applied *Oncale* and concluded, as a matter of law, based on the undisputed facts: "**it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female**" and that Harrison "**targeted women other than Plaintiff.**" 1999 U.S. Dist. LEXIS 19516 at *10-11 (#23 at 7) (JA557-8). On October 4, 2006, however, *after the trial*, Judge Hogan *abandoned* his own December 16, 1999 holding that Harrison's harassment of Prof. Martin was based on her sex. *Martin Brief* at 11-13; *Reply Brief* at 9-12.

The Panel (Op. at 3, Section I) held:

At that stage of the litigation, the District Court assumed the accuracy of the facts alleged by Ms. Martin and, based on her allegations,¹³ decided that it could not find as a matter of law that appellees were entitled to judgment. In other words, Chief Judge Hogan found

¹³ The Court did not "assume" facts in 1999. Howard filed its first *Motion for Summary Judgment* (#Dkt.5), on July 22, 1999, with a *Statement of Material Undisputed Facts* (JA297). The facts regarding Harrison's specific actions and Prof. Martin's response to them were never disputed. Judge Hogan made rulings of law based on the undisputed facts and identified the issues for trial.

only “that Mr. Harrison’s conduct *could* be considered sexual harassment”¹⁴ and thus properly rejected appellee’s motion to take the issue from the jury. The language in the Magistrate Judge’s Report and Recommendation is admittedly inartful, but it did not (and could not) countermand the holding of the District Court.

The Panel failed to acknowledge that, on September 16, 2005, Judge Hogan *adopted* MJ Facciola’s October 20, 2003 *Report and Recommendation* as *his own decision* adjudicating the parties’ cross-motions for summary judgment. Dkt #318 (JA8,388); Martin Brief at 13; Reply Brief at 10. Ms. Martin did *not* rely on a holding in which MJ Facciola “countermand[ed]” Judge Hogan; rather, she relied on *Judge Hogan’s own September 16, 2005 decision* adopting MJ Facciola’s decision.

The Panel did not specify why MJ Facciola’s decision was “inartful.” MJ Facciola wrote:

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

... [T]he Chief Judge concluded:

1. The alleged harassment by Harrison of the plaintiff was based on her sex; ... I will not permit HU, in its second motion for summary judgment, to re-litigate those issues that were resolved against it. Triable issues of fact in 1999 remain triable issues of fact in 2003.

2003 U.S. Dist. LEXIS 18501 at *6-7 (#307 at 4-5) (JA8,275-8,276)

The trial court’s change of its pre-trial ruling, *after trial*, violates the law of the case and the right to procedural due process. It is fundamentally unfair to try a case, operating under court decisions identifying the facts to be proved at trial, and then *add a fact after trial*, when the plaintiff has lost any opportunity to prove it. Martin Brief at 13; Reply Brief at 8-13; 3-17-08 Tr. 5:1-7:18.

B. The Panel Failed to Acknowledge that Ms. Martin was Prevented from Presenting Evidence on the “Based on Sex” Question

The Panel held: “it is absolutely clear from the record in this case that both sides addressed the

¹⁴ The 1999 decision more fully states:

... the Court finds that Mr. Harrison's conduct could be considered sexual harassment and that the question of whether this behavior was sufficiently severe or pervasive to be actionable is a jury question... (emphasis added).

Judge Hogan’s use of the *singular* verb “*is*” and article “*a*” indicate that he was only identifying the *one* issue in the clause as a jury question -- the question of “sufficiently severe and pervasive; otherwise, the decision is both internally inconsistent and grammatically incorrect.

‘based on gender’ question at trial and that neither side was foreclosed from presenting its case on this issue.” (Op. at 3, Section II) The Panel did not cite the record to support its conclusion; moreover, Ms. Martin specified, in her Briefs and at oral argument, that she was precluded from taking actions regarding the “based on sex” question at trial. Most notably, when Ms. Martin’s counsel attempted to cross-examine Dean Bullock on her notice and understanding of the sexual nature of Harrison’s conduct, Judge Hogan **stopped the examination**, and proclaimed that **the question had “no evidentiary value there. It doesn’t go to prove or disprove the fact at issue.”**¹⁵ Judge Hogan’s pronouncement again reaffirmed his holding that the question of whether Harrison’s harassment was based on sex was not “a fact at issue”¹⁶ -- nor did she even have the *opportunity* to do address it at trial.

C. The Panel’s Decision Erroneously Relies on Howard’s Misrepresentations of the Record, Rewarding Perjury and Egregious Attorney Misconduct

Even *if* Judge Hogan had not decided the “based on gender” question in 1999, and even *if* Ms. Martin had addressed this question at trial, the Panel erred by holding (Op. at 3, Section III):

[t]here was ample evidence – including the fact that Harrison had stalked at least one man in the past – from which the jury could have concluded that Harrison’s conduct was not based on Ms. Martin’s gender. Indeed, the jury reasonably may have concluded that Harrison’s stalking was attributable to his *misidentification* of Ms. Martin as his wife, not bad behavior based on Ms. Martin’s gender.”

First, the jury overlooked the *conclusive* evidence that Dean Bullock perceived Harrison as harassing *women only*. In her July 1, 1999 memo to Howard’s General Counsel, Dean Bullock admitted that she and Dean Newsom were concerned that Harrison might “*stalk or otherwise harass*” Prof. Martin or “other *women*” on campus. Martin Brief at 21-23; Pl’s Tr. Ex. 8b (JA14,407). Pursuant to *Oncale*, harassment that is directed to members of one sex and not the other constitutes sexual harassment. The jury apparently relied upon Dean Bullock’s *perjured trial testimony* the contrary. Martin Brief at 21-23.

¹⁵ 3-17-08 Tr. 6:20-7:2; Tr. 1534:9-1535:4 (JA12,328-12,329); Reply Brief at 8 (by citation).

¹⁶ In its September 30, 2002 *Motion for Summary Judgment* (#268) at 2 (JA5,415). Howard offered its fabrication of an “estranged wife” as evidence that Harrison’s harassment was not “severe and pervasive” – an issue that it lost at trial. On appeal, however, Howard argues that this fabrication was “evidence” that Harrison did not target Prof. Martin based on her gender.

Second, the Panel relied on Howard's fabricated "facts," although Ms. Martin expressly and repeatedly informed the Court of Howard's sanctionable misrepresentations of the record.¹⁷ There is *absolutely no evidence* to support the Panel's conclusion that Harrison *misidentified* Prof. Martin for an actual wife or that Harrison ever actually had a real "wife." Harrison could not possibly have "misidentified" Prof. Martin for a *non-existent person*. Harrison might as well have been looking for "*Wonder Woman*." The potential number of women that Harrison has harassed – and may still be harassing in his quest for the unobtainable – is endless.

There is *no evidence* that Harrison "*stalked*" any *man*. *Amicus* at 16-17; Appellant's March 30, 2008 *Mot. for Sanctions* at 14. Howard improperly referred to Harrison's *one-time contact* with Prof. Bell, in 1990, as "stalking;" D.C. Criminal Code Ann. § 22-404 (b) defines a "stalker" as:

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)

In addition, Harrison's letter (JEX 126 at 11, **JA**14,287) and Prof. Bell's affidavit (**JA**14,776) (*both hearsay*)¹⁸ explain that Harrison confronted Prof. Bell – *only once* -- for the sole purpose of asking him to identify the "real" Geneva – in other words, his next *female* stalking victim.

III. Title VII Protections must not be Denied Simply because Third-Party Harassment is Reported Differently than Employee Harassment, pursuant to EEOC Regulation 29 CFR 1104.11(e)

Judge Hogan adopted EEOC Regulation 29 CFR § 1604.11(e) in *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516 at 7-8 (D.D.C. 1999), thereby setting precedent for the District of

¹⁷ Reply Brief at 1-5, 8-9, 16-18; Appellant's March 11, 2008 *Motion for Sanctions against Howard University for Misrepresentations of the Record in its Brief*; Appellant's March 30, 2008 *Motion for Sanctions against Brian Schwalb and Venable, LLC, for False Representations Made during Oral Argument*; Appellant's April 7, 2008 *Motion for Reconsideration of March 31, 2008 Denial of Motion for Sanctions*; Appellant's April 8, *Motion for Reconsideration of April 7, 2008 Denial of Motion for Sanctions*; Appellant's April 17, 2008 *Opposition to Howard University's Motion to Strike Appellant's Motion for Reconsideration of April 7, 2008 Denial of Motion for Sanctions*. The Panel denied each of these motions with one sentence. On April 11, 2008, the Panel ordered the Clerk not to accept any further motions for sanctions or reconsideration from *Appellant*. There is *no restriction on Appellees*.

¹⁸ Judge Hogan refused to allow Prof. Bell to testify on behalf of Ms. Martin. Instead, he ruled that Ms. Martin could testify about what Prof. Bell told her as evidence of her state of mind and fear of Harrison even after leaving Howard; however, this *hearsay* testimony could not even constitute evidence of *the truth* of Prof. Bell's statements to her about his *one* contact with Harrison *seven years earlier*.

Columbia; however, the Panel completely omits any reference to EEOC Regulation or third party harasser cases. The Panel failed to analyze Prof. Martin's requests for campus security in the context of addressing sexual harassment by a non-employee of Howard University Law School. See Martin Brief at 4, Reply Brief at 6-7; *Amicus* at 8-9.

In 1999, Judge Hogan relied on *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025 (D. Nev. 1992), which held that the plaintiff had engaged in "protected activity" when she told her employer simply, "I don't have to take this" because her employer observed customer behavior that he should have recognized as sexual harassment. 1999 LEXIS 19516 at *17-18. *Powell* held that a simple request to the employer to "do something" was enough to invoke Title VII. Judge Hogan continued: "There are no 'magic words' which must be chanted in order to invoke Title VII protection, *citing EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012-1013 (9th Cir. 1983). *Id.*

It is the province of the Court, not the jury, to determine whether the plaintiff has engaged in "protected activity;"¹⁹ however, Judge Hogan submitted this question to the jury. Ms. Martin requested that he instruct the jury using language from his own 1999 decision, stating that it is not necessary for a plaintiff to use the words "sexual harassment" in order to invoke Title VII protection, but he denied her request. Martin Brief at 18; Reply Brief at 6-7. Prof. Martin used the police department's characterization of Harrison's conduct as "stalking" in her memos to Dean Bullock to emphasize the seriousness of the conduct, the potential danger and the immediate need for security.²⁰ Courts have long recognized that *stalking is one of the most egregious forms of sexual harassment*, invoking Title VII. See

¹⁹ *McFarland v. George Washington University*, 2007 WL 3284016 at 11 (D.C. 2007); *Howard University v. Green*, 652 A.2d 41, 45-47 (D.C. 1994).

²⁰ Prof. Martin actually *did* refer to Harrison's conduct as "sexual harassment" on or about November 20, 1997, before the MPD characterized the conduct as "stalking." See Appellant's April 17, 2008 *Opposition to Howard University's Motion to Strike* at 14-15, fn. 14; Appellant's March 30, 2008 *Motion for Sanctions* at 8-11. In her memos written from November 25, 1997 through December 18, 1998, however, she stressed the need for campus security to take the precautions necessary to keep Harrison off campus. Martin Brief at 19, 30; Reply Brief at 13; JEXs 71 (JA14,035), 72 (JA14,040), 19 (JA 14,052). When these efforts proved futile and Howard began retaliating against her, she stopped. The content of Harrison's letters themselves demonstrate that he targeted Prof. Martin based on her sex (JEX 53, JA13,826), (126, JA14,277) and that he research her background. JEX 54 (JA13,828)

Amicus at 14-16. The term “sexual harassment” may or may not receive immediate attention. It may include conduct that is offensive, but not in need of immediate redress;²¹ however, conduct that has been characterized as “stalking” by the D.C. police department, conveys the severity of the harassment and the urgency of the need for a remedy.

Ms. Martin’s “stalking” complaint was a *harassment* complaint, *by legal definition* (see Section II, above); yet, Mr. Schwalb told jurors that Ms. Martin was *not credible* when she testified that she complained of “harassment,” because her memos referred to Harrison’s harassment as “stalking. Martin Brief at 19. Howard’s counsel misled jurors into believing that “stalking” was different from “harassment.” By holding that the trial judge was not obligated to tell the jurors that an employee is not obligated to use the words “sexual harassment” to invoke Title VII protection, the Panel has set the precedent that *the “magic words” are “sexual harassment;”* if the plaintiff refers to the conduct in *any other way, she will lose*. D.C. is the only circuit so holding, thereby creating a split in the federal circuits. See Martin Brief at 11-12; *Amicus* at 5-7 (discussing cases that have adopted the Regulation as law.)

IV. Martin Squarely Presents the Issue of whether Women who are Stalked at Work, based on their Gender, can be Fired for Asking their Employers for Protection in the Workplace

The Panel (Op. at 3) held:

We need not decide whether and under what circumstances stalking might amount to harassment “based on gender.” Rather, we merely hold that on the facts of this case, the jury’s verdict must stand. (Emphasis added)

Despite this declaration, the Panel, has, in effect, decided that an employee can be fired for being stalked and that she will have no remedy. If stalking does not constitute sexual harassment on the facts of *this case*, it is difficult to imagine a fact pattern that would qualify for Title VII protection. Prof. Martin was doing nothing more than “*working while female*” as a law professor at Howard University. Howard has never argued that she *attracted* Harrison to the law school or that the stalking was somehow her

²¹ Sexual harassment complaints received little, if any response from Dean Bullock or other Howard administrators. See, e.g., Sexual “jokes” circulated by Prof. Reggie Robinson, despite complaints by other faculty members that it may constitute “sexual harassment.” Pl’s Ex. 23 (JA14,730).

“fault.” *Martin* is a case that does not lend itself to the “blame the victim” prejudices that might be imposed upon a woman who is stalked by a former husband or domestic partner. At oral argument (3-17-08 Tr. at 16:10-12), Howard’s counsel, Brian L. Schwalb, played on these very prejudices:²²

The law, we would submit, doesn't make every time a woman is the subject of a stalking or a domestic violence issue a Title 7 federal anti-discrimination case.

Neither Ms. Martin nor *Amicus* NAWL sought to hold the employer responsible for any actions but its own. EEOC Regulation 29 CFR 1604.11(e) only obligates the employer to employ the *reasonable* means available to it to protect against sexual harassment that it knew *or should have known* was occurring and failed to take measures reasonably calculated to end it. *Amicus* at 5-7; *Martin* Brief at 5-6; *Martin*, 1999 U.S. Dist. LEXIS 19516 at 7-8.²³ The “reasonable” measures necessary to end sexual harassment by a non-employee typically entail barring the harasser from the workplace and/or involving law enforcement. The denial of Title VII protection in this case leaves nearly all women unprotected for reporting stalking in the workplace.

V. Violating *Burlington* and *Rochon*, as well as Creating a Split in the Circuits, the Panel Left Undisturbed the District Court’s Holding that Canceling a Job Vacancy Cannot Constitute Actionable Retaliation under Title VII, holding that it is not an “Ultimate Employment Decision”

Ms. Martin alleged that Dean Alice Gresham-Bullock failed to renew her teaching contract and cancelled, withdrew and/or concealed several vacant and advertised faculty positions in order to remove her from the faculty in retaliation for reporting Harrison’s stalking. In 1999, Judge Hogan sustained these retaliation claims, but on October 20, 2003, Magistrate Judge Facciola dismissed them, holding: **“Title VII applies only to ultimate employment decisions such as hiring or discharging....”** *Martin*, 2003 U.S. Dist. LEXIS 18501 at * 31-32 (JA307). Judge Hogan adopted this decision as his own, on September 16, 2005. The Panel left this decision undisturbed; however, it conflicts with the Supreme

²² At trial, Mr. Schwalb espoused additional hostile remarks about women who are stalked, telling the jury that Prof. Martin “*played the sexual harassment card.*” *Martin* Brief at 17.

²³ *Maupin v. Howard Co. Board of Education*, No. 13C0506262 (Howard Circuit Court, July 2, 2007), discussed in Prof. Martin Brief, at pages 18, 23-24, provides an example of a non-employee harasser in a racial harassment case, where an African-American teacher received a call at work from someone claiming to be with the Ku Klux Klan.

Court's precedent in *Burlington Northern*, 548 U.S. 53 (2006), which expressly held that **actionable retaliation under Title VII is not limited to "hiring, firing and promotion."** Martin Brief at 25-27; Reply Brief at 15-17; *Amicus* at 17-20.

VI. Taxing Defendants' Costs to Appellant Will Have a Chilling Effect on Title VII Plaintiffs

The Panel held that Ms. Martin's appeal of the district court's taxation of costs against her is not ripe for review because costs – in excess of \$11,000 – are not imposed until after the mandate is issued (Op. at 5); however, **the only reason that the mandate was not yet issued was because Ms. Martin appealed.** The district court taxed Howard's costs on August 21, 2006. Ms. Martin filed her Notice of Appeal on September 11, 2006. In his January 3, 2007 decision (Dkt. #514, JA10,657), Judge Hogan *refused* to consider any arguments or case law in her Opp. to Costs. (Dkt. #510, JA10,441)²⁴

The National Organization of Women (NOW) launched a national campaign opposing the imposition of costs on the plaintiff lost in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007). *Amicus* at 21-23; Martin Brief at 44-45. Ms. Martin and NAWL urged this Court to adopt the *criteria* offered by other jurisdictions to prevent the hardship and a chilling effect on Title VII plaintiffs.

VII. The Panel's Affirmance of the District 1999 Dismissal of Ms. Martin's Intentional Infliction of Emotional Distress (IIED) Claim Conflicts with this Court's Recent Decisions, Khan and Kassem

The Panel's decision (Op. at 4, Section V) conflicts with *Khan v. Parsons Global Services, Ltd.*, 2008 WL 996510 (D.C. Cir. 2008) and *Kassem v. Washington Hospital Center*, 513 F.3d 251 (D.C. Cir. 2008). *Kassem* expressly adopted the court's rationales in *King v. Kidd*, 640 A.2d 656, 677-78 (D.C. 1993) and *Howard Univ. v. Best*, 484 A.2d 958, 986 (D.C. 1984), holding that a plaintiff who was sexually harassed by her supervisor and/or retaliated against for opposing sexual harassment, could sustain a separate claim of intentional infliction of emotional distress, separate and apart from any claims that she might have under Title VII. *Kassem*, 513 F.3d at 255. Sexual harassment and retaliation are not

²⁴ Once the mandate is issued, the district court will order the judgment executed. Ms. Martin will then have to appeal to this Court *again*. This circular process would thwart the appellate process and waste both the parties and the courts' resources.

traditional “occupational” related issues and are therefore actionable as IIED claims. *Id.* Such conduct violates public policy and constitutes “outrageous” conduct. See Martin Brief at 32-33.

VIII. The Panel Failed to Address the District Court’s Avoidance of Awarding Mandatory Rule 37 Sanctions against Howard University by Placement the Issue in “Perpetual Abeyance”

After three years of Howard delaying discovery, finally resulting in it being held in Contempt of Court for violating repeated court orders to produce the sought discovery orders, Ms. Martin had expended more than \$364,000.00 worth of attorney time devoted entirely to obtaining orders for Howard to produce it. Howard never challenged the *Laffey* rate requested or the hours spent; yet, MJ Facciola placed the issue in abeyance, on May 30, 2001. Despite numerous motions to remove the issue from abeyance and award the mandatory attorneys’ fees, neither Judge Hogan nor Magistrate Facciola would address the issue; neither has the Appellate Panel. Martin Brief at 23-24; *Amicus* at 20-21.

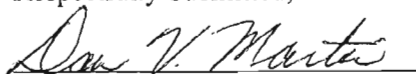
IX. The Panel Failed to Address Ms. Martin’s Claim for Wrongful Termination, in Violation of Public Policy, for Complaining about Stalking in the Workplace

Wrongful discharge claims are permitted where there is no statutory basis for a claim, but the discharge violates public policy. *Elemery v. Holzmann*, 2008 WL 316376 (D.D.C. 2008) at 14, *citing Kassem*, 513 F.3d at 254-255. If the Court sustains the Panel’s determination that Ms. Martin’s complaints about stalking were not protected activity pursuant to Title VII, there is no statutory basis for her claim; however, the facts of her case constitute a claim of wrongful discharge. In any case, this Court may – and recently did -- consider an issue belatedly raised on appeal “where injustice might otherwise result.” *IRS v. Murphy*, 493 F.3d 170, 172 (D.C. Cir. 2007). Martin Brief at 29.

CONCLUSION

Appellant respectfully requests that this Court rehear this case, *en banc*.

Respectfully Submitted,



Dawn V. Martin, Esquire
Law Offices of Dawn V. Martin
1725 I Street, Suite 300
Washington, D.C. 20006

Appendix

Panel Decision

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7157

September Term, 2007

FILED ON: MARCH 31, 2008

Dawn V. Martin,
Appellant

v.

Howard University, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia
(99cv01175)

Before: HENDERSON, *Circuit Judge*, and EDWARDS and WILLIAMS, *Senior Circuit Judges*.

J U D G M E N T

This cause was considered on the record from the United States District Court for the District of Columbia, and was briefed and argued by counsel. It is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed for the reasons set forth in the accompanying memorandum.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. See FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

By: /s/
Michael C. McGrail
Deputy Clerk

MEMORANDUM

Appellant Dawn Martin challenges several decisions of the trial judge and a jury verdict regarding her discrimination, contract, and tort claims against Howard University and Howard University School of Law (collectively "Howard"), and Alice Gresham-Bullock, former Dean of the law school. The factual background of this case is adequately sketched in a Memorandum Opinion of Chief Judge Hogan. See *Martin v. Howard University*, No. 99-1175, 2006 WL 2850656 (D.D.C. Oct. 4, 2006).

Plaintiff Dawn Martin, a Visiting Professor at Howard University School of Law from July 1996 through May 1998, brought this action against several defendants on May 14, 1999. . . .

Plaintiff alleges that she was the victim of a hostile work environment in violation of Title VII and the District of Columbia Human Rights Act as a result of the conduct of Mr. Leonard Harrison, a homeless person who was neither an employee of, nor a student at, Howard. Specifically, Mr. Harrison sent Plaintiff two letters that were hand-delivered to Plaintiff's office, left voice mail messages for her, and attempted three personal visits to Plaintiff's office (Plaintiff was only in her office during the third visit and Harrison was chased out by a security officer), and at one point stated that he thought Plaintiff was his wife. Plaintiff has claimed that Howard's response and inaction towards Mr. Harrison is a violation of Title VII. Plaintiff's other two claims include retaliation in violation of Title VII and breach of contract. Plaintiff asserted that because of her complaints regarding Mr. Harrison and her requests for protection from Mr. Harrison, the administration retaliated against her in several ways. . . . [First,] the then Dean of the law school, Dean Bullock, got the Appointments, Promotions and Tenure Committee ("APT Committee") to not recommend Plaintiff for the EEO/Labor Law tenure-track position she sought and to instead recommend Professor Cunningham, and [second,] that Dean Newsom sent Plaintiff a letter asking her to vacate her office early, in May 1998, rather than in June or July 1998 when most professors had to leave. Plaintiff also alleges she had an oral contract that her . . . visitorship would be renewed until a tenure-track position became available, at which time she would get that position. Plaintiff alleged the contract was breached when she was not selected for any tenure-track position.

Id. at *1 (citations omitted).

As noted in Chief Judge Hogan's opinion, Ms. Martin's first claim of discrimination is that the law school's response to Harrison was inadequate, causing her to endure a hostile work environment. Her second discrimination claim is that because she complained of sexual harassment by Harrison, the law school retaliated against her by, *inter alia*, failing

to offer her continued employment. Ms. Martin also argues that Howard and Dean Bullock caused her to suffer emotional distress by failing to provide her with a tenure-track position and adequately protect her from Harrison. Finally, Ms. Martin argues that the law school violated a binding promise to continue her employment, either as a visiting professor or a tenure-track professor.

Before the jury trial, the District Court granted summary judgment for all defendants on Ms. Martin's tort claim, and limited Ms. Martin's retaliation claims to the law school's decision not to hire Ms. Martin and its order for her to vacate her office. Following the trial, the jury found: (1) that Ms. Martin had failed to prove that Harrison's conduct was based on her gender; (2) that Ms. Martin had not proven that she was engaged in legally protected conduct when she informed the law school about Harrison's behavior; and (3) that Ms. Martin had failed to prove that she had ever been promised future employment by the law school. These findings disposed of Ms. Martin's claims. The District Court denied Ms. Martin's motions for judgment as a matter of law, for relief from the final judgment, and for a new trial. We now review those decisions.

I.

Before trial, Howard contended that Ms. Martin's hostile work environment claim should be dismissed, because she could not show that Harrison's conduct was based on gender and that Harrison's conduct was sufficiently severe or pervasive. In a memorandum opinion addressing Defendants' Motion to Dismiss or Alternatively for Summary Judgment with regard to Ms. Martin's hostile work environment claim, the District Court first stated that, "[i]n this case, it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female; therefore, the alleged stalking activities do appear to have been 'because of sex' even if they were not inherently sexual in nature." *Martin v. Howard Univ.*, No. 99-1175, 1999 WL 1295339 (D.D.C. Dec. 16, 1999). The trial judge then went on to say:

[S]ince the Court finds that Mr. Harrison's conduct *could be* considered sexual harassment and that the question of whether this behavior was sufficiently severe or pervasive to be actionable is a jury question, and since Defendants admit that there is a material dispute regarding whether the University took appropriate actions in connection with Mr. Harrison, the Court must deny Defendants' Motion to Dismiss or Alternatively for Summary Judgment with regard to the Hostile Work Environment claim.

Id. (emphasis added). The District Court never held that Harrison's alleged stalking activities constituted conduct based on gender. The question of whether Harrison's conduct could be considered sexual harassment was then submitted to the jury, along with Ms. Martin's other claims.

Ms. Martin now argues that the question of whether Harrison's behavior was based on Ms. Martin's gender should not have been submitted to the jury, because it was decided in her favor in Chief Judge Hogan's 1999 opinion addressing Defendants' Motion to

Dismiss or Alternatively for Summary Judgment. To bolster this argument, Ms. Martin points to a 2003 Magistrate Judge's Report and Recommendation stating that the trial judge had already "concluded [that] [t]he alleged harassment by Harrison of the plaintiff was based on her sex." *Martin v. Howard Univ.*, No. 99-1175, 2003 WL 22383031, at *2 (D.D.C. Oct. 20, 2003) (Report and Recommendation). Ms. Martin contends that submitting this question to the jury violated the law of the case.

Martin obviously misinterprets the meaning of the District Court's denial of appellees' Motion to Dismiss or Alternatively for Summary Judgment. At that stage of the litigation, the District Court assumed the accuracy of the facts alleged by Ms. Martin and, based on her allegations, decided that it could not find as a matter of law that appellees were entitled to judgment. In other words, Chief Judge Hogan found only "that Mr. Harrison's conduct *could be* considered sexual harassment" and, thus, properly rejected appellees' motion to take the issue from the jury. The language in the Magistrate Judge's Report and Recommendation is admittedly inartful, but it did not (and could not) countermand the holding of the District Court. In short, in submitting the question of whether Harrison's behavior was based on Ms. Martin's gender, the District Court did not violate the law of the case, nor did it act in a fashion that was contrary to its 1999 decision on this matter.

II.

Ms. Martin also argues that she was prevented from fully presenting her case to the jury on the "based on gender" question. However, she does not indicate any action that she took – or failed to take – based on a misunderstanding as to what claims were before the jury. Indeed, it is absolutely clear from the record in this case that both sides addressed the "based on gender" question at trial and neither side was foreclosed from presenting its case on this issue. Because Ms. Martin fails to show that her case was somehow impermissibly compromised, we reject this challenge to the jury's verdict.

III.

Ms. Martin additionally contends that the District Court erred in denying her motion for a judgment as a matter of law on the "based on gender" question. We disagree. The grant of judgment as a matter of law is rarely appropriate. "Intrusion upon the rightful province of the jury is highly disfavored. We have repeatedly emphasized that the jury's verdict must stand unless the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable people could not disagree on the verdict." *Smith v. District of Columbia*, 413 F.3d 86, 97 (D.C. Cir. 2005) (alterations and quotation marks omitted). Ms. Martin does not meet this exceedingly high standard. There was ample evidence – including the fact that Harrison had stalked at least one man in the past – from which the jury could have concluded that Harrison's conduct was not based on Ms. Martin's gender. Indeed, the jury reasonably may have concluded that Harrison's stalking was attributable to his *misidentification* of Ms. Martin as his wife, not bad behavior based on Ms. Martin's gender. We need not decide whether and under what circumstances stalking might amount to harassment "based on gender." Rather, we merely hold that on the facts of this case, the jury's verdict must stand.

IV.

Ms. Martin further contends that the District Court should have entered judgment as a matter of law on her retaliation and contract claims. We reject these claims as well. Under the applicable standard governing judgments as a matter of law, the District Court acted correctly on both issues. The jury had evidence before it, including Ms. Martin's own earlier characterization of Harrison's conduct as a security matter, not sexual harassment, from which it could conclude that Ms. Martin's complaints about Harrison were not protected activity. And the jury's verdict that Ms. Martin was not promised future employment by Howard was amply supported by the evidence.

V.

Ms. Martin next challenges the grants of summary judgment for appellees on her tort and retaliation claims. The District Court's finding that Ms. Martin had failed to allege the outrageous conduct needed to make out a claim of intentional infliction of emotion distress is well-founded. Under District of Columbia law, this tort "requires conduct 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 community." *Browning v. Clinton*, 292 F.3d 235, 248 (D.C. Cir. 2002) (quotation marks omitted). Ms. Martin alleged no such outrageous conduct.

The District Court limited Ms. Martin's retaliation claims to two alleged harms – the decision of Howard Law not to hire her for a tenure-track position in equal employment opportunity law and her expulsion from her office. Any challenge to these alleged harms is now moot. Because the jury reasonably found that Ms. Martin had not engaged in protected activity, the necessary predicate for her claims of retaliation is missing.

VI.

Ms. Martin raises various challenges to evidentiary and procedural decisions made by the District Court during trial, and contests some jury instructions. The trial court's evidentiary and procedural decisions at issue are reviewed for abuse of discretion. See, e.g., *United States v. Graham*, 317 F.3d 262, 266 (D.C. Cir. 2003) (hearsay); *United States v. Hemphill*, 514 F.3d 1350, 1360 (D.C. Cir. 2008) (cross examination). After careful review of the record, we can find no abuse of discretion in any of these decisions.

Ms. Martin has also failed to show that any alleged error with respect to a jury instruction was other than harmless. FED. R. CIV. P. 61. Indeed, we find that the jury instructions challenged by Ms. Martin were proper. The District Court's instruction on the standard for protected activity in retaliation claims was correct. And the District Court properly excluded as irrelevant the District of Columbia criminal code's definition of stalking, which Ms. Martin sought to have included in the jury instructions on hostile work environment.

VII.

Ms. Martin has moved under Federal Rule of Civil Procedure 60(b)(3) for relief from the judgment based on the allegedly perjured testimony of former-Dean Bullock. It is “well-settled that a litigant seeking relief from a judgment under [Rule] 60(b)(3) based on allegations of fraud upon the court must prove the fraud by clear and convincing evidence.” *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1477 (D.C. Cir. 1995). Ms. Martin has not come close to meeting this standard. Nor has she shown prejudice. *Summers v. Howard Univ.*, 374 F.3d 1188, 1193 (D.C. Cir. 2004).

VIII.

In her brief to this court, Ms. Martin asserts that Howard’s failure to hire her for an equal employment opportunity law position was a violation of the Age Discrimination in Employment Act (“ADEA”), because it was allegedly revealed at trial that the person appointed to this position was selected because of her age. Ms. Martin’s complaint did not include an ADEA claim, so this matter was not tried before the jury and it is not properly before this court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”). In her reply brief, Ms. Martin belatedly argues that she “had no reason or opportunity, prior to trial, to amend the complaint to include an ADEA claim[, because i]t was only at trial that [Howard Law] Prof. Leggett . . . made the eleventh-hour admission – that he selected Visiting Assistant Professor Cunningham over Visiting Associate Professor Martin to teach the EEO class because of her age that this issue arose.” Appellant’s Reply Br. at 19 (emphasis omitted). However, Ms. Martin did not object at trial or seek to amend her complaint upon hearing Professor Leggett’s testimony. Ms. Martin asserts that she asked in her post-trial motion to be “permitted to amend her complaint to include a claim of age discrimination under the ADEA,” citing her Reply to Defendant’s Opposition to Plaintiff’s Motion for Judgment on Her Retaliation Claims, Or in the Alternative, for a New Trial at 22-23, *reprinted in* Joint Appendix (“JA”) 10,264-65. *Id.* But there is no motion to amend the complaint at the cited pages. Rather, Ms. Martin merely stated that she was “*considering* filing a motion to amend her complaint to conform to the evidence produced at trial, to add a claim under the ADEA.” JA 10,264 n.20 (emphasis added). And in responding to Ms. Martin’s post-trial motion, the District Court plainly saw no motion to amend the complaint. We therefore reject Ms. Martin’s belated attempt to add an ADEA claim to this case.

IX.

Finally, Ms. Martin’s challenge to the imposition of costs by the District Court is not ripe for review. As explained by the trial court, costs are imposed *after* this court issues its mandate. *Martin v. Howard Univ.*, Civ. Action No. 99-1175, slip op. at 1 (D.D.C. Jan. 23, 2007) (order). Because the District Court has not yet exercised its discretion on this question, there is no ruling to review.

The judgment of the District Court is hereby affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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

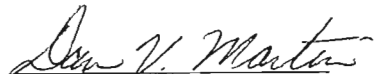
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 29th day of April, 2008, a true copy of the *Appellant's* *Petition for Rehearing En Banc*, via first class mail and e-mail to:

Brian Schwalb, Esquire
575 7th Street, NW
Washington, DC 20004

Frederick D. Cooke, Jr. , Esquire
RUBIN, WINSTON, DIERCKS
1155 Connecticut Avenue, NW
Suite 600
Washington, DC 20036-4324

Roberta Y. Wright, Esquire
Counsel for Proposed *Amicus Curiae*
National Association of Women Lawyers (NAWL)
Law Office of Roberta Y. Wright
1111 14th Street, N.W.
Washington, D.C. 20004-5503


Dawn V. Martin, Esquire
D.C. Federal Bar No. 412348
Law Offices of Dawn V. Martin
1725 I Street, Suite 300
Washington, D.C. 20006