

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Dawn V. Martin,)
)
v.)
)
Howard University, *et. al.*)
_____)

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

PLAINTIFF’S OPPOSITION TO DEFENDANT’S BILL OF COSTS

I. The Clerk of the Court Prematurely Taxed Costs

The Clerk of the Court has prematurely taxed costs in a case where no “final judgment” has been issued. *Machesney v. Bruni*, 905 F. Supp. 1122, 1136-1137 (D.D.C. 1995) Pursuant to Local Rule 54.1(c) (formerly Rule 214(c)) of the U.S. District Court for the District of Columbia, the Clerk of the Court may only tax costs once the judgment is final, the parties agree to an earlier date, or the Court so orders.¹ Rule 54.1(c) continues:

A judgment is final when the time for appeal has expired and no appeal has been taken, or when the court of appeals issues its mandate.

On August 21, 2006, this Court/Clerk of the Court issued a judgment on that verdict. The judgment, *sua sponte*, taxed Defendant Howard University’s costs of litigation to Plaintiff, without prior notice or opportunity to be heard. Defendant filed its *Assessment of Costs* on September 25, 2006 after receiving an enlargement of time to file. Plaintiff received an enlargement of time to file her Opposition until November 9, 2006.

Plaintiff filed a *Notice of Appeal* on September 11, 2006.² This Court issued an order on post trial motions on October 4, 2006. On October 28, 2006, Plaintiff amended her *Notice of Appeal* to include the October 4, 2006 decision denying Plaintiff’s *Motion for Judgment, or, in the Alternative, for a New Trial*. Since Plaintiff timely filed an appeal in this case, and since that appeal is now pending, there is no final judgment in this case; accordingly, the Clerk’s taxation of costs was premature and should therefore be vacated as untimely;

¹ Howard University did not move the court for costs before the Clerk assessed them, *sua sponte*. Judge Hogan never addressed this issue in any decision.

² The *National Association of Women Lawyers* (NAWL) has already informed counsel for both Howard University and Alice Gresham-Bullock (in her individual capacity) that it intends to file an *amicus curiae* (friend of the Court) brief in support of Ms. Martin. Other women’s advocacy and civil rights groups are expected to join NAWL’s *amicus* brief. Counsel for both Howard and Ms. Bullock have stated, in writing, their intention to oppose any *amicus* participation by NAWL.

nevertheless, as did Magistrate Judge Kay, in *Machesney v. Bruni*, 905 F. Supp. 1122, Plaintiff will also address the substantive arguments regarding the taxation of costs.

II. The Court Must Exercise Discretion when Considering Taxing Costs to Title VII Plaintiffs

Trial courts should exercise discretion in taxing costs to the losing party in litigation. *Crawford Fitting Co. v. Gibbons*, 482 U.S. 437 (1987) (interpreting Fed. R. Civ. P. 54); *Baez v. the United States*, 684 F.2d 999, 1003-1004, 1007 (D.C. Cir. 1982) (Rule 54); *Pannonia Farms v. RE/Max International, Inc.*, 2005 WL 3262902 at * 3 (D.D.C. 2005) (Rule 54 and 17 U.S.C. § 505); *Summit v. Technology, Inc.* 435 F.3d 1371, 1374 (Fed. Cir. 2006). The trial court should exercise its sound discretion in assessing whether costs should be assessed against a non-prevailing party in “public law litigation” cases such as Title VII of the Civil Rights Act of 1964. *Dual v. Cleland*, 79 F.R.D. 696, 697 (D.D.C. 1978). In the Title VII area, the Court, in the exercise of its discretion, must take special considerations into account.

The Supreme Court has characterized the Title VII plaintiff as “the chosen instrument of Congress to vindicate ‘a policy that Congress considered of the highest priority.’” *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 98 S. Ct. 694, 699, 54 L. Ed 2d 648 (1978), quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263. District courts have specifically adopted the *Christianburg* rationale to deny Title VII defendants costs when they prevailed. *Evans v. American Import Merchants Corp.*, 82 F.R. D. 710 (S.D.N.Y. 1970) and *Dual v. Cleland*, 79 F.R.D. at 697. These courts were unwilling to “chill” the pursuit of the objectives of Title VII by individuals who believed they were injured by illegal discrimination. In *County of Suffolk v. Secretary*, 76 F.R.D. 469 (E.D.N.Y. 1977), the court set forth factors that should be considered by Courts, in the exercise of judicial discretion, to determine whether costs should be awarded in a case of public law litigation:

- 1) whether the action was brought and carried forward in good faith; 2) whether the prosecution of the action provided direct benefits to the public; 3) whether the action resulted in direct or indirect benefit to the defendant; 4) whether novel and substantial issues of law or fact were resolved; 5) whether costs were required to reimburse needy defendants; 6) whether costs would unduly burden non-affluent plaintiffs; and 7) whether the imposition of costs would unduly inhibit future similar challenges.

The above criteria will be addressed individually, below.

A. Plaintiff Clearly Brought this Action in Good Faith

1. The Jury's Factual Conclusions are Evidence of Plaintiff's "Good Faith"

In his 1999 decision, Judge Hogan reviewed the undisputed facts and then designated the questions to proceed to the jury for factual determinations. Judge Hogan stated that the case should proceed to a jury trial to determine whether: 1) Harrison's harassment was severe and pervasive enough to constitute a hostile work environment; and 2) Howard took reasonable steps to end it.

On April 18, 2006, the jury found, as Plaintiff alleged, that Harrison's harassment was severe and pervasive and *did* create a "hostile work environment" for her while she was employed by Howard Law School. The jury further concluded, as Plaintiff alleged, that Howard administrators knew or should have known of the harassment and failed or refused to take reasonable steps to end it.

2. The Jury Verdict Turned on Interpretation of "Sexual in Nature" and "Based on Sex" – not an Issue of "Good Faith"

Despite the jury's specific findings in favor of Plaintiff on the issues of fact designated for jury determinations in the 1999 decision, the jury issued a verdict *for Defendant*. The jury dismissed Ms. Martin's claims because it concluded that that Harrison's harassment was *not* "sexual" in nature or *based on her gender*. This conclusion meant that Martin's complaints were not "protected activity" under Title VII of the Civil Rights Act or any other statute. This left her with absolutely *no remedy at law for being stalked in her workplace or for being terminated in retaliation for complaining about it*; however, the jury's verdict does not reflect any indication that the it found Plaintiff to be acting in bad faith or to have fabricated the facts.

3. The Undisputed and/or Proven Facts are Evidence of Plaintiff's "Good Faith"

a) It is Undisputed that Plaintiff was Harassed/Stalked on Campus by Leonard Harrison

Even though the jury verdict was for the Defendant on an interpretation of law, Plaintiff was vindicated with respect to her factual claims and her credibility. It was always undisputed that the Plaintiff, former Howard University Law Professor, Dawn V. Martin, was stalked on campus by a delusional, homeless stranger with a criminal record, Leonard Harrison, who stated that he was pursuing her to be his "wife." According to the information in Harrison's letters to Prof. Martin, which she immediately turned over to Howard's administration,

Harrison had been targeting African-American female professors since the mid-1980s, claiming that he was searching for his “natural wife.” Harrison described this “wife” as the physical embodiment of a fictitious female character, Geneva Crenshaw, in a book, written by NYU professor, Derrick Bell.³

b) It is Undisputed that Prof. Martin Notified Howard Administrators of Harrison’s Harassment of her on Campus

Dean Bullock’s own memoranda demonstrate that Prof. Martin directly notified her and other Howard administrators and security personnel, as well as the D.C. Metropolitan Police Department of Harrison’s harassment of her. The police department labeled it “stalking” and took a criminal stalking report. The police provided Howard with specific instructions to help keep Harrison away from Prof. Martin and to assist the police in apprehending them if he returned.

c) Howard Administrators Admitted that they did not Take Reasonable Measures to Stop Harrison from Harassment/Stalking Prof. Martin or “Other Women” on Campus

Both Dean Bullock and Associate Dean Newsom perceived Harrison as a threat to Prof. Martin and to "other women" that he might "stalk or otherwise harass" on campus. Dean Newsom so testified in his deposition and at trial. Prof. Martin also testified that Dean Newsom specifically told her that Harrison’s stalking was not just “about you,” but affected all other women on campus. Dean Bullock wrote a memorandum to Howard’s General Counsel stating that both she and Dean Newsom perceived Harrison as a threat to Prof. Martin and “other women.” Howard provided this memo to the EEOC as an exhibit to its Response to Prof. Martin’s EEOC charge; yet former Dean Bullock actually perjured herself at trial by testifying that she never perceived Harrison's conduct toward Prof. Martin as a threat to her as a woman or as a threat to other women.

Dean Bullock and other Associate Dean Newsom admitted that Howard took none of the actions recommended by police. Dean Bullock also admitted that she falsely stated, in a memorandum to Prof. Martin, that she was discussing the matter with Security Director, Lawrence Dawson, when, in fact, she never spoke to Mr. Dawson or any other security or police officer regarding Prof. Martin’s complaints about

³ In an affidavit, Prof. Bell said that Harrison accosted him in 1990, at Harvard, demanding that he name the “real” Geneva Crenshaw. Harrison told Bell that he would return and “blow [his] head off” because he did not name this *fictitious woman*. Bell described the confrontation as the “most frightening experience of my career.” Judge Hogan did not allow Prof. Bell to testify at trial, so the jury did not hear his testimony.

Harrison. Bullock did not even attempt to discuss the issue with Howard's Campus Security personnel or the police, despite her ready access to them and their express purpose of protecting persons on campus.⁴

d) **The Admissions of Bullock and Taslitz Prove Retaliatory Motive**

Both Dean Bullock and Prof. Taslitz testified that Bullock had told Taslitz that she did not want Prof. Martin on the faculty and that Prof. Martin was "causing problems" for her office. Bullock specifically told Taslitz that she was "having a bad day" because of Prof. Martin's complaints about the stalking and that she had "a lot to do" with respect to it; yet, Bullock admittedly did *absolutely nothing* to address Harrison's stalking.

Dean Bullock's animus toward Prof. Martin, as a result of her complaints about Harrison's stalking in her workplace, was so great that she could not even contain it when she was interviewed by the EEOC investigator in 1999, in response to Plaintiff's EEOC charge Bullock said:

Martin did not seem satisfied with my response. I was left with the impression that **she wanted me to wrestle the stalker down.** (Emphasis added)

Clearly, Prof. Martin never asked Dean Bullock to "wrestle" anyone; she, as well as the D.C. police department and Howard's own Security Officer, Officer Sirleaf, simply asked Dean Bullock to work with Campus Security and employ the procedures already set forth in Howard's Security policies to ban Harrison from the workplace, post/circulate notices to the University community that campus security should be notified if they saw Harrison on campus and call D.C. police if Harrison appeared on campus so that they could arrest him for stalking

⁴ In another sexual harassment case against a University, setting forth the obligations of a University to promptly act on a complaint of sexual harassment, *Wilson v. Tulsa Junior College*, 164 F.3d 534 (10th Cir. 1998), a custodial employee of the University was harassed by her supervisor on the University's campus, while on duty. The plaintiff prevailed because the University failed to take "prompt and appropriate corrective action" to eliminate the sexual harassment. 164 F.3d at 539. Once University management (in the form of campus police) became aware of the first reported incident of conduct constituting harassment, "the response of the campus police was grossly inadequate." 164 F.3d at 540. The supervisor of Campus Security "did nothing for eight hours, neither reporting the incident to Personnel nor taking action to prevent (the harasser) from repeating his threatening sexual behavior." *Id.*

The incident of sexual harassment in *Wilson* occurred on only one occasion -- Wilson's supervisor exposed himself to her and asked for oral sex. The University was held liable, even though it permitted a police undercover investigation on its premises, suspended the alleged sexual harasser while conducting an investigation, and reassigned the alleged harasser to a post where the plaintiff had no interaction with him. The University's actions were held not to be immediate and appropriate. 164 F.3d at 539. Howard's administration did absolutely nothing, not just for 8 hours, but for indefinitely, and instead, began a pattern of retaliatory harassment against Prof. Martin, orchestrating her non-renewal and the destruction of her career as a law professor.

Prof. Martin, as well as for trespassing on Howard's property.

e) **APT Committee Members All Testified that Prof. Martin was a Good Professor and a Good Colleague**

Howard admits that it refused to renew Prof. Martin's contract, either as a permanent faculty member or even as a continued visitorship. The Appointments Committee (APT) Chair, Prof. **Isaiah Leggett**, *who was just elected Montgomery County Executive*, testified that Martin was "a very good teacher," "a good colleague," and someone who "contributed to the law school community," but that he was "confused" about her publications. (**Exhibit A**, Chart summarizing testimony of APT Committee members; Plaintiff's *Motion for Judgment on her Retaliation Claims*) Three other professors on the APT Committee, Profs. J. Clay Smith, Laurence Nolan and Homer LaRue, independently gave similar assessments of Prof. Martin, describing her as "terrific," "excellent teacher" and a "friend." (**Exhibit A**; Plaintiff's *Motion for Judgment on her Retaliation Claims*)

The one remaining Committee member, Vice Chair, Prof. Andrew Taslitz, misrepresented Prof. Martin's publications and those of a competing junior visiting professor after Bullock told him that she wanted Prof. Martin removed from the faculty; yet, even Taslitz testified that he found Prof. Martin to be a "warm person" and considered her his "friend." (**Exhibit A**; Plaintiff's *Motion for Judgment on her Retaliation Claim*)

f) **Howard's Stated Reason for Prof. Martin's Rejection is Proven False by Profs. Martin and Cunningham's Applications and Resumes**

Since the jury found that Prof. Martin's complaints about Harrison were not "protected activity" because Harrison's pursuit of her was not sexual in nature or based on sex, the jury never reached the issue of whether Howard retaliated against her for those complaints. If the jurors had answered the questions on the verdict form that formed the elements of the retaliation charge, they would have been compelled to answer "yes" to the question of whether Howard's stated reasons for selecting Prof. Cunningham over Prof. Martin were false.

Taslitz' representations that he believed that Prof. Martin had not completed an article since joining Howard's faculty, is proven false by the very application, resume and *completed article* that Prof. Martin submitted to the APT Committee before it made its December 18, 1999 decision to reject her. Taslitz' claim was also proven false by his own testimony, as well as the testimony of *all* four of the other APT members, that they knew, prior to the December 18, 1999, that Prof. Martin's article was completed *and accepted for publication*.

Prof. Martin's application also stated that she had a draft of a second article, since joining Howard, which had been submitted to Dean Bullock as part of her application for a summer grant. Dean Bullock testified that she granted the summer grant request based on Prof. Martin's demonstrated satisfactory progress in scholarship.

The junior visiting professor, Christi Cunningham, that APT Vice Chair recommended be selected instead of Prof. Martin had no publications since her graduation from law school in 1992 – in contrast to Prof. Martin's four publications;⁵ yet, Taslitz led the other members of the APT Committee to believe that Prof. Cunningham had more publications than did Prof. Martin and that the article that Cunningham had begun since joining Howard was actually *published, in print*, as of December 18, 1997. Cunningham's article, an exhibit since 2002, shows its publication date as "Winter of 1998" – *a full year after* Taslitz represented that Cunningham's article was already published! Prof. Martin's article was also published in the Winter of 1998 and was more than twice as long as Cunningham's article. Both articles had been accepted approximately a year earlier, which is a common phenomenon in academic scholarship.

g) Bullock Admitted, as Plaintiff Alleged, that she Withheld Faculty Positions from the APT Committee and Withheld an Advertised Constitutional Law/Civil Rights Position while Plaintiff was the Only Candidate and Qualified for the Con Law and other Positions

In her *Answer to the Complaint*, former Dean Bullock admitted that there were at least three vacant faculty positions for which Prof. Martin qualified; however, Dean Bullock left these needed positions *vacant* rather than to allow the APT Committee to consider Prof. Martin to fill any of them. (*Plaintiff's Motion for Judgment on her Retaliation Claims*) One position was an advertised Constitutional Law/Civil Rights position, which the original selectee turned down. Months after the "hiring season" had ended, Prof. Martin learned, from an outside source, that the candidate declined the position. She so informed the APT Committee members and applied for the position. In response to Prof. Martin's application, Bullock immediately converted the position to a tax position and told Prof. Martin that she would never hire her to teach tax.

Howard students sent letters and petitions protesting Martin's non-renewal and praising her as a professor; however, Dean Bullock ignored their requests to renew Prof. Martin and left positions vacant while

⁵ Cunningham also had less legal experience, less EEO experience than Martin, who had seventeen years of experience and national recognition as an expert in EEO law.

students clamored for scarce courses, due to the shortage of necessary law professors. But for MJ Facciola's *sua sponte* dismissal of Plaintiff's strongest retaliation claims, in his October 20, 2003 *Report and Recommendation*, the jury would have been compelled to find that Dean Bullock had no legitimate business justification for withholding and concerting faculty positions to remove Prof. Martin from the faculty.

Plaintiff's retaliation claims were based on sound legal principles and cannot be said to have been filed in "bad faith." The soundness of her arguments is established first by the fact that Judge Hogan upheld these very claims in his 1999 decision demonstrates that Plaintiff's legal analysis was well founded.

B. The Prosecution of the Present Case Provides Direct Benefits to the Public

The prosecution of this case benefits the public because it will foster a dialogue about legal remedies for violence against women in the workplace, and an employer's duty to prevent it when on notice of potential danger.⁶ Workplace violence, particularly against women, is a serious problem that must not be ignored.⁷

This case additionally moves women's advocates, the public, the courts – and perhaps the legislature – to protect a woman from losing her job if she requests that her employer take reasonable steps to prevent stalking in the workplace, when on notice of it. If a woman can be stalked in her workplace by a violent, delusional stranger, and then fired for asking her employer to take reasonable steps to stop it, then there is a deficiency in the law that needs to be addressed, either through case law applying existing statutes, such as Title VII, and/or through legislation. If not reversed on appeal, this case means that a woman who is stalked at work must choose between her safety and her job. If she complains or asks for protection, she can be fired, with no remedy.

C. Plaintiff Arguments Indirectly Benefit the Defendant

During trial and elsewhere, Howard University has touted itself as the cornerstone of civil rights advocacy, repeatedly invoking the name and legacy of the late Honorable Thurgood Marshall professing to educate social engineers for justice. Ironically, Howard is advocating narrow interpretations of sex discrimination, sexual harassment and actionable adverse actions under Title VII. If Howard's arguments are adopted by the Court of

⁶ This dialogue will benefit not only women. Men may also become "collateral damage" in workplace violence directed at women.

⁷ See, e.g., *Workplace Stalking*, published by the U.S. Department of Justice, 2002, and citations therein. www.doc.sc.gov/VictimServices/WorkplaceStalking.doc.

Appeals, the holding will adversely affect women and minorities, both in identifying gender discrimination and in Title VII cases for retaliation for protesting any type of illegal discrimination, including race. Since Howard is an historically and majority African-American University, with a majority African-American administration, faculty and student body, members of *Howard University's own community* will be adversely affected in the workforce by the position that Howard advocates.⁸

Although the present case is based on sex discrimination, a harasser could just as easily select a target for harassment based on other protected categories, such as race, national origin, color, religion, age or disability. A harasser could target a victim based on an obsession with Dr. Martin Luther King and harass only African-American men (triggering Title VII protection, based on race and sex). The obsession could be Mahatma Ghandi and the target would be Indian men (triggering Title VII protection, based on national origin and sex); Buddha, with the target being Chinese men (national origin, sex and/or religion); Helen Keller, blind women (ADA and sex), or John Lennon (national origin and sex). Where the category of people targeted for harassment is a discreet minority group, or member of such a group, the decision-makers in that employment environment, not personally threatened by the harasser, may callously refuse or fail to act to protect the person targeted.⁹ There must be a legal obligation to do so.

Various civil rights groups, representing women and racial minority groups joined the *amicus* brief in *Burlington*. All of these organizations recognized the importance of *expanding*, rather than limiting, the definition of “adverse action” under Title VII. If Howard’s position is adopted, an African-American man would have no remedy if he applied for a promotion, for which he was the most qualified candidate, and the employer cancelled that vacancy, or left it unfilled, to avoid filling the position with the African-American man. Similarly, the employer could decide not to “renew” or “rehire” the African-American man where a written contract is expiring, but there was an expectation of renewal, or rehiring into another available position for which he is well

⁸ Howard did not initially raise the argument narrowing the definition of adverse actions. Howard even agreed with Plaintiff that MJ Facciola’s October 20, 2003 *Report and Recommendation* should be vacated in its entirety, since it was replete with factual errors. Judge Hogan denied Plaintiff’s *unopposed* motions to vacate the *Report* even though the Court eventually recognized several errors in the *Report* and corrected two of them.

⁹ In this case, the primary decision-maker is also an African-American female; however, she did not otherwise fit the profile of Geneva Crenshaw. Dean Bullock was a tax professor with no background in civil rights law.

qualified. This non-“renewal” is effectively a termination; yet, under the district court’s opinion in this case, as well as the position now taken by Howard University, he would have no cause of action against his employer, no matter how clear the evidence was that the reason for canceling or failing to fill the vacancy was racial discrimination or retaliation for opposing illegal discrimination.

Howard’s position is antithetical to its history of civil rights, the legacy of Thurgood Marshall and even the interests of its own graduates. If Plaintiff prevails in her argument, expanding, rather than limiting, the definition of “adverse action” under Title VII to include the withholding and conversion of vacancies, then Howard will indirectly benefit from this ruling of the law. Howard’s own graduates (and employees, whether while still at Howard or elsewhere) will be able to rely on *Martin v. Howard University* for protection against such adverse actions if they are based on retaliation for protesting illegal discrimination.

D. This Litigation has, or will, Resolve Substantial Issues of Law

1. The Present Case Set Precedent in Title VII Sexual Harassment Law

a) Employer Liability for the Sexual Harassment of an Employee by a Non-Employee

In 1999, Judge Hogan set precedent within the D.C. Circuit, in the present case. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516. Judge Hogan held that an employer can be held liable for the sexual harassment of an employee, by a non-employee, if the employer knew or should have known of the harassment and failed to take reasonable steps to stop it.¹⁰

¹⁰ Some of the legal commentators that have recognized the precedential importance of this case have included the following: 1) **Fair Employment Practice Reporter**, 81 FEP Cases (BNA) 964 (D.C. D.C. 1999); 2) **Individual Employee Rights Reporter**, 15 IER Cases 1587 (BNA) (D.C. D.C. 1999); 3) **EEOC Newsletter**, January 2000; 4) **BNA Daily Labor Report**, ISSN 0418-2693, January 11, 2000; 5) **Daily Labor Reporter**, ISSN 1043-5506, January 17, 2000; 6) 3-46 Larson on Employment Discrimination @46.05n.127; 7) 3-46 Larson on Employment Discrimination @46.034 n.62; 8) **The Twenty-Fourth Annual Law Review Symposium: Sexual Harassment in the Workplace: Fifteen Years after Meritor Savings Bank: Symposium Article: Have We Come Full Circle?** 27 Ohio N.U.L. Rev 439 (2001); 9) 5 No. 12 **Andrews Sex. Harassment Litig. Rep.** 5 (February 2000); 10) **WOL A.M. radio**, May of 2000; 11) **WPFW, F.M. radio**, June of 2000; 12) Holland and Knight, P.C. (law firm representing Howard University warned other universities not to act as Howard did) <http://www.hklaw.com/newsletters.asp?ID=95&Article=467>; 13) Lawroom, www.lawroom.com/download/CR005.pdf, 14) Venable Bates, P.C., <http://www.venable.com/newsletters/wlu/2003/newsltr1.pdf>, 15) <http://www.ncbl.com/archive/02-00labor.html>, 16) Hand Arendall, P.C. <http://www.handarendall.com/0400NLRev.htm>, 17) <http://www.michbar.org/publications/labor2000.html>, 18) College Publications, www.collegepubs.com/ref/SfxNdx35.shtml; 19) Presentation before American Association of University

Judge Hogan's 1999 decision adopted the EEOC Regulation, [29 C.F.R. § 1604.11\(e\)](#); yet it will be a case of first impression before the D.C. Circuit Court of Appeals. Howard continues to argue that 1999 decision is wrong and therefore jeopardizes the precedent set by Judge Hogan in 1999. In addition to the EEOC regulation, Judge Hogan adopted the law of other jurisdictions to make this determination, citing *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1992) ("the environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers in the workplace."); ("An employer may also be responsible for the acts of non-employees with respect to sexual harassment of employees in the workplace. . ."); *Otis v. Wyse*, 1994 U.S. Dist. LEXIS 15172, 1994 WL 566943 at *7 (D. Kan., Aug. 24, 1994).¹¹

Professors, <http://www.cg2consulting.com/AAUP-Presentation.html>; 21) National Association of College and University Attorneys Annual Meeting, June 2006, "Keeping the Bad Ones Out and the Good Ones Safe," nacua.org/meetings/VirtualSeminars/June2006/Documents/021Lannon.DOC. Cases citing Judge Hogan's 1999 decision include *Mitchell v. AMTRAK*, 407 F. Supp. 2d 213, 218 (D.D.C. 2005) and *Coles v. Kelly Servs.*, 287 F. Supp. 2d 25 (D.D.C. 2003).

¹¹ The Second Circuit adopted 29 C.F.R. Section 1604.11(e) in *Murray v. New York University*, 57 F.3d 243 (2d Cir. 1995) (student intern allegedly harassed by patient at dental clinic). The Fifth Circuit resolved this issue in *Waltman v. International Paper Co.*, 875 F. 2d 468, 471 (5th Cir. 1989) (employee harassed by independent contractor of employer while on a travel assignment) and *Dornbecker v. Malibu Grand Prix*, 828 F. 2d 307, 309 (5th Cir. 1987) (employee harassed by consultant and employer took swift corrective action). The Eighth Circuit similarly adopted the regulations in *Christ v. Focus Homes*, 122 F.3d 1107 (8th Cir. 1997) (employees harassed by mentally incapacitated residents). The Ninth Circuit found a hostile work environment, based on sexual harassment, where a corporate service manager was terminated after reporting that she was raped by a customer during a business dinner. *Little v. Windermere Relocation, Inc.*, 301 F.3d 968 (9th Cir. 2001) The Ninth Circuit had precedent for employer liability for sexual harassment by a non-employee in *Folkerson v. Circus Enterprises, Inc.*, 107 F.3d 754 (9th Cir. 1997) (employee of circus harassed by patron while performing pantomime act). Cases in the Tenth Circuit are often cited by other circuits on this issue. *Turnbull v. Topeka State Hospital*, 255 F.3d 1238 (10th Cir. 2001) (psychiatrist harassed by patient); *Lockard v. Pizza Hut*, 162 F.3d 1062 (10th Cir. 1998) (waitress harassed by customer); *Adler v. Wal-Mart Stores*, 144 F.3d 664 (10th Cir. 1998) (employer liability for co-worker harassment is analyzed using the same standard as is harassment by a non-employee).

Decisions of district courts within Fourth Circuit have been consistent with other circuits. *McGuire v. Virginia*, 988 F. Supp. 980 (W.D. Va. 1997) (executive secretary sexually harassed at worksite by son of Chairman of Board); *Mullis v. Mechanics and Farmers Bank*, 994 F. Supp. 680 (M.D. N. C. 1997) (loan secretary sexually harassed by bank Vice President at work site to which she was temporarily detailed by another employer). District Courts have also consistently adopted EEOC Regulation, 29 C.F.R. 1604.11(e). *Ligenza v. Genesis Health Ventures of Massachusetts, Inc.*, 995 F. Supp. 226 (D. Mass. 1998) (respiratory therapist harassed by patient at employer's health clinic); *Jarman v. City of Northlake*, 950 F. Supp. 1375 (N.D. Ill. 1997) (deputy clerk sexually harassed by elected official); *Kudatsky v. The Galbreath Co.*, 1997 U.S. Dist. LEXIS 14445 (S.D. New York 1997) (real estate sales person sexually harassed by client); *Mart v. Dr. Pepper Co., et al.*, 923 F. Supp. 1380 (D. Kan. 1996) (account sales manager sexually harassed by client); *Hallberg v. Eat "n Park*, 1996 U.S.

Beyond adopting the EEOC regulation is applying it. There are few cases on point, and absolutely no other cases reported in this jurisdiction, that apply the EEOC regulation. Even looking to other jurisdictions, the cases are so fact specific that new law is made in each case, at least with respect to determining whether the employer took reasonable measures to stop the harassment.

b) The Court's October 4, 2006 Decision Erroneously Characterizes "Typical" Sexual Harassment Cases as Involving "Touching"

In its October 4, 2006 decision, 2006 WL 2850656 at * 4 (D.D.C. 2006), the court justified the jury's finding that Harrison's harassment was not "sexual in nature" or "based on sex" by stating:

The jury did not hear or see evidence that Mr. Harrison's conduct involved conduct *typical of sexual harassment* such as groping, touching or making sexual advances. (Emphasis added)

The decision does not cite *any* authority for its conclusion that "typical" sexual harassment cases involve touching or groping, or any type of sexual assault or battery. There is no prior authority for this conclusion. If the October 4, 2006 decision is not reversed, *it* could serve as authority, or precedent, in future sexual harassment cases, to require women to prove a *sexual assault* in order to establish a workplace sexual harassment claim under Title VII. This has never been the law under Title VII and such a standard should not now be adopted for the D.C. Circuit. This would be a major step backward for a woman's right to work free from sexual harassment.

c) The Adverse Impact of Stalking on Women Established Sex Discrimination

In his 1999 decision, Judge Hogan briefly acknowledged Plaintiff's argument that stalking has a disparate, or adverse impact, on women and therefore constitutes sex discrimination. Where a woman is stalked in her workplace, the disparate impact analysis should be used to find that the harassment is based on sex. This issue will be further examined and developed on appeal, particularly since the *National Association of Women Lawyers (NAWL)* will be moving to participate as *amicus curiae*.

Dist. LEXIS 3573; 70 Fair Empl. Prac. Cas. (BNA) 361 (waitress sexually harassed by custom); *Otis v. Wyse, et al.*, 1994 U.S. Dist. LEXIS 15172 (D. Kan. 1994) (nurse trainer harassed by independent medical provider); *Hernandez v. Miranda, et al.*, 1994 U.S. Dist. LEXIS 10598 (D. P. R. 1994) (office manager harassed by a customer). *Powell v. Los Vegas Hilton, Corp.*, 841 F. Supp. 1024, 1029 (D. Ct. Nev. 1992) (casino liable for sexual harassment of employee by customers); *Churchman v. Pinkerton*, 756 F. Supp. 515, 518-519 (D. Ct. Kan. 1991) (female security officer harassed by employer's client); EEOC Decision 84-3, 1984 (waitress subject to unwelcome sexual conduct by customer).

Even when conduct might affect both men and women, the conduct may constitute harassment on the basis of sex if the conduct disproportionately affects women. *Turnbull*, 255 F.3d at 1244; *see also Crist v. Focus Homes*, 122 F.3d 1107, 1111 (8th cir. 1997). Statistics compiled by the U.S. Department of Justice reflect that women are, in fact, disproportionately affected by workplace violence, such as sexual assault and stalking. See Bureau of Justice Statistics, *National Crime Victimization Survey, Violence in the Workplace, 1993-1999* (December 2001), at www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf.

d) This Case Presents Issues of Sex Discrimination, as a Matter of Law, Based on Sexual and Specific Terms

Judge Hogan cited Harrison's desire for Prof. Martin to be his "wife" and his references to Prof. Martin as "voluptuous" to conclude that "it is clear" that Harrison's pursuit of her was "sexual in nature" or "based on sex" yet, on October 4, 2006, Judge Hogan held that he had not included, in 1999, that Harrison's harassment was "sexual in nature" or "based on sex." He therefore denied Prof. Martin's motion to set aside the jury verdict, as an error of fact and/or law. *Martin v. Howard University*, 2006 WL 2850656 (D.D.C.)

e) Where Female specific language is Used to Identify and Target the Female Harassment Victim(s), the Harassment is Per Se Based on Sex

Where the harasser targets women because he fantasizes that they are related to him in sex specific terms, such as "wife," "mother," "sister," "aunt," "grandmother," again, the target can only be a woman, although the harasser may need to see additional qualities in particular women in order for him to cast her in the role he has chosen for her. Whatever his reasons are, from a legal standpoint, this harassment is just as much harassment based on sex, as any other case where the harasser does not harass all women in the universe, but selects particular women, or even one particular woman to harass, based, in part, because she is a woman.

f) Targeted a Harassment Victim to be a "Wife" is Inherently Sexual Harassment

Where a harasser targets his victim because he is looking for a woman to be his "wife," his quest to make her his "wife" is inherently sexual in nature. Sex is an inherent part of marriage, and is even so recognized by law. In the District of Columbia, as in most states, a spouse's refusal to participate in sexual relations with his/her

spouse constitutes grounds for divorce. Howard's own Campus Security Officer, Officer Sirleaf, testified that, when Plaintiff reported Harrison's harassment to him, showing him the letters and playing Harrison's voicemail messages to her, he immediately understood Harrison's harassment of Plaintiff to be sexual in nature, particularly because Harrison's pursuit of her as his "wife" clearly indicated that he wanted a sexual relationship with her.¹²

g) Where a Harasser Expresses his "Infatuation with the Body Parts of his Female Targets, Describing their Bodies as "Voluptuous"no Reasonable Jury could Conclude that the Harassment is not "Sexual in Nature"

Harrison referred to his physical attraction to Prof. Martin and other women that he pursued in his search of "Geneva Crenshaw," referring to Prof. Martin as "more youthful," "prettier" and "more voluptuous" than a previous object of his "Geneva Crenshaw" obsession, purportedly named Valerie Edwards. With respect to the original Valerie Edwards (as contrasted with an attorney in Canada whom he later pursued) Harrison stated that he was "infatuated with her legs." The 1999 decision quoted these passages of Harrison's letters and concluded that "it is clear" that Harrison's pursuit of Plaintiff was "sexual in nature" or based on sex; yet, in the October 4, 2006 decision held that there was sufficient evidence to find that the harassment was not based on sex/gender.

h) Where the Harasser Selects his Victim Based on his Perception of her Similarities to a Female Character, Real or Fictitious, the Harassment is Per Se Based on Sex or Gender

Where the harasser selects the victim based on his obsession with a female character, real or imagined, dead or alive, the harasser has selected the victim based on the basis of her gender. Harrison targeted Prof. Dawn Martin, but he would not have targeted her if she were Prof. Dan Martin. Harrison was only looking for a woman because only a woman could be "Geneva Crenshaw."

Although "Geneva Crenshaw" is not a household name, the legal analysis would be the same if the harasser's obsession were with any other female character or celebrity. The next delusional stalker could just as well be obsessed with "Wonder Woman," Joan of Arc, Mary Magdalene, Mother Theresa, Hillary Clinton, Rosa Parks, Halle Barry, Jennifer Lopez or Connie Chung. The fact that the target may have additional characteristics that fit the profile does not negate the discriminatory nature of the harassment, based on gender. For example,

¹² During trial, Judge Hogan recognized this fact, saying that this was "obvious," interrupting Officer Sirleaf's testimony and ordered Plaintiff's then counsel, Melvin Otey, to "move on."

although *all* women do not fit the profile of the comic book character of “Wonder Woman” (and none could fit the profile completely), *only* women could be considered for the “role.” All men are therefore safe from a harasser targeting a Wonder Woman prototype, while women may be targeted to the degree that the delusional stalker believes that they share characteristics with Wonder Woman, or her secret alter ego in her workplace. Although the concept may seem far fetched, it is no more far fetched that a delusional, criminal stalker would be infatuated with the fictional character of Wonder Woman than with the fictional character of Geneva Crenshaw.

2. No “Magic Words” are Necessary to Invoke Title VII Protection

Judge Hogan’s 1999 decision holds that there are no “magic words,” to describe sexual harassment. A victim need not use the words “sexual harassment” to invoke Title VII, but need only report to her employer *conduct that constitutes sexual harassment*. Howard has consistently argued, even in its post trial motions, that the victim is required to form her request for protection from sexual harassment like an EEO charge. The present case helps to clarify and develop the law under the “Opposition” clause of the retaliation provision of Title VII. It is not necessary to file a charge or formal complaint of discrimination to qualify for Title VII protection.

3. This Case will Set Precedent in the Area of Title VII Retaliation Law

On October 20, 2003, Magistrate Facciola actually reversed Judge Hogan’s 1999 decision, in part, dismissing Plaintiff’s strongest retaliation claims. MJ Facciola held:

It is ... clear that the other acts of which she complains, the conversion of the Constitutional Law/Civil Rights position into a Visiting Tax, Trust position and the decision to leave certain faculty positions vacant, do not qualify as adverse actions. They lack a direct and immediate impact upon Martin that would permit them to be characterized as causing objectively tangible harm. While these acts ultimately led, in Martin's view, to her departure from HU despite her desire to stay in any faculty position, they did not in themselves cause her any harm cognizable as retaliatory.

....

Title VII applies only to ultimate employment decisions such as hiring or discharging....
(Emphasis added)

Martin v. Howard University, 2003 U.S. Dist. LEXIS 18501 at * 31-32 (D.D.C. 2003).

MJ Facciola repeatedly referred to Prof. Martin’s non-renewal as a "firing," "termination" and "denial of tenure" when it was undeniably none of the above, nor did Howard ever claim that it was any of the above. In

June of 2006, after the trial in this case, the Supreme Court decide *Burlington v. White*, 126 S. Ct. 2405 (2006).

Burlington specifically rejected the standards applied in the Courts of Appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provision and that have limited actionable retaliation to so-called "ultimate employment decisions." 126 S. Ct. at 2414. *Burlington*, 126 S. Ct. at 2410, continues:

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

Burlington expressly adopted the standard for proving actionable retaliation set forth in *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006). 26 S. Ct. at 2411, 2413, 2415. Even before *Burlington*, there was a stream of cases flowing from the D.C. Circuit clarifying, expanding and re-evaluating the definition of "adverse action" within the meaning of Title VII -- all of which Plaintiff cited in various motions for reconsideration of MJ Facciola's dismissal of her two strongest retaliation claims. *Holcomb v. Powell*, 433 F.3d 889 at 902 (D.C. Cir. 2006) (Jan.10, 2006), held that adverse actions included acts that affected future employment opportunities *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006), held that Title VII makes unlawful any act of retaliation by an employer that might dissuade a reasonable employee from making or supporting a charge of discrimination pursuant to Title VII -- whether it is related to current employment opportunities, future employment opportunities, or even potentially adverse consequences completely unrelated to employment.

On March 17, 2006, the D.C. Circuit decided *Chappelle-Johnson v. Powell*, 440 F.3d 484 (D.C. Cir. 2006). The Court held that it is not necessary that the plaintiff "show that the position remained open and that the employer continued to seek applicants." It was enough that the plaintiff alleged that the employer "denied her an opportunity for advancement." In *Chappelle-Johnson*, the adverse action was the denial of "the opportunity to compete for a vacant position with a grade for which she would otherwise be ineligible." As discussed in Plaintiff's *Motion for Judgment on her Retaliation Claims*, at 15-18, as in *Chappelle-Johnson*, Dean Bullock denied Prof. Martin the opportunity to compete for a vacant position when she left positions vacant and converted

the Constitutional Law/Civil Rights position, rather than permit the APT Committee to fill the needed positions, for fear that the Committee would fill one of the positions with Prof. Martin.

Mastro v. Potomic Electric Power Company, 447 F.3d 843, 855 (2006) reversed the lower court holding that plaintiff had not established a *prima facie* case under Title VII because his position was not filled on a permanent basis. *Mastro* explained that the only purpose of this original requirement was to require the plaintiff to prove that the position from which he or she was terminated was not simply eliminated for non-discriminatory reasons. Plaintiff presented substantial evidence that Dean Bullock eliminated the advertised Constitutional law position and withheld at list three undesignated faculty positions, to retaliate against her for her complaints about Harrison by eliminating or withholding any position that she could fill.

On July 11, 2006, the D.C. Circuit's neighboring sister Circuit, the U.S. Court of Appeals for the Federal Circuit, decided *Ruggieri v. Merit Systems Protection Board*, 2006 WL 1889897 (Fed. Cir. 2006), a case of first impression, involving the retaliation claim of an employee under the "Whistleblower Act" (The False Claims Act). Although *Ruggieri* is not a Title VII case, it does involve employer conduct constituting actionable retaliation for protected activity, under a federal statute. *Ruggieri* held that if an employer cancelled a vacancy, or failed to fill a vacancy, in order to prevent the plaintiff from being appointed to the vacancy, the employer's conduct may form a basis for a claim of retaliation. When an employer cancels, withdraws or conceals a vacancy, to exclude a person who engaged in federally protected activity, that conduct constitutes actionable retaliation, as courts now specifically recognize. There is certainly no indication that Congress intended to afford less protection against retaliation to plaintiffs under Title VII than it does to whistleblowers.

Post *Burlington*, courts will have to examine various employer practices under a new analysis. This case offers an opportunity to examine the employer practices of withholding and converting job vacancies to exclude an applicant, based on a retaliatory motive. The precedent set by this decision will pave the way for many other plaintiffs – whether based on sex discrimination, race, color, religion, national origin, age or disability.

E. The Defendant is not Needy and Does not Need to be Reimbursed for Costs

The Defendant, Howard University, is a multi-billion dollar, major institution with nearly vast resources. In fact, Howard has chosen to hire a total of five outside law firms, including some of the most prominent and

expensive law firms in the D.C. area that *specialize in opposing plaintiffs* in civil rights/employment discrimination cases. Howard never even *asked* for reimbursement of its costs prior to the Clerk's taxation of costs. The \$11,000 in costs that Howard now requests is, as Howard's counsel once remarked with respect to witness fees, "a drop in the bucket for Howard."

Awarding Howard costs would certainly add insult, as well as further injury, to the injury that Plaintiff has suffered, due to Howard's withholding of discovery, litigation conversion, changing defenses (See **Exhibit B**, Chart of Changing Defenses), filing of frivolous motions, thwarting of discovery, contempt of court and repeated violations of the rules and orders of this Court over the past eight years. See Section III, below, incorporated by reference herein.

F. It Would Unduly Burden Plaintiff, who was Deprived of her Livelihood by Howard's Actions, to Order her to Pay Howard's Costs in Addition to her Own

In sharp contrast to Howard's Goliath resources and stature, Plaintiff's taxable income has been roughly \$25,000 for most of the 8 years since Howard destroyed her teaching career. Although her financial situation has recently begun to improve, with cases she has worked on for years coming to closure, she owes so much money in business and personal expenses, that \$11,000 would still cause her incredible hardship. Howard cost Plaintiff thousands of dollars in deposition costs and hundreds, if not thousands of hours, over 8 years, in attorney time, to combat Howard's actions to thwart discovery, conceal evidence and fabricate alleged facts, it would be an incredible additional miscarriage of justice to make Plaintiff pay an additional penalty for Howard's misconduct. See Section III, below, incorporated by reference herein.

G. The Imposition of Costs would Unduly Inhibit Future Similar Challenges

Potential plaintiffs who learn that the Plaintiff in the present case was taxed Howard's costs, after Howard terminated her for complaining about a criminal, violent stalker in her workplace, and after Howard delayed and thwarted litigation for 8 years, draining her of her limited resources, with impunity, there will be a distinct chilling effect on other women, and Title VII plaintiffs generally, with respect to speaking up to oppose discrimination.

III. **Defendant's Violations of Rules 8(c), 26 and 37 Necessitated Depositions and Howard should Pay for them; Howard Should not be Rewarded for its Misconduct nor should Plaintiff and her Family Endure Further Hardship because of Howard's Repeated Misconduct**

A. Howard Violated Rules 11 and 8 by Failing to Answer the Complaint, in Good Faith

Fed. R. Civ. P. 8 requires the Defendant to answer the Complaint. Howard never filed a valid Answer. In his May 30, 2001 decision, MJ Facciola specifically recognized that Howard's Answer did not qualify as a valid Answer under Rule 8. MJ Facciola deemed Dean Bullock's Answer, in her individual capacity, as an Answer for Howard as well; however, Dean Bullock did not respond to the questions that were outside of her personal purview, but known to the University. In addition, she also denied many of the basic allegations that she later admitted, particularly with respect to her own actions in response to Prof. Martin's complaint about the stalking and her own role in rejecting Prof. Martin for positions in December of 1997, as well as in the spring of 1998.

As detailed in Plaintiff's May 6, 2001, *Motion for Rule 11 Sanctions for Defendant's Continuing Refusal to Provide a Proper Answer to Plaintiff's First Amended Complaint*,¹³ incorporated by reference herein, Howard denied nearly every allegation in Plaintiff's complaint (**Exhibit C**) – even that Alice Gresham Bullock was the dean of the law school and that Plaintiff had been employed by Howard!

B. Howard Violated Rules 26 and 37 by Withholding Discovery, Repeatedly Changing its Answers, Defenses and Theories of the Case, Falsely Answering Interrogatories and Producing Fabricated Documents Years into the Litigation

Howard's thwarting of discovery cost Plaintiff her May 30, 2001 trial date and caused her to wait five (5) additional years for her day in court! See Chronology of litigation, up to August, 2002 (**Exhibit D**), when Howard was held in Contempt of Court. In addition to filing a "non-Answer" Answer to the Complaint, Howard similarly violated discovery Rules 26 and 37.

In its Answers to Interrogatories, Howard falsely claimed that it had taken certain steps to keep Harrison out of Prof. Martin's workplace, the law school, and that Dean Bullock was working with Campus Security Director Lawrence Dawson, other security personnel and the D.C. Police Department, to address Harrison's stalking of Prof. Martin and threat to her and "other women" on campus. In her deposition, and at trial, former Dean Bullock admitted that she took no such action. Mr. Dawson also testified that Dean Bullock never told him of the stalking and that he first learned of it years later when Plaintiff noticed his deposition.

¹³ Since this motion was filed prior to the adoption of the electronic filing system in this case, Plaintiff has attached it as an exhibit, for the Court's convenience. See also fn. 15.

If Howard had admitted the facts that it knew to be true, that it later admitted and that the jury found to be true,¹⁴ Plaintiff would not have had to depose any of the security officers, Dean Newsom, of Dean Bullock, with respect to the background of the stalking. See also Plaintiff's August 3, 2001 *Motion for a Default Judgment Based on Defendant's Production of Late, Incomplete and Falsified Discovery (Exhibit E)*,¹⁵ incorporated by reference herein. Had Howard answered the Complaint and discovery requests honestly – as Rules 11, 26 and 37 require -- there would not have been a need for a trial at all, to determine any facts. The facts would have been undisputed and it would have been decided as a matter of law, in 1999.

In its *Answers to Interrogatories* and court filings, Howard falsely alleged, in violation of Rules 11, 26 and 37, that Prof. Martin had not completed an article for publication, as of December 17, 2001, and/or that she had “no article accepted for publication.” When deposed, *all five* Committee members testified that they knew that Prof. Martin's article was *completed and accepted for publication before December 18, 1997*.

Howard clearly had no basis for answering the interrogatories as it did, since the persons who needed to be consulted on the reasons for the rejection were the five APT Committee members. Since every one of them testified that they knew that Prof. Martin's article was accepted for publication, Howard clearly did not employ due diligence in learning the answer to the Interrogatory and could not possibly have answered the Interrogatories with any semblance of good faith. To the contrary, Howard responded with answers that it knew to be false. Had Howard answered truthfully, as it was obligated to do, Plaintiff would not have had to depose any of the APT Committee members. It was only because of Howard's misconduct and repeated violations of Rules 11, 26 and

¹⁴ The jury did not indicate, in any way, that Howard had legitimate reasons for not renewing Prof. Martin. Once it determined that her complaints did not constitute “protected activity,” the reason for her non-renewal was irrelevant. The jury then left the questions regarding the credibility of Howard's stated reasons blank.

¹⁵ Since this motion was filed prior to the adoption of the electronic filing system in this case, Plaintiff has attached it as an exhibit, for the Court's convenience. Plaintiff also notes, as she has in the past, that the case file that she has observed in the Office of the Clerk of the Court has repeatedly been taken from the Clerk's office and held for long periods of time by the Court, reportedly by “chambers.” The Clerk's office never indicated whether “chambers” referred to Judge Hogan's chambers or MJ Facciola's chambers; however, Plaintiff provided courtesy copies to both judges' chambers, as well as filing two copies with the Clerk's office, one of which was intended for the assigned judge, pursuant to the rules and procedures of the Court. When finally being given access to the Court file, Plaintiff observed, and so notified the Court, in filings and immediately, through the Office of the Clerk, that some of the filings, particularly those with extensive exhibits, had been disassembled and that some of the exhibits were either missing, placed in the wrong section or placed upside down or otherwise disorganized in the file. The *Motion for Default Judgment* is one of the filings that had been disassembled and corrupted.

37, that Plaintiff had to take these depositions.

In its *Supplemental Answers to Interrogatories*, submitted three years into this litigation, Howard alleged, for the first time, a “kitchen sink” of purported reasons for Prof. Martin’s non-renewal; however, Howard never produced an iota of credible *evidence* that any of the listed “reasons” for her non-renewal was actually a reason, or a consideration of the APT Committee in its deliberations regarding Prof. Martin’s candidacy. To the contrary, Howard produced a May 11, 2001 statement from APT Chair, Prof. Leggett, on behalf of the APT Committee, specifically setting forth the four criteria used in the Committee’s deliberations: 1) teaching ability; 2) collegiality; 3) scholarship; and 4) service to the law school and the larger community. *See Plaintiff’s April 26, 2006 Motion for Judgment on her Retaliation Claim.*

The May 11, 2001 APT Committee Statement, signed by Prof. Leggett, specifically stated that the Committee viewed Prof. Martin favorably, both independently and as compared to Prof. Cunningham, with respect to teaching, collegiality and service. The statement specifically identified the issue of scholarship as the determining factor in selecting Prof. Cunningham over Prof. Martin; however, as previously discussed, the purported factual basis for determining that Prof. Cunningham had a superior record of scholarship to Prof. Martin – specifically that Prof. Cunningham’s article was already “published” and that she had another article soon forthcoming, and that Prof. Martin had not even completed one article since joining Howard’s faculty – was completely false and proven to be false by the applications and documentation submitted to the Committee by both Cunningham and Martin, as well as the final, published articles of both candidates, which were *both* accepted for publication in the fall of 1997 and *both* actually published in “Winter 1998” Law Journals. Howard had before it the actual publications, as well as the applications and resumes of Profs. Martin and Cunningham, throughout this litigation. Howard therefore knew full well that its repeated representations to this Court and in discovery, that Plaintiff’s article was not completed or accepted for publication in the fall of 1997, and that Cunningham’s article was already “published” at that time, was a complete and utter lie.

Depositions of the five Committee members revealed that Prof. Martin’s collegiality was never questioned in deliberations and that it was not a factor in the decision, except to her credit, for at least four of the five Committee members. The only member of the Committee that was even ambivalent on the issue of Prof.

Martin's collegiality was Prof. Taslitz, who Plaintiff alleged was the instrument, or "henchman" through which Dean Bullock carried out her retaliatory removal of Prof. Martin from the faculty. Taslitz claimed that he had received some negative feedback about Prof. Martin from colleagues, most notably, his good friend, Prof. Gavil; yet, Taslitz admitted that he never discussed Gavil's comments with any other Committee member or with Prof. Martin, even though Gavil's comments were purportedly made to him in November of 1996 – more than a year before the Committee's December 17, 1997 decision. During that year period, Taslitz testified that he considered himself Prof. Martin's friend and mentor, and that he was an advocate for her to obtain a permanent position. Taslitz own description of his relationship with Prof. Martin after Gavil purportedly made the negative comments to him demonstrates that Gavil's comments could not have been a significant factor in his recommendation to vote against Prof. Martin on December 18, 1997. All of the ATP Committee members (including Taslitz) testified that Taslitz' stated reasons, during the meetings, was that Prof. Cunningham's scholarship was superior to that of Prof. Martin. As discussed, these claims are demonstrably and blatantly false.

Howard failed to produce minutes of the APT Committee meetings, although both APT Committee member, Prof. Homer LaRue and Faculty Services Director Delphyne Bruner both testified that such minutes were taken, typed and distributed to APT Committee members. APT Committee member Prof. Nolan *admitted* that she took contemporaneous notes of these meetings, but that *she deliberately destroyed them* in order to conceal the Committee's deliberations. She did so knowing that Prof. Martin was challenging the Committee's decision as retaliatory and as a breach of contract. Certainly, as an attorney, Prof. Nolan knew that these notes would be requested in discovery if Prof. Martin's challenge developed into a lawsuit, as it did. Taslitz expressly anticipated a lawsuit. He asked Dean Bullock for legal representation by Howard if Prof. Martin sued him.

Howard's destruction, withholding, concealment and falsification of discovery responses and production required the deposition testimony of all APT Committee members, as well as additional depositions of faculty members to rebut Howard's claims that her colleagues viewed her as "non-collegial." Had Howard not made the false claim that the Committee members believed that Prof. Martin was not-collegial, she would not have had to depose Profs. Boyer, Jones or Rogers. Howard also withheld Assistant Dean Denise Purdie-Spriggs from appearing for her a deposition, noticed in response to Gavil's new accusations. Purdie-Spriggs was privy to the

actual events misrepresented by Gavil. MJ Facciola ordered Howard precluded from using Gavil's testimony in its motion for summary judgment; yet, Howard violated the Order and centered its *Motion for Summary Judgment* around Gavil's precluded testimony! MJ Facciola ignored Plaintiff's *Motion to Strike Howard's Motion for Summary Judgment* for its inclusion of precluded testimony. Instead, MJ relied on this precluded testimony, as well as Howard's blatant misrepresentation that Gavil was a member of the APT Committee in 1997-1998 (despite Plaintiff's proof – including Howard's admissions to the contrary) to deny Plaintiff's *Motion for Summary Judgment*. *Martin v. Howard University*, 2003 U.S. Dist. LEXIS 18501.

Finally, Plaintiff had to depose Cathy Miller because Howard refused to produce minutes of faculty meetings. In her deposition, Dean Bullock claimed that Prof. Martin talked too much in faculty meetings. Plaintiff therefore requested the minutes of those meetings, as the "best evidence" of how much she talked in meetings and what she said. Howard claimed that they were not available; however, Cathy Miller, Dean Bullock's then secretary, testified that all of the minutes, for many years, are filed, along with the actual audio-tapes, in the Dean's office. If Howard had complied with Rule 26 and produced the minutes and/or tapes, Plaintiff would not have had to depose Ms. Miller.

In a May 30, 2001 decision, MJ Facciola granted Plaintiff's *Motion to Compel Discovery*; however, instead of granting Plaintiff's motion to compensate her for her attorney time and costs necessary to obtain the withheld discovery, MJ Facciola held Plaintiff's motion for Rule 37 costs in "abeyance" or "limbo." In a published 2002 decision, MJ Facciola specifically warned Howard, quoting his own May 30, 2001 Order:

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. 2d 1; 2002 U.S. Dist. LEXIS 9717 at *4(D.D.C. 2002). MJ Facciola further characterized Defendant's "defense" by stating, "It is hard to imagine a process that more trivializes the obligation a litigant has to comply with a court's orders." Even a year after his May 30, 2001 warning, MJ Facciola did nothing to sanction Howard for its continuing violations of his orders to produce discovery.

Despite MJ Facciola's harsh words for Howard, he has never ordered any sanctions against Howard or otherwise addressed Plaintiff's Rule 37 motion. Even after being held in Contempt of Court, on June 25, 2002, Howard continued to withhold discovery, including and through trial. Plaintiff has repeatedly implored the Court to take this issue out of abeyance and award her the sanctions to which she is entitled, both to ease the financial hardship caused by Howard's misconduct and to deter future misconduct by Howard. Plaintiff's July 8, 2002 *Modification of June 25, 2002 Order to Increase \$1,000.00 Contempt Sanction on Defendant Howard University and Other Relief (Exhibit F)*, Plaintiff's July 28, 2002 *Assessment of Discovery Produced by Howard (Exhibit G)*, Plaintiff's August 3, 2001 *Motion for a Default Judgment Based on Defendant's Production of Late, Incomplete and Falsified Discovery (Exhibit E)*;¹⁶ and Plaintiff's December 21, 2005 *Motion to Compel Depositions of Dean Denise Purdie-Spriggs, Prof. Steven Jamar*, at 15. See also reference in Plaintiff's December 18, 2005 *Opposition to Defendant's Motion in Limine to Preclude Plaintiff from Offering Argument of Evidence Regarding Alleged Damages*, at 9. Plaintiff detailed the attorney time that she spent in pursuit of the requested discovery, totaling more than \$ 364,120.00, as of June 25, 2002, applying the appropriate *Laffey* rate, not including the fees of consulting attorneys, of counsel attorneys or her paralegal. Plaintiff's July 8, 2002 *Modification of June 25, 2002 Order (Exhibit F)*, at 13-15 and supporting Exhibit A.

All of these filings are hereby incorporated herein by reference. The Court left Plaintiff's 2001 motion in "abeyance" forever – allowing Howard to avoid the mandatory result of paying Plaintiff the fees that Rule 37 obligates it to pay. Howard should at least pay for copies of the depositions.

Fed. R. Civ. P. 37(a)(4)(A) states that if a motion to compel discovery is granted, the Court "shall" require the party whose conduct required the motion to pay the moving party the reasonable expenses incurred in

¹⁶ Since this motion was filed prior to the adoption of the electronic filing system in this case, Plaintiff has attached it as an exhibit, for the Court's convenience. Plaintiff also notes, as she has in the past, that the case file that she has observed in the Office of the Clerk of the Court has repeatedly been taken from the Clerk's office and held for long periods of time by the Court, reportedly by "chambers." The Clerk's office never indicated whether "chambers" referred to Judge Hogan's chambers or MJ Facciola's chambers; however, Plaintiff provided courtesy copies to both judges' chambers, as well as filing two copies with the Clerk's office, one of which was intended for the assigned judge, pursuant to the rules and procedures of the Court. When given access to the Court file, Plaintiff observed that some of the filings, particularly those with extensive exhibits, had been disassembled. Some of the exhibits were either missing, placed in the wrong section or otherwise disorganized. The *Motion for Default Judgment* is one of the filings that Plaintiff identified as corrupted.

