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U.S. Court of Appeals Rules that a Woman Can be Fired for being Stalked by a Stranger Roaming Freely in her Workplace

Washington, D.C. – On March 31, 2008, the United States Court of Appeals for the D.C. Circuit, Judges Edwards, Henderson and Williams, decided the appeal of *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). Prof. Dawn V. Martin was harassed by a serial campus stalker. Her contract was "not renewed" after she asked the university to implement its own security procedures to bar the stalker from the law school.

In oral argument, on March 17, 2008, Ms. Martin told the Court: "The precedent set by this Court will determine how employers and educational institutions will respond to stalking and other types of workplace and campus violence – particularly when it is directed against women. If a woman can be stalked in her workplace, and fired for asking her employer to take reasonable steps to keep him out of the workplace, then women will be forced to choose between their safety and their livelihood – a Hobson's choice." Less than two weeks later, in an unpublished decision by the three-judge panel, the Court squarely placed women in the position of choosing between their jobs and their safety, if they are stalked at work.

The Court's decision allows the employer to fire the female stalking victim even in a case such as Ms. Martin's, where the selected her *precisely* because of the position she held, as a law professor at Howard University, in conjunction with her gender. This delusional, homeless, serial campus stalker, Leonard Harrison, had been targeting women of color, at Universities since the mid-1980s. Harrison had his own *vision* of his "natural wife," or "soul-mate," whom he believed was the physical embodiment of a fictional character, Geneva Crenshaw, in a book, written by the renowned NYU law professor, Derrick Bell.

All Briefs are uploaded onto http://www.dvmartinlaw.com/MartinvHowardU.html). You may also hear radio interviews about the case at that cite. Groups interested in assisting Ms. Martin in her motion for rehearing before the full Court of Appeals and/or a petition to the United States Supreme Court, if rehearing is not granted, should contact Ms. Martin at dvmartinlaw@yahoo.com.

In 1999, the federal district court set precedent in *Martin* by adopting the EEOC Regulation 29 CFR 1604.11(e), holding that an employer can be held liable for the sexual harassment of an employee, by a non-employee, if the employer knew or should have known of the harassment and failed to take reasonable steps to stop it. Howard asked the Court to reverse this decision and invalidate the EEOC Regulation. The Court of Appeals did not address Howard's argument, or otherwise discuss the lower court's holding on how employers should address non-employee harassment of employees.

Martin is the first case considering the concept of "gender profiling" in employment, under Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of sex. *The National Association of Women Lawyers (NAWL)*, as *Amicus Curiae* filed a Brief supporting Martin. Ms. Martin said, "In 1999, the district court judge said that it was 'clear' that Harrison harassed me based on my sex –but seven years later, after all of the evidence was presented at trial, the same judge suddenly submitted the question to the jury. The jurors were clearly confused on the law. They asked the court to give them additional instruction on the definition of sexual harassment, but the judge would not provide it. Based on what they understood the law to be, the jurors concluded that Harrison' stalking was not sexual in nature or based on my gender. That meant that there is no statute to protect me from being stalked in my workplace from being fired for reporting it."

The Court of Appeals held that Ms. Martin misinterpreted Judge Hogan's 1999 decision; however, on October 20, 2003, Magistrate Judge Facciola, to whom Judge Hogan referred the case, specifically detailed what issues were decided in 1999 and would not be "triable issues of fact" for the jury and what issues would proceed to a jury at trial. The Court of Appeals discounted MJ Facciola's interpretation of Judge Hogan's decision, stating that he could not overrule Judge Hogan; however, as Ms. Martin stressed in her Brief, Reply Brief and oral argument, Judge Hogan adopted Judge Facciola's decision as his own, on September 16, 2005.

The district court also held that "groping" and "touching" are "typical" indicia of sexual harassment cases and that since Harrison did not touch Prof. Martin, the jury had reason to find that she was not sexually harassed." The Court of Appeals did not address this issue. Since it has not been overturned, this precedent set by this decision arguably requires that a woman to be assaulted in order to establish that she was sexually harassed in her workplace.

The Court of Appeals also held that because, on one occasion in 1990, Harrison threatened Prof Bell, this was enough to defeat Ms. Martin's claim that Harrison harassed her because of her gender; however, Ms. Martin repeatedly pointed out that Harrison did not *stalk* Prof. Bell. The legal definition of "stalking" requires *repeated acts of harassment directed toward the same victim.* Harrison contacted Prof. Bell on only *one occasion*, and then only to solicit his assistance in identifying the next *woman* he would stalk -- any woman that he believed might be the "model" for "Geneva Crenshaw." Ms. Martin said, "Howard's argument is like saying that John Hinckley did not sexually harass Jodie Foster when he stalked her because he also attempted to kill President Reagan. The fact that a sexually harassing stalker may also have committed a violent act against a man in his lifetime does not negate the fact that he sexually harassed a woman in another setting."

Martin also presented issues regarding actionable retaliation under Title VII, but the Court of Appeals deemed these issues moot. Since the Court determined that Howard was free to commit any retaliatory act against Prof. Martin for being stalked, with no Title VII penalty, the lower court's definition of acts that constitute actionable retaliation under Title VII was irrelevant to this case; however, the Court of Appeals' failure to reverse the lower court on this issue leaves the lower court's precedent intact: an employer may leave positions unfilled, cancel vacancies and/or convert advertised positions to positions for which an applicant is not the best qualified, even where it is done to prevent the most qualified applicant from being hired, in retaliation for reporting sexual harassment – or any other EEO violation, whether based on race, national origin, religion, ethnicity, age or disability.

Ms. Martin also asked the Court to define the circumstances under which Title VII plaintiffs may be ordered to pay the litigation costs of the defendant. The *National Organization of Women* (NOW) recently ran a campaign protesting the 11th Circuit's assessment of costs against the plaintiff in *Ledbetter v. Goodyear*, after the Supreme Court ruled against her in her sex discrimination claim. NOW and NAWL have argued that such assessments unfairly punish women who file sex discrimination lawsuits, in good faith, in the public interest. The Court declined to address this issue at this time.

The Court of Appeals also did not explain why Dean Alice Gresham Bullock's perjury does not require vacating the verdict. In a July 1, 1999 memorandum to Howard's General Counsel, Bullock admitted that she perceived Harrison as a threat to Prof. Martin and "other women" on campus; yet, at trial, she testified that she never perceived Harrison's harassment as sexual harassment, or harassment based on sex/gender. Martin said. "Neither Howard nor her own personal counsel has denied that she committed perjury. Alice Gresham Bullock created ten years of contentious and expensive litigation for both sides. She has caused ten years of suffering for my family and me. We will never get those years back -- the years that I was raising my daughter. This could all have been avoided if she had simply followed the university's own security procedures and barred Harrison from the law school rather than devoting her efforts to *removing me* from the law school."