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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)**

**AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF  
WOMEN LAWYERS (NAWL) IN SUPPORT OF APPELLANT,  
DAWN V. MARTIN**

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October 23, 2007

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## The Interests of *Amicus Curiae*

### 1) The National Association of Women Lawyers (NAWL)

The National Association of Women Lawyers (NAWL) is the oldest women's bar association in the United States. NAWL works to advance the rights of women and to end discrimination and violence against women. NAWL acts as *amicus curiae*, advises legislators and policymakers. NAWL members serve as delegates and liaisons to national and international organizations in its pursuit of justice for women. NAWL has an interest in promoting safety of women in the workplace and in eliminating gender based discrimination.

## INTRODUCTION

The record herein establishes the following undisputed facts:

1) Prof. Dawn Martin was stalked in her workplace, *Howard University Law School*, by Leonard Harrison, a delusional serial campus stalker, with a history of violence.

2) Harrison pursued Prof. Martin to be his "wife," based on his assertion that she bore professional and physical similarities to a *fictional* character in a book written by renowned Prof. Derrick Bell;

3) Prof. Martin reported Harrison's conduct to the law school administration, the D.C. Metropolitan Police Department and campus security, asking for protection on campus;

4) Dean Bullock responded to Prof. Martin in writing, assuring her that she was discussing the matter with the Director of Campus security;

5) However, Dean Bullock did not ever discuss the stalking of Prof. Martin with the Director of Campus Security or any security officer, nor did she take any action to prevent Harrison from entering the law school premises;

6) Howard University failed to follow its own procedures for addressing stalking on campus, so that the stalker freely reached Prof. Martin's office;

4) Less than a month after Prof. Martin reported the harassment by the campus stalker, Howard's administration decided not to "renew" her teaching contract;

5) Howard continued to reject Prof. Martin from any position, permanent or visiting, for the remaining six months of her tenure at Howard, although there were three vacant positions for which Prof. Martin was well qualified;

6) Dean Bullock concealed vacancies from the Appointments Committee, even when a member specifically asked whether there was any vacancy for which Prof. Martin could be considered.

On April 18, 2006, the jury found, as Prof. Martin alleged, that Harrison *did* create a "hostile work environment" for her. The jury further concluded that Howard failed to take reasonable steps to end it. Despite these findings, the jury returned a verdict for Howard University because it concluded that Harrison's harassment was not "*sexual*" in nature or based on Prof. Martin's gender, which meant that her complaints were not "protected activity" within the meaning of Title VII of the Civil Rights Act of 1964, *et seq.* Thus, whether or not Howard retaliated against her for reporting the stalking, Prof. Martin was thereby deprived of a cause of action. Such a result leaves women in this jurisdiction with absolutely no remedy at law for being stalked in their workplaces or for being terminated in retaliation for complaining about it.<sup>1</sup>

For this reason, this Brief concurs with Prof. Martin's argument that the dismissal of her retaliation claims requires restoration pursuant to *Burlington Northern v. White*, 126 S. Ct. 2405

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<sup>1</sup> Although Prof. Martin was stalked by a stranger, this Court's decision will also affect victims of domestic violence. Domestic violence does not necessarily stop at the front door, but often overflows into the workplace.

(2006), and that she is entitled to judgment on her sexual harassment and retaliation claims. The arguments below detail the impact of a decision adverse to Prof. Martin on the broader issues of sexual harassment and retaliation confronting women in their workplaces and campuses.

## ARGUMENT

### **I. Employers Must be Held Liable for the Sexual Harassment of an Employee by a Non-Employee where they Knew or Should have Known of the Harassment and Failed to Take Reasonable Measures to End it**

#### **A. The D.C. Circuit Should Expressly Adopt EEOC Regulation 29 C.F.R. § 1604.11(e)**

Although in 1999, Judge Hogan set precedent within the D.C. Circuit in *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) by holding that an employer can be held liable for the sexual harassment of an employee, by a non-employee, if the employer knew or should have known of the harassment and failed to take reasonable steps to stop it;<sup>2</sup> throughout later stages of the district court proceedings, Howard argued that it *cannot* be held liable for the harassment of an employee by a non-employee. If Howard's position is upheld in this case, it will jeopardize the precedent set by Judge Hogan in 1999 and the remedies available to women who are stalked by non-employees in their workplaces.

This Court should therefore join other circuits in adopting 29 C.F.R. § 1604.11(e). *See, Murray v. New York University*, 57 F.3d 243 (2d Cir. 1995) (student intern allegedly harassed by patient at dental clinic); *Waltman v. International Paper Co.*, 875 F. 2d 468, 471 (5th Cir. 1989) (employee harassed by independent contractor of employer while on a travel assignment); *Dornbecker v. Malibu Grand Prix*, 828 F. 2d 307, 309 (5th Cir. 1987) (employee harassed by

consultant and employer took swift corrective action); *Christ v. Focus Homes*, 122 F.3d 1107 (8th Cir. 1997) (employees harassed by mentally incapacitated residents); *Little v. Windermere Relocation, Inc.*, 301 F.3d 968 (9th Cir. 2001) (corporate service manager was terminated after reporting that she was raped by a customer during a business dinner); *Folkerson v. Circus Enterprises, Inc.*, 107 F.3d 754 (9th Cir. 1997) (employee of circus harassed by patron while performing pantomime act); *Turnbull v. Topeka State Hospital*, 255 F.3d 1238 (10th Cir. 2001) (psychiatrist harassed by patient); *Lockard v. Pizza Hut*, 162 F.3d 1062 (10th Cir. 1998) (waitress harassed by customer); *Adler v. Wal-Mart Stores*, 144 F.3d 664 (10th Cir. 1998) (employer liability for co-worker harassment is analyzed using the same standard as is harassment by a non-employee); *McGuire v. Virginia*, 988 F. Supp. 980 (W.D. Va. 1997) (executive secretary sexually harassed at worksite by son of Chairman of Board); *Mullis v. Mechanics and Farmers Bank*, 994 F. Supp. 680 (M.D. N. C. 1997) (loan secretary sexually harassed by bank Vice President at work site to which she was temporarily detailed by another employer); *Ligenza v. Genesis Health Ventures of Massachusetts, Inc.*, 995 F. Supp. 226 (D. Mass. 1998) (respiratory therapist harassed by patient at employer's health clinic); *Jarman v. City of Northlake*, 950 F. Supp. 1375 (N.D. Ill. 1997) (deputy clerk sexually harassed by elected official); *Kudatsky v. The Galbreath Co.*, 1997 U.S. Dist. LEXIS 14445 (S.D. New York 1997) (real estate sales person sexually harassed by client); *Mart v. Dr. Pepper Co., et al.*, 923 F. Supp. 1380 (D. Kan. 1996) (account sales manager sexually harassed by client); *Hallberg v. Eat 'n Park*, 1996 U.S. Dist. LEXIS 3573, 70 Fair Empl. Prac. Cas. (BNA) 361 (waitress sexually harassed by customer); *Otis v. Wyse, et al.*, 1994 U.S. Dist. LEXIS 15172 (D. Kan. 1994) (nurse trainer harassed by independent medical provider); *Hernandez v. Miranda, et al.*, 1994 U.S. Dist.

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<sup>2</sup> 1999 U.S. Dist. LEXIS 19516 at \*7-8.

LEXIS 10598 (D. P. R. 1994) (office manager harassed by a customer); *Powell v. Las Vegas Hilton, Corp.*, 841 F. Supp. 1024, 1029 (D. Ct. Nev. 1992) (casino liable for sexual harassment of employee by customers); *Churchman v. Pinkerton*, 756 F. Supp. 515, 518-519 (D. Ct. Kan. 1991) (female security officer harassed by employer's client); EEOC Decision 84-3, 1984 (waitress subject to unwelcome sexual conduct by customer).<sup>3</sup>

Even if express adoption of EEOC regulation 29 C.F.R. 1604.11(e) goes unchallenged by Howard, this Court must make decisions regarding how the regulation should be applied because third party harassment, unlike that between co-workers, cannot be solved by the imposition of employer discipline. The “reasonable” measures necessary to end a hostile work environment created by a non-employee typically entails banning the harasser from the workplace or contacting law enforcement.

Because Howard University employs armed, special police officers, who work in cooperation with the D.C. Metropolitan Police Department, with specific stalking-related policies and procedures, this Court has before it explicit examples of “reasonable” actions that could and should have been taken here to end third-party harassment or hostile work environment.<sup>4</sup>

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<sup>3</sup> *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.

<sup>4</sup> Since tragedies on campuses such as Virginia Tech, public awareness is heightened and greater precautions are taken where courts have provided examples of “reasonable” steps that can be taken to protect against violence on campus when a person posing a potential danger has been identified. At least one jurisdiction has fined an employer who failed to follow established procedures when such failure led to murder of its employee. The State of Washington Department of Labor and Industries fined the University of Washington because [its employees] were put in danger due to the supervisor’s failure to relay the deceased’s earlier pleas to Human Resources as required. Sanjay Bhatt, “Campus slaying results in state fine against UW,” *Seattle Times*, October 6, 2007.

**B. Title VII Protections Must Not Be Denied Simply because Third-Party Harassment has been Reported Differently than Employee Harassment**

Where an employee reports a co-worker for sexual harassment in the employer's EEO office, she typically fills out a form, offering options for the basis of the EEO claim, including the requirement of checking a "box" characterizing the harassment as based on sex; however, where a non-employee is involved, the "reasonable measures" to be taken are not the typical remedies meted out through an EEO office. The report may be to administrators, supervisors, the employer's security force and/or the police department.

This Court's decision in *Martin* will provide guidance regarding the conduct that employers should be expected to recognize as constituting sexual harassment.<sup>5</sup> Howard's administrators did not doubt that Prof. Martin was being stalked on campus. There was no need for an EEO investigation, nor could the EEO office enlist the cooperation of Harrison, a non-employee, in such an investigation. There was, however, an urgent and immediate need for security measures, as acknowledged by the D.C. Metropolitan Police Department, the administration and campus security officers. Women who are stalked in their workplaces must not be deprived of Title VII protections simply because harassment by a non-employee might involve a variation on the standard methods of reporting and remedying sexual harassment.

As discussed in Ms. Martin's Brief, at 17, the court in *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025 (D. Nev. 1992), held that Title VII was invoked where an employee simply told her supervisor, "I don't have to take this; do something." These words constituted a complaint of sexual harassment, protected by Title VII. Although Judge Hogan expressly

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<sup>5</sup> Martin Brief at 11-12.

adopted the rationale of *Powell* in his 1999 decision,<sup>6</sup> his 2006 decision implicitly vacates that 1999 holding. NAWL respectfully requests that this Court adopt the holding in the 1999 decision on this issue.

**II. Harrison’s Stalking of Prof. Martin Constituted Harassment Based on Sex/Gender, Thereby Invoking Title VII**

**A. Sexual Harassment, or Harassment Based on Sex or Gender, Is Harassment Aimed at Members of One Sex**

It is well-settled that one form of discrimination occurs when an employee is harassed in the workplace because of her sex or gender. In 1999, Judge Hogan summarized it thusly:

Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed solely at discrimination because of sex. *Oncala v. Sundowner Offshore Services*, 523 U.S. 75, 118 S. Ct. 998, 1001, 140 L. Ed. 2d 201 (1998). Workplace harassment is not automatically discrimination because of sex merely because the words used have sexual content or connotations. *Id.* “The critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” *Id.*

*Martin*, 1999 U.S. Dist. LEXIS 19516 at \*8-9.

**B. Title VII Protection Should Not Depend upon the Employer’s Subjective Understanding of What Conduct Constitutes Sexual Harassment,**

In 1999, Judge Hogan concluded:

In 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*, 1999 U.S. Dist. LEXIS 19516 at \*11.

On October 4, 2006, however, Judge Hogan held that he had not concluded, in 1999, that Harrison’s harassment was “sexual in nature” or “based on sex.”

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<sup>6</sup> 1999 LEXIS 19516 at \*17-18.

[T]his Court never found that Mr. Harrison's conduct was sexual in nature or because of Plaintiff's gender, but left this as a question for the jury. The jury verdict did not, therefore, contradict the Court's 1999 decision.

*Martin*, 2006 WL 2850656 at \*3 (D.D.C.).<sup>7</sup>

The only evidence before the jury indicating that Harrison's conduct was not sexual in nature was the testimony of Dean Alice Gresham Bullock stating that she did not perceive Harrison's conduct to be based on sex or sexual in nature.<sup>8</sup> Employers should not be permitted to escape liability for Title VII retaliation by claiming "ignorance of the law" – which would not even be a valid excuse in criminal proceedings. The district court's 2006 decision and the jury's verdict make it possible for an employer to escape Title VII liability simply by stating that the employer's officials did not understand that the reported conduct constituted sexual harassment.

Employers cannot ignore stalking harassment of women as a gender based activity by simply disregarding the fundamental nature of stalking as a tool to control women. While stalking can be a gender neutral activity, the vast majority of stalking victims are female.<sup>9</sup> At least eighty percent of stalking victims are female.<sup>10</sup> Ninety-four percent of the female stalking victims identified their stalkers as being male.<sup>11</sup> Additionally, stalking has been classified as an integral part of violence against women. "Stalking is often a strategy of intimidation and control used by men to force their female partners to remain in a relationship."<sup>12</sup>

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<sup>7</sup> Prof. Martin's brief characterizes the District Court's submission of whether Harrison's harassment was based on sex to the jury as violating "the law of the case." Martin Brief, at 11-13.

<sup>8</sup> But see Appellant's Brief at Page at 21-22 where, in a Memo to Howard's General Counsel, Dean Bullock stated to the contrary.

<sup>9</sup> P. Tjaden and N. Thoennes, *Research in Brief*, National Institute of Justice Centers for Disease Control and Prevention, (April 1998)

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> P. Mullen and M. Pathe, *Stalking*, 29 Crime 273 (2002).

Employers are obligated to understand their duties under Title VII. If a supervisor can simply claim that he did not realize that the conduct complained of constituted sexual harassment, it will be in the employers' interests *not* to educate its managers regarding conduct that constitutes sexual harassment so they can all claim "ignorance" when a woman files a sexual harassment charge. Whether or not a woman is protected from termination by Title VII must not depend upon the purported level of knowledge of any particular supervisor.

**C. Where Gender Specific Language is Used to Identify and Target the Harassment Victim(s), the Harassment is "Based on Sex"**

Where a harasser targets a woman because he fantasizes that she is related to him in sex specific terms, such as "wife," "mother," "sister," "aunt," "grandmother," the target can only be a woman. The very words used by Harrison clearly identified his victims in terms that required them to be female. Harrison's harassment was, therefore, based on sex. The contrary finding by the jury below not only disregards the great weight of the evidence but also offends the struggle of women to be safe in the workplace.

**D. "Gender Profiling" as a "Sex-Plus" Factor in Sex Discrimination**

NAWL urges the adoption of Prof. Martin's "gender profiling" analysis as part of employment law. (Martin Brief at 14-15). "Gender profiling" is closely related to the long recognized doctrine of "sex plus" employment discrimination.

Prior to *Martin*, Judge Hogan had long recognized that "sex-plus" basis discrimination violates Title VII:

Disparate treatment of subclasses of women, based on an immutable characteristic or the exercise of a fundamental right, has been held unlawful under Title VII; e.g. *Abraham v. Graphic Arts International Union*, 212 U.S. App. D.C. 412, 660 F.2d 811 (D.C. Cir. 1981) (leave policy did not accommodate pregnancy and

hence was unlawful gender discrimination under Title VII); *Jefferies v. Harris County Community Action Association*, 615 F.2d 1025, 1033-34 (5th Cir. 1980).

*Judge v. Marsh*, 649 F. Supp. 770, 779-780 (D.D.C. 1980). In a “sex-plus” case, an employer does not discriminate against a protected class as a whole; rather it treats a subclass within a protected class disparately. *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 (sex plus marriage violated Title VII, where airline hired married male flight attendants but not married female flight attendants).

The dissent in *Back v. Hastings on the Hudson*, 365 F.3d 107, 108 (2d Cir. 2004), summarized the “sex-plus” analysis:

... as the judge that coined the term “sex plus” pointed out: Free to add non-sex factors, the rankest sort of discrimination against women can be worked by employers. This could include, for example, all sorts of physical characteristics, such as minimum weight (175 lbs.), minimum shoulder width, minimum biceps measurement, minimum lifting capacity (100 lbs.), and the like. Others could include minimum educational requirements (minimum high school, junior college), intelligence tests, aptitude tests, etc. *Phillips v. Martin Marietta Corp.*, 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown, C.J., dissenting from denial of rehearing *en banc*).

Most sexual harassers have personal preferences and do not harass every woman they meet. In this case, Leonard Harrison targeted women based on their profession – particularly female academics addressing civil rights issues. Harrison did not similarly pursue male civil rights professors to be his “wife.”

**E. Where a Gender Specific Character is Used to Identify the Harassment Victim, the Harassment Constitutes “Gender Profiling”**

Only a woman could be “Geneva Crenshaw.” Where the harasser selects the victim based on his obsession with a female character, real or imagined, the harasser has selected the victim based on the basis of her gender. Although the harasser may need to see additional qualities in particular women in order for him to cast her in the role he has chosen for her, one constant requirement for the role is that she be female. The harassment is, therefore, necessarily based on sex and invokes Title VII.<sup>13</sup>

**F. A Sexual Harassment Claim Does Not Require that the Harasser Sexually Assault the Victim or Expressly Solicit Sexual Acts**

Judge Hogan upheld the jury’s conclusion that Harrison’s harassment was not 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.

NAWL contends that the enunciation of such a standard ignores the gains made by working women during the past several decades. A plaintiff is not required to prove that she was “touched,” “groped,” or sexually assaulted to establish a sexual harassment claim. Even intended compliments can constitute sexual harassment---a fact that Judge Hogan explicitly acknowledged in his 1999 decision. *See, Martin*, 1999 LEXIS 19516 at \*12-13. *Accord, Ellison v. Brady*, 924 F. 2d 872, 880 (9th Cir. 1991), wherein a male subordinate wrote love letters strikingly similar to those Harrison wrote to Prof. Martin and the Court held that the fear of

receiving a “bizarre note from...a person she barely knew...” and “not knowing what this mentally unstable person would do next,” was enough to create a hostile work environment for the plaintiff.

*See also, Fuller v. City of Oakland*, 473 F.3d 1523 (9<sup>th</sup> Cir. 1995), wherein a female police officer trainee was harassed by her ex-boyfriend, a more senior police officer. The sexual harasser did not touch plaintiff or threaten her; nor did he say anything to her that was overtly sexual; however, the context of the conduct and the history of the relationship indicated that the harasser wanted the plaintiff to be his girlfriend again. The court therefore defined the conduct as sexual harassment. If harassment is “sexual in nature” where the harasser wants the victim to be his “girlfriend,” it must also be sexual in nature where the harasser takes it a step further, targeting the victim to be his “wife.”

### **G. Stalking Has Been Recognized as a Severe Form of Sexual Harassment against Women**

Statistics compiled by the U.S. Department of Justice reflect that women are, in fact, disproportionately affected by workplace violence, such as sexual assault and stalking. See Bureau of Justice Statistics, *National Crime Victimization Survey, Violence in the Workplace, 1993-1999* (December 2001), at [www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf). Not only are at least Eighty (80%) of stalking victims are female<sup>14</sup> (*Id.*, Tjaden and Thoennes) but, according to the

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<sup>13</sup> As discussed in the Martin Brief at 23, harassment based on “character profiling” could just as easily be based on racial profiling, or on the basis of national origin, color, religion, age or disability

<sup>14</sup> Some of the targeted men are actually the boyfriends of women who are the real focus of the stalker; thus, the stalking of the man is simply part and parcel of the stalker’s harassment of the woman. Even where a woman stalks a man, the stalking is generally “sexual in nature” or based on her desire to have or continue a sexual or romantic relationship with him. Thus, nearly all stalking is either “sexual in nature” or based on sex.

U.S. Department of Justice, 1 in 12 females versus 1 in 45 males will be stalked. *Accord*, <http://www.feelsafeagain.org/StalkingVictimsNewsJan2007.pdf>.

Even when conduct might affect both men and women, the conduct may constitute harassment on the basis of sex if it disproportionately affects women. *Turnbull*, 255 F.3d at 1244; *see also Crist v. Focus Homes*, 122 F.3d 1107, 1111 (8<sup>th</sup> cir. 1997).

In his 1999 decision, Judge Hogan acknowledged Prof. Martin's argument that stalking has a disparate or adverse impact on women and therefore constitutes sex discrimination. *Martin v. Howard University, et. al.*, 1999 U.S. Dist. LEXIS 19516 at \*10. Where a woman is stalked in her workplace, the disparate impact analysis should be used in determining if the harassment is based on sex.

Courts have long recognized that stalking is one of the most egregious forms of sexual harassment. *Crowley v. L.L. Bean*, 303 F.3d 387, 396, 401-403 (D. Me. 2002) (plaintiff identified the harasser's conduct as "stalking" and had therefore met her burden of demonstrating that she perceived the harasser to have created a "hostile or abusive environment"); *Frazier v. Delco Electronics Corporation*, 263 F.3d 663, 668 (7<sup>th</sup> Cir. 2001) (stalking recognized as creating a hostile work environment); *Whitmore v. O'Connor Management, Inc.*, 156 F.3d 796, 798 (8<sup>th</sup> Cir. 1998) (sexual harassment was so severe that co-worker would "almost call it stalking"); *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1108 (8<sup>th</sup> Cir. 1998) (plaintiff felt that her co-worker "was harassing her, actually, stalking her"); *Angeles-Sanchez v. Alvarado*, 1993 U.S. App. LEXUS 10509 (1<sup>st</sup> Cir. 1993) (sexual harassment/hostile work environment included "stalking"); *Spina v. Forest Preserve District of Cook County*, 207 F. Supp. 764, 772 (D. Ill. 2002) ("stalking" listed as one of the more severe allegations of sexual harassment); *Ramirez v. New York Presbyterian Hospital*, 129 F. Supp. 2d 676, 678 (S.D.N.Y. 2001) (plaintiff used

“stalking” to describe acts of sexual harassment/hostile work environment); *Dolman v. Willamette University*, 2001 U.S. Dist. LEXIS 7772 (D. Or. 2001) (professor stalked by a former student was sexually harassed); *Chontos v. Rhea and Indiana University*, 29 F. Supp. 931, 937 (N. Dist. Ind. 1998)<sup>15</sup> (“stalking” was one of the most “disturbing” acts of sexual harassment).

**H. Prof. Derrick Bell’s Confrontation with Harrison Strengthens Prof. Martin’s Claim of Sexual Harassment Rather than Diminishing That Claim.**

**1. When Prof. Martin Complained of Stalking, Howard Had No Knowledge of Any Contact between Harrison and Prof. Bell**

Judge Hogan’s October 4, 2006 decision justified the jury’s verdict by referring to Harrison’s confrontation with a renowned African-American male professor, Prof. Derrick Bell, at Harvard University Law School. (*See*, 2006 WL 2850656 at \*4). Harrison had confronted Prof. Bell seven years before his contact with Prof. Martin. However, neither Howard’s administrators nor Prof. Martin even knew that Harrison confronted Derrick Bell until 1999 -- a year after Prof. Martin left Howard.

In 1997-1998, when Prof. Martin was complaining of Harrison’s stalking, neither Howard nor Prof. Martin had any reason to believe that Harrison had harassed any man, at any time. Conversely, Harrison’s letters expressly identified numerous women that he had targeted, over a period of years, to be his “wife.” It is not possible, then, that Howard could have perceived Harrison as an “equal opportunity harasser” at the time Prof. Martin requested protection from him. To argue that one who commits ongoing acts of female gender based harassment would never commit an aggressive act against a man is as ludicrous as it is irrelevant.

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<sup>15</sup> This lawsuit was filed against University under Title IX, rather than Title VII of the Civil Rights Act of 1964.

Harrison's one-time confrontation of Prof. Bell in 1990, therefore, cannot possibly serve as evidence that Howard's officials believed that Harrison was an equal threat to men and women, or an "equal opportunity harasser." The fact is that Harrison was not an ongoing threat to Bell. Harrison only confronted Prof. Bell as a means of locating his next *female* stalking victim. Significantly, Harrison's confrontation of Prof. Bell cannot be considered stalking by any definition, as a pattern of behavior is a necessary requirement of stalking.<sup>16</sup>

Harrison's confrontation with Bell was not a gender-based act against Bell although his purpose was gender-based: to locate a woman to be Harrison's "wife" based upon Bell's fictional character of Geneva Crenshaw.

**2. A Sexual Harassment Claim Should Not be Invalidated Simply because the Sexual Harasser Also Demonstrated Threatening Behavior Towards a Man, at Some Point in His Life**

Under the rationale set forth by the district court, an employer can invalidate a woman's Title VII protections by producing evidence that the sexual harasser demonstrated violent or threatening behavior toward any male, at any time in his life. The broad implications of this new legal edict could seriously thwart future sexual harassment claims. For example, one could argue that, since John Hinkley shot at President Ronald Reagan – a male -- on March 31, 1981, his stalking of actress Jodie Foster while she was an undergraduate student at Yale University was not based on sex, although he professed his "love" for her in letters and phone calls – as did Harrison in letters and phone calls to Prof. Martin.

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<sup>16</sup> DC ST § 22-404 (b) states that "Any person who on more than one occasion engages in conduct with the intent to cause emotional distress to another person or places another person in reasonable fear of death or bodily injury by willfully, maliciously, and repeatedly following or harassing that person, or who, without a legal purpose, willfully, maliciously, and repeatedly follows or harasses another person, is guilty of the crime of stalking."

A sexual harasser may have exhibited violent or other threatening behavior at some point in his life. This prior act neither diminishes nor negates sex-based harassment, such as stalking.

### **III. The District Court's 2003 Dismissal of Prof. Martin's Retaliation Claims Violates *Burlington Northern v. White***

Prof. 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 because she asked for reasonable steps to be taken to stop a delusional stalker from pursuing her, in her workplace. In 1999, Judge Hogan sustained these retaliation claims,<sup>17</sup> 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 (D.D.C. 2003).

In June of 2006, the Supreme Court decided *Burlington Northern v. White*, 126 S. Ct. 2405 (2006). *Burlington* expressly rejected the analysis set forth by MJ Facciola, limiting actionable retaliation to “ultimate employment decisions.” 126 S. Ct. at 2414. Instead, the Court held:

...the proper formulation requires a retaliation plaintiff to show that the challenged action “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”

126 S. Ct. at 2410.

Even before *Burlington*, this Court decided a stream of cases elucidating the definition of “adverse action” within the meaning of Title VII. *Holcomb v. Powell*, 433 F.3d 889, 902 (D.C.

Cir. 2006) held that adverse actions included acts that affected future employment opportunities. *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006), held that Title VII makes unlawful any act of retaliation by an employer that might dissuade a reasonable employee from making or supporting a charge of discrimination pursuant to Title VII – whether it is related to current employment opportunities, future employment opportunities, or even potentially adverse consequences completely unrelated to employment. *Burlington* expressly adopted the standard for proving actionable retaliation set forth in *Rochon*. 26 S. Ct. at 2411, 2413, 2415.

*Chappelle-Johnson v. Powell*, 440 F.3d 484 (D.C. Cir. 2006), held that it is not necessary that the plaintiff "show that the position remained open and that the employer continued to seek applicants." It was enough that the plaintiff alleged that the employer "denied her an opportunity for advancement." *Mastro v. Potomac Electric Power Company*, 447 F.3d 843, 855 (D.C. Cir. 2006), held that the failure to permanently fill a vacancy could violate Title VII if the position was eliminated for discriminatory reasons. This Court's decisions were consistent with *Terry v. Gallegos*, 926 F. Supp. 679, 710 (W.D. Tenn. 1996), holding that a vacancy cancellation constituted actionable retaliation under Title VII.<sup>18</sup>

*In Bowie v. Ashcroft*, 283 F. Supp, 2d 25 (D.D.C. 2003), the same magistrate that dismissed Ms. Martin's claims only a month later actually cited *Terry* with approval, holding that:

no particular type of personnel action [is] automatically excluded from serving as the basis of a cause of action under [Title VII]."

In *Mintz v. District of Columbia*, 2006 U.S. Dist. LEXIS 34446 at \*12-13 (D.D. C. . 2006) the same court, *via* a different judge, upheld a plaintiff's Title VII retaliation claim where he

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<sup>17</sup> 1999 U.S. Dist. LEXIS 19516.

alleged that his employer failed to convert his temporary status to a permanent employee status, in retaliation for his support of the original plaintiff. The district court decisions in *Mintz* and *Martin* are inconsistent and must be reconciled within the D.C. Circuit.

*Mintz* is consistent with all other circuit and district court decisions that have considered whether a non-renewal is actionable under Title VII. *Walker v. Board of Regents of University of Wisconsin System*, 300 F. Supp. 2d 836, 853 (W.D Wis. 2004), a case, like *Martin*, against a University with employees holding temporary and/or renewable contracts, held:

Whether this action is considered a termination or a refusal to re-hire, I conclude that it is a cognizable injury for the purpose of § 1981, § 1983 and Title VII.

Being denied a renewed contract is not a “minor or trivial” action. *Silk v. City of Chicago*, 194 F.3d 788, 800 (7th Cir.1999).<sup>19</sup>

If this Court affirms the lower court’s decision, *Burlington* and even this Court’s pre-*Burlington* definition of actionable retaliation, will be substantially eviscerated in the D.C. Circuit.

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<sup>18</sup> *Accord, Ruggieri v. Merit Systems Protection Board*, 455 F.3d 1323 (Fed. Cir. 2006) (“Whistleblower Act” retaliation claim upheld where employer cancelled a vacancy in order to prevent the plaintiff from being promoted into it).

<sup>19</sup> *Walker* relied on the unanimous consensus of other jurisdictions on this issue, including *Carter v. University of Toledo*, 349 F.3d 269 (6th Cir.2003); *Fekade v. Lincoln University*, 167 F.Supp.2d 731, 739 (E.D.Pa.2001); *Lindblom v. Challenger Day Program, Ltd.*, 37 F.Supp.2d 1109, 1116 (N.D.Ill.1999); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Trejo v. Shoben*, 319 F.3d 878 (7th Cir.2003); *Griffin v. Board of Regents of Regency Universities*, 795 F.2d 1281 (7th Cir.1986). *Minshall v. McGraw Hill Broadcasting, Inc.*, 323 F.3d 1273, 1280 (10th Cir.2003) (ADEA); *Day v. South Park Independent School District*, 768 F.2d 696 (5th Cir.1985) (§ 1983); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 50 F.Supp.2d 845, 851 (S.D.Ind.1999) (ADEA).

#### **IV. The Tort of “Wrongful Discharge” Should Be Applied Where Employees Are Fired for Reporting Stalking and Other Violent Crimes**

NAWL expressly adopts Prof. Martin’s arguments, on page 23-24 of her Brief, relying on recent developments in the law of wrongful discharge. In *Franklin v. Monadnock Co.*, 151 Cal.App.4th 252 (Cal. 2007), the plaintiff alleged that he was fired for telling his employer and police that a co-worker who assaulted him threatened to have him and others killed. The Court found that the state’s public policy interest in preventing crime, as well as violence in the workplace, created a wrongful discharge claim.

*Franklin* provides encouraging precedent for relief for stalking victims, in their workplaces and on campuses, in cases that do not meet the Title VII or Title IX<sup>20</sup> definitions of sex discrimination. NAWL urges the court to apply the *Franklin* rationale to the case at bar to provide an alternative theory of protection for victims of workplace and campus violence, violating both the ADEA and Title VII. See discussion of “sex plus” cases in Section II, D.

#### **V. Howard’s Defense, Advocating Age Discrimination, Adversely Affects Women**

As discussed in Prof. Martin’s Brief, at 29, the Appointments Committee Chair, and now Montgomery County Executive, Isaiah Leggett, testified that Prof. Martin’s age (40) was a factor in her rejection for a permanent position. Prof. Leggett’s admission constitutes a *per se* violation of the *Age Discrimination in Employment Act (ADEA)*. The allegation, real or feigned, that age discrimination played a role in Prof. Martin’s non-renewal -- although she was one of the youngest professors on the faculty and younger than Prof. Leggett -- indicates that the purported age standard was discriminatorily applied against women. The combination of age and sex

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<sup>20</sup> Title IX of the Civil Rights Act of 1964 prohibits sex discrimination in education, paralleling Title VII, which prevents discrimination on the basis of sex, race, national origin and religion in employment.

discrimination constitutes a case of intersectional discrimination, violating both the ADEA and Title VII. *See*, “sex plus” cases in Section II, E.

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

NAWL urges this Court to reverse the district court’s taxation of Howard University’s costs on Prof. Martin. Martin Brief at 44-45. *The National Organization of Women (NOW)* launched a national campaign opposing the imposition of costs on the plaintiff in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007), for the same reasons that costs should not be imposed upon Ms. Martin. A woman who acts as a “private attorney general,” in good faith, to eliminate sexual harassment in the workplace, should not be forced to pay the unpredictable litigation costs of a wealthy corporate defendant simply because the court did not adopt her legal arguments. After years of sacrificing to finance her own litigation costs, a woman should not have to risk the food being taken from her children’s table to pay the defendant’s costs if she loses.

NAWL urges this Court to expressly adopt the *criteria* offered by other jurisdictions to prevent the unjust result imposed on Ms. Martin by the district court. In *County of Suffolk v. Secretary*, 76 F.R.D. 469 (E.D.N.Y. 1977), the court set forth factors to be considered in determining whether costs should be assessed against plaintiff 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 burden non-affluent plaintiffs; and 7) whether the imposition of costs would unduly inhibit future similar challenges.

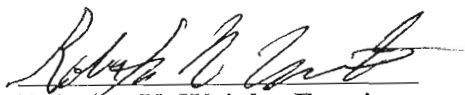
The trial court must exercise restraint in assessing whether costs should be assessed against a non-prevailing party in “public law litigation” cases such as Title VII of the Civil Rights Act of 1964. *Crawford Fitting Co. v. Gibbons*, 482 U.S. 437 (1987); *Baez v. the United States*, 684 F.2d 999, 1003-1004, 1007 (D.C. Cir. 1982); *Pannonia Farms v. RE/Max International, Inc.*, 2005 WL 3262902 at \* 3 (D.D.C. 2005); *Summit v. Technology, Inc.* 435 F.3d 1371, 1374 (Fed. Cir. 2006); *Dual v. Cleland*, 79 F.R.D. 696, 697 (D.D.C. 1978). These courts were unwilling to “chill” the pursuit of the objectives of Title VII by individuals who believed they were injured by illegal discrimination.

The jury’s factual findings in Prof. Martin’s favor demonstrate her good faith in instituting and maintaining this lawsuit. NAWL’s participation as *Amicus* further demonstrates that the issues she raised in this case are important issues of public policy. The district court’s decision to impose Howard’s costs on her is unsupported by facts or relevant case law.

### **CONCLUSION**

NAWL respectfully joins Prof. Martin’s requests for reversal of the district court’s judgment for the Defendant and for the specific remedial relief requested in her Brief.

Respectfully Submitted,



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

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

1. This Brief complies with the type-volume limitations of Fed. R. App. P. 32(a) (7) (B) because it contains 6,315 words, excluding the parts of the brief exempted by Fed. R. App. 32(a) (7) (B) (iii) and D.C. Circuit Rule 32 (a) (2).
2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a) (5) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 12 point Times New Roman font.



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Dated: October 22nd, 2007

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_)  
Dawn V. Martin, Esquire, )  
 )  
*Appellant* )  
 v. )  
 )  
Howard University, )  
Howard University Law School )  
and Alice Gresham Bullock, Esquire )  
 )  
*Appellees.* )  
\_\_\_\_\_)

Appeal No. 06-7157


CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 23rd day of October, 2007, a true copy of the  
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