UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Dawn V. Martin,	)	
v.	)	
	)	Case No. 1:99CV01175
Howard University, *et. al.*	)	Judge: TFH/AK

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON HER RETALIATION CLAIMS, AFTER VERDICT

Plaintiff incorporates into this Opposition, her April 25, 2006 *Motions for Judgment on Her Sexual Harassment, Retaliation and Breach of Contract Claims* as well as her Oppositions to Defendant's pending *Motions for Judgment on Plaintiff's Sexual Harassment, Retaliation and Breach of Contract Claims* and incorporates this *Opposition* into the aforementioned motions.

I. **Relationship of Present Motion to Pending Motions**

The jury in this case determined that Prof. Martin endured severe and pervasive harassment in her workplace when she was stalked by Leonard Harrison, a homeless, delusional stranger with a criminal record and a history of violence. The jury further found that Howard failed to take reasonable steps to eliminate this hostile work environment; however, the jury then determined that Harrison's pursuit of Prof. Martin, to be his "wife," was not sexual in nature, or based on her gender. The jury therefore concluded that Plaintiff was not engaged in "protected activity" within the meaning of Title VII of the Civil Rights Act of 1964 or the D.C. Human Rights Act. As fully discussed in Plaintiff's *Motion for Judgment on Her Sexual Harassment Claim* and her *Opposition to Defendant's Motions for Judgment on Plaintiff's Sexual Harassment*, the jury's conclusion was based on a misunderstanding of law and should be set aside.

If the jury had proceeded to the remaining questions on the verdict form regarding retaliation, it would have been compelled to find that Howard's ever-changing, purported reasons for Plaintiff's non-renewal are false and based, in part, on *perjury* by former Dean Alice Gresham Bullock. In addition, Bullock made statements constituting direct evidence of retaliatory animus. Finally, Bullock left faculty positions vacant, for

which she admits Martin was well qualified. Bullock actually lied to her colleagues on the APT Committee about these vacancies in order to prevent the Committee from selecting Martin for one of these positions. The undisputed evidence of record compels judgment for Plaintiff, not Defendant.

II. **<u>Plaintiff's Complaints Constituted "Protected Activity" within the Meaning of Title VII</u>**

A. **<u>Dean Bullock Expressly Recognized that Harrison's Harassment was Based on Sex and that Harrison Posed a Threat to Plaintiff and "Other Women" on Campus</u>**

At trial*, Bullock perjured herself* by testifying that she did not perceive Harrison's pursuit of Martin as based on her gender.[1] As fully discussed in Plaintiff's *Motion for Judgment on her Sexual Harassment Claim* and *Opposition to Defendant's Motion for Judgment on Plaintiff's Sexual Harassment Claim*, Deans Bullock and Newsom, as well as Howard's additional agents, University Campus Officer Sirleaf and Prof. Taslitz, *always* understood Harrison' harassment of Martin to be based on her gender, or status as a woman. Plaintiff will not repeat the facts, but highlights Howard's most glaring fraud below.

In her July 1, 1998 memorandum to Howard's General Counsel, provided as an attachment to Howard's Position Statement to the EEOC, responding to Plaintiff's charges of sexual harassment/hostile work environment and retaliation, Dean Bullock admitted that she was aware, by no later than December 1, 1997, that Harrison posed a threat of **stalking and harassment** to Prof. Martin and "**other women" on campus**.

> Associate Dean Newsom advised me that he thought that MPD should be called in to provide more manpower in tracking down the individual not only to benefit Professor Martin, but also **to prevent harm to other women whom this person might stalk or otherwise harass**. (Emphasis added)

Ex. A; Pl.'s Trial Ex. 8B; Ex. KKK-1 of Pl.'s October 9, 2002 *Motion for Summary Judgment* (MSJ), re-filed electronically on November 1, 2005, Docket # 330. In addition, in her March 6, 1998 memo to Bullock, Martin specifically referred to Harrison targeting her and "other African-American women." (**Ex. B;** MSJ Ex. XX, page 2, fn. 1) For eight years, Howard has fraudulently argued, in violation of Fed. R. Civ. P. 11, and in direct contradiction to the documented evidence of record, that neither Deans Bullock nor Newsom understood Prof.

[1] Particularly as an attorney and an officer of the Court, such conduct violates the D.C. Code of Ethics and is sanctionable, up to and including, disbarment. The extents to which Howard and its representatives have resorted to avoid any remedy for Plaintiff, or the restoration of her teaching career, is extraordinary.

Martin's complaints to indicate that she was being "harassed" or that such harassment was sexual in nature or based on her gender.[2] Pursuant to Fed. R. Civ. P. 60(B)(3), this fraud should end here and now.

B. Plaintiff's Complaints Constituted Protected Activity, as "Good Faith" EEO Complaints

An employee is protected against retaliation for opposing perceived discrimination, if s/he had a reasonable and good faith belief that the opposed practices were unlawful. *Little v. United Technologies*, 103 F.3d 956, 960 (11th Cir. 1997); *Trent v. Valley Electric Association*, Inc., 41 F.3d 524, 526 (9th Cir. 1994). The plaintiff does not need to prove the underlying sexual harassment in order to establish a case of retaliation. *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir.1978). *See also Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981); *cert. denied*, 455 U.S. 1000 (1982).

Plaintiff testified that she feared a sexual attack by Harrison. Plaintiff's fear was reasonable. On November 20, 1997, when Martin showed Prof. Taslitz Harrison's letters and told him of Harrison's phone message, he advised Martin to call the police immediately, saying, "Howard's Security is *for shit*. You'll be *raped* and killed right in front of that security booth." Martin described Harrison as targeting her and "other African-American women." **Ex. B,** page 2, fn. 1. Martin reasonably *perceived* Harrison's conduct as based on her sex and is protected by Title VII and the D.C. Human Rights Act.

C. Plaintiff's EEOC Charge Constituted Protected Activity

Howard acknowledged, as did the Court, that Plaintiff's May 14, 1998 EEOC charge constituted protected activity within the meaning of Title VII and the D.C. Human Rights Act; 1999 U.S. Dist. LEXIS 19516 at *16-17. Plaintiff clearly engaged in protected activity before Dean Newsom ordered her to vacate her office by May 29, 1998, even before her EEO class grades were due. To the extent that there was any question of whether Deans Bullock or Newsom knew of Plaintiff's EEOC charge before Newsom ordered her to vacate her office, there can be no question that Howard knew that Plaintiff filed an internal grievance with the Howard University Grievance Committee within one day of filing her EEOC charge (**Ex. C;** Pl. Trial Ex. 39). Although

[2] Howard has repeatedly and fraudulently described Harrison as "a gentleman" who was in search of his "estranged wife" and that his pursuit of Prof. Martin was a case of "mistaken identity." Howard's administrators were well aware that this was no "gentleman," that there was no "estranged wife," and that there could be no "mistaken identify" because *there was no real person*, but only a fictional character, to "identify."

Howard represented, at trial, that the Grievance Committee had no jurisdiction over sexual harassment of other EEO claims, the Grievance Committee's cited its authority sex discrimination claims. **Ex. C,** at 1.[3]

III. Howard's Purported Legitimate Reasons for Plaintiff's Non-Renewal are False and Pre-Textual

A. Martin Reasonably Expected, and Earned, Renewal on Howard's Faculty

In the fall of 1997, Prof. Martin had every reason to believe that she would be placed in a tenure-track position and that she would obtain tenure in her fifth year of teaching, which would have been the 1998-1999 academic year. As discussed in Pl. MSJ at 29, 35-36, Prof. Martin graduated from an Ivy League college, Columbia University (**Ex. D**), and a top ten law school, NYU (**Ex. E**), in 1981. She had seventeen years of exceptional experience as a civil rights attorney, including as a Trial Attorney for the United States Department of Justice, Civil Rights Division, Education Section, hired through the Honors' Program, from 1981-1985, litigating school desegregation cases. She was a Trial Attorney for the New York State Office of the Attorney General, Civil Rights Bureau, and for the Legal Aid Society of New York. Martin was recognized as a national expert in EEO law, based on her work experience, particularly her 6 years of national policy-making experience with the U.S. Equal Employment Opportunity Commission (EEOC) and her contributions to a Treatise on EEO law, as well as writing the Introduction to a Symposium on the Americans with Disabilities Act.[4] Pl. MSJ at 37.

[3] If the timing of its notice of Plaintiff's EEOC charge is in question, Plaintiff should be permitted to amend the Complaint to conform to this evidence and add the allegation that Howard ordered her to prematurely vacate her office in retaliation for her filing of an internal grievance, addressing, *inter alia*, sex discrimination.

[4] Howard has repeatedly stated, even in closing argument, that Plaintiff's representation of herself as a recognized national expert in EEO law is not substantiated by anything but her own opinion. Again, Howard has engaged in repeated Rule 11 violations, bad faith, and outright fraudulent representations to the Court and the jury. Howard's attorneys are well aware that Plaintiff was recognized as a national expert in EEO law by: 1) Prof. Merrick Rossein, author of the Treatise, *Employment Discrimination Law and Litigation*, in which Prof. Rossein acknowledged Plaintiff's national expertise in a forward to his Treatise in which he thanked her for writing three sections of his Treatise, invited to do so based on her national expertise (**Ex. F**; Ex. SS of Pl.'s MSJ; 2) former U.S. EEOC Commissioner Joyce E. Tucker recognized, in Plaintiff's 1993 EEOC performance evaluation that Plaintiff was a recognized expert in EEO law, bringing additional prestige to the Commissioner's office, since Plaintiff was Commissioner Tucker's Special Assistant at the time. (**Ex. G,** Ex. RR of Pl.'s MSJ); and 3) Plaintiff was invited to write the introduction to a Symposium on the Americans with Disabilities Act (ADA), by Cleveland-Marshall College of Law professor Steve Werber, based on her expertise in EEO law and particularly the ADA . Plaintiff sought, several times, both before and during trial, to admit these exhibits, but the court excluded them as hearsay, although they were part of Plaintiff's original application to Howard, along with her resume. Plaintiff asked the Court to preclude Howard's attorney, Mr. Shwalb, from making the statement that he knew to be false – i.e., that Plaintiff's statement that she was a national expert in EEO law was only her opinion of herself; however, the Court denied Plaintiff's request, and, as Plaintiff

Martin had been a law professor for four years, teaching EEO law, in addition to Torts I and II, Evidence and Race as a Factor in American Law. Pl. MSJ at 2, 38, 43. At Howard, she was the incumbent teaching EEO law, Torts and Evidence, with excellent teaching evaluations and exceptional student support. Pl. MSJ at 2, 19.

The scholarship requirement for tenure was two articles, or one book, within six years of teaching. (Howard Handbook, pages 2-3, Section III; **Ex. H**; MSJ Ex. CCC,) Martin had already met that requirement, within the first semester of her fourth year of teaching. She was already exceeding that requirement with her two works in progress. Only a few months earlier, Bullock had awarded Martin a 1997 summer grant, demonstratingher approval of Martin's scholarship progress. MSJ at 25 and Bullock's trial testimony. Taslitz told Martin that she could get "two or three" articles out of "911…" and had even suggested that she make it a book; thus, "911…" alone could have qualified her for tenure, even without her previous publications or works in progress. Martin had every reason to anticipate that her teaching career would continue to flourish; however, "on the heels" of her complaints of being stalked in her workplace, Martin's career was derailed and destroyed.

B. Howard Violated Civ. R. P. 8(c) and 26(h) by Asserting Untimely Defenses not Raised in its Answer to the Complaint or Timely Answers to Interrogatories

As fully discussed in Plaintiff's May 8, 2006 *Motion for Judgment on her Retaliation Claims*, pages 32-33, pursuant to Fed. R. Civ. P. 8(c), Howard was required to raise all enumerated defenses in its Answer to the Complaint or its *Motion to Dismiss*, filed before its *Answer*. *Harris v. Sec. of U.S. Dept. of Veteran's Affairs,* 126 F.3d 339, 343 (D.C. Cir. 1997) Since Howard did not raise a defense of "non-collegiality" or "bad judgment" in its *Answer*, or in its *Motion to Dismiss*, it waived its right to raise this defense three years later.

If any of the reasons that Howard asserted in 2001 had actually been the reasons for Martin's 1997-1998 non-renewal, surely, Howard would have known it in 1999, when it responded to the EEOC and answered the Complaint filed in this Court. Howard's purported defenses, in its 1999 *Answer to the Complaint*, its 2000 *Answers to Interrogatories* and its 2001 "*Supplemental" Answers to Interrogatories* were all filed in bad faith, in violation of Fed. R. Cic. P. 26(h), with no evidence to support even one of Howard's allegations. *See also* Plaintiff's August 2, 2001 *Motion for a Default Judgment for Defendant's Production of Late, Incomplete and*

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anticipated, Mr. Shwalb made this false representation to the jury – in violation of Rule 11.

Falsified/Tainted Evidence (Docket # 143) Even Howard's July 13, 2001 articulated reasons for failing to renew Plaintiff were *completely contradicted by* the APT Committee members, as well as the actual resumes and applications of Plaintiff and the selectees, Profs. Cunningham[5] and Mtima.[6] In fact, all APT Committee members -- except Andrew Taslitz -- seemed oblivious to *any* the purported reasons for Martin's non-renewal asserted by Howard, other than scholarship, in *both sets* of *Answers to Interrogatories*. Pl. MSJ at 24-29; Leggett deposition at 223, line 10 through 224, line 16. A party should not prevail in a case based on such fraudulent representations. Fed. R. Civ. P. 60(B)(3).

C. **Howard's Purported Reasons are Ever-Changing, Inconsistent, False and Pretextual**

The undisputable evidence of record demonstrates that all of Howard's ever-changing "reasons" for Prof. Martin's non-renewal are blatantly false. Howard could not produce evidence to support *even one* of its untimely, improperly admitted, ever-changing defenses. See **Ex. I**, Chart of Howard's Changing Defenses.

First, in their meeting on January of 1998, Bullock claimed that the APT Committee rejected Prof. Martin because she "had not completed an article as of December 18, 1997." During the meeting, Martin corrected Bullock by informing her that her article was not only completed, but accepted for publication prior to the Committee's December 18, 1997 decision. Martin again corrected Bullock, in writing, in her March 6, 1998 memo (**Ex. J**, MSJ Ex. XX), page 1. Bullock modified this false statement in her April 8, 1997 memorandum to Martin, stating: "I am also advised by the Committee that you had no article accepted for publication as of

[5] Cunningham was selected for a permanent, tenure track position, and *reassigned* to teach the EEO class that Martin had taught at Howard for the previous two years. Martin also taught EEO Law, Torts I and II, and Race as a Factor in American Law, as a tenure-track professor, at Cleveland-Marshall College of Law, which is one of the reasons that she was hired, in 1996, at the rank of *Associate* Professor. Pl. MSJ at 38.

[6] Mr. Mtima, who had no teaching experience at any law school, was hired to teach Commercial Law, which he requested. Pl. MSJ at 43. He was later assigned to teach Torts I and II, courses which he did not want to teach. Pl. MSJ at 43. Mtima had requested that he teach Property, not Torts. Pl. MSJ at 43. A Property professor had retired, just as Mtima was hired, so the slot that he requested had just become available (Pl. MSJ at 42); however, Bullock refused to assign Mtima his preferred course and instead ordered him to take over Prof. Martin's Torts I and II classes, which equaled five credit hours per year, constituting the bulk of Mtima's teaching schedule. Pl. MSJ at 42-43. Once she assigned Torts I and II to the newly hired Mtima, Bullock then told Martin, in writing, that she could not retain her to teach Torts or EEO law since these classes had been committed to other professors, by signed contracts, and that these contracts could not be "rescinded." Pl. MSJ at 43. More than four years later, Bullock admitted that no contracts had been signed with the new hires and that no professor was guaranteed a particular course, but that assignments and reassignments are made based on the needs of the school. Pl. MSJ at 43. Dean Bullock manipulated and rearranged courses, even against the requests of the assigned professors, to take Prof. Martin's courses from her to exclude her from the faculty.

December 18, 1997, the date on which the Committee made the decision on your application – not even the article which served as a major justification for the Associate Professor rank." (**Ex. K**, MSJ Ex. NNN). Bullock repeated this assertion in her April 10, 1998 (**Ex. L**, MSJ Ex. PPP), despite Martin's immediate and repeated correction of Bullock's statement, in writing. (**Ex. M,** MSJ Ex. PPPP) Since all of the APT Committee members admitted that they knew that Martin's article was accepted for publication by December 18, 1997, Dean Bullock clearly lied in her memos regarding the reason for Martin's non-renewal/non-selection.

Second, in Bullock's April 10, 1998 (**Ex. L**, MSJ Ex. PPP) in "responded" to Martin's April 10, 1998 memo (**Ex. M**, MSJ Ex. PPPP, page 3), observing that course needs would be best met by allowing her, as well as Profs. Cunningham or Worthy, to continue teaching what they were all teaching, and assign the newly hired Prof. Mtima to teach what he asked to teach – property, not Torts. *Bullock again lied*, in writing, by saying that she had executed contracts with the "new hires" (Cunningham and Mtima) "several months" earlier that confirmed their teaching assignments. Bullock later admitted, in her deposition, that no such contracts were ever signed and that she never offered Cunningham or Mtima the option of teaching the courses in which they were most experienced or requested. MSJ at 43. Instead, Bullock reassigned the new hires Martin's courses and then claimed that there were no courses left that Martin could teach.

Third, in its July 11, 2001 *Supplemental Response to Interrogatory* # 46, its *Motion for Summary Judgment*, its *Motion in Limine for an Order Clarifying that Plaintiff's Retaliation Claim is Limited to Decision not to Hire Plaintiff for EEO/Labor Law Position,* and some other filings, Defendant claimed that Martin was rejected for a position on October 31, 1997, before she was stalked; however, in its October 17, 2000 *Answer to Interrogatory* # 30, its *Opposition to Plaintiff's Motion for Summary Judgment*, page 9, as well as in other filings, Howard states that the Committee did not make its decision whether to renew Plaintiff's contract until December 18, 1997 – nearly a month after the stalking began. Howard has admitted that the October 31, 1997 letter was a form letter, sent to all professors whose contracts were ending, irrespective of non-renewal, and that Cunningham received the same letter. The November 3, 1997 memo itself clearly stated that the APT Committee had not yet met or made decisions. See Plaintiff's December 19, 2006 *Opposition to Defendant's Motion in Limine for an Order Clarifying that Plaintiff's Retaliation Claim is Limited to Decision not to Hire Plaintiff for EEO/Labor Law*

Position, pages 13-15, and Plaintiff's March 14, 2006 O*pposition to Defendant's Motion for Leave to File Motion to Conduct Discovery to determine whether Plaintiff had a "Good Faith Basis" for her January 17, 2006 Motion for a Trial Continuance, Due to Illness*, pages 11-13, particularly fn. 17. Again, Howard's second purported reason was revealed as a blatant lie, by its own admission.

Fourth, in its December 7, 1999 Statement to the EEOC (**Ex. N**), pages 7-8, Howard claimed that "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." Discovery confirmed, as Prof. Martin alleged, that Howard did not advertise for teaching positions for these courses, but did advertise for EEO/Labor Law, Constitutional Law and Commercial Law; moreover, Bullock assigned the new professor hired to teach Commercial Law, Prof. Mtima, to teach Torts, which Prof. Martin taught, leaving a gap in Property Law, which Prof. Mtima actually requested to teach. In addition, Bullock claimed that there were needs in these course areas because she and Dean Newsom were administrators and not teaching; however, Bullock had not taught for at least three years and Dean Newsom had not taught any of these courses for at least two years; accordingly, there was no new or sudden need in these areas in the spring of 1998, when Bullock converted the advertised Constitutional Law position to a tax position in direct response to Prof. Martin's March 6, 1998 renewed application for the Constitutional Law position after she learned, from an outside source, that the original selectee had declined the position.

Fifth, in its October 17, 2000 and July 11, 2001 *Answers and Supplemental Answers to Interrogatories*, Howard repeated its false claim that Martin "did not complete an article for publication by December 18, 1998"– despite its knowledge that the article was accepted for publication on December 18, 1997, and was published in the fall of 1998, as was Cunningham's article.

Sixth, in its July 11, 2001 *Supplemental Answers to Interrogatories*, produced after several Court orders for Howard to produce requested discovery, for the first time in the three years the case had been litigated, Howard claimed that: 1) there were no positions available that Prof. Martin was qualified to fill – directly contradicting Bullock's *Answer to the Complaint*, ¶ 326, admitting that Howard Law School had at least three tenure track positions left available, in the spring of 1998, for which Prof. Martin was well qualified

(MSJ at 42-43); 2) Prof. Martin's performance in law school was not as stellar as her competition – supported by absolutely nothing, particularly since Prof. Martin graduated from a top ten law school, into the Honors Program of the U.S. Department of Justice in 1981, and Howard never requested a transcript or asked her about her grades, in any case;[7] 3) Prof. Martin's work experience was not as stellar as her competition –contradicted by Prof. Martin's 17 years of legal experience, working for this nation's top civil rights agencies, leaving government with "outstanding" evaluations, publishing as a recognized national expert in EEO law, and teaching for four years with excellent performance evaluations;[8] 4) Cunningham was more qualified for the EEO position than was Martin – contradicted by their resumes and applications, as well as the fact that *Howard itself* had deemed Martin more qualified for the position than Cunningham less than two years earlier, when it hired them both and selected Martin over Cunningham to teach EEO law (this assertion incorporates, by inference, education and work experience, already listed as #s 2 and 3); and 5) that Prof. Martin's colleagues did not find her "collegial" – a claim contradicted by all Committee members except for Taslitz – an alleged retaliating official – as well as by three additional professors, Boyer, Jones and Rogers. MSJ at 40-41.

D. **<u>The December 9/19, 1997 Memo Fails to even Acknowledge Martin as a Candidate</u>**

Perhaps most telling is the Committee's purported December 9/19, 1997[9] Memorandum (**Ex. O;** MSJ Ex. BBB), discussed in Plaintiff's MSJ at 29-38. The December 9/19, 1997 memo does not even *mention* Martin – the incumbent -- as a candidate! *The memo reads as if Martin did not exist*. The only reference to a candidate

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[7] Leggett specifically testified, in his deposition, that "education," including school rank, honors, and grades were *not* factors in the decision, since both Martin and Cunningham were already teaching at Howard. Leggett deposition at 223, line 10 through 224, line 16.

[8] MJ Facciola acknowledged:

> Finally, that **Martin's professional experience in EEO law was greater than Cunningham's** undercuts the argument that Cunningham was substantially more qualified than Martin. (Emphasis added)

2003 U.S. Dist. LEXIS 18501 at 26.

[9] Taslitz admitted that he drafted the memo, although, in their depositions, none of the Committee members, except Taslitz, could confirm ever previously seeing it. MSJ at 30. Committee members testified that it may have been a "draft," rather than a final copy, because it was not signed. MSJ at 29-30. Taslitz deposition, page 143-144. (Interestingly, at trial, *both* Taslitz and Leggett testified that they authored this memorandum.) Taslitz testified that there may have been a "tentative" vote, a week before the December 18, 1997 vote; however, all other Committee members testified that there was only one vote. Leggett testified that he was still deliberating and "confused" during the December 18, 1997 meeyting and had made no previous decision.

for the EEO/Labor position, other than Cunningham, was to *an outside candidate who specialized in Labor Law* (Martin specialized in EEO law). MSJ at 36. The December 18, 1997 vote was a retaliatory vote to remove Martin from the faculty – whether she was replaced by Cunningham or someone else.

The "retaliation road" began with Bullock, proceeded to Newsom and then to Tazlitz. From that point on, "all roads lead to Andrew Taslitz." Taslitz is the *only* member of the APT Committee who made any negative claims about plaintiff's teaching, collegiality, or service to the law school. Taslitz is directly contradicted on all of these points by all four of the remaining members of the APT Committee. These four members, Profs. Leggett, Smith, Nolan and LaRue,[10] praised Professor Martin with respect to all of these criteria. *See* Ex. D, Chart of Committee Members' Assessment of Martin. Even the committee's official statement, three years into this litigation, contradicts Taslitz' statements alleging problems with Martin in these areas.[11]

The remaining criterion, "scholarship," is the only criterion that any Committee member – other than Taslitz -- claimed was the reason for Cunningham's selection for the EEO/Labor position that Martin had held at Howard for the previous two years; however, all committee members -- other than Taslitz -- testified that, during their deliberations, an APT committee member represented that: 1) Cunningham's article was "in print;" 2) Cunningham had the "superior record of scholarship;" 3) that Cunningham made substantial progress toward completing two additional articles since joining Howard's faculty; and 4) Martin had just completed the article that she had begun more than two years earlier and had no drafts of other articles or works in progress. Each and every one of these representations was *blatantly false.*

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[10] MJ Facciola erroneously concluded that Gavil was a member of the APT Committee during 1997-1998 and improperly attributed Gavil's purported opinion of Martin to part of the Committee's deliberations.

[11] Taslitz testified in ways that are inconsistent, illogical and confused. In his 2002 deposition, he claimed that he "did not recall" material facts. 2003 U.S. Dist. LEXIS 18501 at *20. He could not even remember the year that he took his own sabbatical to write his Evidence case book. Pl. MSJ at 18. Speculating why Bullock alleged that Martin had "bad judgment," Taslitz referred to a faculty meeting in which Martin debated an issue with a colleague. Taslitz complained that Martin was "very insistent" that her position was correct and that this insistence might have been interpreted as "bad judgment" by some faculty members. *Id.* MJ Facciola quoted Taslitz' testimony. 2003 U.S. Dist. LEXIS 18501 at *20. Despite Taslitz' purported negative perception of Martin's comments during that meeting, *not one of the other eleven faculty members* who testified indicated, in any way, that her behavior at *any* faculty meeting was inappropriate. To the contrary, Boyer, who was the professor with whom Martin debated on the exam issue, testified that they disagreed and debated, but with respect, as colleagues. Pl. MSJ at 40-41. Boyer testified that Martin was one of the most collegial and respectful members of the faculty and that he and other senior members of the faculty believe that she should win this case and be reinstated. Pl. MSJ at 40-41.

As discussed more fully below, each of these misrepresentations is readily disproved by simply examining the resumes (**Ex. P,** Martin resume, MSJ Ex. E; **Ex. Q,** Cunningham resume, MSJ Ex. F;) and Martin and Cunningham 1997 applications (**Ex. R,** Martin, MSJ Ex. YY; **Ex. S,** Cunningham, Joint Tr. Ex.50); however the "Unsuspecting 4" Committee members had no reason to know that Taslitz would lie about their mutual colleagues -- particularly since Taslitz presented himself as Martin's "friend" and mentor.

Taslitz admitted that he took the lead in presenting Martin and Cunningham as candidates. Taslitz depo at 141-142. The "Unsuspecting 4" had been led by Bullock to believe that there was only one position to fill -- the EEO labor position. Forced to choose between two "terrific" colleagues,[12] the "Unsuspecting 4" voted for Cunningham, mistakenly believing that she was the candidate with "a proven record of scholarship," and therefore the better candidate to help Howard maintained its accreditation status for scholarship over the long term. The "Unsuspecting 4" did not realize that it was Martin, not Cunningham, who had the "proven record of scholarship" until confronted with the candidates' résumés during their 2002 depositions[13] and/or at trial in 2006.[14] They were completely unaware of Taslitz's private meetings with Bullock regarding Martin and that Bullock told Taslitz, Newsom that she did not want Martin on the faculty. The source of all negative comments about Martin was Taslitz. *See* **Ex. T,** Chart of APT Committee's Assessment of Martin. Martin non-renewal was engineered by Taslitz[15] -- and Taslitz took his orders from Bullock.[16]

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[12] Prof. J. Clay Smith, testified that that both Martin and Cunningham were "terrific." MSJ at 31.

[13] Examining the résumés during his 2002 deposition, Smith exclaimed, with surprise, that it was plaintiff, not Cunningham, who had the superior record of scholarship. Pl.'s MSJ at 33; Smith depo 144-145.

[14] During trial, Prof. LaRue testified that Cunningham's article was actually published, in print, by December 18, 1997. On the stand, LaRue had to be shown Cunningham's own application stating that her article had just been accepted for publication for the spring of 1998 to demonstrate to him that he was mistaken. At trial, Professor Nolan changed her deposition testimony, that Cunningham's article was "in print" on December 18, 1997, to state that Cunningham's article was in the "final editing stage." This testimony, and some other testimony by the "Unsuspecting 4," does indicate that, by the time of their depositions and/or trial, they did try to hold up to the Howard mantra, "Don't air our dirty laundry, commanded by Dean Bullock (Pl.'s MSJ at 49) to convince professors and students that exposing Howard's wrongdoing will result in leaving African-American students without a law school to attend and/or with greatly depleted resources and programs. In reality, however, Howard has spent possibly millions of dollars making at least four outside EEO defense firms, specializing in *opposing* civil rights cases, even richer – rather than reinstating Martin and making some attempt to compensate her for the 8 years it has stolen from her and her family.

[15] Far from being the "social engineers for justice" contemplated by Charles Hamilton Houston, and touted by Howard as the goals set for its students, professors, administrators and leaders, in this case Howard's law school Dean, at least one law professor, several administrators and Howard attorneys have acted as engineers for

E. **Comparison of the Credentials of Martin and Cunningham**

When Prof. Martin and Ms. Cunningham were hired in 1996, both sought to teach EEO law and Torts. In the spring of 1996, Howard selected Prof. Martin as the superior candidate to teach both of these courses. In fact, in order to entice Prof. Martin to leave her tenure track position at Cleveland State, and from pursuing other tenure-track positions for which she was interviewing, Howard guaranteed, in writing, at least a two year visitorship, at the promoted rank of "Associate Professor," while waiting for a tenure-track position to become available at Howard.[17] Ms. Cunningham was only guaranteed a one year visitorship, at the beginning rank of "Assistant Professor." See **Ex. U** (Ex. KKKK of MSJ), Chart comparing Martin and Cunningham in 1996.[18]

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injustice have made a mockery of Howard's civil rights legacy.

[16] When Howard's most senior member of the faculty, Boyer, expressed his concern that Bullock was excluding senior faculty members from the most influential Committees at the law school, in favor of Taslitz and the other few White professors, such as Gavil, Bullock admits that she replied, "The White boys do the work." Pl. MSJ at 21-22, fn. 9. In order to keep his appointments to controlling Committees at Howard Law School, Taslitz had to perform the deeds that Bullock wanted performed.

[17] Arguably, Martin's two year contract provided her even more protection than would a tenure-track position. In his deposition, page 307-308**,** Taslitz testified that even tenure-track professors are not guaranteed renewal:

> I don't believe that I ever led you to believe that your job was secure conditioned upon satisfactory performance and the last part, "as is any job." I don't think that's true of a tenure track position. Someone can be in a tenure track position and their contract cannot be renewed because the school says the needs have changed or they're raising their sights as to the kind of person they're looking for or whatever reason. There's no guarantee of contract renewal for someone who is a tenure track so I certainly wouldn't have said that in your case….

Taslitz' statement also corroborates Plaintiff's testimony at trial, regarding her November 16, 1996 letter to. Gavil (MSJ Ex. VVV). Plaintiff testified that her statement to Gavil was something that she would have said even if she had held an official tenure-track position. Martin asked Gavil to correct any inaccurate statements to colleagues that he may have made regarding her interaction with a particular student who had complained that Martin did not call on her fast enough in class -- particularly because she was a new, visiting professor hoping to become a permanent member of the faculty.

[18] Prof. Martin had taught both EEO law and Torts for two years at Cleveland State University. She was recognized as a national expert in EEO law, had extensive experience in EEO law, particularly as a Special Assistant to Commissioner Tucker at the EEOC, developing national policy in EEO law. Ms. Cunningham had clerked, for one year, for the Honorable Constance Baker Motley and had participated in the drafting of an opinion in an EEO case. Cunningham had also been an Associate, for three years, in a New York law firm, where she worked on a variety of cases, including insurance law, divorce law and some work defending corporate employers in employment discrimination cases. Pursuant to the University Handbook, *Cunningham did even not qualify to hold a "visitorship"* because Visiting Professors were required to hold rank at another school before visiting Howard. Cunningham did not hold such a rank because she had never taught before she joined Howard's faculty. Cunningham's status, in violation of the handbook, lends some corroboration to Martin's testimony that Taslitz represented to her, in negotiations regarding her hire, that Howard uses its "visitorships" flexibly and renewed them when it did not have tenure-track positions to offer candidates.

A year and a half later, Howard claimed that the junior Visiting Assistant Prof. Cunningham was a "far superior" candidate than was Visiting Associate Prof. Martin to teach *the very EEO course* that Martin had been teaching at Howard for two years and in Cleveland for an additional two years, whereas Prof. Cunningham had never taught it at all. See **Ex. V** (Ex. LLLL of MSJ**,** Chart comparing Martin and Cunningham in 1997.

The logical question is: "What happened less than two years later that destroyed Prof. Martin's career and ability to even support herself and her daughter?" What changed the positions and qualifications of these two professors, Martin and Cunningham? The answer is that Martin was stalked in her workplace by a homeless stranger and Cunningham was not. There is no explanation that rebuts the *prima facie* case of retaliation.

F. <u>Howard's Purported Hiring Criteria Examined and Applied</u>

At trial, Howard stated that it used four criteria to select Cunningham over Martin. Each will be examined below to determine whether Howard has produced any credible evidence to support its claim.

1. <u>Teaching</u>

In a May 11, 2001 memorandum (**Ex. X,** page 2; Pl.'s Trial Ex. 33), the APT Committee, *via* its Chair, Prof. Isaiah Leggett, stated:

> Professor Martin and Professor Cunningham (sic) were among the four candidates applying for the second tenure track position covering labor law, collective bargaining and other general course subjects.[19] …. All of the four candidates … were found to be quite competent as teachers and capable of fulfilling the Law School's instructional needs in this area…. Students participating in the process appeared to be mixed in their preference of Professor Martin and Cunningham. The Committee did receive a petition from a number of students asking that we select Professor Martin for the position.

Howard's admission, – made even three years into this litigation, precludes any conclusion that Prof. Martin's non-renewal was due to any question of teaching ability. In fact, Howard's admissions are consistent with Dean Bullock's admission, in her Answer to the Complaint, that Prof. Martin was a very good teacher, with above average teaching evaluations, as well as the deposition testimony of APT Committee members,

[19] This is not an accurate description of the advertised course or of either Prof. Martin's or Cunningham's applications. The advertised position was EEO/Labor, with emphasis on EEO law, which is the course that Prof. Martin was teaching at the time. Both Martin and Cunningham applied for *all* available positions; neither limited her application to the EEO/Labor position. This "APT Committee justification memo directly contradicts Prof. Taslitz' deposition, pages 206-207, in which he testified that the Committee members determined the possible slots for the candidates, including whether Prof. Martin would be considered for one or more positions, and that she did not restrict her application to any particular advertised position.

Profs. Nolan, Leggett, Smith and LaRue. *See* Pl.'s MSJ at 19, 23, 32. In addition, students wrote letters to Dean Bullock and/or University President Swygart, protesting Prof. Martin's non-renewal and praising her for her teaching ability, exam-taking workshops, sample exams and answers and extensive availability. *See* Pl.'s MSJ at 19; **Ex. W**, also in record as Ex. VV of Pl.'s MSJ.

One student, Mika Dorsey, referred to Prof. Martin as "phenomenal woman," for her own professional accomplishments and contributions and for her willingness to give her time to help others. Ms. Dorsey explained that Martin had arranged classes to be taped for her and met with her regularly to review all materials covered in class while she was obtaining medical treatment for a life-threatening illness. **Ex. W**, second letter.[20]

Bullock told Dean Samuel Thompson, of the University of Miami, that the only reason that Martin was not being renewed was that she needed a teacher to teach tax, but that Martin was regarded as a very good teacher. Pl. Facts ¶ 227; Bullock depo at 150. Even in 1999, in response to Plaintiff's EEOC charge, Bullock told the EEOC investigator interviewing her: *"There is no particular reason that I would not want Martin to teach at Howard University School of Law*." Pl. MSJ at 19. Howard's admissions that Prof. Martin was a very good teacher preclude any purported defense that Professor Martin was not renewed because of her teaching.

2. **Scholarship**

a) **The APT Committee's Official Position Statement**

MJ Facciola noted some of Howard's glaringly false statements regarding Prof. Martin's scholarship.

> In Howard's Answers to Interrogatories dated October 17, 2000, Howard stated that Martin was refused tenure[21] in part because as of December 18, 1997 Martin had "no scholarship articles accepted for publication." Plains. Mot. at 25. In fact, HU was aware that Martin's *911* article had been accepted for publication on December 17, 1997, that she had substantially completed work

[20] It was particularly disgraceful that Mr. Schwab addressed the jurors, pointing to plaintiff, saying, "Do you want and *this woman* teaching your children?", as if Professor Martin had committed a crime of moral turpitude or endangered the welfare of her students (though adults, not "children"). Shwalb also told jurors that Prof. Martin had "squandered" her opportunity to teach. There was nothing to support such an outrageous insult and there was overwhelming evidence to the contrary.

[21] The parties agree that Martin never applied for tenure and was never "refused tenure." She would have been eligible for tenure in 1998-1999, had she been renewed. MJ Facciola's factual error was one of many. Plaintiff has repeatedly asked, without opposition from Howard, that MJ Facciola's *Report and Recommendation* (still reported on the internet and on LEXIS, without the modifications made by Chief Judge Hogan from November 21, 2005-the present) be vacated. Howard has filed responses agreeing with Plaintiff that the *Report* is replete with the material factual errors identified by Plaintiff. Plaintiff again requests that the *Report* be vacated. The false representations it contains continue to harm Plaintiff's professional reputation and ability to earn a living.

> on a second article (*Lights*), and that she was in the process of researching a third. Taslitz Dep. at 159:12-162:13. Significantly, four of the five APT Committee members testified that they knew of the article's publication. Plains. Statement of Facts at 27. Taslitz even testified that he had informed the other members that Martin's article was recently accepted for publication. Taslitz Dep. at 141:7-16.
>
> Leggett testified that not only was he made aware that the *911* article had been approved by the time of the December 18 meeting, but that he was even considering giving Martin credit for two different articles. Leggett Dep. at 117:15-121:8.

2003 U.S. Dist. LEXIS 1850 the 1 at * 22-24.

Nine months after producing its October 17, 2000 Answers, Howard produced July 11, 2001 *Supplemental Answers to Interrogatories*, including a Memorandum signed by Prof. Leggett, as the official position of the APT Committee, page 2-3 (**Ex. X;** Pl.'s Trial Ex. 33). The memo stated:

> Individual faculty members who participated in the process clearly favored Professor Cunningham, primarily for her academic vigor, research and publication abilities and potential for growth as a scholar…. Although Professor Martin had been involved in the legal profession longer, the quality of her academic and scholarly production was viewed by the members of the faculty and the APT Committee to be less substantive than Professor cunningham's research and publication potential…. She had already published one article and did extensive legal research in her position as a clerk for a U.S. District Court Judge, Constance Baker Motley…. During her initial visit to Howard, she was able to actually publish another article, and she made a very favorable impression on the Committee with the vast amount of work she had accomplished on a variety of other research and publication projects in process. **Prof. Martin did not complete a publication during the same visitation period at Howard.** (Emphasis added.)

Profs. Martin's and Cunningham's own resumes and applications demonstrate that Taslitz' representations regarding their scholarship were blatantly false. Pl. MSJ at 31-35. By December 18, 1997, Cunningham's 67 page article (published pages) was not yet in print, but was scheduled for publication in the spring of 1998 – the same status as Plaintiff's article. Pl. MSJ at 34-35. Both Plaintiff's and Cunningham's articles were actually published in the Winter of 1998 (**Ex. Y**, first page of Trial Ex. 133, internet version of Cunningham article; and **Ex. Z**, first page of internet version of Plaintiff's article[22]– a full year after the APT Committee's December 18, 1997 decision. The Committee's statement is blatantly false and pretextual.

Although MJ Facciola recognized Howard's false statements to deny Howard's *Motion for Summary Judgment*, he did not consider that Howard's fabrications justified granting *Plaintiff's Motion for Summary*

[22] The Court excluded this exhibit at trial, allowing Howard to mislead the jury about the publication date.

Judgment.[23] As APT members were well aware, both from Prof. Martin's application memo and from her conversations with them, that the article had been *completed* for months.[24] As her November 5, 1997 application memo stated, during her first year at Howard, Martin had not only expanded "911…," but had a draft of a second article, "*Lights Camera, Discrimination! 'Playing' the Victim under Title VII*" (**Ex. R,** page 5; MSJ Ex. YY), which she had submitted to Dean Bullock as part of her application for a summer grant, which she had been awarded, based on the progress of her scholarship. She also had a thesis, title, and preliminary research conducted for a third article, "*Still Racist after all these Years – and Covered by the Americans with Disabilities Act*?" *Id.* In contrast to Cunningham's purported planned articles expanding the same topic, all of Plaintiff's articles, since joining Howard, had different theses and relied on different research.

The resumes and applications clearly show that it was Prof. Martin, by far, who had the superior record of scholarship to Cunningham, in the fall of 1997. When Cunningham was hired, two years earlier, Bullock's memo justifying Cunningham's salary, did not represent her as anyone with a "record of scholarship," but as:

> …a young lawyer … who has already demonstrated interest in and potential for research and writing. While still a law student she published Unmaddening: A Response to Professor Angela Harris, 4 Yale J.I., & Feminism 155 (1991).

During her two years at Howard, Cunningham had only produced the one article, 67 pages long, not yet published, as of December 18, 1997; yet, Taslitz falsely touted Cunningham, as compared to Martin, as being the "only candidate" with a "proven record of scholarship." Pl. MSJ at 34-35. Cunningham had no previous publications, except for a "student note," which is normally not counted at all or is counted with little weight,

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[23] MJ Facciola misrepresented in his *Report,* that Plaintiff, as well as Howard, did not file a Fed. R. Civ. P. 56.1 and Local Rule 7.1(h) *Statement of Material Disputed Facts*. On November 21, 2005, Chief Judge Hogan issued an Order correcting MJ Facciola's erroneous statement; however, the consequences of the error were never addressed. MJ Facciola also erroneously stated that Prof. Martin was turned down for tenure and that Howard had determined that she had not met the qualifications for a "promotion" to the rank of Associate Professor; however, Plaintiff was not rejected for tenure. Martin was not eligible for tenure consideration until the following year, but was precluded from consideration due to her non-renewal. Pl. MSJ at 33. Martin was not being considered for a "promotion" at all; she was already an *Associate* Professor at Howard, hired at that rank two years earlier, since she joined Howard with two years of law school teaching experience. MJ Facciola appeared to be confusing Martin's qualifications with those of Cunningham, who was hired in 1996, with no teaching experience , as a "Visiting Assistant Professor," and promoted to *Associate* Professor in 1998.

[24] Director of Faculty Services, Mrs. Bruner, testified that Prof. Martin had submitted the *completed* article to her for distribution to law journals on August 4, 1997, but that it was corrupted in her typing pool and had to be retyped. (See also **Ex. AA,** Mrs. Bruner's notes from August 1997- 1997) Mrs. Bruner testified that the re-typing of Martin's was given low priority by Dean Bullock.

when considering a faculty member for a promotion, raise, tenure or re-appointment. Plaintiff's MJS at 34. Martin had published five articles since law school, and had been credited with at least four by Howard when she joined Howard's faculty. Pl. MSJ at 34-35. The undisputed documented evidence of record demonstrates that Howard's asserted reason for Cunningham's selection over Martin was blatantly false and pretextual.

b) **<u>Taslitz Deliberately Misrepresented the Scholarship of Martin and Cunningham to Convince the "Unsuspecting 4" to Vote against Martin</u>**

Taslitz admitted that he was the APT Committee member who presented the candidates to the other four members of the Committee, summarizing their qualifications. Pl. MSJ at 36. Tazlitz deliberately misled Profs. Nolan, Smith, Leggett and LaRue into believing that it was Cunningham, rather than Martin, who had the "superior record of scholarship," when, in fact, *the opposite was true*.

Nolan testified that she voted in favor of Cunningham, over Martin, because "someone on the Committee" had represented that Cunningham's article was actually in print, rather than just accepted for publication and that Cunningham had demonstrated more potential for scholarship than had Martin. Pl. MSJ at 32-36. Smith also testified that "someone on the Committee" represented that Cunningham's scholarship achievements were superior to that of Martin and that she had produced more scholarship than had Martin since joining Howard's faculty. Pl. MSJ at 35-36. Leggett testified that he was "confused" about the status of Martin's article and as to whether she was working on a second article since joining Howard's faculty. MSJ at 31-32. The statements of professors Leggett, Nolan and Smith all demonstrate that the Committee members did not rely on their own review of the resumes or applications, but instead, relied on Taslitz' presentation.

MJ Facciola recognized that Prof. Leggett, the named Chair of the Committee, relied on another Committee member's representations regarding the candidates' publications, rather than read them himself.

> Nevertheless, when asked why he chose Cunningham, Leggett testified that Cunningham had not only published during her time at Howard but had also presented "sufficient information" to suggest that she would publish again and was in the process of doing so. Id. at 160:6-19. Although Leggett testified that publication was a "crucial" factor in his decision, he admitted to not even having read Cunningham's article. Id. at 170:19-20.[25]

[25] Actually, all of the Committee members, except Taslitz, admitted that they had not read *either* Martin's or Cunningham's articles before the December 18, 1997 decision. Pl. MSJ at 33. In her article, Cunningham theorized that Title VII protects groups other than those specifically enumerated in Title VII. When the two Committee members who had Title VII background, Smith and LaRue, were confronted with Cunningham's

Again, all roads lead to Taslitz. Taslitz improperly credited Cunningham with two additional articles in progress, when, in fact, Cunningham did not have any drafts or new research for a second or third article; Cunninhgam had merely *stated her intention to expand the article she had just written* into two more articles, "*The Rise of Identity Politics II" and* "*The Rise of Identity Politics III,*" relying on the same research and thesis she had already used for her first article. Pl. MSJ at 34.

Taslitz *misrepresented* the facts to his colleagues when he told them that Cunningham's article was "in print," on December 18, 1997 and that she had the "superior record of scholarship," as compared to Martin. Once the APT members were deposed, there was no way that Howard could continue to conceal Taslitz' improper conduct. If the "Unsuspecting 4" had actually picked up the resumes and or applications, no one would have been "confused" about the status of Martin's "911:…" article, the fact that she had a draft of a second article, "*Lights, Camera, Discrimination*!...," or that she had a title, thesis and preliminary research conducted on a third article since joining Howard's faculty, "*Still Racist After all these Years*…." This information was clearly stated in Martin's application. Similarly, if "Unsuspecting 4" had picked up Cunningham's résumé and/or application, they would have readily seen that her first article had just been accepted for publication, that Cunningham had no drafts of additional articles; rather, the only evidence that she would publish again was her own statement that she intended to expand her first article into two more articles.

Howard's main trial strategy was to confuse the jury into believing that Prof. Martin's scholarship was deficient, and that she made "11 excuses" in her November 5, 1997 memorandum for her delayed publication of her "911…." article as a desperate attempt to save her job; however, this memo is 6 pages long, single spaced (**Ex. R**) – the same approximate length of Cunningham's application memo (**Ex. S**) Martin's memo stated her extreme pride in her "*911…*" article, as well as her teaching, scholarship in progress, service to the law school

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thesis, both Profs. Smith and LaRue testified that the thesis of Cunningham's article was *incorrect*, as a matter of law. Pl. MSJ at 34. In contrast, APT Committee members praised Prof. Martin's "*911: How Will Police and Fire Departments Respond to Public Safety* Needs and *the Americans with Disabilities Act?"* as "excellent," "covered the universe of the topic," "very lengthy and very detailed," "deemed to be quite substantial." Pl. MSJ at 32-33. Even Dean Bullock testified that, when Howard was evaluated for accreditation purposes, Martin's article received "a wonderful accreditation review" by the American Association of Law Schools. Pl. MSJ at 32. Prof. LaRue specifically acknowledged that, during her first year at Howard, Prof. Martin "changed it" and "deepened the analysis," resulting in "a good piece of scholarship." *Id.*

and other accomplishments. She reviewed her first year at Howard, making observations and recommendations for the future, clearly assuming that she would remain on the faculty. There is nothing in the memo that indicates any fear of non-renewal, as Shwalb argued on behalf of Howard.

Martin testified that she *added* the 11 *reasons* that extensive "*911*.." article took as long to send out as it did because Taslitz instructed her to do so, after he reviewed her first draft, which did *not* include any such "reasons" for the delay. Although Mr. Shwalb led the jury to believe that Martin was lying about this issue, **Martin's testimony is corroborated by Taslitz. Taslitz testified that he reviewed Plaintiff's first draft and that he advised her to add the paragraph listing the reasons for the delays in publishing "911..."** MSJ Ex. 22, Taslitz depo, at 230-231. Taslitz admitted that he told Martin that her application looked "very good." *Id*. He did not indicate to her that she was in danger of rejection by the Committee.[26] This conversation took place in early November of 1997 – before the stalking began. Everything changed after the stalking began.

Howard never had *an iota* of evidence to support its articulated purported reason(s) for Martin's non-selection. Howard lied in Court filings for three years was because the truth was completely unconscionable, unethical, "non-collegial" and *illegal* under Title VII and the D. C. Human Rights Act. Howard should not be permitted to survive judgment, as a matter of law, based on a blatantly false assertion, contradicted by its own witnesses. Such violations of Fed. R. Civ. P. 11 and 26(h) and should be severely sanctioned, not rewarded.

3. <u>Service to the Law School</u>

The APT Committee May 11, 2001 memorandum, page 3 (Pl.'s Trial Ex. 33), stated:

> Martin and cunningham (sic) were both viewed favorably regarding service to the legal profession, the community and the University.[27]

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[26] There are some differences in Martin's and Taslitz' testimony. Martin testified that *Taslitz asked her* to review her memo before she submitted it to the entire Committee, and that he suggested that she add the paragraph to highlight all she had accomplished under the adversities that she had faced that year. Taslitz testified that Martin *asked him* to review the draft. Martin vehemently denies ever making such a request. Had she made such a bold request, Taslitz, as the Vice Chair of the Committee, should have refused; however, Martin, as a candidate, was not in a position to refuse to allow the Vice Chair to review her draft.

[27] Deeming the candidates equal actually grossly undervalues Martin's 17 years of contributions to the legal profession, civil rights and public service, as contrasted with Cunningham's one year federal clerkship and 3 years as an associate in a high paying law firm representing corporate clients, prior to her two years of teaching.

Howard's own admission precludes any defense that Prof. Martin was not renewed because she did not contribute sufficiently to the University, the community or the legal profession. As Martin documented in her application (**Ex. R**, page 5, MSJ Ex. YY), she provided Howard students with extra bar preparation classes, on Saturdays and other non-class days, including recruiting an Assistant Maryland Bar Examiner participate, to help students maximize success in law school exams and the bar exam. Howard Law School passage rate for Maryland had become a major concern and even attracted national publicity. (MSJ at 29; Facts ¶ 142) Even Dean Bullock testified that she was aware that Prof. Martin gave extra exam-taking workshops and prepared extensive sample exams and answers for students. (MSJ at 29; Facts ¶ 142)

Prof. Martin also acted as a judge, on a Saturday, for Howard's Trial Advocacy Program, volunteered and participated in Howard's mentoring program, "Close Up," and taught exam taking for the Regional BALSA (Black Allied Law Students Association) conference at Howard. (MSJ at 29; Facts ¶ 142) Profs. Boyer and Nolan testified that Plaintiff spent a great deal of time meeting with students. (MSJ at 29)

4. <u>Collegiality</u>

The APT Committee May 11, 2001 memorandum, page 3 (Pl.'s Trial Ex. 33), stated:

> Martin and cunningham were both viewed favorably regarding service to the legal profession, the community and the University.

These statements are admissions of a party-opponent – made three years into this litigation, and do not in imply that Martin was not collegial, as alleged by Taslitz – once again, the only Committee member who had private conversations with Bullock about Martin's candidacy.

MJ Facciola acknowledged that Taslitz is contradicted by his fellow Committee members.

> The third suggestion of pretext is rooted in the Committee's assessment of Martin's judgment. **Leggett testified, contrary to Taslitz' assertion, that he found Cunningham and Martin "basically both qualified . . . judgment-wise."** Leggett Dep. at 194:22-195:3. **Leggett also testified inconsistently with Taslitz on the issue of faculty comments about Martin**. … In fact, **according to Leggett, faculty members generally had "good things [to say] about [Martin's] .. . work,"** Leggett Dep. at 249:7-12, and **there was "no faculty concern brought to [Leggett's] attention regarding Martin's appointment."** Id. at 251:13-15. **Leggett himself admitted that he found Martin "to be collegial" based on his personal contact with her**. Id. at 258:20-259:7.
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> … **the articulated reasons for firing[28] Martin are contradicted by the potential testimony of**

[28] The parties agree that Martin was not "fir[ed]." She was not renewed. This is one of the many material

> **members of the ATP committee who have voiced positive views of Martin**.. …contrary to HU's contention that Martin displayed poor judgment, **there is evidence that certain faculty members had positive impressions of Martin and that both she and Cunningham were viewed as equally qualified in terms of their exercise of judgment.**

2003 U.S. Dist. LEXIS 18501 at *24-26.

All APT Committee members -- except Taslitz -- deny that there were any allegations of "non-collegiality" or "bad judgment" in its deliberations regarding Martin. In fact, *all* APT Committee members – including Taslitz -- testified that they found Martin to be very collegial and that they all liked and respected her. MSJ at 27-29, 39-41; Pl. Facts ¶¶185-186. Smith testified that he found the Martin to be "terrific" and someone whom he "admired, both professionally and personally." MSJ at 31. Nolan, hugged Martin after the decision and said, "I wish I had a job for you. I am praying for you." (Pl.'s Facts ¶ 185) Nolan even asked Bullock if there were any vacant positions for which Martin could be considered, but Bullock told her that there no more vacant positions.[29] Pl. MSJ at 40. Even *Taslitz* described Martin as a "warm" person and testified that he considered himself her friend! MSJ at 21; Pl. Facts ¶ 17, 186.

The most senior faculty members, Profs. Spencer Boyer and Henry Jones, part of the civil rights legacy of which Howard boasted during trial, testified that they found Plaintiff to be *one of the most collegial* members of the faculty on a divided faculty with some non-collegial members. Pl. MSJ at 40-41. Howard has produced absolutely *no* evidence that the APT Committee ever considered any allegations of "non-collegiality" or "bad judgment" in its deliberations.[30] The only decision-maker making this allegation is Taslitz – and he is contradicted by every other member of the Committee! As an accused retaliating official, Taslitz has reason to fabricate to conceal his improper role in Bullock's retaliatory plan to remove Martin from the faculty.

Howard fabricated the "non-collegiality" "bad judgment" defense *three years* into this litigation, after the Court forced Howard to produce documents and witnesses for depositions. This evidence demonstrated that Howard's previous "scholarship" defense was completely frivilous. When Plaintiff survived Howard's years of

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factual errors in MJ Facciola's Report and one of the many reasons that it should be vacated.

[29] Bullock's statements to Nolan were false. Under *Holcomb v. Powell*, 433 F.3d 889, citing *Aka v. Washington Hospital Ctr.*, 156 F.3d 1284, 1289 (D.C. Circ. 1998), such lies are evidence of discrimination.

[30] Plaintiff sought APT Committee notes in discovery, but Howard refused to produce them. Pl. MSJ at 48-49. Plaintiff is therefore entitled to an adverse inference that the Committee never raised "collegiality" or "bad judgment" as a reason for Plaintiff's non-renewal.

improperly evading and delaying discovery, Howard resorted to fabricating a list of additional lies, all of which were easily disproved, except for the nebulous claim of "non-collegiality" and "bad judgment," which amounts to a self-serving mudslinging campaign by Andrew Taslitz[31] and his close friend, Andrew Gavil.[32]

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[31] None of the Committee members -- other than Taslitz – heard Gavil's accusation that, in a private conversation in October of 1996 – more than a year before the December 18, 1997 decision, Martin referred to a student as a "bitch." *See* Plaintiff's November 13, 2002 *Motion to Strike from the Record Defendant's Motion for Summary Judgment and to Preclude Defendant's "Eleventh Hour" Defense, Alleging "Bad Judgment,"* Howard never made this accusation until four years into this litigation. Gavil blurted it out, without warning, in his September, 2002 deposition, days before discovery ended. *Id*. Martin vehemently denies the reference, but readily states that she did refer to the student as a "brat" for her childish and inappropriate behavior in class and for complaining to Gavil that Martin did not call on her "enough" in class. The student later apologized, took every course Prof. Martin taught at Howard, signed and even helped circulate a petition protesting Martin's non-renewal. *See Plaintiff's Motion to Strike,* pages 7-8. Although MJ Facciola specifically precluded Howard from using Gavil's testimony in its *Motion for Summary Judgment*, Howard defied the Order and framed its entire *Motion for Summary Judgment* around this prohibited testimony, highlighting it **in bold**. MJ Facciola ignored both his own September 24, 2002 Order and Plaintiff's *Motion to Strike* and relied on the forbidden testimony in his published October 20, 1997 *Report and Recommendation*.

[32] In her November 13, 2002 *Motion to Strike*, Plaintiff discussed pointed out the lack of credibility in Gavil's testimony, not only regarding their communications regarding this student, but also Gavil's false claim that he saw Martin "rushing" to get her article out, in the spring of 1998, in the photocopying center. Gavil repeated this testimony at trial, insisting that he saw Martin with "envelopes" and copies of her article, getting them ready to mail to law journals. Both Martin and Bruner have repeatedly testified that Martin did not make the copies of her articles, prepare envelopes, or mail her article to law journals, but that Mrs. Bruner did this for her, as she does for most of the faculty members. In addition to the Martin's and Bruner's testimony, Plaintiff offers Mrs. Bruner's notes (**Ex. AA),** entries dated: 1) September 29, 1997,"generate law review labels; envelopes (Martin);" 2) October 31, 1997 (merge cover letters for article (Martin) (180);"3) November 25, 1997, "Reproduce 32 copies of 911 article;" 4) November 12, 1997, "Print and sign 32 cover letters for 911 article;" 5) November 25, 1997 "Prepare/mail 911 article to 30 law reviews;"6) November 12, 1997,"Print two individual cover letters (West Publishing and N.C. Press)"; 7) November 25, 1997, "Print and reproduce 30 copies of 911 'article version'"); 8) November 21, 1997 ("Print 2 copies of "book version" 911;" 9) November 21, 1997 "Prepare 30 pages 911 article w/cover letter for mailing; take to Copy Center;" 10) November 21, 1997 "FedEx on 911 book version w/cover letter to North Carolina Press." Even once the article was accepted for publication and other professors at other schools requested copies of the article, it was Mrs. Bruner, not Prof. Martin, who prepared the packages and mailed them. *See* **Ex. AA**, entries for March 5 and March 6, 1998, reflecting that Martin asked Mrs. Bruner to send a copy of her 911… to a professor at St. Mary's Law School, Prof. Dubin. Mrs. Bruner's March 6, 1998 entry indicates that Mrs. Bruner sent it to Prof. Dubin *via* Fed Ex. Howard has never produced any documentation to indicate that Prof. Martin ever personally used postage meters, obtained mailing envelopes or labels, or any other resources necessary to mail out copies or her article, even to one professor, let alone to 30 or more law journals. Moreover, the evidence is undisputed that Martin received her first acceptance for her article on December 17, 1997 and that she selected NYU to publish it, after NYU accepted it in January of 1998. There was, therefore, no reason for Martin to be "rushing" the article out in the spring of 1998. Gavil's "story" about seeing Martin with copies and envelopes in the Copying Center, "rushing" to mail out her article in the spring of 1998, is blatantly and patently false – as is his story that, in a private conversation, Martin referred to a student as a "bitch" or otherwise handled the student's inappropriate behavior in an unprofessional manner, in October of 1996. Finally, even if Martin had used a "curse word" to describe a difficult student, in a private conversation with a colleague who "surprised" her with the student's complaint, one such curse word would not justify the loss of her job more than a year later, where there was no

Taslitz' credibility has already been destroyed since he lied to fellow Committee members about the status of the scholarship of the candidates, Martin and Cunningham. Taslitz' word, then, cannot be enough to create a genuine dispute of fact, where all other evidence contradicts his word. Based on the evidence, no reasonable juror could possibly conclude that the Committee rejected Martin for a permanent position because they found her not to be collegial or because they determined that she had "bad judgment."

IV. **Howard's Misrepresentations of the Candidates' Credentials is Evidence of Retaliation**

Holcomb held that an employer's substantive misrepresentations regarding a candidate's qualifications constitutes evidence of discrimination. *Holcomb v. Powell*, 433 F.3d 889 (D.C. Cir. 2006), citing *Aka v. Washington Hospital Ctr*., 156 F.3d 1284, 1289 (D.C. Circ. 1998). As discussed in Pl. MSJ at 31-39, Taslitz grossly exaggerated the qualifications of Cunningham and grossly under-representing Martin's qualifications.

V. **Defendant's "Discriminatory Statements" and "Attitudes" are Evidence of Discrimination**

As discussed in Plaintiff's *Motion for Judgment on her Retaliation Claims*, pages 33-37, where the alleged discriminating official has made statements indicating discriminatory animus, or other "attitudes" suggesting that the alleged discriminator harbors discriminatory attitudes toward the plaintiff for a prohibited reason, these statements constitute evidence of discriminatory motive. *Holcomb*, 433 F.3d 889, citing *Dunaway v. International Brotherhood of Teamsters*, 310 F.3d 758 (D.C. Circ. 2002).

Bullock told Taslitz that she was having a "bad day" because of Prof. Martin's "bad judgment" and that she had "a lot to do" with respect to Martin's complaints about being stalked by Harrison at the law school (Pl. MSJ at 16-17; Taslitz deposition at 131-132).[33] Newsom also testified that Bullock had told him that she intended to take action to exclude Martin from the faculty and that Martin was on a "short list" of people causing problems for Howard, although he could not explain why. MSJ at 19-20. Bullock's secret

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meeting, conference, counseling, or other disciplinary action taken and the student apologized for her behavior.

[33] Ironically, *Bullock* was so "*non-collegial*" and exercised such "*bad judgment*" that she refused to take even the most basic steps to keep a criminal stalker out of the law school. She then lied, in writing, pretending that she was consulting with Security Director Dawson to solve the problem. Meanwhile, she secretly enlisted Taslitz to remove Martin from the faculty. Bullock could not exercise the "good judgment," self-control or professionalism appropriate for a Dean of a national law school, to refrain from sarcastically declaring to the EEOC, more than a year later, that Martin wanted her "to wrestle the stalker down." This is the same type of "bad judgment" that Bullock exhibited in Court, when she screamed out, pounded counsel table and threw her pen across the table, while Martin testified. One of Howard's attorneys grabbed Bullock's arm to subdue her.

conversations with Taslitz and Newsom demonstrate that she recognized that her motives for removing Martin from the faculty were improper and illegal. Bullock even lied to Nolan, telling her that she was trying to find another job for Martin since there were no positions left at Howard. Pl. MSJ at 21.

As discussed in Pl. MSJ at 16, Bullock made specific statements exhibiting extreme hostility toward Plaintiff in response to her requests to bar the stalker from the law school. Bullock told the EEOC:

> 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)

As discussed in Plaintiff's *Motion for Judgment on her Retaliation Claims*, page 36, within days after the stalking began, Bullock enlisted Newsom in a campaign of retaliation against Martin. Bullock and Newsom's actions were clearly designed to create additional emotional distress for Prof. Martin, to cause her to worry about her employment, knowing that the Dean's office was trying to build a written record against her to get rid of her. At a time when she was afraid to be in her office, the Dean's office was conveying to her that if she did not stay in her office (even during the semester break), waiting, like a "sitting duck" for Harrison, she could lose her job. The actions of the Dean's office clearly demonstrate a callous disregard for Martin's very life, reflecting hostility, retaliatory animus and discriminatory "attitude," as defined by *Holcomb*.

VI. The Jury Verdict Form Improperly Restricted Plaintiff's Retaliation Claims

A. Bullock's Withholding of Positions and "Con Law Conversion" Constituted Adverse Actions

As fully discussed in Plaintiff's *Motion for Judgment on her Retaliation Claims*, pages 10-22, the jury form improperly restricted the jurors to the decision that the APT Committee made, on December 18, 1997, selecting Cunningham over Martin, to fill the advertised EEO/Labor law position. The Court's restriction of the retaliation claim was based on Howard's misrepresentation that MJ Facciola's October 20, 2003 *Report and Recommendation* restricted Plaintiff's retaliation claim to the December 18, 1997 decision not to hire Plaintiff to fill the advertised EEO/Labor position. Howard's misconduct is sanctionable, under Fed. R. Civ. P. 11. Certainly, no court order should stand where it was based on fraud. Fed. R. Civ. P. 60(B)(3).

As discussed in Plaintiff's *Motion for Judgment on her Retaliation Claims*, pages 14-21, recent conrolling case law *Holcomb v. Powell*, 433 F.3d 889, *Rochon v. Gonzales*, 438 F.3d 1211(D.C. Cir. 2006) and *Chappelle-*

Johnson v. Powell, 440 F.3d 484 (D.C. Cir. 2006), require reversal of this limited interpretation of "adverse actions" under Title VII. *Chappelle-Johnson* held that **an adverse action includes the denial of an opportunity to compete for a vacant position.** Bullock denied Martin the **opportunity to compete for a vacant position** when she left positions vacant and pretended to convert the Constitutional Law/Civil Rights position, for fear that the Committee would fill one of the positions with Martin. No reasonable juror could conclude that, Martin was not more qualified to teach at Howard than an "empty chair" -- particularly while students were protesting both her non-renewal and the shortage of courses and faculty members, Martin had expertise and teaching experience in needed course areas and Howard's accreditation was in jeopardy.

B. **Howard's Premature Order that Plaintiff Vacate her Office was an Adverse Action**

As discussed on pages 15-16 of Plaintiff's *Motion for Judgment on her Retaliation Claims*, *Rochon v. Gonzales*, 2006 U.S. App. LEXIS 5028 (D.C. Cir. 2006), adopted, for Title VII, the definition of adverse action that it had set forth in *Passer v. American Chemical Society,* 935 F. 2d 322 (D.C. Cir. 1991), an Age Discrimination in Employment Act (ADEA) case. 2006 U.S. App. LEXIS 5028 at *16. *Passer* held that an employer had retaliated against the *retired* plaintiff when it cancelled a symposium that was to be held in the plaintiff's honor. *Id.* If the jury had understood that the cancellation of a symposium to honor a *former*, employee, *retired*, constituted an adverse action, it would have been compelled to find that Howard's premature order to Martin that vacate her office by May 29, 1997, on three days' notice, while she was still grading EEO exams, not due until June 16, 1998, also constituted an adverse action – particularly when the other exiting visiting professor, Betsy Levin, was not ordered to vacate at any time and stayed through July of 1998.

CONCLUSION

For the foregoing reasons, Defendants' motion for judgment should be denied.

Respectfully submitted,

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