

MEMORANDUM IN SUPPORT OF MOTION

I. BACKGROUND

Chief Judge Hogan set precedent in the District of Columbia, on December 15, 1999, when he denied Defendant's *Motion to Dismiss, or in the Alternative, for Summary Judgment*, controlling the issues of sexual harassment/hostile work environment, retaliation and breach of contract under Title VII of the Civil Rights Act of 1964 and the D.C. Human Rights Act. Joining all other jurisdictions that have addressed this issue, Judge Hogan adopted EEOC Regulation 29 C.F.R 1604.11(e) and held that an employer is liable for the sexual harassment of an employee by a non-employee if it knew or should have known of the harassment and failed to take measures reasonably calculated to end the harassment. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516, 81 FEP Cases (BNA) 964; 15 IER Cases 1587 (BNA) (D.C. D.C. 1999).²

II. FACTS³

Plaintiff, Dawn V. Martin, began with Howard University as a Visiting Associate Professor at of law in July of 1996. Beginning in November of 1997, Professor Martin was stalked in her workplace by a delusional homeless stranger with a criminal record, a history of violence and a pattern of targeting African-American female professors/attorneys, pursuing them as his "wife." This serial stalker, Leonard Harrison, was searching for the physical embodiment of a fictional character in a book, whom he determined was his "natural wife."

Plaintiff immediately reported the stalking to the law school administration, Howard security and the D.C. Metropolitan Police Department. Plaintiff repeatedly asked the administration to bar the stalker from campus, but the University took no reasonable steps to keep the stalker out of the workplace, despite the availability of barring procedures already set in place by Howard University campus security. Plaintiff endured a hostile work environment, pervaded by sexual harassment by the stalker, from November 20, 1997 until the end of her

² This case has broad implications for women in the workplace, violence in educational institutions, the obligations of an employer to maintain a safe workplace, and the obligations of an employer to prevent the sexual harassment/stalking of an employee by a non-employee in the workplace, particularly where the workplace is a University. These issues have become increasingly more important in recent years, with the well-publicized murder of students at Columbine High School in 1999, and other schools across the nation, and particularly the murder of professors at Appalachian Law School in 2000 and the October 27, 2002, murders of three professors by a troubled student at the University of Arizona.

³ The facts are detailed in the *Statement of Undisputed Material Facts* accompanying Plaintiff's MSJ (hereinafter, "Facts)."

employment with Howard University, in June of 1998. Plaintiff continued to perform all of her teaching duties, taking certain precautions to protect her students, her teenage daughter and herself from the stalker.

Despite thirteen years of outstanding civil rights legal practice/policy-making, four additional years of teaching equal employment law and torts, noteworthy scholarship in the area of equal employment law, excellent student evaluations and student petitions and letters in support of her renewal, Plaintiff was not selected for a permanent position or even a renewed visitorship. Plaintiff had left a permanent, tenure-track teaching position in Cleveland to return to the Washington, D.C. area, based on representations that the visiting position would be converted to a permanent, tenure-track position at Howard. This decision, made after the academic “hiring season,” left Plaintiff without a job, severely damaged her reputation and tremendously limited her career opportunities. Plaintiff seeks reinstatement, monetary damages and attorneys’ fees.

ARGUMENT

II. DEFENDANT’S MOTION FOR SUMMARY JUDGMENT DEFIANTLY VIOLATED THE COURT’S ORDER OF SEPTEMBER 24, 2002

On September 24, 2002, this Court issued an Order specifically precluding Defendant from including, in its *Motion for Summary Judgment*, any reference to accusations made by Prof. Andrew Gavil that Plaintiff exercised “bad judgment” in her interaction with a first-year student, in the fall of 1996, who commented to Prof. Andrew Gavil that Plaintiff did not call on her frequently enough in class.

Defendant never raised *any* allegations that Plaintiff exercised “bad judgment” in any of its discovery responses or pleadings, prior to the August, 2002 Gavil deposition. Gavil’s testimony, taken after approximately sixteen (15) depositions had already been taken in this case, deprived Plaintiff of her opportunity to conduct proper discovery on this new allegation. Plaintiff noticed the deposition of Dean of Students, Denise Purdie (now Spriggs), to whom Gavil reported the student “complaint.” Dean Purdie made inquiries about the student and told Plaintiff that she should not be at all concerned about the matter because it was clear that the problem was with the student, not with Plaintiff. (See October 9, 2002 Plaintiff’s *Motion for Summary Judgment*, hereinafter, “MSJ,” at 28-29, fn.10; Facts ¶225)

Plaintiff wrote a memorandum to her own file, memorializing the related events, and provided copies of the memo to both Purdie and Gavil. (Facts ¶225) Plaintiff did not know why Gavil would have elevated such a trivial issue to the level of reporting it to the Dean of Students. (Facts ¶225) Not knowing Gavil's motivation, Plaintiff wrote the memo to make sure that there was a record of the incident so that the incident could not later be "remembered" differently than it actually occurred, to suit the purposes of someone with an improper motive. (Facts ¶225) That is precisely what has occurred.

Plaintiff provided Defendant with a detailed explanation of the need to depose Dean Spriggs (See *Plaintiff's October 25, 2002 Opposition to Defendant's Motion for Reconsideration of the Court's September 24, 2002 Decision at 3-5, 8*); however, Defendant refused to produce her for the noticed deposition and filed a motion to preclude Plaintiff from ever deposing Spriggs. (*Id.*) On September 24, 2002, the Court denied Defendant's motion. In addition, the Court precluded Defendant from including any of Gavil's testimony with respect to the student complaint in its *Motion for Summary Judgment*, since Defendant refused to allow Spriggs to be deposed. The motions were due by September 27, 2002, leaving no time to depose Spriggs and incorporate her testimony into the dispositive motions.

Defendant blatantly defied the Court's Order not to include this argument in its Motion for Summary Judgment. The prohibited allegations made in Defendant's motion are inflammatory and poison the entire document. Defendant's "bolded" emphasis of the words "that bitch," falsely attributed to Plaintiff, demonstrates that, in its desperation for a defense, Defendant only wants to tell this "story," solely in order to attribute to Plaintiff a "curse word" and make her appear to be unprofessional.⁴

In its May 23, 2002 Order certifying that Defendant had violated its Orders of April 11, 2001 and May 30, 2001, this Court stated:

⁴ In her November 14, 1997 memo to her file, with copies to Gavil and Purdie, Plaintiff recounted that she used the term "tough cookies," when she was confronted by this student in her office, with trivial criticisms of her practices with respect to calling on students in class. (See Ex. VVV of Plaintiff's MSJ.) Plaintiff noted that this was the first term that occurred to her, rather than resorting to the language that she grew up hearing in "The Bronx." Clearly, Plaintiff was not inclined to outbursts of cursing in professional settings or with people who might use it against her. Plaintiff's memo to Gavil illustrates that she considered him a person who might use her language against her; therefore, it is highly unlikely that, even in surprise and/or anger, she would have used a word that Gavil could so easily use against her.

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

Martin v. Howard University, 204 F. Supp. 1, 4 (D.C.D.C. 2002) Despite this admonition, and the Court's first admonition, in its Order of April 11, 2001, that Defendant would be sanctioned, monetarily and/or by being precluded from asserting certain defenses, or even any defense at all in this case, Defendant continues to "flagrantly disregard" this Court's Orders. Defendant continues to waste Plaintiff's and this Court's time with frivolous, repetitive motions and false statements to the Court, to thwart discovery, delay litigation and harass Plaintiff, draining her of her extremely limited resources in her solo practice. Defendant's refusal to comply with the basic Rules and Orders of this Court are the sole reasons for the extensive file in this case.⁵

Plaintiff again implores this Court to send the message to Defendant that it cannot continue to ignore this Court's Orders without penalty. Plaintiff respectfully maintains that the only appropriate sanction is to strike from the record Defendant's *Motion for Summary Judgment* in its entirety, pursuant to Rules 37(b)(2)(C) and 37(c)(1) of the Fed. R. Civ. Proc., and to impose monetary sanctions on Defendant in the amount of attorneys' fees for the many hours expended responding to this improper motion, pursuant to Rule 37 (b)(2)(E).

III. DEFENDANT IMPROPERLY REASSERTS ARGUMENTS THAT IT HAS ALREADY LOST AND ARE BARRED BY THE DOCTRINE OF RES JUDICATA

In its December 15, 1999 decision, Chief Judge Hogan set out the legal framework of this case and denied Defendant's July 22, 1999 *Motion to Dismiss, or in the Alternative, for Summary Judgment*, on the issues of sexual harassment/hostile work environment, retaliation and breach of contract. *Martin v. Howard*

⁵ The only sanction imposed upon Defendant, to date, was the June 25, 2002 sanction of \$1,000, for its contempt of the Court's April 11, 2001 Order. Defendant has not yet been required to reimburse Plaintiff for the hundreds of attorney hours wasted due to Defendant's violation of the Rules and Orders of this Court; consequently, Defendant has succeeded in draining Plaintiff of her limited resources to properly pursue this case and even to support herself and her daughter. On June 25, 2002, the Court did leave open the option of additional sanctions, both monetary and in the form of preclusions, adverse inferences, and even a default judgment, depending upon what the Defendant produced after the contempt finding. In addition, pursuant to his Order of May 30, 2001, MJ Facciola is still holding in abeyance the issue of sanctions against Defendant for the costs of litigating Plaintiff's January 12, 2000 Motion to Compel Discovery. Plaintiff respectfully requests that the Court now consider these issues.

University, 1999 U.S. Dist. LEXIS 19516, 81 FEP 1999 U.S. Dist. LEXIS 19516, 81 FEP Cases (BNA) 964; IER Cases 1587 (BNA) (D.C. D.C. 1999).

This Court has already held that Plaintiff's allegations set forth a legal basis for each of these claims. After such a decision, the only argument available to Defendant in a *Motion for Summary Judgment* would be that the record demonstrates that Plaintiff cannot prove her factual allegations. Since Defendant cannot make this argument, in light of the actual record,⁶ Defendant is attempting to re-litigate all of the legal arguments that it has already lost, in total disregard of the December 15, 1999 decision. Defendant continues to take for second, third and fourth "bites at the apple," frivolously re-litigating matters already resolved and prohibited by the doctrine of *res judicata*.⁷ Plaintiff implores the Court not to allow Defendant to violate the principles of *res judicata* and take the Court and Plaintiff through the same arguments yet another time.

Defendant's attempt to re-litigate decided issues is particularly offensive since it petitioned the Court to exceed the 15 page limit, and even the 45 page limit to file a 49 page motion, arguing that it had attempted to keep the document within the page limit, but could not do so without sacrificing "crucial arguments." Defendant's arguments are even more offensive since this is Defendant's fourth *Motion to Dismiss* or for *Summary Judgment/Supplement to Motion to Dismiss* or for *Summary Judgment* and all of these motions have exceeded 15 pages, ranging from 21 to 33 pages, exclusive of exhibits, even while Plaintiff was held to a 15 page limit, recently held to include exhibits. Defendant's previous motions to dismiss/for summary judgment, have included its July 22, 1999 *Motion to Dismiss, or in the Alternative, for Summary Judgment*, its July 11, 2001 *Motion to Dismiss, or in the Alternative, for Summary Judgment* its September 9, 2001 *Motion to Supplement its pending Motion for Summary Judgment*, not including its pending 33 page (exclusive of exhibits) July 1, 2002 *Objection to Magistrate's Report and Recommendation of March 7, 2002*.

⁶ Defendant has also completely misrepresented the record, blatantly making false statements, citing excerpts from the record which do not support -- and sometimes contradict the asserted allegation. Defendant has also taken isolated facts out of context and sequence to distort the truth.

⁷ Defendant repeatedly took second and third "bites at the apple" after it failed to make any legal arguments in its *Opposition to Plaintiff's January 12, 2000 Motion to Compel Discovery*; thereafter, it filed several motions for protective orders, making arguments that it failed to make in its *Opposition*. These motions, as well as Defendant's motions for enlargements of time, deprived Plaintiff of her originally scheduled trial date of May 1, 2001

Plaintiff respectfully requests that Defendant's *Motion for Summary Judgment* be stricken from the record/rejected for filing and that Defendant be ordered to pay monetary to Plaintiff the amount of attorneys' fees for attorney hours expended responding to this improper motion.

IV. DEFENDANT SHOULD BE PRECLUDED FROM MAKING ANY ARGUMENT THAT PLAINTIFF EXERCISED "BAD JUDGMENT"

A. Pursuant to Rule 37(b)(2)(B) and (D) and 37(c) of the Federal Rules of Procedure, Defendant Should be Precluded from Arguing that Plaintiff had "Bad Judgment"

Where a party has failed to provide the facts upon which it intends to rely, in its *Answers Interrogatories*, in violation of Fed. R. Civ. Proc. 26(g) and 37(b)(2)(B) and (D), that party may be precluded from asserting those facts as a defense, where the opposing party is "surprised" by the testimony and is prejudiced by the withholding party's failure to timely reveal the alleged facts in the discovery process. Fed. R. Civ. Proc. 37(c).

Plaintiff was both surprised and prejudiced by Gavil's testimony. She was deprived of the opportunity to ask witnesses deposed prior to Gavil whether they had ever heard Gavil's "bitch" story, or whether Plaintiff ever complained to them about being assigned to teach Evidence, or whether she ever complained about her office or computer, and if so, whether her complaints were justified and/or reasonable. Plaintiff had no idea, prior to Gavil and Taslitz' testimony, in September of 2002, that such rumor and innuendo would alleged at all, let alone elevated to the crux of Howard's defense. Furthermore, Plaintiff was denied the opportunity to conduct discovery on comparative evidence of complaints and "rumors" about other professors who have been awarded tenure and otherwise retained. Having never raised such a claim for three years of litigation, Defendant should be permanently precluded from now claiming that Plaintiff exercised "bad judgment" in the performance of her job.

B. The Negligible Probative Value of Gavil's Testimony Regarding Alleged "Bad Judgment" Is Substantially Outweighed by the Danger of Unfair Prejudice

1. Gavil's Accusations are Immaterial and Irrelevant, since the APT Committee Never Considered Any Alleged "Bad Judgment" by Plaintiff

Gavil's testimony with respect to his vague "recollection" of his "impression" that Plaintiff exercised "bad judgment" with a student in the fall of 1996, is immaterial and irrelevant to this case. As discussed in MSJ at 28, 40-41, all of the members of the *Appointments, Promotions and Tenure Committee* (APT), other than

Taslitz, testified that they found Plaintiff to be collegial and that they had never heard, discussed, or considered any negative feedback from faculty members regarding Plaintiff. Three additional faculty member, Profs. Spencer Boyer, Henry Jones and Sherman Rogers also praised Plaintiff as a colleague and indicated that they had only heard positive feedback from faculty members about Plaintiff. (See MSJ at 28, 40-41).

Since four members of the five member Committee had no knowledge of any allegations of “bad judgment” by Plaintiff, and Taslitz never mentioned the accusations of his close friend, Andy Gavil, to the other members of the Committee, the accusations of “bad judgment” cannot be material or “highly relevant,” as Defendant claims, to the decision not to select or renew her for a faculty position.

2. The Former Student who “Complained” to Gavil Praises Plaintiff as a Professor and Asks this Court NOT to Use her Comment, as a First Year Student, as Evidence of “Bad Judgment” on the Part of Plaintiff

The former student who “complained” to Gavil is now a practicing attorney. She has submitted a Declaration praising Plaintiff as a professor and accepting responsibility for the initial trivial problem between Plaintiff and herself. **(Exhibit A)**⁸

... I did not feel that Professor Martin called on me enough to allow me to achieve the maximum amount of class participation points. I complained about that. While I do not recall actual conversations I had, I may have complained to Professor Andrew Gavil, and he may have advised me to talk about it with Professor Martin directly....

In retrospect, I can see that I was an over-zealous, over-sensitive first-year law student, and that is mostly to blame for my initial problems with Professor Martin. I do not believe Professor Martin to have been a bad professor. In fact, I believe her to be one of the better professors I had at Howard. My relationship with Professor Martin improved considerably in the remainder of my time as a law student, and I had gone on to take other classes she taught. I can recall doing exceptionally well in the Evidence and EEO classes I took with her. The instruction I received in Evidence gave me a command of the subject, which later proved invaluable for the bar exam. Because I had come to think highly of Professor Martin, I was disappointed to learn that Howard would not be keeping her on as a professor. With this sentiment, I signed and helped circulate a petition asking the administration to retain her.

In sum, I do not believe that the complaint I lodged against Professor Martin during my first year of law school should serve as evidence of bad judgment or poor performance against her.

Defendant appears to have elevated, to its primary defense in this case, the trivial, informal comment of a first year student, long ago resolved by Plaintiff and this former student.

⁸**Attachment A** has the former student’s name redacted; however, with the permission of this Court, the actual Declaration will be filed under seal.

3. Gavil's Testimony is Not Material, Relevant or Credible, Since Plaintiff Did not "Personalize" her Relationship with the Student in Question

Gavil did not indicate that his negative "impression" of Plaintiff was her alleged use of a "curse word," but rather, he claimed that Plaintiff had inappropriately "personalized" her relationship with a student.

As I indicated earlier, this one incident where we talked about the student, I thought that Professor Martin's comments about the student were really inappropriate and it gave me some concern about a personalization of the relationship between faculty and students.

(MSJ, Ex. G, Gavil deposition, page 143)

If Gavil's testimony is being offered as evidence of Plaintiff's alleged "personalization of the relationship between faculty and students," then his vague, subjective, unsubstantiated testimony is completely irrelevant and immaterial to this case. It was Gavil's report to Plaintiff that conveyed a very "personalized" attack on Plaintiff by the student. In contrast, Plaintiff held no personal "grudge" against the student. As set forth in MSJ at 28-29, fn. and MJS Ex. J, Martin Declaration ¶ 12), this student opted to take the two additional courses that Plaintiff taught, Evidence and EEO law, after completing her required Torts I and II classes with Plaintiff. The student apologized to Plaintiff for her behavior during her first semester of law school. (MJS Ex. J, Martin Declaration ¶ 12) As discussed above by the student herself, she performed extremely well in both of these upper level classes. She even asked Plaintiff to admit her into her EEO class, even though the class was full and the registration date had passed. (MJS Ex. J, Martin Declaration ¶ 12) Plaintiff granted the student's request because the student was upset that Plaintiff's contract would not be renewed and she would have no other opportunity to take EEO law with Plaintiff. (MJS Ex. J, Martin Declaration ¶ 12)

Gavil's unreliable testimony is based on his alleged vague "recollection" of bits and pieces of an incident raised only six years after it happened; yet, Gavil should have, in his own files, a memorandum from Plaintiff that details the interaction with the student and her conversation with Gavil. Gavil's testimony about this incident, without producing the November 14, 1997 memo that Plaintiff wrote to Gavil memorializing the events also violates the Best Evidence Rule, under Rule 1004. Plaintiff unequivocally denies that she referred to the student as "that bitch" or used any other "curse word" to describe her.

Even if Gavil's "accusation" were true, the comment would have to be considered in context. Where a professor is caught "off guard" by a colleague who confronts her with an allegation that she has a personal vendetta against a student, and that she student believes that she will violate the anonymous grading system to deliberately give her a "bad grade," the surprised professor might, understandably, blurt out an unflattering characterization of the student. Such a reaction, in this one instance, could not rise to the level of justifying this professor's termination a year later, particularly in light of the overwhelming support that she received from students (*See MSJ* at 19 and *Facts* ¶ 178-179) This is particularly true when the allegation is compared to the complaints against and comments by other professors.

Although Plaintiff had little opportunity to conduct discovery on or enter into the record the unprofessional conduct/non-collegiality of her former colleagues, some of the conduct of Prof. Reggie Robinson is discussed in *MSJ* at 41, *Facts* ¶ 231, 233 and *Ex. YYY*. Plaintiff's motion includes, as Exhibit *YYY*, some of the inappropriate sexual jokes that Robinson e-mailed repeatedly to all faculty and staff, despite protests of inappropriateness and even with allegations that they created a sexual harassment/hostile work environment; yet, Robinson was awarded a full professorship during the same semester that Plaintiff was terminated from Howard. In addition, the problems caused by Prof. Steven Jamar in teaching a class of students an "alternative" citation form to the blue book are discussed in *MSJ 41, Facts* ¶ 200.

Plaintiff would have no choice, in defending such an accusation, but to make comparisons between herself and other faculty members regarding the same type of rumor, innuendo and incomplete "stories." Despite the vagueness, unreliability and bias of Gavil's testimony, a jury hearing a professor testify that another professor referred to her student as "that bitch," could be highly prejudicial and distract the jury from the relevant facts of the case. Plaintiff hopes, however, that this Court will not allow the trial of this case to deteriorate into a contest of "he said, she said," full of rumor, hearsay and innuendo never raised by Defendants in any of its three sets of Discovery responses, submitted over a period of nearly two years (October of 2000, July 11, 2001, July 19, 2002). The admission of his vague testimony would unduly and unfairly prejudice Plaintiff by distracting the jury by making them waste time wondering whether Plaintiff actually used the word, "bitch" and whether she would lie about it. It would only waste the Court's time and distract the jury from the

real issues in this case. Plaintiff therefore respectfully requests that it be excluded.

4. **Gavil's Testimony only Puts His own "Judgment" into Question**

Gavil's testimony only puts his own judgment into question. Gavil made "a mountain out of a molehill," elevating this student's trivial comment to the level of reporting Plaintiff to the Dean of Students, without the knowledge of Plaintiff or the student. Certainly, such conduct cannot be considered "collegial," or productive. Furthermore, he apparently disregarded the 10 page memo that Plaintiff wrote to him setting forth the specifics of the incident with the student and, instead of speaking to Plaintiff about any questions he may have still had, reportedly defamed her character to at least one other faculty member – Taslitz.

5. **Gavil's Testimony is Devoid of Credibility and Patently Unreliable**

Gavil testified that he had little or no recollection of the nature of the student's complaint, the circumstances under which she complained, the substance of his conversation with Plaintiff about the complaint, the location or circumstances under which he discussed the complaint with Plaintiff, or any other conversations that he may have had about the complaint. *Gavil even claimed that he did not recall the name of the student – he claimed that he did not even recognize the name of the student when her name was stated off the record.* Gavil did not indicate that he reported the complaint to Dean Purdie.

Gavil made other accusations against Plaintiff that contradict all other evidence of record. For example, Gavil claimed that Plaintiff "was not around a lot" (MSJ, Ex. C, Gavil deposition at 143); yet, Plaintiff's students and other colleagues specifically recognized that Plaintiff was readily available for her students, putting in the extra time to help them, to and provide them with extra exam-taking classes. (See MSJ at 29; Facts ¶¶ 121-122, 142; Ex. VV) Students praised Plaintiff for being available to them during and well beyond office hours and "going the extra mile" to make sure that they had what they needed to learn and to function in law school. (MSJ, Ex. VV; Exhibits O and P of the First Amended Complaint)⁹

⁹ Plaintiff provided Howard students with extra bar preparation classes, on Saturdays and other non-class days, including recruiting an Assistant Maryland Bar Examiner participate, to give help students achieve maximum success in law school exams and the bar exam, particularly since the Howard Law School passage rate for Maryland had become a subject of major concern and even national publicity. (MSJ at 29; Facts ¶ 142) Even Dean Bullock testified that she was aware that Plaintiff gave extra exam taking classes and prepared extensive sample exams and answers for students. (MSJ at 29; Facts ¶ 142) Profs. Boyer and Nolan testified that Plaintiff spent a great deal of time meeting with students. (MSJ at 29)

Gavil's testimony about his "impression," while all of the specific evidence contradicts his testimony, demonstrates that his "impressions" and vague "recollections" are unreliable, have absolutely no probative value and are devoid of credibility. Gavil is, admittedly, a close personal friend of Taslitz. (MSJ at 28-29, fn. 10; Facts ¶ 224-225) Taslitz is left standing alone on the APT Committee with respect to his allegation that he had heard other faculty members complain that Plaintiff had "bad judgment." Taslitz is also the only member of the APT Committee with whom former Dean Bullock discussed her disdain for Plaintiff. Taslitz and Dean Bullock had numerous conversations about Plaintiff, prior to the decision not to renew her, during which Bullock made disparaging remarks about Plaintiff to Taslitz. Bullock made it clear that she did not want Plaintiff on the faculty. Bullock and Taslitz apparently kept these conversations "secret" from the other members of the Committee. (MSJ at 18-24, 28, 39-41)

It is no coincidence that Taslitz' "best friend," Andy Gavil, is the source of this "bad judgment"/"bitch" story. With no substantive defense in this case, Defendant has disgracefully attempted to impugn Plaintiff's character by claiming that she used a "curse word" to characterize a student. The only significance of Gavil's allegations in this case is that it demonstrates the desperate "witch hunt" that Howard University has recently conducted, and the willingness of some members of the faculty to fabricate, misrepresent, and "not recall"¹⁰ in order to try to save Howard's "defenseless defense" and to save the reputations of their friend and ally, Taslitz, along with former Dean Bullock – representing what they believe is the reputation and resources of the law school. They have attempted to fulfill Bullock's mandate, "Don't air our dirty laundry." (See MSJ at 49)

C. Bullock's Testimony Alleging "Bad Judgment" by Plaintiff has no Probative Value and Violates the Best Evidence Rule

On September 18, 2002, Bullock testified that Plaintiff had bad judgment because she "talked a lot in faculty meetings" and "did not listen" to her senior colleagues; yet, when Plaintiff asked Howard to produce the faculty meeting minutes prior to the continuation of Bullock's testimony, it refused to do so and still refuses to produce them. (See MSJ at 40). Instead, Bullock came in on the second day of her deposition with a new

Plaintiff acted as a judge, on a Saturday, for Howard's Trial Advocacy Program, volunteered and participated in Howard's mentoring program, "Close Up," and taught exam taking for the Regional BALSAs (Black Allied Law Students Association) conference at Howard. (MSJ at 29; Facts ¶ 142)

¹⁰ See, as prime examples, but not limited to, the depositions of Dean Newsom and Prof. Kurland.

“story” of Plaintiff complaining to her about teaching Evidence over lunch. (See *MSJ* at 40) Bullock had testified about the lunch only two days earlier, on September 18, 2002, and never mentioned any conversation with Plaintiff about teaching Evidence. On September 18, 2002, Bullock described the lunch with Plaintiff as “not unpleasant,” noting that they talked about their children, teaching, articles, allergies and casual matters. (*MSJ*, Ex. H, Bullock deposition at 18-24) In addition, Bullock cannot recall whether this lunch took place in the spring of Plaintiff’s first year or the fall of Plaintiff’s second year at Howard. To the best of Plaintiff’s recollection, the lunch took place during the spring of her first year. (*MSJ*, Ex. H, Bullock deposition at 18) At that time, Plaintiff was not teaching Evidence, and did not even know that she would be assigned Evidence; consequently, she could neither have complained about teaching it nor could she have cited it as a reason or “excuse” for any delay in publication.

Bullock desperately concocted this “last minute story” that Plaintiff complained about teaching Evidence only because she was “caught” in a lie regarding Plaintiff’s behavior at faculty meetings. If Howard had produced the minutes, as requested, Bullock’s testimony would have been immediately discredited by these documents. Bullock struggled then, to invent another “story” to support an allegation of “bad judgment” – this time one which involved no documentation, but only her word against that of Plaintiff. Pursuant to the Best Evidence Rule, Rule 1004 of the Federal Rules of Evidence, Plaintiff is entitled to an adverse inference with respect to Defendant’s refusal to produce the faculty meeting minutes. Bullock’s newly raised, uncorroborated and contradicted testimony is not credible and has no probative value.

Plaintiff did not “complain” about being assigned Evidence, but did express “nervousness” to Dean Newsom, who assigned her the class, and Profs. Taslitz and Kurland, who taught Evidence. (*MSJ* Ex J, Martin Declaration, ¶ 8) Plaintiff’s own written words in 1997¹¹ are in absolute contrast to former Dean Bullock’s portrayal of Plaintiff as an arrogant teacher who professed her own ability to teach Evidence, but resented having to do so. Bullock’s testimony completely lacks credibility and has no probative value. Furthermore,

¹¹ Plaintiff described her own nervousness about teaching Evidence and described the teaching methods that she utilized in her November 5 and November 24, 1997 memos to the APT Committee. (*MSJ* Exs. YY and UUUU) Plaintiff sought advice from Taslitz and Kurland about teaching Evidence because she had not taught it before and had not litigated in years. (*MSJ* Ex J, Martin Declaration, ¶ 8)

even if Plaintiff had complained to Bullock about teaching Evidence, however, such complaints were never discussed by the APT Committee in its deliberations; consequently, this petty accusation is immaterial and irrelevant to the issue of why the APT Committee rejected Plaintiff for a teaching position.

VI. DEFENDANT'S ALLEGATIONS OF "BAD JUDGMENT" ARE SIMPLY AN "ELEVENTH HOUR" FABRICATION IN A CHAIN OF CHANGING "DEFENSES"

As set forth in *MSJ*, pages 24-41 and 47-49, Defendant has repeatedly changed its *Answers to Interrogatories*, factual allegations and defenses. In determining the source of the non-collegiality and "bad judgment" allegations, all roads lead back to Taslitz – and Taslitz has pointed us to Alice Gresham-Bullock. The four faculty survey forms, purportedly submitted to Taslitz, at some point in the fall of 1997, were first produced on July 11, 2001, more than three years after Plaintiff filed her charge with the EEOC and more than two years since this litigation commenced.¹² Even then, it was filed only after two Court Orders to produce discovery and in the midst of contempt proceedings against it,¹³ after Plaintiff had already dis-proven Defendant's earlier claim as its defense, that Plaintiff did not have an article accepted for publication at the time that the APT Committee made its decision. (Facts ¶¶ 198, 205, 206; Plaintiff's August 3, 2001 *Motion for Default Judgment*) They had never been referenced by Defendant, in any way, prior to their July 19, 2001 production. (*Id.*) Associate Dean Newsom claimed that he recognized his own handwriting on one of the survey forms, but that he did not recall filling it out and could not say if or when he filled it out. (Facts ¶ 205)¹⁴

The faculty factions and alignments in this case are typical at the law school. For example, in a recent memorandum from Prof. Reggie Robinson, purportedly to Prof. Spencer Boyer, but distributed by Robinson to the entire faculty, staff, and some students, Robinson attacks Boyer, the most senior member of the faculty, with

¹² Steve Jamar, another friend and ally of Taslitz, actually wrote his name on the form that is usually anonymously submitted, as it he wanted "credit" for the deed. (Facts at 198) Plaintiff never worked with Jamar had negligible contact with him. (Facts at 198) Plaintiff has no idea why Jamar would make negative comments about her, other than to support Taslitz. (Facts at 198) Even so, Jamar, in his forms, never accused Plaintiff of "bad judgment." (MDJ, Ex. EEE)

¹³ Defendant has still failed to produce all of the discovery ordered produced, as set forth in her July 25, 2002 *Assessment of Defendant's July 19, 2002 Discovery Production*. Plaintiff's *Assessment*, although acknowledged by the Court during the July 26, 2002 Status Conference, was rejected for filing. Plaintiff re-filed her *Assessment* without the exhibits, so that it was within the 15 pages limit, but the *Assessment* was again rejected for filing, this time based on the Court's June 18, 2002 Order that the parties not file any document in this case, unless it is within the jurisdiction of MJ Facciola, without to file.

¹⁴ Before being presented with the survey form, he testified that it would probably have been inappropriate for him to fill one out, since, as Associate Dean, he was a part of the Dean Office and the Dean's office had to remain separate from the APT Committee since the Dean has an independent vote on the candidate. (Facts ¶ 205)

a tenure of more than 40 years at Howard. (**Ex. C**) Among other allegations, Robinson accused Boyer of trying to “gain” influence on the faculty (which one might presume he already has, as the most senior member of the faculty) and attempting to diminish the influence of Profs. Taslitz, Gavil, Kurland and Jamar (the tenured White professors on the faculty), as well as former Deans Bullock and Ramsey. As Prof. Boyer testified, Bullock held the White professors in special esteem and justified disproportionately assigning them to positions of authority and influence by stating, “The White boys do the work.” (*MSJ* at 21, fn. 9)

The politics, factions and alignments at Howard Law set the backdrop for the inconsistent, changing, and unreliable testimony of those few professors trying to cover for each other, but not even knowing what lie to tell at what time. This “hodgepodge” of last minute, subjective, vague statements of “impression” have no probative value, are not appropriately before this Court and should not be paraded before a jury.

CONCLUSION

For the foregoing reasons, Plaintiff’s motion should be granted. Defendant should be completely precluded from making this newly concocted “bad judgment” defense, based only on the “eleventh hour” proclamations of a few closely connected members of the faculty who have made last minute attempts to “cover up” for the former Dean Bullock and APT Committee Vice Chair Taslitz.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)
Dawn V. Martin,)
)
v.)
)
Howard University, <i>et. al.</i>)
_____)

Case No. 1:99CV01175
Judge: TFH/JMF

ORDER

Upon consideration of *Plaintiff's Motion to Strike from the Record Defendant's Motion for Summary Judgment* and Defendant's *Opposition*, Plaintiff's Motion is hereby **GRANTED**.

ORDERED: that Defendant's October 4, 2002 *Motion for Summary Judgment* shall be stricken from the Record/Rejected for Filing;

FURTHER ORDERED: Defendant shall pay to Plaintiff reasonable attorneys' fees for the attorney time spent responding to its motion. This sanction is necessary, appropriate, and just, pursuant to Fed. R. Civ. Proc. 37(b)(2)(C) and 37(c)(1) for the following reasons.

1) Defendant willingly and knowingly filed its *Motion for Summary Judgment*, including the precluded testimony, in flagrant violation of this Court's September 24, 2002 Order, demonstrating disregard and contempt for this Court;

2) Defendant has previously violated this Court's Orders of April 11, 2001, May 30, 2001, was held in Contempt of Court on June 25, 2002 and was sanctioned in the amount of \$1,000.00 on June 25, 2002, yet Defendant continues to defy and disrespect the Orders of this Court;

3) Defendant disregarded and ignored this Court's December 15, 1999 Order setting forth the legal framework of this case, demonstrating disregard and contempt for this Court, and in violation of the principles of *res judicata*; and

4) Defendant caused this Court and Plaintiff to waste many hours assessing evidence that this Court held to be inadmissible in Defendant's motion and to re-litigate matters that have already been resolved by this Court.

FURTHER ORDERED: Defendant shall be precluded, at trial, motions, pleadings, oppositions, any court filing in this case and in any other proceedings in this litigation, from asserting the defense, presenting testimony that, or making any argument that, Plaintiff exercised “bad judgment” as a law professor at Howard University. This preclusion includes, but is not limited to:

- 1) any testimony or reference to any allegation that Plaintiff referred to a student as a “bitch,” or otherwise exercised “bad judgment” or mishandled a situation with a first year student in the fall of 1996, when that student complained that Plaintiff did not “call on her” in class frequently or quickly;
- 2) any testimony that Plaintiff exercised “bad judgment,” “talked a lot” or failed to listen to senior colleagues during faculty meetings; and
- 3) any testimony that Plaintiff exercised “bad judgment” by complaining about: 1) being the only professor without research capability on her computer; 2) being the only professor with an office slated for a clerical or administrative employee; and/or 3) teaching Evidence.

The above preclusions are necessary sanctions for the following reasons.

- 1) Defendant raised its allegations of “bad judgment” three years into this litigation, never having raised it in any of its three sets of Answers to Interrogatories, provided pursuant to Court Orders, and after approximately sixteen depositions had been taken;
- 2) By presenting an “eleventh-hour defense,” of allegations of “bad judgment,” based on subjective and vague testimony of questionable credibility, Plaintiff was deprived of an appropriate opportunity to conduct discovery on whether other faculty members believed that she had “bad judgment;
- 3) by presenting an “eleventh-hour defense,” of allegations of “bad judgment,” based on subjective and vague testimony of questionable credibility, Plaintiff was deprived of an appropriate opportunity to conduct discovery on comparative evidence regarding faculty views on whether other faculty members are regarded as having “bad judgment;”

4) since four of the five Committee members testified that they found Plaintiff to be quite collegial and that they had heard only positive feedback about Plaintiff from other faculty members, the undisputed evidence demonstrates that the APT Committee was unaware of, or, in any case, did not include in its deliberations any discussion of any allegations of “bad judgment” or non-collegiality by Plaintiff, the issue of whether any faculty members believed that Plaintiff ever exercised “bad judgment” is immaterial and irrelevant to the non-selection of Plaintiff for a tenure track or renewed visiting faculty position;

5) Defendant has failed and refused to produce faculty meeting minutes, pursuant to Plaintiff’s valid discovery requests, to determine the truth of former Dean Bullock’s allegations regarding Plaintiff’s comments during faculty meetings; therefore, Defendant must be precluded from asserting this allegation while withholding the most probative evidence of Plaintiff’s comments during faculty meetings; and

6) Defendant’s testimonial evidence with respect to its allegations that Plaintiff was viewed by a one colleague, Prof. Andrew Gavil, and former Dean Alice Gresham-Bullock, as exercising “bad judgment” is vague, subjective, inconsistent, uncorroborated and permeated with bias; such testimony is unreliable, devoid of probative value, unduly prejudicial and would unnecessarily confuse the jury and waste the time of the Court, jurors and litigants.

The Honorable Thomas F. Hogan
Chief Judge
United States Federal District Court for the District of Columbia

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this ___th day of November, 2002, a true copy of the Foregoing *Plaintiff's Motion to Strike from the Record Defendant's Motion for Summary Judgment* was mailed, first class, postage pre-paid, to:

Phillip Lattimore, Esquire ¹⁵
Senior Associate General Counsel
Office of General Counsel
Howard University
2400 Sixth Street, N.W., Suite 321
Washington, D.C. 20059

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¹⁵ By agreement of the parties, service upon the Office of General Counsel for Defendant Howard University constitutes service upon all four counsel of record for Defendant.