

204 F. Supp. at 2. Further describing Howard University's conduct, the Court held:

It is hard to imagine a process that more trivializes the obligation a litigant has to comply with a court's orders. 204 F. Supp. at 3.

Despite these admonitions, and a subsequent Order by the Chief Judge of this Court, on June 26, 2002, holding Howard University in Contempt of Court, Howard continues to arrogantly assert that it can "overrule" this Court's decisions, ignoring them as it chooses, and simply do whatever it wants in this case. Despite the Court's clear Order, on September 24, 2002, precluding any of Prof. Andrew Gavil's testimony regarding the alleged 1996 incident that he concluded was evidence of "bad judgment" by Plaintiff, Defendant Howard University included it, highlighted in **bold**, and used it throughout its pleading. Howard then asserted its "right" to do so because it filed a *Motion for Reconsideration* with Chief Judge Hogan, pursuant to Rule 72.2(b) to overrule Magistrate Judge Facciola's September 24, 2002 Order.¹ No decision has yet been made on that motion. An "appeal," or Rule 72.2(B) pending motion, does not permit the appealing party to disobey the Order while the appeal is pending.

Howard University has even ventured so far as to state that the Court told it that it did not mean what it said in its September 24, 2002 written Order! Amazingly, on page 7 of its *Opposition*, Howard states:

Thereafter, the Court appeared to indicate to defense counsel that it was possible that the Court did not mean to preclude them from asserting this factual matter as a defense.

Plaintiff refers to this statement as Howard University's **Lie # 1** of its *Opposition*. Howard cites no written Court Order, hearing transcript, hearing date, or any other context for this alleged statement by the

¹ Plaintiff has filed several motions for reconsideration under Rule 72.2. In all of those circumstances, Plaintiff was required to abide by the ruling of the magistrate pending that reconsideration, which in some cases constituted many months. Furthermore, two of those motions for reconsideration were actually decided by Magistrate Facciola, who made the decision being appealed (Orders of May 30, 2001 and August 26, 2002), although Rule 72.2(b) requires reconsideration by the trial judge. In the instances where Chief Judge Hogan did issue Orders regarding Plaintiff's reconsideration motions, the motions for reconsideration were denied or the Court issued a one or two paragraph affirmation of the magistrate's order. Despite this history of MJ Facciola reviewing his own decisions and/or Chief Judge Hogan denying Rule 72.2(b) motions for reconsideration of MJ Facciola's decisions, or simply affirming those decisions without discussion of the legal arguments, Defendant Howard University apparently and arrogantly assumes that Chief Judge Hogan will personally review *its* Rule 72.2(b) motion and overrule MJ Facciola's decision, and has clearly acted as if the Chief Judge has already done so.

Court allegedly “indicating” to Howard University that it could ignore the Court’s Order. Indeed, Howard does not identify the judge as Chief Judge Hogan or Magistrate Judge Facciola. Since the September 24, 2002 was issued by MJ Facciola, Howard appears to be implying that it was MJ Facciola who said that he “did not mean it.” Howard does not state the time, place, or other context of this alleged statement by the Court. No such statement was made by the Court in the presence of Plaintiff; consequently, if any such conversation took place, it would have to have been *ex-parte*, and therefore, an improper communication. Certainly, neither the Chief Judge of this Court, nor Magistrate Facciola would participate in such an *ex-parte* conversation with defense counsel; consequently, in addition to being sanctioned for violating the Order, Howard should certainly be sanctioned for implicating the Court in improper conduct.

B. Howard has Asserted its “Right” to Create its Own “Order” and Substitute it for that of this Court

Howard attempts to substitute its own “judgment” for the Order actually issued by this Court. The Court precluded Howard from including Gavil’s testimony in its *Motion for Summary Judgment*, allowing Plaintiff to reasonably schedule Dean Spriggs’ deposition after the “rush” of the imminent dispositive motions, due three days after the issuance of the September 24, 2002 Order; yet, Howard insists that Plaintiff was somehow obligated to depose Dean Spriggs, on its terms, on one of three days offered, during which time Plaintiff was both struggling to meet an expedited Court Schedule and was physically ill. Plaintiff specifically informed the Court and Defendant that she was ill, both in pleadings, and in e-mail correspondence with Defendant, stating that she was not available to take Dean Spriggs deposition on the three days’ offered, because she was ill. Plaintiff asked to schedule the deposition when she recovered.

Defendant refused!

Howard insists that Plaintiff should have squeezed in the deposition of Dean Purdy Spriggs, on one of the three days that Howard offered her for a deposition, despite her illness, after motions for summary judgment were filed – even though the Court specifically said that she did not have to do this and should not be faced with Gavil’s accusations in Howard’s motion. Howard was attempting to force Plaintiff to take time from drafting her own motion for summary judgment, already due in a matter of days, and her

Opposition to Defendant's Motion for Summary Judgment, as well as her other cases, in order to rush through a deposition of Dean Spriggs, request yet another expedited deposition transcript, at double the cost of a regularly scheduled transcript, analyze it and fit it into her *Opposition to Howard's Motion for Summary Judgment*, although not having the information for her own motion. All of this would be to accommodate Howard after it had **lost** its motion to preclude Dean Spriggs' testimony altogether, and after Howard had previously refused to allow Plaintiff to depose Dean Spriggs prior to the end of discovery or even at some point before *Motions for Summary Judgment* were due.

If indeed, Howard so wanted to include Gavil's testimony in its *Motion for Summary Judgment*, it could have joined Plaintiff's motion to continue the scheduled November 18, 2002 trial (which was granted, in any case) and delayed the "fast track" motions for summary judgment so that Dean Spriggs could have been deposed prior to their filing; instead, however, Howard consistently opposed any continuation of the trial, although ultimately needing enlargements of time itself for the motions and responses, despite the resources of its own General Counsel's office, as well as two outside law firms still on record as representing Howard University and at least one outside law firm actively participating in depositions and motions.

Plaintiff has every intention of deposing Dean Spriggs. As is indicated in her recent motions for enlargements of time, however, the expedited schedule in this case, as well as her illness over the past few months, has created a backlog in her work in other cases, all of which she is trying to get back under control, as a solo practitioner, with small, struggling practice. Plaintiff's extremely limited resources have been drained tremendously by this case, with Defendant's improper withholding of discovery for nearly three years and its filing of frivolous pleadings, filled with false representations to this Court, requiring hundreds of hours of uncompensated attorney time by Plaintiff.

Howard's entire discussion of Plaintiff's possible opportunities to depose Dean Spriggs, in between filing her motion for summary judgment and responding to Defendant's motion, is academic. The Court did not require Plaintiff to squeeze in this deposition and Howard cannot so require it. Plaintiff relied on

the Court Order to schedule her work and is free to depose Dean Spriggs now that her Court ordered obligations have been met.

C. **Sanctions for Howard's Violation of the Court's Order**

Defendant argues that striking its *Motion for Summary Judgment* is too “harsh” a penalty for its knowing, willful and flagrant defiance of this Court’s Order; yet, Howard has not suggested a lesser sanction. What possible sanction can there be for Howard’s repeated violations of the Orders and Rules of this Court? How can the Court consider Defendant’s motion when it is replete with the prohibited arguments and testimony?

Defendant claims, on page 6 of its motion, that Plaintiff, “never sought to depose Dean Spriggs before; there was no discovery order by HU at the time that the Court issued its September 24, 2002, order.” This is **Lie # 2** of Defendant’s *Opposition*. As explained and documented *Plaintiff’s Opposition to Defendant’s Motion to Preclude the Deposition of Dean Spriggs*, Plaintiff specifically noticed Dean Spriggs deposition for September 20, 2002, after attempting, for approximately one week prior, to arrange an acceptable date for her deposition. It was not until Gavil’s September 5, 2002 deposition that Plaintiff had ever heard Gavil’s claims that Plaintiff exercised “bad judgment” with respect to a first year student’s complaint in 1996, or that he claimed that she had referred to this student as “that bitch” – a claim that Plaintiff vehemently denies.

There was no need for this Court to issue yet another Order against Howard University for violating a Rule of Discovery. Pursuant to the Rules of Discovery, Defendant was obligated to produce Dean Spriggs for her noticed deposition. *It chose not to do so, in specific violation of Rule 26 of the Fed. R. Civil Procedure*. The Court was entitled to sanction Howard for violating a Rule of this Court and did not have to issue an order requiring it to comply with a Rule and wait for it to violate the Order before sanctioning it. Plaintiff began requesting that Defendant offer dates for Spriggs’ deposition immediately after the testimony of Taslitz and Gavil.

Despite the appropriateness of striking Defendant’s *Motion for Summary Judgment*, the reality is, that **this remedy is not nearly harsh enough**. If Howard’s motion is not stricken, it must be denied, in any

case. As set forth in Plaintiff's *Opposition to Defendant's Motion for Summary Judgment* and her *Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment*, Howard has completely "fabricated" a story to tell instead of the story told by the record. Defendant's motion is so frivolous, so completely without merit or support in the record, and so blatantly in violation of Rule 11 of the Federal Rules of Civil Procedure, that Defendant's motion should not only be denied on its merits – or lack thereof – but Defendant should be severely sanctioned for filing a document so replete with knowingly false statements. See *Plaintiff's Opposition to Defendant's Motion for Summary Judgment*, and Plaintiff's *Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment*.

Since Plaintiff has already been forced to address the false statements made by Defendant in the dispositive motions and responses, there is little point in striking *Defendant's Motion for Summary Judgment*, except as a matter of principle, to convey to Howard that it cannot simply ignore the Orders of this Court, arrogantly create its own Order, and force everyone to abide by its self proclaimed "Order." Plaintiff therefore offers, as an alternative to striking Howard's motion from the record, that Plaintiff redact all of the precluded testimony and arguments from Defendant's *Motion for Summary Judgment*, Plaintiff's *Opposition*, Defendant's *Reply*, Defendant's *Opposition to Plaintiff's Motion for Summary Judgment* and Plaintiff's *Reply*, by simply using a black "magic marker" to blacken the prohibited portions of the filings. Plaintiff has attached an alternative proposed Order, in addition to the one originally submitted with Plaintiff's motion, for the Court's consideration. Plaintiff requests that, if the Court does not strike Defendant's motion in its entirety, it consider only the "redacted" versions of these pleadings for purposes of deciding the motions for summary judgment.

Plaintiff requests that she be awarded monetary compensation by Howard for the time spent drafting her *Motion to Strike Defendant's Motion for Summary Judgment*, the *Reply*, and the portions of her *Opposition to Defendant's Motion for Summary Judgment* and her *Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment*, addressing the precluded issues, and the time spent redacting all of the documents specified above. Plaintiff assesses the amount of attorney time spent on these issues as follows:

<i>Motion to Strike:</i>	24.3 hours
<i>Reply to Motion to Strike:</i>	19.4 hours
<i>Opposition to Defendant’s Motion for Summary Judgment</i>	3.3 hours ²
<i>Reply to Defendant’s Opposition to Plaintiff’s MSJ</i>	2.0 hours ³
Redacting all documents	<u>4.0 hours⁴</u>
	52.0 hours

At Plaintiff’s appropriate *Laffey* rate of \$400 per hour,⁵ the fees due to her under this proposal would be \$20,800. Defendant Howard University has deemed fees totaling close to \$1,000 to be “a drop in the bucket for Howard University.” Defendant has claimed that the Court’s failure to consider its motion at all would be too harsh. The proposal of a penalty of \$20,800, probably, again, a “drop in the bucket” compared to the attorneys’ fees that Howard has been paying to outside counsel in three law firms, still of record in this case, is imminently reasonable and appropriate in light of Defendant’s repeated defiance of this Court’s Orders and draining of Plaintiff’s limited resources.

II. **HOWARD CONTINUES TO MAKE FALSE REPRESENTATIONS BEFORE THIS COURT, ASSUMING IMPUNITY**

Howard has made Plaintiff’s point for her, with respect to its knowing, willful and deliberate inclusion of blatantly false statements in all, or nearly all, of its pleadings/filings. Even though Plaintiff has just itemized the deliberate false statements made in *Defendant’s Motion for Summary Judgment* and *Opposition to Plaintiff’s Motion for Summary Judgment*, in her response pleadings to Defendant’s pleadings, and requested sanctions for Defendant’s flagrant lies to this Court, Defendant has filed its *Opposition to Plaintiff’s Motion to Strike*, again, blatantly lying to this Court. These false statements are so easily refuted by the record, and are so completely ridiculous, in light of the record, that they could

²The *Opposition* took a total of 35.2 hours to write, but approximately 3.3 hours were devoted to addressing the prohibited testimony and arguments.

³The *Reply* took a total of 15.5 hours to write, but approximately 2.0 hours were devoted to addressing the prohibited testimony and arguments.

⁴ This number is an estimate, since the documents total more than 200 pages.

⁵ Plaintiff has been an attorney for more than twenty-one years and has specific expertise in the area of employment discrimination, entitling her to an “enhancer” for that expertise in her hourly rate.

only have been made for the purpose of deliberately creating unnecessary work for Plaintiff, draining her further of her limited financial and physical resources. In the process, Defendant must hope to confuse the Court so that it will not focus on the facts of record and grant Plaintiff's *Motion for Summary Judgment*. Plaintiff again implores this Court to sanction Defendant for its deliberate lies to this Court, causing Plaintiff to waste countless hours, in pleading after pleading, to refute the lies and refer the Court to attachments and the record to demonstrate the clear falsity of Defendant's statements. The statements identified by Plaintiff, can, in no way, be interpreted as anything but deliberate misrepresentations, made with the assumption of impunity. This impunity must be removed by the imposition of harsh sanctions, or Defendant will continue this practice, as it has done, and has done so increasingly as it "gets away with it."

In addition to **Lies #s 1 and 2** (i.e. **Lie # 1**, that this Court indicated to Defendant's counsel that Defendant did not have to obey this Court's Order of September 24, 2002, discussed on page 2; and **Lie # 2**, that Plaintiff "never sought to depose Dean Spriggs," discussed on page 5), Defendant included the following lies.

A. **Lie # 3: "Gavil was a Member of the 1997/1998 APT Committee that Rejected Plaintiff"**

On page 4 of its Opposition, Defendant states:

Prof. Gavil was a member of the APT Committee that did not recommend plaintiff for a teaching position in 1998.

Defendant's statement is blatantly false. Defendant knows it is false, as is demonstrated by its own *Motion for Summary Judgment*, page 4, footnote 2, as well as elsewhere in its motion and other filings. The five Committee members were: 1) Prof. Issaiah Leggett (Chair); 2) Prof. Andrew Tazlitz (Vice Chair); 3) Prof. J. Clay Smith; 4) Prof. Laurence Nolan; and 5) Prof. Homer LaRue. The names of the five Committee members have been stated over and over again in pleadings, and their individual testimony has been discussed at great length in the dispositive motions. It is impossible that counsel for Howard University, Phillip Lattimore, after three years of working on this case, writing and responding to countless pleadings in this case and witnessing, or at least reviewing approximately 20 depositions in this

case, does not know a fact as basic as the identities of the five members of the 199/1998 APT Committee. Indeed, Mr. Lattimore was involved in numerous controversies over taking each of their depositions and was involved in scheduling them before this MJ Facciola, even if he did not participate in them all.

Gavil had absolutely no position on, or role in, the APT Committee in 1997/1998, nor did he have any “vote” on whether Plaintiff would be recommended for a faculty appointment for the 1998/1999 academic year.⁶ In fact, of the four “faculty survey forms,” mysteriously produced by Taslitz three years after this case was filed, in July of 2001, purportedly in the sole custody of Prof. Taslitz for those years, not one of them was claimed to be that of Gavil, nor did the forms reflect anything like the story told by Gavil. If Gavil so strongly believed that Plaintiff had “bad judgment,” in 1998, he had a perfect opportunity to express that opinion and/or to tell this story to the APT Committee on the faculty survey form. There is no question that he did not do so. Since the APT Committee members never considered Gavil’s opinion in its deliberations, and four of five of them were, indisputably, completely unaware of this “story” or purported opinion of Gavil, Gavil’s opinion is completely irrelevant to the decision made by the APT Committee regarding Plaintiff’s candidacy.

Howard builds on its false statement to argue that Gavil’s testimony regarding his alleged assessment that Plaintiff had “bad judgment,” based on a 1996 incident conversation that he barely remembers, is “relevant and material.” This argument must fail and be disregarded since it is based on a completely false statement.

B. **Lie # 4: “There is no Admissible Evidence that APT Committee Members Did not Consider Gavil’s ‘Opinion’ of Plaintiff”**

Also on page 4 of its Opposition, Defendant states:

Even though plaintiff argues that no *other APT Committee member*⁷ may have had knowledge of Prof. Gavil’s opinion of her, this assertion is a conclusory allegation that is not supported by any admissible evidence. (Emphasis added)

⁶ The only time that Gavil had any opportunity to vote on Plaintiff’s status as a faculty member was in 1996, when *he voted to recommend Plaintiff for appointment, as part of the 1996 APT Committee’s unanimous decision for Plaintiff to make Plaintiff an offer to leave her tenure-track teaching position at Cleveland-Marshall College of Law to join Howard’s faculty.*

⁷ Even the premise of this statement is in error, counting Gavil as one of the APT Committee members.

In her *Motion to Strike*, Plaintiff specifically cited the deposition testimony of the actual 1998 APT Committee members. *See also* the extensive discussions and citations to the record on this point in Plaintiff's pending *Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment*, hereby incorporated into this *Reply*, by reference. Four of the five Committee members, that is, all of the Committee members except for Gavil's best friend, Andrew Taslitz, testified that the faculty viewed Plaintiff very favorably, and that there was no discussion of any negative faculty feedback regarding Plaintiff. Although Taslitz now claims that Gavil relayed some portion of this story and his opinion of Plaintiff to Taslitz in 1996, there is no question that neither Gavil nor Taslitz mentioned this story or Gavil's purported opinion of Plaintiff to other APT Committee members. It was not part of the Committee's deliberations. Indeed, even Taslitz testified that he personally liked Plaintiff, considered her a "friend," and found her to be a "warm" person. The record reflects this clearly admissible, sworn deposition testimony, cited in Plaintiff's *Motion to Strike*; yet, Defendant deliberately misrepresents the record to this Court, stating that there is no such evidence.

C. **Lie # 5: "Howard Raised the Allegation of "Bad Judgment" by Plaintiff Years Ago, Including at the EEOC"**

On page 5 of its Opposition, Defendant states:

Finally, the testimony by HU Law School faculty that plaintiff lacked judgment is not an 11th hour fabrication.... This defense has consistently been asserted by the University in this case and before the EEOC.

Defendant does not cite anything in the record to support its argument that "bad judgment" was consistently part of its defense, or that it was ever alleged at the EEOC. Defendant does not do so because it cannot. Defendant simply made up this lie, at the last minute, as the newest of its ever-changing defenses (see Chart of Defendant's Changing Defenses, **Exhibit A** and Plaintiff's August 3, 2001 *Motion for a Default Judgment, Based on Defendant's Production of Late, Incomplete and Falsified Evidence*, also incorporated by reference herein.

In her pending *Motion for Summary Judgment* and accompanying *Statement of Undisputed Material Facts*, Plaintiff has extensively cited Defendant's own *Answers to Interrogatories*, the EEOC

Statements of the APT Committee members and former Dean Bullock, adopted/modified/explained in their depositions, and cited Defendant's Position Statement to the EEOC. **NOWHERE IN THE EEOC RECORD IS THERE ANY REFERENCE TO "BAD JUDGMENT" BY PLAINTIFF.** As cited in Plaintiff's *Motion for Summary Judgment*, **Bullock told the EEOC that there was no reason why she would not want Plaintiff to teach at Howard.** Prof. LaRue told the EEOC investigator, "There was nothing negative about Dawn." Prof. Smith told the EEOC that he and Plaintiff shared information and were good friends/colleagues.

Even at the time of their August and September, 2002 depositions, **four of the five 1998 APT Committee members appeared to have absolutely no idea that "bad judgment" or "non-collegiality" had ever been raised as a defense in this case, all of them testifying that they found Plaintiff to be "collegial," using adjectives like "terrific," "collegial," "friendly" and other flattering terms.** Three additional faculty members, including the two most senior members, also praised Plaintiff for her collegiality, caring and respect for others. As documented by the record, cited in Plaintiff's pending *Motion for Summary Judgment*, students praised her, in writing and in meetings with former Dean Bullock and protested her non-renewal.

The allegation that Plaintiff was rejected from the faculty for "bad judgment" is certainly a desperate 11th hour defense. It is a very personalized attack on Plaintiff, made more than three years after this case was filed and even then, only by the two persons accused of misconduct in this case – Bullock⁸ and Taslitz. They are supported only by Taslitz' best friend, Andy Gavil. These matters are discussed in detail in Plaintiff's *Motion for Summary Judgment*, hereby incorporated into this *Reply*.

Taslitz' testimony and Bullock and Gavil's own admissions leave Gavil, Bullock, and possibly Jamar, open to lawsuits by Plaintiff for defamation of character (slander). Plaintiff is seriously considering such lawsuits, possibly by amending the complaint in this case to include them in their individual capacities.

⁸ Bullock's purported opinion of Plaintiff is also irrelevant to the Committee's decision. Four of the five APT Committee members (all but Taslitz) testified that they had never heard of Dean Bullock making any negative comments about Plaintiff; consequently, they could not have considered Bullock's views in their deliberations.

This last minute “mudslinging defense” tactic unduly prejudices Plaintiff. Plaintiff was entitled to notice of Defendant’s defenses, both to dispute the specific charges, and in order to gather “comparative” evidence regarding “rumors” and faculty “opinions” of other faculty members who were promoted and/or retained, despite those rumors and/or negative faculty views. Although Plaintiff has no desire to indulge in a “mudslinging” contest, the admission of Gavil’s purported “opinion,” would leave Plaintiff no alternative but to introduce comparative evidence to demonstrate that Howard’s new accusation, based on vague, uncorroborated, trivial accusations raised by two faculty members (former Dean Bullock and Gavil) are pre-textual.

Plaintiff has asked this Court to exclude these matters from the jury because the comparative evidence accusations and rumors against other faculty members/administrators –directly involved in this case as comparators and/or accusers, include subjective personal opinions, accusations of improper conduct and matters of their personal lives. For example, the “live-in partner” of one direct comparator faculty member reportedly sought refuge, on several occasions, at the apartment of students when she and the faculty member became involved in domestic disputes/altercations.⁹ Another professor is reputed to have improper relationships with students and repeatedly made inappropriate sexual comments in professional contexts with colleagues. Former Dean Bullock is reputed to have exhibited incidents and “themes” of “bad judgment,” displayed at the law school, dating back to her days as a student at Howard and continuing throughout her tenure as a professor and Dean. If Howard is permitted to indulge in such vague, uncorroborated, irrelevant smearing of Plaintiff, the University has opened up this examination of the rest of the faculty/administration for comparison. Such evidence would turn the entire trial into a “scandal sheet” and detract from the important issues at hand – namely, a woman’s right to work free of sexual harassment/stalking in her workplace.

Plaintiff again renews her August 3, 2001 *Motion for a Default Judgment*, based on Defendant’s continued misconduct and the apparent lack of deterrence of a lesser sanction than default. Furthermore,

⁹ Had Plaintiff anticipated this type of “defense”/attack by Howard, Plaintiff would have subpoenaed one of these former students, whom she knows by name, for a deposition. Without anticipating accusations of “bad judgment” Plaintiff had no reason or desire to address this faculty member’s personal problems or those of anyone else.

Defendant's continued withholding of discovery, inconsistent and changing "defenses" (**Exhibit A**) and falsifying of discovery eventually produced, has so corrupted this entire litigation that the full truth will never be ascertained. Under these circumstances, the extreme sanction of a default judgment, in addition to monetary sanctions, is necessary and appropriate. *Webb v. District of Columbia*, 189 F.R.D. 180 (D.C.D.C. 1999). *Monroe v. Ridley*, 135 F.R.D 1 (D.C.D.C. 1990); *Perkins v. Hailikems*, 110 F.R.D. 55 (D.C.D.C.1985); *Sherman v. Treaters, Ltd. v. Ahlbrandt*, 115 F.R.D. 519 (D.C.D.C. 1987).

III. **HOWARD STILL REFUSES TO ACCEPT THIS COURT'S RULINGS OF LAW, MADE IN ITS PRECEDENT-SETTING DECEMBER 15, 1999 DECISION**

Defendant has cited *Williamsburg Wax Museum, Inc., v. Historic Figures, Inc. et. al.* 810 F.2d 243, 251 (D.C. App. 1987), for the proposition that it is entitled to file a second *Motion for Summary Judgment*, based on the same arguments already rejected by the Court in an Order denying the previous motion for summary judgment, where there is an expanded record. Plaintiff specifically acknowledged this principle in her *Motion to Strike*, but noted: "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." Indeed, that was the basis for the Court's decision not to apply the doctrine of *res judicata* in *Williamsburg*. The *Williamsburg* Court specifically found that the expanded record demonstrated that a material fact previously disputed could no longer be disputed. The *Williamsburg* Court did not reconsider any of its rulings of law or change the legal framework of the case, as Howard asks this Court to do.

The Court in *Williamsburg* discusses a refinement of the doctrine of *res judicata*, adapted specifically to apply to an earlier ruling in the same case. The Court held:

Under the law of the case doctrine, a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time. *Laffey v. Northwest Airlines, Inc.*, 238 U.S. App. D.C. 400, 740 F.2d 1071, 1089-93, 1102-03 (D.C. Cir. 1984); see also 18 Wright, Miller and Cooper, *Federal Practice and Procedure* § 4478 (1981); 1B Moore's *Federal Practice* para. 0.404[1] (2d ed. 1984). The doctrine encompasses a court's explicit decisions, as well as those issues decided by necessary implication, *Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316, 1320 (5th Cir. 1978); see also 18 Wright, Miller and Cooper, *supra*, § 4478.

See also New York v. Microsoft, 224 F. Supp. 2d 76 (D.C.D.C. 2002). Since this case is likely to be reassigned, based on Chief Judge Hogan's unavailability for trial until late July of 2003, Defendant may again attempt to re-litigate the legal framework of this case with a new judge. In anticipation of such an attempt, Plaintiff adds the following analysis, by the D.C. Court of Appeals in *Williams v. Mt. Jezreel Baptist Church*, 589 A. 901 (D.C. App. 1991), on this subject.

The law of the case doctrine "bars a trial court from reconsidering the same question of law that was submitted to and adjudicated by another court of coordinate jurisdiction." *Weinberg v. Johnson*, 518 A.2d 985 (D.C. 1986). "This serves the judicial system's need to dispose of cases efficiently by discouraging "judge-shopping" and multiple attempts to prevail on a single question." *Tompkins v. Washington Hospital Center*, 433 A.2d 1093, 1098 (S.C. 1981) (quoting *Kritsidimas v. Sheskin*, 411 A.2d 370, 371 (D.C. 1980)). We have never dealt with the question whether law of the case doctrine applies as clearly to a case in which a single judge has presided over multiple stages of the same litigation as it does to a case in which several judges have ruled. Obviously, the judge-shopping concern is inapplicable to the single judge situation, but law of the case doctrine still has force in that situation because, irrespective of how many judges have participated, the "efficient disposition of the case demands that each stage of the litigation build on the last and not afford an opportunity to reargue every previous filing. 1B Moore's Federal Practice, para. 0.404[1] 1988.

As stated in Plaintiff's motion, this Court has already held that Plaintiff's allegations set forth a legal basis for each of these claims. *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). Howard was entitled, within ten days of the decision, to file a motion for reconsideration of the December 15, 1999 decision. Howard could, within one year of the decision, even have filed a motion for reconsideration under Rules 59 and/or 60, of the Federal Rules of Civil Procedure, arguing that the December 15, 1999 decision was in error. Defendant could even file a new *Motion for Summary Judgment*, at this time, if it specifically raised new law decided since the 1999 decision, or new facts demonstrating that Plaintiff could not meet the standard set by the 1999 decision. Defendant took none of these actions, nor did it have a basis for doing so; moreover, *Defendant never so much as acknowledged that the Court had already addressed these legal issues*, despite the notoriety of the December 15, 1999 decision and Plaintiff's repeated cites to it. This was not an oversight, but rather, a deliberate effort upon the part of Defendant to attempt to "trick" the Court into deciding issues already decided anew, with no discussion of whether or why the previous resolution of these legal issues should not be upheld.

Since Defendant cannot credibly argue that Plaintiff could not prove her material allegations before a jury – and, since many of her material allegations are not undisputed and require summary judgment in her favor (particularly on the issue of sexual harassment/hostile work environment), Defendant is desperately attempting to re-litigate all of the legal arguments that it has already lost, in total disregard of the December 15, 1999 decision. Howard is *trying to take this entire case back three years*, to “Day 1” to change the legal framework that must be applied to the facts of record. The doctrine of *res judicata*, and “the law of the case doctrine” prohibit such an abuse of the Court process and of Plaintiff.

CONCLUSION

Plaintiff respectfully requests that her motion be granted. Plaintiff also respectfully requests that Defendant be ordered to file with this Court and to provide to Plaintiff, within ten days of the date of a decision on this motion, a written explanation of its basis for asserting that this Court:

appeared to indicate to defense counsel that it was possible that the Court did not mean to preclude them from asserting this factual matter (Prof. Gavil’s allegations regarding a first-year student’s complaint about Plaintiff in 1996) as a defense.

Plaintiff asks that this Court require Defendant to state: 1) the date, time, place and context of this alleged “indication” or representation by the Court; 2) the name and title of the specific person representing the Court who purportedly made this representation to defense counsel; and 3) the name and title of each person present at the time that the Court purportedly made this representation to defense counsel.

ORAL ARGUMENT REQUESTED

Plaintiff respectfully requests oral argument on this motion, particularly in light of the serious allegations made by Howard that this Court indicated to its counsel that Howard did not have to comply with this Court’s September 24, 2002 Order.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
Dawn V. Martin,)	
)	
v.)	
)	Case No. 1:99CV01175
Howard University, <i>et. al.</i>)	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;

ORDERED: that Plaintiff will be permitted to redact and submit to the Court, as substitute filings for the following filings, all of the precluded testimony and arguments from Defendant's *Motion for Summary Judgment*, Plaintiff's *Opposition*, Defendant's *Reply*, Defendant's *Opposition* to Plaintiff's *Motion for Summary Judgment* and Plaintiff's *Reply*, by simply using a black "magic marker" to blacken the prohibited portions of the filings.

FURTHER ORDERED: that Defendant file with this Court, and provide to Plaintiff, within ten days of this Order, a written explanation of its basis for asserting that this Court:

appeared to indicate to defense counsel that it was possible that the Court did not mean to preclude them from asserting this factual matter (Prof. Gavil's allegations regarding a first-year student's complaint about Plaintiff in 1996) as a defense.

Defendant shall state: 1) the date, time, place and context of this alleged "indication" by the Court; 2) the name and title of the specific person representing the Court who purportedly made this representation to defense counsel; and 3) the name and title of each person present at the time that the Court purportedly made this representation to defense counsel.

FURTHER ORDERED: Defendant shall pay to Plaintiff reasonable attorneys' fees for the attorney time spent responding to its motion and for redacting the prohibited portions of the pleadings, in the amount of \$ 20,800. Defendant shall pay this amount directly to Plaintiff within ten (10) days of the date of this Order. 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 9th day of December, 2002, a true copy of the Foregoing *Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion to Strike from the Record Defendant's Motion for Summary Judgment* was mailed, first class, postage pre-paid, to:

Phillip Lattimore, Esquire¹⁰
Senior Associate General Counsel
Office of General Counsel
Howard University
2400 Sixth Street, N.W., Suite 321
Washington, D.C. 20059

Dawn V. Martin, Esquire
Law Offices of Dawn V. Martin
1090 Vermont Avenue
Suite 800
Washington, D.C. 20005
(202) 408-7040
(703) 370-1226 *facsimile*

¹⁰ 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.

Defendant's Changing Stated "Reasons" for Plaintiff's Non-Renewal

Date	Stated Reason	Inquiry	Proof Offered	Disputed by
12-7-98	Decision not to select/renew Plaintiff was made prior to stalking	EEOC Position Statement	11/3/97 letter from Dean to Plaintiff	1) All visitors received the same form letter advising that contract was ending, including those renewed; 2) letter specifically states that the APT Committee will make a decision on the pending application at a later date; 3) Prof. Taslitz' letter of 12/30/97 confirms that the decision was made on 12/18-97.
12-7-98, March 1999	"The decision not to reappoint Complainant was based entirely on the fact that the APT Committee was in need of a faculty member to teach courses in Taxation, Wills, Trusts and Estates and Real Property."	EEOC Position Statement	The March 1998 hiring of Angela Vallario as Visiting Professor, teaching tax/wills	Christa Cunningham was hired to fill that position, on December 18, 1997. Defendant's advertised for the EEO/Labor position. APT Committee interviewed candidates, including Plaintiff, for an EEO/Labor law teaching position. Plaintiff had taught EEO law during her two years at HU. No tax or wills position was advertised. Dean Bullock converted a Constitutional Law/civil rights position to a tax/wills position, in March of 1998, only after Plaintiff applied for the con law/civil rights position. At the same time, she recommended that it be filled by Adjunct Professor Vallario. These facts were confirmed by the depositions of APT Committee members and former Dean Bullock, in August-September of 2002

12-7-99; 3-__-99; 10-17-00 6-11-01	Plaintiff did not complete an article for publication by December 18, 1997, while at HU	EEOC Position Statement APT Committee members' statements to EEOC Answer to Int. # 30 Answer to Int. # 30	NONE.	When the APT Committee members were finally deposed, in August/September of 2002, <i>not one</i> supported this allegation or "defense." 4 of the 5 members specifically remembered that Plaintiff's article was completed and accepted for publication at the time of the December 18, 1997 decision. The 5 th member, Prof. Smith, simply could not recall and did not consider the issue a major factor in the decision, in any case.
6-11-01	Christa Cunningham was more qualified for the EEO/Labor law position than was Plaintiff	Answer to Int. # 30	NONE.	HU had selected Plaintiff over Christa Cunningham, in 1996, to teach EEO Law, whereas both wanted to teach it. Plaintiff had 17 years of experience as an attorney, was a national expert in EEO law, having developed national policy in the area, taught it for 4 years, and had published 5 articles/book sections in the area, not including the one recently accepted for publication. Cunningham had 6 years of legal experience, had never taught EEO law previously, had limited experience in the area and had just submitted her first article in EEO law for publication.
6-11-01	There were no positions available that Plaintiff was qualified to fill	Answer to Int. # 30	NONE.	Plaintiff was qualified for both the advertised EEO/Labor position and the Constitutional Law/Civil Rights position. In addition, in her Answer to the First Amended Complaint, Dean Bullock admitted that there were three vacant tenure-track positions, not designated by course, that Plaintiff could have been hired to fill. Dean Bullock also admitted that Plaintiff was qualified to continue teaching what she had been teaching, EEO Law, Torts I and II, and Evidence.

6-11-01	“Plaintiff’s performance in law school ... was not as stellar as her competition”	Answer to Int. # 59	NONE.	<p>In their August/September 2002 depositions, no APT Committee member claimed that Cunningham’s law school performance was superior to that of Plaintiff. APT Chair/Councilman Isaiah Leggett, specifically testified that law school performance was not relevant since both Plaintiff and Cunningham were already faculty members. In addition, no law school transcripts were requested by Defendant during the hiring process or produced in discovery; consequently, no transcripts could have been considered in the decision. Plaintiff graduated from a top ten-law school and, upon graduation, was accepted into the United States Department of Justice Honors Program. She also graduated from an Ivy League University, receiving undergraduate Honors in Political Science, as well as making the Dean’s List each year. Plaintiff and Cunningham also graduated from law school 11 years apart, making comparisons particularly inapplicable. In 1996, HU deemed Plaintiff the superior candidate to Cunningham.</p>
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6-11-01	“Plaintiff’s work experience ... was not as stellar as her competition”	Answer to Int. # 59	NONE.	In their August/September 2002 depositions, no APT Committee member claimed that Cunningham’s work experience was superior to that of Plaintiff. To the contrary, Committee members testified that Plaintiff’s work experience was more substantial and related to the subject matter of EEO law than was Cunningham’s limited work history. Plaintiff had 17 years experience, with this nation’s top Civil Rights Agencies, including the U.S. Department of Justice, Civil Rights Division, the EEOC, the New York State Office of the Attorney General, Civil Rights Bureau, and 4 years of teaching EEO law and other courses. Plaintiff was recognized as a national expert in EEO law and helped develop national policy in the area at the EEOC. Cunningham had six years of legal experience, 2 as a Visiting Assistant Professor of Law at HU, 2 with a corporate NY law firm, and 2 as a law clerk for a prominent Federal District Court judge.
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6-11-01	"Plaintiff's colleagues did not find her collegial."	Answer to Int. # 59	4 anonymous "faculty" survey forms, produced by Taslitz, 3 years into the litigation, stating that Plaintiff was not "collegial," with no explanation on any of the forms; Howard provided not explanation of why these forms had not been produced for three years or where they had been, other than, in the personal possession of Taslitz	<p>In their August/September 2002 depositions, no APT Committee member claimed that Plaintiff was not collegial. To the contrary, they all testified that they personally found Plaintiff to be collegial, using terms to describe Plaintiff such as "terrific," "respected," "warm," "considerate," "respectful" and "friendly." 3 additional faculty senior faculty members, Prof. Boyer, Jones and Rogers, gave similar testimony. Taslitz was the only faculty member who claimed that he had received negative feedback about Plaintiff, allegedly hearing it from Dean Bullock and his own best friend, Andy Gavil. Taslitz never mentioned these negative comments to the rest of the Committee.</p> <p>Defendant had never before, in the 3 years since this case had been filed at the EEOC, alleged that Plaintiff was not collegial, nor had it previously produced these 4 anonymous faculty survey forms or any other faculty survey forms. To the contrary, the APT Committee members all stated that they were "friends" with Plaintiff and/or "liked her personally." Even Dean Bullock said, "There is no particular reason that I would not want Martin on the faculty of Howard University School of Law." Even as recently as May 11, 2001, the APT Committee Statement said, "Professors Martin and Cunningham were both viewed favorably regarding service to the legal profession, the community, and the University."</p>
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August-September 2002	Cunningham had an article in print, as of December 18, 1997, while Plaintiff's article was only just accepted for publication	Depositions of Nolan, Leggett, Smith and LaRue	NONE.	Cunningham's resume, as of December 18, 1997, clearly states that her 60 page article was accepted for publication and was due to be published in the spring of 1998, as was Plaintiff's article of 141 pages. Nolan, Leggett, Smith and LaRue mistakenly believed that Cunningham's article was in print, having been misled by Taslitz, who took the lead in presenting the candidates' credentials during the deliberations.
August-September 2002	Cunningham had a "proven record of scholarship" as of December 18, 1997, which was superior to that of Plaintiff.	Depositions of Nolan, Leggett, Smith and LaRue	NONE.	When the APT Committee members were finally deposed, in August/September of 2002 and confronted with the 1997 resumes of both Plaintiff and Cunningham, all admitted that Plaintiff's scholarship was much more extensive than that of Cunningham. Plaintiff was credited by Howard with publishing four articles before joining Howard. She had completed a major article while at Howard, had a draft of a second article begun while at Howard, and had begun research on a third article, having developed a title and thesis. This totaled 5 completed articles and two works in progress. In sharp contrast, Cunningham had just completed her first article since law school and her two "works in progress" were simply extensions of the article she had just completed.

<p>9-6-02 9-20-02</p>	<p>In rejecting Plaintiff for a permanent position, a substantial factor in the APT Committee's decision was Gavil's purported opinion views that Plaintiff exercised "bad judgment" because she she complained about her office and her computer</p>	<p>Tazlitz deposition Bullock deposition</p>	<p>Tazlitz deposition Bullock deposition</p>	<p>1) Plaintiff's sworn statement and deposition testimony of some faculty members that they were aware of Plaintiff's inferior computer and office. 2) Undisputed evidence that Plaintiff was the only faculty member with a small secretarial office (assigned to her by Bullock, although Prof. Cunningham was junior to Plaintiff in every way and had only a 1 year contract, contrasted with Plaintiff's 2 year contract). Plaintiff's office was isolated from other faculty members on a separate floor, without even room for a bookcase. Plaintiff was also the only faculty member with a computer having no access to the internet or legal research. Taslitz and Gavil, upon seeing her office, immediately told her that her office and computer were "unacceptable" and advised her to complain. Taslitz even said that he would speak to Bullock for her about the office and computer. 3) Plaintiff respectfully and appropriately requested a new office and a functional computer, as is exhibited by her May 23, 1998 memo to Dean Newsom requesting a new office assignment. 4) credibility problems and bias of Taslitz and Bullock, the alleged discriminators</p>
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<p>9-6-02 9-20-02</p>	<p>In rejecting Plaintiff for a permanent position, a substantial factor in the APT Committee’s decision was Gavil’s purported opinion views that Plaintiff exercised “bad judgment” because she she complained about teaching Evidence</p>	<p>Tazlitz deposition Bullock deposition</p>	<p>Tazlitz deposition Bullock deposition</p>	<p>1) Plaintiff’s sworn 2002 Declaration; Plaintiff’s 11-24-97 Supplemental memo to the APT Committee expresses Plaintiff’s nervousness about teaching Evidence and her successful efforts to develop a creative Evidence course; Plaintiff did not “complain” about teaching Evidence, but expressed “nervousness” and concern to Dean Newsom who assigned it to her and to Taslitz and Kurland, who taught it, asking them for feedback and guidance. 4) Only Taslitz and Bullock alleged these complaints, out of 11 professors/administrators were deposed; 1) Plaintiff’s sworn statements; 5) Evidence that Bullock and Taslitz, the accused discriminators, are not credible.</p>
<p>9-18-02</p>	<p>In rejecting Plaintiff for a permanent position, a substantial factor in the APT Committee’s decision was Gavil’s purported opinion views that Plaintiff exercised “bad judgment,” because she “talked a lot” at faculty meetings and did not listen to her senior colleagues</p>	<p>Bullock deposition</p>	<p>Bullock deposition</p>	<p>1) Adverse inference from Defendant’s refusal to produce faculty meeting minutes; 2) Deposition testimony of all five APT Committee members, except Taslitz, as well as deposition testimony of the two most senior faculty members, Profs. Boyer and Jones, as well as senior faculty member Prof. Rogers, finding Plaintiff collegial, respectful, considerate and professional, and “terrific;” 3) Plaintiff’s sworn statements; Numerous inconsistent statements made by Bullock demonstrating that she is not credible.</p>