

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**PLAINTIFF’S RENEWED MOTION FOR JUDGMENT ON HER BREACH OF CONTRACT CLAIM, OR IN THE ALTERNATIVE, FOR A NEW TRIAL, PURSUANT TO RULES 59 AND 60**

Plaintiff respectfully renews her April 25, 2006 Rule 50(a) motion for judgment, as a matter of law, pursuant to Fed. R. Civ. P. 50(b), notwithstanding the jury verdict, on her claim of breach of contract claim, or, in the alternative, for a new trial, pursuant to Fed. R. Civ. P. 59(a) and (e) and 60(b)(3). Plaintiff incorporates, by reference, all arguments made in her previous motion for judgment on her breach of contract claim.

**MEMORANDUM IN SUPPORT OF MOTION**

**I. Legal Standard**

**A. Rule 50(B)**

When assessing a Rule 50(b) motion for judgment after a jury verdict, the issue is whether there was sufficient evidence upon which the jury could base its verdict. *Scott v. District of Columbia*, 101 F.3d 748, 752-753 (D.C. Cir. 1996). Although the court cannot substitute its view for that of the jury, and can assess neither the credibility nor weight of the evidence, the jury's verdict can only stand if the evidence in support of it is "significantly probative" and "more than merely colorable." *Scott* at 752-753, citing *Mackey v. United States*, 303 U.S. App. D.C. 422, 8 F.3d 826, 829 (D.C. Cir. 1993), (citing *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 826 F.2d 637, 640-41 (D.C. Cir. 1988); *Ferguson v. F.R. Winkler GMBH & Co.*, 79 F.3d 1221, 1224 (D.C. Cir.), *cert. denied*, 136 L. Ed. 2d 252, 117 S. Ct. 360 (1996); *see also Siegel v. Mazda Motor Corp.*, 878 F.2d 435, 437 (D.C. Cir. 1989). The D.C. Circuit’s analysis is

consistent with that of the U.S. Supreme Court. *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996); *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).

The Court may grant judgment as a matter of law, after trial, where the facts are undisputed and/or no reasonable juror could find for the opposing party. This standard is the same standard used in the context of motions for summary judgment. Summary judgment is also appropriate where “no reasonable juror” could determine the facts in favor of the opposing party, in light of the evidence presented. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144 (1970); *Woodfield v. Providence Hospital*, 779A.2d 933, 936 (D.C. 2001). As the U.S. Court of Appeals for the D.C. Circuit has recently reaffirmed, where there is no genuine dispute as to material facts, there are no facts for a jury to determine and this case can be decided as a matter of law. *Holcomb v. Powell*, 433 F.3d 889 (D.C. C. 2006).

**B. Rule 59(a) and (e)**

Pursuant to Fed. R. Civ. P. 59(a) and (e), motions for new trials, and/or to alter or amend judgment, must be filed within ten days of the Court’s judgment or jury verdict. New trials granted under Rule 59 are based on errors of law, evidentiary errors, and/or error may have influenced the jury’s decision. *Ashcraft and Gerel v. Coady*, 244 F.3d 948 (D.C. Cir. 2001). The standard for whether a new trial should be granted, pursuant to Rule 59, is whether there was “a clear miscarriage of justice.” *Warren v. Thompson*, 224 F.R.D. 236, 238 (D.D.C. 2004), citing *Webb v. Hyman*, 861 F. Supp. 1094, 1109-110 (D.D.C. 1994); *Nyman v. FDIC*, 967 F. Supp 1562, 1569 (D.D.C. 1997), quoting *Federal Deposit Ins. Corp v. Meyer*, 781 F.2d 1260, 1268 (7<sup>th</sup> Cir. 1986)..

**C. Rule 60(b)(3)**

Pursuant to Fed. R. Civ. P. 60(b), a party may file a motion for a new trial based upon the adverse party’s commission of fraud, misrepresentation or other misconduct. Any such misrepresentation to the Court simultaneously constitutes a violation of Fed. Civ. R. P. 11 (b)(1), which prohibits a party from: 1) making representations to the court “for any improper purpose, such as to harass or to cause unnecessary delay, or needless increase in the cost of litigation;” 2) asserting “claims and defenses and other legal contentions” that are not “warranted by existing law” or are frivolous; 3) asserting “allegations

and other factual contentions” that have no “evidentiary support;” and 4) denying “factual contentions” that are not “warranted on the evidence.”

## **II. Facts as Set Forth in Chief Judge Hogan’s 1999 Decision**

Chief Judge Hogan denied Howard’s *Motion to Dismiss, or in the Alternative, for Summary Judgment, Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516; 81 Fair Empl. Prac. Cas. (BNA) 964; 15 I.E.R. Cas. (BNA) 1587 (D.D.C. 1999). Judge Hogan summarized the facts, as alleged in Plaintiff’s Complaint, as follows.

Plaintiff Dawn Martin was a Visiting Associate Professor at Howard University School of Law from July 1996 through May 1998.

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Plaintiff alleges that she has been the victim of hostile work environment sexual harassment as a result of the conduct of Mr. Leonard Harrison, a homeless person who resided in a shelter and was neither an employee nor a student of the University but who regularly used Howard University’s Law School library. Specifically, Plaintiff claims that Defendants knowingly allowed Mr. Harrison, a man characterized by the D.C. Metropolitan Police Department as a “stalker” with a criminal record and history of violence, free access to the law school campus and buildings, thereby facilitating his sexual harassment of Plaintiff in her workplace. Due to this alleged inaction, Plaintiff claims that Defendants have violated both Title VII and the DCHRA as well as caused her intentional infliction of emotional distress. Plaintiff also claims that due to her complaints, Defendant Bullock took retaliatory measures, on five different occasions, to ensure that Plaintiff was not offered a permanent professorship or a renewed visitorship at the Law School. Furthermore, Plaintiff alleges that Defendants Howard University and Howard University School of Law breached their contract with Plaintiff in failing to renew her contract or selecting her for a tenure-track position in violation of Professor Taslitz’s alleged oral promise to Plaintiff that she would be placed into a tenure track position as soon as one became available. And finally, Plaintiff claims that she was forcefully and prematurely evicted from her office in retaliation for her filing of a charge with the U.S. Equal Employment Opportunity Commission (“EEOC”).

1999 U.S. Dist. LEXIS 19516 at 2-4.

Judge Hogan elaborated on the facts setting forth Plaintiff’s breach of contract claim.

## **III. The Jury’s Verdict Contradicts the Relevant Undisputed Evidence of Record, although all of it was not before the Jury**

### **A. The Jury was Subjected to Prejudicial Testimony that had no Probative Value, in Violation of Fed. R. Ev. 803**

After eight years of waiting to try this case, Plaintiff’s claims were tried before a jury; however, Howard litigated facts that it had admitted, contradicting its own admissions, raised irrelevant matters to

confuse and distract the jury, repeatedly violated Fed. R. Civ. P. 11 by making false accusations and innuendo, in bad faith, to “trick” the jury into believing that Plaintiff was misrepresenting facts – whether relevant or irrelevant to this litigation in order to impugn Plaintiff’s character and to force Plaintiff to waste her limited and restricted trial time, during her case in chief, on Howard’s defenses and irrelevant “mudslinging.”

Plaintiff specifically warned of these problems, in her *Motion in Limine to Exclude Allegations of Non-Collegiality and ‘Bad Judgment’*” Plaintiff specifically warned that if Howard were granted license for unlimited “mudslinging,” that she would need far more time than the allotted 25 hours to rebut such irrelevant and unpredictable accusations and to offer comparative evidence of the behavior of other faculty members that would be considered far worse “judgment” and far less “collegial” than the accusations hurled at Plaintiff.

During the course of the trial, Howard’s witnesses, particularly former Dean Bullock and APT Vice Chair, Prof. Taslitz – the accused retaliating officials -- were permitted to testify about unlimited hearsay and innuendo they purportedly heard about Prof. Martin at any point in time. Conversely, Prof. Martin was not permitted to testify about the support that she had on the faculty.

**IV. The Undisputed Facts of Record Compelled Summary Judgment for Plaintiff, however, Plaintiff’s Motion was never Considered on its Merits because MJ Facciola Mistakenly believed that it was Dismissed in 1999**

In his 1999 precedent-setting decision, *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516, 81 FEP Cases (BNA) 964; 15 IER Cases 1587 (BNA) (D.C. D.C. 1999), Chief Judge Hogan denied Defendant’s *Motion to Dismiss* in to allow the jury to decide: 1) whether Professor Taslitz had the authority to bind the University; 2) whether Taslitz actually led Plaintiff to believe that the Visiting Associate Professor position that she was being offered was expected to become a tenure-track position. Howard has admitted that Taslitz had the authority to bind the University. Judge Hogan also held that Howard may not prevail on a Statute of Frauds Defense if the contract could conceivably have been performed in one years, even if was not actually performed in one year.

**A. Defendant has Admitted that Taslitz had the Authority to Bind the University when he Made an Offer to Plaintiff in 1996**

The issue of whether Prof. Taslitz had the authority, or the apparent authority, to bind the University should not have even been litigated during this trial. Howard had already admitted that Taslitz had the authority to bind the University. *Def.'s July 11, 2001 Answers to Interrogatories*, ¶ 18 (MSJ Ex. B; PLAINTIFF'S EXHIBIT 26B; *see also* Taslitz deposition<sup>1</sup> at 68-69, 75, 87. Howard wasted the Court's, jury's and Plaintiff's time and energy on this issue at trial and confused the jury by asserting this defense. The jury may well have determined that Prof. Taslitz did not

**B. Defendant should not have been Permitted to Assert a Statute of Frauds under the Undisputed Facts**

Plaintiff has consistently asserted, unchallenged, that a tenure-track could have become available at any moment, based on the resignation of a tenured or tenure-track faculty member, or the allocation of additional funds for faculty hiring. At trial, Plaintiff testified that both Prof. Taslitz and Dean Ramsey represented to her that if Prof. Argrett did not return from sabbatical, but relinquished her tenure-track slot on the faculty, that this was an example of a "slot" that Plaintiff could fill. Neither Taslitz nor Ramsey could "guarantee" if or when Prof. Argrett would resign, but agreed that she could resign at any moment, freeing up a faculty slot that Plaintiff could fill.

No one disputed Plaintiff's testimony on these facts. Under these undisputed facts, there is no question that the contract could have been fulfilled in less than a year. Prof. Argrett could have resigned a week after Plaintiff joined Howard's faculty and Howard could have filled the slot with Plaintiff, as agreed. The Statute of Frauds defense therefore does not apply to the facts of this case.

Again, Howard has wasted the Court's, jury's and Plaintiff's time and energy on this issue and should not waste further time by re-arguing its own admission in motions.

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<sup>1</sup> For purposes of this litigation, Howard has specifically identified Andrew Taslitz as one of the professors whose testimony has binding effect on the University; accordingly, his own statements that he did have the authority to bind the University when he made offers and representations about the terms and conditions of the offer, bind the University to those statements as admissions of a party.

**V. The Undisputed Testimony, Plaintiff's April 27, 1996 Letter to Dean Ramsey, and the Totality of the Circumstances and the Parties Actions Demonstrate a Meeting of the Minds and an Intent to be Bound by the Oral Representations**

Evidence produced both in discovery and at trial demonstrates that Taslitz negotiated with candidates, including Plaintiff, wrote letters making offers and orally made offers, with the approval of Howard officials. (*Facts*, ¶ 16-17) Plaintiff alleges that Prof. Taslitz made representations to her, at the time of her hire in early 1996, that: 1) if a tenure track position had been available at the time of the offer, Howard would have offered it to Plaintiff (*Facts*, ¶ 17); 2) Howard was offering her a visiting position only because no tenure-track positions were available (*Facts*, ¶ 17); 3) Howard generally has visitorships available and has renewed visitors for many years, including Prof. Patricia Worthy and others (*Facts*, ¶ 17); 4) Howard could offer her a multiple year contract, if that would make her more inclined to accept the offer (*Facts*, ¶ 17); 5) Howard would just keep renewing Plaintiff as a visitor until a tenure-track position opened up and then they would “slide” her into it (*Facts*, ¶ 6, 17); 6) the visitorship being offered to her was a “visitorship only in name,” and “for all practical purposes, a tenure-track position.” Plaintiff also alleged that she told Taslitz that her daughter was starting high school that year and that she would not move her back to D.C. from Ohio, then “rip her out of high school” to move somewhere else. (*Facts*, ¶ 17)

Plaintiff's April 27, 1996 letter to Dean Ramsey also states that she intended to make Howard her “permanent home” and that once she and her daughter returned to the D.C. area, she had “no intention of leaving.” In her letter, Plaintiff informed Dean Ramsey that she had resigned from her tenure-track position in Cleveland and informed them that she had lost her summer grant as a result, since Cleveland-Marshall believed that a summer grant should appropriately be awarded by Howard, her new school. In response to this letter, Howard granted Plaintiff a partial summer grant to assist with her moving expenses from Cleveland to Washington, D.C. At no time did Dean Ramsey, Prof. Taslitz (whom Plaintiff sent a copy of the letter), or anyone at Howard write to Plaintiff or call her to advise her that she was not guaranteed a permanent position, or a renewed visitorship, after the two year written guarantee expired. At no time did anyone advise her that she should not sell her house or that she revoke her resignation at

Cleveland-Marshall in favor of a leave of absence. Plaintiff had made it plain that once out of Cleveland, she would not return and that she was only accepting this “visitorship” in name with the understanding that the visitorship would be renewed until a tenure-track position became available. Plaintiff understood that no one could guarantee when a tenure-track position would become available because it required a faculty member to resign or the designation of additional funds for faculty positions; accordingly, she knew that, while the parties were waiting for a tenure-track position to become available, she might be in a position of “visitor” status for several years, as was Prof. Patricia Worthy.

Taslitz has admitted making the representations numbered 1, 2, 3 and 4 (*Facts*, ¶ 17). Taslitz also admitted that Plaintiff told him that she did not want to start her daughter in school and then move her after only one year. (*Facts*, ¶ 17) Taslitz testified that he could not recall his “exact words,” but that he intended to convey the message that, if Plaintiff accepted the visitorship, she would be “well placed” for a permanent position when one opened up. (*Facts*, ¶ 18) The differences between Plaintiff’s allegations and Taslitz’ admissions are ones of degree, rather than substance. Taslitz was clearly giving Plaintiff a “sales pitch” to convince her to teach at Howard. As part of its enticement and an indication that its representations regarding job stability were made in good faith, Taslitz offered Plaintiff a two-year visitorship, as part of her written offer. (*Facts*, ¶ 19) Multiple year contracts were not offered to either of the other two visitors hired that year. Cunningham or Levin, nevertheless, both Cunningham and Levin were renewed for a second year (*Facts*, ¶ 27), consistent with Taslitz’ representations about the renewal of visitorships. These renewals reassured Plaintiff that she did not need to participate in the AALS conference or otherwise seek employment outside of Howard.

The representations made by Taslitz do not indicate a limited term visitorship. In fact, they go beyond even a “looksee visitorship.” A “looksee visitorship is defined as a visitorship allowing time for each party to determine whether it wanted the other (*Facts*, ¶ 24) Taslitz represented that Howard wanted Plaintiff, not that it wanted time to “check her out” as a professor. Similarly, Plaintiff made it plain that she wanted a tenure track position at Howard, not that she two years “check out” Howard. (*Facts*, ¶ 17)

Plaintiff had already determined that she wanted to be a permanent member of the faculty. Taslitz knew that in order to accept Howard's offer, Plaintiff had to forfeit job opportunities elsewhere.

Objective evidence regarding visitorships corroborates Plaintiff's claims regarding Taslitz' representations. Howard uses its visitor slots fluidly, to suit its needs. For example, pursuant to the faculty handbook, a faculty member can only be a visitor if he/she holds rank at another University. (Facts, ¶ 14) Cunningham did not hold any rank at any other University before coming to Howard, since she had never previously taught; yet, she was brought on as a visitor because no tenure-track positions were available. She is now a tenured professor at Howard. Similarly, other tenured members of the faculty began at Howard as visitors, including Interim Dean Patricia Worthy (Facts, ¶ 10), J. Clay Smith (Facts, ¶ 10), Sherman Rogers (Facts, ¶ 10), Laurence Nolan (Facts, ¶ 10).

The "meeting of the minds," irrespective of the precise words used or "recalled" was that Plaintiff was being hired in the only position available for the longest period of time possible, to allow time for a permanent position to become available for her to officially become a permanent member of the faculty. If Taslitz "cannot recall" the precise words that he said, no reasonable juror could conclude that he did not say those words. Plaintiff is entitled to an adverse inference that the words she recalls Taslitz using were said. This oral contract was breached when, during the 1997-1998 academic year, anywhere from three to six tenure-track positions became available and Plaintiff was not selected for any of them. The breach of contract was particularly egregious since Taslitz did not even give Professor Martin any warning that she might not be hired (while he did so warn Professor Cunningham), leaving her without a teaching job after the hiring season had ended.

Howard has not produced evidence to establish a genuine dispute of facts to survive Plaintiff's Motion for judgment, under *Holcomb v. Powell*, 433 F.3d 889. As discussed in Plaintiff's *Motion for Summary Judgment*, at 43-45, there are no genuine disputed material facts to be determined by a jury on Plaintiff's breach of contract claim. Plaintiff testified that Taslitz told her that, if she accepted a visitorship at Howard, which was the only position available in 1996, Howard would simply continue to renew her each year, until a tenure-track position opened up and then "slide" her into it. Taslitz testified

that he did not recall his “exact” words, but he does recall Martin stating that she did not want a visitorship, or to start her daughter and in high school, only to have to “rip her out” to move again. Pl. MSJ at 45. Taslitz admitted that Martin told him that she needed assurances of job security, and that he responded by conveying to her, in words that he “cannot recall,” the message that she would be well placed for a tenure-track position when one opened up.

Martin recalls the precise words Taslitz used, and understandably so, since she sold her house in Cleveland, resigned her tenure-track position at Cleveland-Marshall Law School, and started her daughter in high school in Fairfax County, Virginia. Pl. MSJ at 45. With all that was at stake for Martin, the precise promise made was important to her in making these decisions.

**VI. Howard’s Entire Defense at Trial was to Commit Rule 11 Violations and Hope the Jury Believed Howard’s Attorneys, rather than Plaintiff**

Throughout the trial of this case, Defendant Howard University, through its counsel, made blatant misrepresentations that it made to the Court, particularly during the cross examination of Plaintiff. In accordance with the apparent plan of Howard’s attorneys, Plaintiff ran out of time for her own case in chief or to rebut all of the false and/or irrelevant allegations that they used to impugn Plaintiff’s integrity and credibility. Since the breach of contract claim hinged largely on a credibility contest between Plaintiff and Prof. Taslitz, the improper attacks on Plaintiff’s credibility, through Rule 11 violations, constitute reversible error, judgment for Plaintiff and/or a new trial on Plaintiff’s breach of contract claim.

**A. Shwalb’s Misrepresentations During Cross Examination**

1) **Publication Date of Prof. Cunningham’s Article.** Mr. Shwalb presented a bound volume of the Connecticut Law Journal, for the years 1997-1998, and represented that Prof. Christi Cunningham’s article, “The Myth of the Protected Class...” was published in the Winter of 1997 – a material issue in this case. In addition improperly forcing a witness with no connection to this document to read from it, Mr. Shwalb pointed to a copyright date of 1997 and attempted to “trick” Plaintiff into being the source to indicate that the article was published in 1997. Similarly, Mr. Shwalb presented the bound volume of the 1998-1999 bound volume of the NYU Journal of Legislation and Policy, wherein

Plaintiff's article is published and attempted to mislead the jury into believing that Plaintiff's article was not published until 1999.

In fact, Joint Exhibit 133, which is the internet printout of the article, clearly indicates that Prof. Cunningham's article was published in the **Winter, 1998** Issue of the Connecticut Law Journal – a full year after the APT Committee made its December 19, 1997 decision to recommend Cunningham over Plaintiff to fill the tenure-track EEO/Labor position. Plaintiff's article, "*911: How will Police and Fire Departments Respond to Public Safety Needs and the Americans with Disabilities Act?*" was published in the **Winter, 1998** issue of the NYU Journal of Legislation and Policy; accordingly, both articles were in the same status, accepted for publication, but not yet in print, as of December 18, 1997, and both articles were in print, a year later, in the Winter 1998 editions of their respective Journals.

Plaintiff brought this matter to the Court's attention and attempted to use the internet website of NYU's Journal of Legislation and Policy as an exhibit to document that her article was published in the Winter of 1998, as was the article of the comparator, Prof. Cunningham. Cunningham's article was an exhibit, as printed out from the internet site of the University of Connecticut Law Journal, documenting that it was published in the Winter of 1998. Plaintiff only sought to admit the comparable NYU cite to similarly document the publication date of her own article. The Court denied this request.

Plaintiff was left with no proof other than her own testimony that her article was, in fact, published in the Winter of 1998 and that Mr. Shwalb's statements that Cunningham's article was published in 1997 was false and a "trick." The jury had no knowledge that Plaintiff had the NYU internet printout proving her statements at her fingertips, but was prohibited from using it to save her own credibility. Even though Plaintiff had brought Mr. Shwalb's misstatements to the Court's attention, Mr. Shwalb, in his closing argument, again argued that Cunningham's article was published in 1997 and that Plaintiff's article was published in 1999. Mr. Shwalb's conduct was a Rule 11 violation, clearly made in bad faith, and improperly impugned Plaintiff's credibility. Plaintiff objected to Mr. Shwalb's statement during his closing, but he was permitted to continue his closing with no instruction to the jury that the statement was false and/or made in bad faith. Mr. Shwalb was not required to retract this, or any other

false statement that he made during trial, in the presence of the jury, falsely and improperly impugning Plaintiff's credibility.

2) **1990 EEOC Policy Guidance on the use of testers.** With no foundation for the question, Mr. Shwalb asked Plaintiff whether the policy guidance on the use of testers that she wrote was only 4 pages long, giving the jury the impression that this was the length of the document. In fact, it is 12 pages long, single spaced, making it 24 pages in manuscript pages. Although Plaintiff knew that it was not 4 pages long, she did not recall the exact number of pages of this document that she wrote 16 years ago. Because she could not state the precise number of pages, and, even if she had had the document in court, could not have produced it on cross-examination, Plaintiff will have to waste her valuable trial time, exhausting time that she needs for witnesses and closing, to rebut the blatantly false representations made by Mr. Shwalb on cross-examination.

Plaintiff brought Mr. Shwalb's misrepresentation to the Court's attention, produced the EEOC Policy Guidance in question, and attempted to introduce it as rebuttal evidence. The Court excluded this evidence.

Once again, Plaintiff was left with no proof other than her own testimony that the EEOC Policy Guidance was 24 pages long and that Mr. Shwalb's statements were false. Mr. Shwalb was not required to retract this, or any other false statement that he made during trial, in the presence of the jury, falsely and improperly impugning Plaintiff's credibility. The jury had no knowledge that Plaintiff had the NYU internet printout proving her statements at her fingertips, but was prohibited from using it to save her own credibility. Even though Plaintiff had brought Mr. Shwalb's misstatements to the Court's attention, Mr. Shwalb, in his closing argument, again argued that Cunningham's article was published in 1997 and that Plaintiff's article was published in 1999. Mr. Shwalb's conduct was a Rule 11 violation, clearly made in bad faith, and improperly impugned Plaintiff's credibility. Plaintiff objected to Mr. Shwalb's statement during his closing, but he was permitted to continue his closing with no instruction to the jury that the statement was false and/or made in bad faith.

3) **EEOC Right to Sue Letter**. Mr. Shwalb misrepresented that the EEOC completed its investigation of Plaintiff's charge and found no cause to believe that illegal discrimination had occurred. In fact, as Plaintiff testified in court, she requested a right to sue letter while the investigation was still pending. Plaintiff received her right to sue letter on April 29, 1999. She attached it to the Complaint in this case and has produced it numerous times in this litigation, when Howard has attempted to claim that the EEOC found "no cause." Plaintiff had to introduce this right to sue letter into the record on her redirect, again wasting time on Mr. Shwalb's blatant misrepresentation on an issue that is irrelevant in the first place, since proceedings in court are considered *de novo* and an EEOC dismissal is unduly prejudicial with no probative value anyway. The jury was left confused, both as Plaintiff's veracity and with respect to whether the EEOC actually investigated the case and determined that it had no merit.

4) **Howard's Credits of Plaintiff's EEOC Policy Guidances as Scholarship**. Mr. Shwalb misrepresented to the jury that Howard did not consider the EEOC Policy Guidances that she published as "articles" or "scholarship;" however, Joint Exhibit 33, Howard's July 25, 1996 memorandum from the APT Committee to Dean Ramsey, regarding Plaintiff's qualifications, specifically classified her EEOC Policy Guidances as "articles." Howard again so credits these Policy Directives as scholarship in its website (Plaintiff's Exhibit 9A, describing the qualifications of Prof. Martin). Mr. Shwalb confused the jury and wasted time with this frivolous argument, made in bad faith, causing Plaintiff to waste the time that she needed to present her case in chief and to rebut Howard's vague, surprising and "never ending" "non-collegiality" "bad judgment" – or defense – or, more aptly described, "mudslinging campaign."

Mr. Shwalb was beyond abusive and argumentative, even for cross-examination, misrepresenting the requirements and time lines for scholarship, even likening Plaintiff to "a child," because she had no reason to believe that her job was in jeopardy. In fact, based on Howard's own written and oral requirements, Plaintiff was more than "on track" with her scholarship and on the road to tenure.

5) **Fall, 1996 Grades of Torts Students**

Howard's attorneys repeatedly violated Rule 11 and constantly make misrepresentations before this Court. As Plaintiff stated in her *Reply to Defendant's Opposition to Plaintiff's Motion for Reconsideration of MJ Kay's January 5, 2006 Order Regarding Exhibits*, Howard made several misrepresentations to the Court, including that the APT Committee specifically relied on Plaintiff's grades or grading system, in its deliberations resulting in her rejection for a permanent position and/or a renewed visitorship. Judge Kay deemed the grade sheets admissible only because of Howard's misrepresentation.

In fact, no APT Committee member has ever said or implied that he or she ever had access to these grades or ever took them into account in its decision; nevertheless, because of Howard's, Plaintiff had to address these grades in her quickly diminishing court time, in her case in chief, since the grades were admitted during her case in chief, though she did not raise the issue. Because Defendant has been able to introduce any issue at any time, during Plaintiff's case in chief, Plaintiff has not had control over her own case in chief or the time taken to present it.

Howard improperly accused Plaintiff of submitting improper grades when there had never been any such accusation. This was yet another Rule 11 violation. The jury was distracted and left again to wonder whether Plaintiff was incompetent as a professor and/or hiding such incompetence through dishonesty; yet, there was absolutely nothing dishonest or improper about the grades. To the contrary, Plaintiff had asked Dean Newsom how she could credit class participation and still grade the exams anonymously.

VII. **EEOC Policy Performance Evaluation and Treatise Credit**

Mr. Shwalb repeatedly told the jury that Plaintiff misrepresented herself as a recognized expert in EEOC law and that this description was only her opinion of herself.

VIII. **Incorporation of April 15, 2006 Request for Additional Time to Complete Trial**

Plaintiff incorporates, by reference, all arguments made in her April 15, 2006 *Motion For An Extension Of The 25 Hour Time Limitation To Complete Trial*. As Plaintiff set forth in her April 15, 2006 motion, Defendant put on its defense during Plaintiff's case in chief to avoid the professors appearing at trial twice. Accordingly, cross-examination (direct, since Plaintiff called them as adverse witnesses) went far beyond the scope of direct (cross), requiring Plaintiff to address issues that are not part of her case in chief, and which she did not raise, when returning to question the witness for redirect (re-cross). In addition, these professors have been permitted to give lengthy, and even "rambling" responses (most notably Prof. Taslitz) to questions under cross examination, which was deducted from Plaintiff's allotted trial time.

Professors, particularly Taslitz and former Dean Bullock, were permitted to give hearsay testimony regarding "impressions" and comments purportedly made to them by other professors regarding "collegiality" and "judgment;" however, Plaintiff was not permitted to testify about the support that she has received from her colleagues with respect to her possible reinstatement through this litigation. Plaintiff ran out of time before she could call professors to testify to rebut the claims of non-collegiality made by Taslitz and Bullock.

These professors include Prof. Spencer Boyer,<sup>2</sup> who is not only the most senior member of the faculty at Howard, but he is the most senior African-American law professor in the country. Prof. Boyer is renowned and has taught more African-American lawyers than any other law professor in the United States. Prof. Henry Jones is the next most senior member of the faculty. He and Prof. Boyer are ready to

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<sup>2</sup> Prof. Boyer needed an accommodation of being able to testify as soon as he arrives, since he carries oxygen with him that is only supplied for a limited number of hours. Howard had represented to Plaintiff that it would call several witnesses on Tuesday, April 25, 2006, so Plaintiff told Prof. Boyer that he would be called Wednesday morning. Howard only put Prof. Gavil on the stand and, at 11:30 a.m., the Court instructed Plaintiff that she could not call any witness that she did not have in Court by 12:00 noon. In sharp contrast, professors who were called as Howard's binding witnesses had their schedules accommodated and one even left town when scheduled to be called to the stand.

testify as to Plaintiff's collegiality, value as a colleague, and contribution to the civil rights legacy of Howard which they participated in building, alongside James Nabrit and others whose names have been touted in this Courtroom during this trial. Both Profs. Boyer and Jones provided depositions in 2002 and expressed their strong support for Plaintiff and her return to Howard as their colleague.

Prof. Sherman Rogers, a younger member of the faculty, but one with a background in and dedication to civil rights, carrying on the Howard "legacy," also provided deposition testimony in 2002 in support of Plaintiff. Prof. Rogers, with expertise in Title VII, also read Plaintiff's article, "911..." and offered a review of the work in his deposition. Because Prof. Taslitz, who has no background in Title VII or civil rights law, described the article in terms indicating that it was a good effort for a "new professor," it is important for the jury to hear a review of a professor who has a background in the area.

Howard's misconduct is serious, meriting a directed verdict against Howard in this case, and allowing the remaining time for the jury to consider evidence related to damages. Plaintiff was left in a position of not being able to tell her own story in her own trial. Defendant should not benefit from its misconduct and preclude Plaintiff from presenting her case and confusing the jury with false statements, "parlor tricks" and inuendo.

#### **IX. Excluded Evidence**

Plaintiff was unduly prejudiced of the exclusion of evidence that would have corroborated statements that she was left to establish, on her word alone, where there was readily available corroborating evidence. The jury with the impression that that Plaintiff had no documents or person to corroborate her testimony and therefore must not be telling the truth, whether deliberately or mistakenly.

##### **A. Plaintiff's Exhibit # 9: Prof. Merrick Rossein's Preface to Treatise, Acknowledging Contributor, Prof. Martin, as a National Expert in EEO Law**

In its Opposition, page 4, paragraph 9, Howard addresses Plaintiff's Exhibit # 9; however, Howard does not address the fact that the exhibit was originally missing several pages and that MJ Kay specifically stated that this "one page" was not admissible. Without the title and publication pages, the forward was not self-authenticating and therefore did not fall within the exception to the hearsay rule,

under both Fed. R. Ev. Rules 803(17) and 902(5). Judge Kay specifically made reference to the exhibit as “just this one page...” Judge Kay’s point was well taken and correct. The document should have been complete, but a clerical error was made within Mr. Byrd’s office.

Since Plaintiff did provide the document in its complete form, as it was when it was provided as an exhibit to Plaintiff’s *Motion for Summary Judgment*, it should have been admitted as evidence, as were the resume and performance evaluation. The full exhibit demonstrates that the document is part of a preface to a published treatise on EEO law, who recognized, in his preface, that Plaintiff was also a national expert in EEO law. Plaintiff even produced the actual, hard-cover textbook at trial. Howard did not rebutted Plaintiff’s argument that the full exhibit constitutes an exception to the hearsay rule, under both Fed. R. Ev. Rules 803(17) and 902(5) as a self-authenticating commercial publication; yet, the document was excluded from the jury.

Reputation and status in the legal community and the opinions of candidates’ former associates in the legal profession were therefore relevant to the APT Committee decision. Howard has not denied that the Treatise Forward was part of Plaintiff’s application, as part of the materials that Prof. Martin actually provided to Prof. Taslitz for the APT Committee to consider when assessing her credentials.<sup>3</sup> In its July 13, 2002 “*Supplemental Answers to Interrogatories*,” Howard specifically listed contributions to the legal community as a criteria used to select Prof. Cunningham over Prof. Martin. Certainly, Prof. Martin’s contribution to a treatise on EEO law. Prof. Martin’s published recognition for that contribution by the author of the treatise is evidence of her contribution to the legal community.

Prof. Rossein’s Treatise is similar to a written recommendation, a resume,<sup>4</sup> or a job performance, such as the one that MJ Kay did, in fact, admit as Plaintiff’s Exhibit 8.<sup>5</sup> Howard argues that a “third

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<sup>3</sup> When Prof. Martin was recruited by Howard from her tenure track position at Cleveland State University, in 1995, she provided Prof. Taslitz with the actual Treatise sections that she wrote, as one of her writing samples in addition to the Treatise Forward.

<sup>4</sup> Howard originally objected to the admission of Plaintiff’s resume as hearsay, but later withdrew the objection.

<sup>5</sup> Howard argued that both Plaintiff’s resume and her EEOC outstanding job performance evaluation were hearsay; however, they were both part of her application and Howard had every opportunity to make inquires based on any information provided as part of the application. MJ Kay

party's opinion" is irrelevant to Howard's hiring decision; however, job references are relevant to a hiring decision. Prof. Nolan testified that the APT Committee does consider job references and all information in a candidate's personnel file when making decisions involving long-term appointments, including references. Nolan depo. at 189. Howard's own hiring memoranda for both Profs. Martin and Cunningham indicate that outside references were called and considered.<sup>6</sup>

Howard argues that the 1992 publication was "too remote in time" to be relevant to the 1997 decision. As MJ Kay stated, in his January 5, 2006 Order, paragraph 6, with respect to Plaintiff's outstanding EEOC performance evaluation, "The document's date goes to the weight of the evidence, but does not, as the Defendant argues, make the document irrelevant..."

Howard has cited Prof. Cunningham's student publication from 1991 and her work for the Law Journal, prior to her 1992 law school graduation, as important considerations in her selection over Prof. Martin. Howard even listed, as one of its many changing purported "reasons" for Prof. Cunningham's selection over Prof. Martin, that Prof. Cunningham's academic performance was more "stellar" than that of Prof. Martin and included a discussion of Prof. Cunningham's college credentials.<sup>7</sup> See, e.g., Howard's Ex. 18, page 3, May 11, 2001 APT Memorandum, bearing the purported signature of Prof./Councilman Isaiah Leggett, the Chair of the APT Committee in 1987-1998. Prof. Cunningham graduated from law school in 1992 and from college in 1989. *Id.* Prof. Martin graduated from law school in 1981 and from

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properly admitted both the resume and the EEOC performance evaluation into evidence. The Treatise Forward should be admitted for the same reason.

<sup>6</sup> Howard specifically alleges that Taslitz considered the opinions of Gavil and Jamar, although he did not personally share their purported opinion of Prof. Martin. Since Gavil and Jamar were not members of the APT Committee and had no vote at all, they should be considered third parties. If Gavil's and Jamar's purported opinions of Prof. Martin were considered, when they admittedly did not read Prof. Martin's publications, ask her about her scholarship in progress, or witness any of her teaching, then certainly, the opinion of an authority on EEO law who reviewed Prof. Martin's work and elected to include it in his own Treatise, should be admitted, where that person's published acknowledgement of Prof. Martin's work was actually before the Committee as part of Prof. Martin's application.

<sup>7</sup> Interestingly, while praising Prof. Cunningham for her 1989 graduation from Southern Methodist University with Honors, Howard completely ignored Prof. Martin's prestigious Ivy League College (Columbia University, with Honors, 1978) and top ten law school credentials (New York University, 1981), as well as her acceptance into the U.S. Department of Justice Honors Program upon her graduation in 1981. Despite its claim that it considered the candidates' academic performance, Howard never even requested law school or college transcripts grades from the candidates and no Committee member has claimed that the Committee had access to law school grades for either candidate.

college in 1978. If a Treatise credit in 1992 is too remote in time to be considered relevant to the Committee's decision, certainly, college and law school experiences of the 1970s and 80s should be too remote in time to be considered. Howard cannot have it both ways.

Howard has not rebutted Plaintiff's argument that her recognition as a national expert in EEO law, in a treatise on EEO law, is evidence of her professional reputation prior to experience at Howard. Plaintiff has alleged that she suffered damages to her reputation as a result of Howard's maintenance of a hostile work environment and retaliation against her. In order to demonstrate damage to her reputation, evidence of her professional reputation prior to Howard must be admitted.

Finally, in her Reply to Plaintiff's Opposition to Plaintiff's Motion for Reconsideration of Judge Kay's January 5, 2006 Order regarding Exhibits, Plaintiff requested that she be permitted to add Prof. Merrick Rossein to her witness list. Prof. Rossein lives in New York City and could have been called to testify at trial. The Court did not grant this request.

**B. Plaintiff's Exhibit # 12: Collective Student Letters Protesting Prof. Martin's Non-Renewal**

While former Dean Bullock and Prof. Taslitz were permitted to testify about all rumors that they had heard about Plaintiff, Plaintiff was not permitted to introduce into evidence the student letters that Dean Bullock admits she received, protesting Prof. Martin's non-renewal – even though she acknowledges that she responded to the letters, in writing and in at least one meeting with students.

Howard did not deny that the student petitions supporting Prof. Martin's permanent appointment to the faculty were relevant to Prof. Martin's qualifications for a permanent position. Howard's own Exhibit 18, a purported 2001 memo, from Prof./Councilman Leggett, page 3, specifically stated that the APT Committee considered student petitions in favor of Prof. Martin as evidence that that she was well liked and respected by her students.

Without explanation, Howard simply asserted that the Best Evidence Rule, Fed. R. Ev. 1002, does not require the admission of the student petitions in favor of Prof. Martin's candidacy and that they are not admissible under Fed. R. Ev. 804(b)(3) or 807. Howard did not rebutted Plaintiff's arguments that the best evidence of student petitions are the petitions themselves. It is the testimony of Prof. Taslitz

about the petitions, without the admission of the petitions, that would constitute hearsay, if not separately excepted as an admission of a party.

The Court advised Plaintiff to limit her witness list and not to call a stream of former students to the stand; having heeded that instruction, Plaintiff limited these students to only two; however, while Mr. Shwalb described Plaintiff in terms so derogatory that they conjure up the image of a child molester teaching elementary school – “Would you want *this woman* teaching *your* children?!” , Plaintiff had to sit idly by while she held in her hands the letters of her former students praising her as a teacher, a mentor, a caring person and even a “phenomenal woman.” The jury heard the hearsay testimony of Taslitz and Bullock, but were deprived of the acknowledged letters of Plaintiff’s actual former students, written to the Dean.

Student letters supporting Prof. Martin’s renewal and/or protesting her non-renewal, like the student petitions, the EEOC performance evaluation and the book credit, are similar to job references that can be checked. Particularly where the authors of these letters were students at the very institution in question, the students could readily be summoned and asked about their specific opinions of Prof. Martin. Dean Bullock testified, in her deposition, that she did meet with students, and even the Student Bar President, representing the students, who directly and personally expressed their support for Prof. Martin and objected to her non-renewal.

Dean Bullock admitted receiving the letters and Howard produced them. Students signed them and many included their student identification numbers. There are no questions regarding the authenticity of the letters. They are inherently reliable, under Fed. R. Ev. 803(24) and were clearly declarations against interest, pursuant to Fed. R. Ev. 804(b)(3), while the students were subject to the administration and dependant upon it for grades, teaching, recommendations and even financial aid, in many cases.

The letters, written in March and April of 1998, were excluded from evidence based on Howard’s misrepresentation that MJ Facciola dismissed all of Plaintiff’s retaliatory non-renewal claims except the non-selection decision made on December 17, 1997. As discussed in Section I, above, incorporated herein, MJ Facciola’s *Report absolutely does not* limit Plaintiff’s retaliation claims to the decision that the

APT Committee made on December 17, 1997, when it selected Prof. Cunningham over her to fill the EEO position. MJ Facciola *expressly* held that Howard's April 8, 1998 rejection of Prof. Martin for any position on the faculty constituted an adverse action within the meaning of Title VII. *Martin v. Howard University*, 2003 U.S. Dist. LEXIS 18501 at \* 31-32.

C. **Plaintiff's Exhibit # 13: Concerned Students' Protest to Faculty**

Howard did not deny that **Dean Bullock distributed the Notice of the Emergency meeting to faculty with the Concerned Students' Letter as an attachment**; accordingly, the source of the memo is former Dean Bullock. The memo was the basis for the emergency faculty meeting and the faculty did discuss the issues raised in the letter at that meeting. In violation of Fed. R. Civ. P. 26, Howard refused to produce minutes of this meeting in discovery; therefore, the Dean's Notice of the Emergency, including its Attachment, is the next best evidence of what was discussed during the meeting.

Prof. Martin's renewal was discussed during this official, emergency faculty meeting. Prof. Kurland even specifically raised the question of why Prof. Martin was not being renewed, particularly in light of the students' protests, and valid concerns, that there were not enough classes being offered for students to fulfill their graduation and Bar requirements, that they were being closed out of courses, and that more professors were needed to cover the curriculum. The issues raised in the student letter were considered serious enough to call an emergency meeting and for form a Committee, headed by Prof. Boyer, as he discussed in his deposition. The "Committee on Concerned Students" was established to study the student concerns, meet with students, and develop solutions to the problems raised in their letter. Boyer depo at 44-47. Despite these conditions and efforts, Dean Bullock still refused to authorize the APT Committee to consider Prof. Martin for a vacant position or to renew her visitorship, even for one year.

The student protest letter is relevant to the issue of Dean Bullock's motive for refusing to renew Prof. Martin, particularly in light of the vacant positions and the school's clear, immediate need for additional professors. See also discussion of Exhibits 11 and 12.

**D. Plaintiff's Exhibit #58: 1999 AALS Placement Bulletin, Containing Howard's Advertised Constitutional Law/Civil Rights Position**

The 1999 AALS listing proves that Dean Bullock did not convert the Constitutional Law/Civil Rights position to a tax position in the spring of 1998, but rather, only pretended to do so to prevent the APT Committee from considering Prof. Martin for the position. It is also evidence that, irrespective of Prof. Martin's qualifications, Howard's administration had an "unspoken" motive for excluding Prof. Martin from the faculty. A jury could certainly conclude that this unspoken motive was retaliation.

Plaintiff applied to Howard in both 1999 and 2000, but was never interviewed or considered for any position. Joint Exhibit 112. Prof. Nolan testified that she received a resume from Prof. Martin and sought legal advice from the University as to what to do with Prof. Martin's resume. Nolan depo. at 317-200; *see also* Defendant's Ex. &, notes from Profs. Nolan and Tazlitz re: application of Dawn Martin. Prof. Nolan confirmed that the Committee did not consider Prof. Martin for a faculty position in response to her applications after 1998. *Id.*

As discussed in Judge Kay's Order, ¶ 35, Howard's original Ex. # 7 consisted of notes from the AALS conference of 2000, demonstrating that Plaintiff submitted an application for a position and the APT Committee members did not consider her. Instead, Nolan and Taslitz sought advice from the University regarding how to handle her application. Howard withdrew the exhibit, but Plaintiff added it to her list, without objection, so it is now Plaintiff's uncontested exhibit.

Like Howard's own Exhibit # 7, Howard's 1999 advertised job vacancy for a Constitutional Law/Civil Rights position is further evidence of retaliatory motive and continued acts of retaliation even beyond the spring of 1998. It would be inconsistent to admit Defendant's Ex. # 7 (now Plaintiff's uncontested exhibit) and exclude Exhibit # 58. Both exhibits demonstrate Howard's continued refusal to consider Plaintiff for positions for which she is qualified, while continuing to advertise and interview others for the position.

Howard did not deny that the Constitutional Law/Civil Rights position was not actually converted to a tax position. Howard has not offered a legitimate business reason for the highly unusual exclusion of

experienced professors and attorneys with experience in equal employment law in the advertisement.<sup>8</sup> To the contrary, Prof. Nolan testified that the Committee did interview Prof. Jon Duncan, an *experienced* law professor who had been teaching at Texas Wesleyan University, for the position, despite the advertised exclusion of such professors. Nolan depo at 320. It appears that the stated exclusion was merely *a ruse to disqualify Plaintiff*, but not other experienced law professors.

The changes in the Constitutional Law/Civil Rights position job description, from the spring of 1998 to 1999 and 2000, to specifically exclude experienced professors and attorneys with experience in equal employment law (Nolan depo at 309-311, discussing a February 10, 2000 APT Committee memorandum) constitute evidence that Howard changed its job description specifically to and solely to justify excluding Prof. Martin as a candidate, since she had already applied for position on October 14, 1998 for the 1999-2000 academic year (Joint Exhibit 112) and applied again in the fall of 1999.

**E. Plaintiff's Exhibit # 17:<sup>9</sup> Memo from Dean Bullock to APT Committee Recommending the Hire of Prof. Angela Vallario**

Judge Kay deferred to Judge Hogan on this issue by sustaining Howard's objection without prejudice, depending upon Judge Hogan's ruling with respect to evidence of events that occurred in the spring of 1998. Again, since Joint Exhibits #s 87-106 are all documents pertaining to Plaintiff's non-renewal and rejection beyond December 18, 1997, throughout the spring of 1998, it would be inconsistent to exclude the Vallario memorandum based on a "cut-off" date. *See* also Section I, above and Section VIII, above, discussing Exhibit # 58, Howard's 1999 AALS advertised Constitutional Law/Civil Rights position.

Howard has asserted that the APT Committee made the decision to hire Angela Vallario; however, in the

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<sup>8</sup> Most Constitutional Law/Civil Rights attorneys/professors do have experience in EEO law and Constitutional Law classes and textbooks do generally include a segment on employment discrimination.

<sup>9</sup>Plaintiff's Exhibit #16 was misidentified as a memorandum related to the hiring of Prof. Angela Vallario; however, it is actually a memorandum from Dean Bullock to Howard's General Counsel's Office, provided to the General Counsel as a basis for the University's response to Plaintiff's EEOC charge. Judge Kay correctly admitted this document into evidence since Howard waived its attorney-client privilege by producing it to the EEOC and to Plaintiff, in response to Plaintiff's discovery requests for all of Howard's correspondence with the EEOC in relation to this case.

March 6, 1998 memorandum, Dean Bullock specifically *instructed* the APT Committee to hire Angela Vallario -- *to fill the faculty vacancy that Prof. Martin had just applied for* on that same day (Joint Exhibit 87). The vacant position had been advertised as a Constitutional Law/Civil Rights position since November of 1997 and *never* as a tax position. Dean Bullock pretended to convert it to a tax position on March 6, 1998, in direct response to Prof. Martin's application to be considered for it.

Once Vallario was hired, the APT Committee believed that the last vacancy had been filled, leaving no more vacancies for which it could consider Prof. Martin. Prof. Nolan even asked Dean Bullock whether there were any remaining positions that Prof. Martin fill. Plaintiff's *Motion for Summary Judgment*, at 21; Plaintiff's Material Facts ¶ 221; Nolan depo at 329-330. Despite at least three funded vacant positions in the spring of 1998, Dean Bullock lied to Prof. Nolan, stating that there were no more vacancies. (*Id.*) Vallario is therefore a selectee for one of the positions for which Prof. Martin applied.

On December 31, 1997, Prof. Taslitz recused himself from any further decisions involving Prof. Martin during the spring of 1998. On April 1, 1998, Taslitz requested that the University guarantee him legal representation if Prof. Martin sued and named him personally, as a Defendant. (Joint Exhibit 89) Knowing that the four remaining Committee members, Nolan, Smith, Leggett and LaRue, wanted to keep Prof. Martin on the faculty, Dean Bullock usurped the authority of the APT Committee to make its own decision on Prof. Martin's application.

Without Taslitz to once again mislead Nolan, Smith, Leggett and LaRue to a decision that implemented Dean Bullock's retaliatory plan to remove Prof. Martin from the faculty, Bullock completely removed the Committee's options and simply instructed its remaining members to hire Vallario instead of Martin, feigning a sudden, unanticipated need in tax, months before the end of the school year – where there had been absolutely no change in tax professors' duties during that school year. Deans Bullock and Newsom had not taught tax or any other courses for years, while performing their administrative duties as Deans and Associate Deans. The APT Committee never evaluated any candidates or conducted interviews for this unadvertised "position." The Committee simply followed orders from Bullock to extend an offer to Vallario.

The timing of the Vallario memo, months after the “hiring season” had ended, months after Prof. Vallario had already committed to teaching tax as an adjunct professor, when Prof. Martin was the *only* candidate left for any position, with at least three faculty slots vacant, indicates that Bullock feigned the need to convert an adjunct tax professor to a visiting full time tax professor as subterfuge for her retaliatory removal of Prof. Martin from the faculty.

Howard did not rebut Plaintiff’s argument that the Constitutional Law/Civil Rights position was *not actually* converted, but remained available after Plaintiff’s rejection. Howard cannot rebut the evidence that Constitutional Law/Civil Rights position was not converted to a tax position or that (*see* Sections I and VII, above), so it sought to exclude it from the jury to hide the truth about Bullock’s motives and control over Prof. Martin’s rejection for this advertised, vacant position.

Since there were credibility contests between Dean Bullock and Plaintiff, evidence that impugned Dean Bullock’s credibility also boosted Plaintiff’s credibility. To the extent that evidence demonstrating that Bullock was not credible was excluded or suppressed, the jury was left to further question Plaintiff’s credibility.

**F. Plaintiff’s Exhibit # 23: E-mails by Prof. Robinson re: Sexual “Jokes”**

Howard argued that the Robinson e-mails are irrelevant and “embarrassing” to Howard. If Howard finds them “embarrassing,” or an exercise of “bad judgment,” Dean Bullock should have prohibited Robinson from writing them and the APT Committee should not have awarded him a full professorship during the 1997-1998 academic year – the same year that the same Committee rejected Prof. Martin for a tenure-track position and/or a renewed visitship. Although Howard may find Robinson’s e-mails “embarrassing,” they are not unduly prejudicial, but are highly relevant to the question of whether Howard’s claim that it decided not to renew Plaintiff for “bad judgment” is false and pre-textual, particularly since Robinson continued sending such e-mails even as late as 2000, when Prof. Boyer produced them pursuant to his deposition testimony.

Prof. Robinson’s “bad judgment” was well known to faculty members. Robinson’s behavior is appropriately used to: 1) demonstrate Dean Bullock’s tolerance for, and indifference to, sexual

harassment at the law school; 2) as evidence that Howard's claim that she was not renewed due to "non-collegiality" and "bad judgment" are pre-textual, in light of the same Committee's simultaneous promotion of Prof. Robinson from the rank of "Associate Professor" to full "Professor;" and 3) Taslitz' purported consideration of Robinson's opinion of Prof. Martin should not be deemed credible.

In her Complaint, Plaintiff specifically identified Prof. Robinson as making comments to her that added to her hostile environment, on the basis of sex, at a faculty party at the American Association of Law Schools Conference, in January of 1998, as well as additional insults from Robinson, wherein he purported to state the APT Committee's reasons for her non-renewal. Compl. ¶¶ 393-399. Prof. Martin reported Robinson's conduct to both Profs. Taslitz and Nolan. Both professors apologized for Robinson's behavior and assured her that Robinson's comments did not reflect the opinions of the APT Committee or the deliberations of the Committee. Compl. ¶¶ 400-401; *see also* Joint Exhibit 90, March 31, 1998 Martin letter to Taslitz, page 6, fn. 2.

Howard claimed that Robinson's e-mails were not addressed to Prof. Martin, but this is not true. Robinson addressed the e-mails to the collective e-mail address including all faculty and staff, which included Prof. Martin of Robinson's sexually offensive e-mails because other faculty members discussed it with her, expressing their disgust with Robinson, particularly, but not limited to, Prof. Patricia Worthy. Plaintiff's Complaint also expressly alleged that Prof. Robinson was known for making inappropriate, vulgar, sexual comments among his colleagues, including professors from other law schools, and even that he made inquiries and innuendo about Prof. Martin's sex life or lack thereof. Compl. ¶ 402. Despite this knowledge, the APT Committee rewarded Robinson with early tenure and a promotion to the rank of full Professor in the spring of 1998. Robinson's e-mails are perfect examples of the behavior that Plaintiff alleged. These e-mails constitute strong evidence that Gavil's and Taslitz' vague, purported "concerns" about Plaintiff's judgment, are fabricated and pre-textual, particularly when assessed against comparators such as Robinson.<sup>10</sup>

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<sup>10</sup> This final argument will only be relevant to rebut Howard's claim that it rejected Prof. Martin due to non-collegiality or bad judgment. Similarly, rebuttal evidence will include the "bad judgment" and "non-

Dean Bullock's tolerance of Robinson's behavior, and the behavior of the other property professor who created a hostile learning environment for female professors<sup>11</sup> constitute evidence that Dean Bullock deemed sexual harassment as something to be accepted by women in their workplaces and institutions of learning, without complaint. Dean Bullock's attitudes about complaints of sexual harassment constitute evidence of her retaliatory motive for Prof. Martin's removal from the faculty.

Finally, Taslitz testified that Robinson was one of the professors who complained to him that Prof. Martin was not "collegial" and had "bad judgment." Taslitz depo at 239. Robinson's own behavior constitutes evidence that Taslitz could not have seriously considered Robinson as a credible judge of whether Prof. Martin had the desired character and/or personality to remain on the faculty.

**G. Plaintiff's Exhibit #39: Faculty Grievance Committee File**

The Court excluded the Howard University Grievance Committee Report, in part, because Howard's attorneys represented that the Committee had no jurisdiction over EEO claims. In fact, as demonstrated by the Committee's Preliminary Report on Plaintiff's Grievance, Pl.'s Trial Exhibit 39, the Committee specifically does have jurisdiction over EEO claims, including sex discrimination claims such as the one filed by Plaintiff.

Howard claimed that Section 2.8.3.4(C)(3) of the Faculty Handbook states that the Faculty Grievance Committee's determinations are not binding on the University, but are only "recommendations," without specifying to whom the recommendations are made. First, Section 2.8.3.4(c) states that the Grievance Committee makes its recommendation to the President of the University (President Swygart) -- not the Law School Dean (Bullock). Second, Howard failed to mention that Section 2.8.3.4(C)(3) also states that, if the President does not implement the

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collegiality" of other professors selected and/or promoted by the same APT Committee, which includes Profs. Cunningham (the selectee for the EEO/Labor position) and Jamar, who was promoted to full Professor by the same Committee, led by Prof. Taslitz.

<sup>11</sup> This professor was eventually forced into early retirement after students organized and took their complaints beyond the law school, to the University General Counsel after Dean Bullock ignored these student complaints, even when the students organized and met with Bullock, led by Student Bar Association President, Gerald Smalls.

Recommendation of the Grievance Committee, the matter may be appealed to the University Senate for a decision.

As stated in Handbook, Section 2.8.3.1, the Grievance Committee consists of tenured faculty members elected by the Senate to conduct hearings. The Senate has delegated its authority to conduct the hearings to the Committee. Howard does not deny that the decisions of the University President and/or the University Senate are binding upon the Law School. By refusing to participate in the University's own grievance process, Dean Bullock refused to submit to the jurisdiction of her own University President and the University Senate.

Howard claims that Plaintiff was not entitled to use the University Grievance Procedure because she was a visiting professor; however, as the Grievance Committee file specifically states, the questions of eligibility and jurisdiction are determinations made by the Grievance Committee -- not by the law school. The Grievance Committee specifically determined that it had jurisdiction over Prof. Martin's complaint and that Prof. Martin had the right as a faculty member to process her grievance through the Committee.

Howard's agreement to stipulate that Plaintiff filed a grievance and that no formal resolution was reached is not sufficient. Such a stipulation could well lead a jury to assume that it was Prof. Martin who unreasonably refused to address these issues at the University level and proceeded to Court. It is only fair that the jury be made aware that Prof. Martin attempted to use internal means to resolve this matter, but that Dean Bullock specifically refused to cooperate with the University's own Grievance Committee, and was, in fact, hostile toward the Committee, as demonstrated by the communications between the Grievance Committee and the law school.

Dean Bullock's violation of the Grievance Committee's decision regarding jurisdiction and her obstinate refusal to make any attempt to resolve this matter within the University, to allow Prof. Martin to keep her job, and even to consider her, in good faith, for a renewed position, is further evidence of Dean Bullock's irrational animus toward Prof. Martin and retaliatory motive for her non-renewal. Dean Bullock clearly did not want her actions reviewed by anyone.

This point was of particular relevance since Howard argued that Plaintiff “concocted this story” for financial gain.<sup>12</sup> If Howard intends to make this argument at trial, Plaintiff should have been permitted to present evidence of her efforts to work within the University structure to keep her job, without a lawsuit or monetary damages, before she left the law school or retained counsel.

In her Complaint, Plaintiff specifically alleged that President Swygart acted with callous disregard and breached his duty to students and faculty by permitting Dean Bullock to remove her from the faculty in retaliation for her complaints about stalking and refusing to allow Plaintiff any means of addressing these issues within the University. Comp. ¶ 295, 317-324. Howard has not addressed the fact that the Grievance Committee determined that the Law School had violated Prof. Martin’s procedural rights, under the Faculty Handbook, to avail herself of the grievance process to avoid her non-renewal or termination from the University. The Grievance Committee determined that her rights to due process and academic freedom had been violated. In her Complaint ¶ 172, incorporated and discussed in ¶¶366-379, Plaintiff alleged that Prof. Taslitz represented to her that the visitorship she was being offered was “a visitorship in name,” and that “for all practical purposes, it is a tenure-track position.” By denying Prof. Martin the procedural rights that even the Grievance Committee held she was entitled to, Howard further breached its contract with Prof. Martin.

There was no basis for Howard’s claim that the Grievance Committee Report will cause undue prejudice and usurp the province of the jury. There was no hearing in the case because Dean Bullock refused to allow the law school to participate in the process; accordingly, the Committee did not decide the merits of the case; it did find that Prof. Martin was being deprived of her right to participate in the Grievance process, that there was evidence to indicate that the law school had acted in a manner that was arbitrary and capricious, and that the law school had violated Prof. Martin’s rights to academic freedom. The University’s conclusion constitutes an admission of a party and should have been admitted.

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<sup>12</sup> Ms. Ford’s outrageous comment was clearly made in bad faith, in light of the police reports, the testimony of Howard’s own Security Officers, Harrison’s letters, and statements from Profs. Derrick Bell, Lani Guinier, Adrienne Wing, James McPherson, Harrison’s letter to a female Toronto attorney, Valerie Edwards, and Howard’s own administrators corroborating this “story,” – which began on November 20, 1997, prior to Plaintiff’s December 17, 1997-June 1998 non-renewal.

**H. Plaintiff's Exhibit # 46: Affidavit of Prof. Derrick Bell**

Judge Hogan ruled that Plaintiff can testify as to what Prof. Bell told her about his experience with and knowledge of Harrison. Howard has not explained why the actual, signed, notarized affidavit from Prof. Derrick Bell, is not the best evidence of what Prof. Bell said in his affidavit; nor has Howard explained why the actual affidavit would be more “prejudicial,” “hearsay,” or unreliable than if Plaintiff testifies about what it says. Certainly, the actual words of Prof. Bell, in writing, are more reliable than will be Plaintiff’s recollection of the exact words in the affidavit, after perhaps, hours of questioning, during the stress of the trial.

Prof. Bell lives in New York City and has been extremely supportive of Plaintiff. Plaintiff listed Prof. Bell as a live witness, but Howard objected. If Howard withdraws its objection, Plaintiff also would prefer the live testimony of Prof. Bell to his affidavit, with the allotment of additional time for his testimony. Absent his own testimony, Prof. Bell’s own affidavit is the best evidence of what he said.

In addition, when Plaintiff attempted to testify about the details of what Prof. Bell, Prof. Guinier, Prof. Wing and Prof. McPherson told her about Harrison, in accordance with the Court’s order, the Court stopped her; accordingly, the jury never heard the full impact of Harrison’s effect on her, nor were they aware of the other professors who could have corroborated the existence of Harrison and his obsession with the fictional “Geneva Crenshaw” character. Instead, the jury was left to wonder whether Plaintiff had made the story up or exaggerated.

**X. Plaintiff's Response to Cunningham was Excluded from Evidence as Hearsay**

During Plaintiff’s cross examination, Mr. Shwalb was permitted to introduce a memo that Prof. Cunningham wrote to her implying that she had misrepresented statements that Cunningham had made to her; however, when Plaintiff sought to introduce her response to Cunningham, which demonstrated that Plaintiff had not misrepresented their conversation, the Court excluded Plaintiff’s own letter as hearsay, although she was on the stand. This memo was not hearsay and its exclusion greatly prejudiced Plaintiff by again, improperly discrediting Plaintiff’s veracity without allowing her to introduce rebuttal evidence.

**XI. Time Limits were Set Anticipating that Adverse Witnesses would “Explain” “Yes” or “No” Answers on Defendant’s Time, but Howard’s Witnesses have “Explained” their Answers on Plaintiff’s Time**

Since the former Dean and Associate Dean, as well as the five APT Committee members, were designated as adverse witnesses, Plaintiff anticipated being able to question them quickly, using leading questions for cross-examination. In order to accommodate the schedules of these professors and avoid them returning for Defendant’s defense, Howard has been permitted to present its defense with each witness, asking questions that exceed the scope of “direct” examination. Plaintiff has had to use time with each witness now, in her case in chief, leaving less time to present the case as she had planned and to explain her own case.

For example, during Plaintiff’s case in chief, Defendant has presented essentially, the “life story” of Dean Bullock, including her history with Howard University and the changes that Howard Law School underwent during her tenure as Dean. This unexpected testimony, during Plaintiff’s case in chief, requires Plaintiff to address the issues raised during this testimony.

**XII. Howard’s Litigation of Facts Already Admitted are Prolonging Trial**

Howard insists upon reviving an argument that it has long admitted was bogus from the beginning. Even as recently as the last day of Court, Thursday, April 13, 2006, Howard put on evidence in a manner to suggest to the jury that Dean Bullock’s November 3, 1997 form letter to Prof. Martin, informing her that her contract was ending in May of 1998, was actually a letter informing her of Howard’s decision to reject her for a renewed position on the faculty. As Plaintiff, this Court, and even Howard has repeatedly stated, this letter was merely a form letter, administered as a matter of routine, pursuant to the University Handbook, informing the professor of when the contract ends and that it is not self-renewing. The Handbook requires the law school to send the letters even before the APT Committee interviews any candidates for the positions at the AALS Conference.

Dean Bullock's Answer to the Complaint, which MJ Facciola ruled could be used against Howard, as its own Answer, since Howard never filed a proper Answer,<sup>13</sup> specifically admit these facts, in paragraphs 21, 23 and 24, respectively. The purpose of an Answer is to avoid litigating issues that are not disputed; yet Howard continues to litigate issues that it has admitted, in violation of Fed. R. Civ. P. 11. Plaintiff specifically warned that Howard would re-litigate this issue and asked the Court to preclude it from doing so. Plaintiff's March 14, 2006 *Opposition to Defendant's 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*, page 13.

Plaintiff also warned that Howard would allege, at trial, that Plaintiff had not completed her article entitled, "911: How will Police and Fire Departments Meet Public Safety Needs and Comply with the Americans with Disabilities Act?" was not accepted by December 18, 1997, even though all members of the APT Committee admitted, in their depositions, that they knew that Plaintiff's article was accepted by that date. These arguments and suggestions to the jury are additional Rule 11 violations, made in bad faith.

Plaintiff did not anticipate that Howard Security Deputy Chief Armstrong contradict his deposition testimony with respect to the most important fact for which Mr. Armstrong was offered. Armstrong testified, in his deposition, that no bar notice was ever issued for the stalker, Leonard Harrison and that Howard never requested a criminal background check for Harrison. Howard never produced a Bar Notice or a criminal background request during discovery. At trial, Armstrong testified that it *did* issue a Bar Notice for Harrison and that it *did* request a criminal background check. Plaintiff immediately asked her counsel to ask when Howard took these actions and/or to impeach Armstrong with his deposition testimony. Plaintiff suspected that Howard did so recently in order to elicit the desired response from Armstrong and to mislead the jury into believing that it was done during the 1997-1998 academic year, while Plaintiff was still employed at Howard and being stalked by Leonard Harrison. Without addressing this issue, the jury will be misled and Howard may even be able to argue, in its

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<sup>13</sup> Order dated May 30, 2001.

closing, that Howard barred Harrison and requested a background check. Plaintiff has attempted to obtain the information from Howard without Court intervention, to no avail.<sup>14</sup> .

### **XIII. Jury Instruction regarding Replacement of Counsel during Trial**

Plaintiff vehemently objected to the jury instruction provided to the jury upon Howard's Motion. Howard proposed that the Court inform the jury that Plaintiff had fired both of her attorneys during trial – then added the language that she had the right to do so and it should not be held against her. Howard's motion was fraudulent and a Rule 11 violation. The purpose was certainly not to instruct the jury not to hold it against Plaintiff that she fired her lawyers, but specifically to induce the jury *to hold it against her*. In fact, during oral argument on this issue, Howard's counsel admitted that Howard wanted the instruction so that jurors would not believe that Plaintiff's attorneys had "abandon" her and feel sorry for her. This fraudulent instruction was just a means to mislead the jury into believing that Plaintiff was an unreasonable person who irrationally fired two lawyers during trial. In fact, these attorneys did abandon her, overwhelmed by Howard's battalion of attorneys, unfavorable rulings by the Court and "calls from all over town" not to sue their *alma mater*, Howard University, against the backdrop of working with little or no "up front" retainer money because Plaintiff does not have the money to finance a legal team as does Howard, with five outside law firms over eight years, in addition to its own General Counsel's office, fighting Plaintiff, primarily *pro se*.

### **CONCLUSION**

Plaintiff respectfully request that this Court grant Plaintiff judgment, as a matter of law, set the case for a new trial on damages for her breach of contract claim and direct the jury to determine compensatory damages. In the alternative, Plaintiff should be granted a new trial pursuant to Fed. R. Civ. P. 59(b) and of 60(b)(3).

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<sup>14</sup> During Armstrong's testimony, Plaintiff urged her then counsel to ask the question "when" Howard took these actions and/or to impeach Armstrong with his deposition testimony, but her counsel ignored her. That opportunity missed, Plaintiff then asked her counsel to file a motion to compel updated discovery to require Howard to produce the purported Bar Notice and criminal background request. Again, Plaintiff's request was ignored. See Section VII, below, discussing change of counsel during trial.

Respectfully submitted,

Dawn V. Martin, Esquire  
*Law Offices of Dawn V. Martin*  
1090 Vermont Avenue, N.W, Suite 800  
Washington, D.C. 20005  
(202) 408-7040 telephone; (703) 642-0208 *facsimile*  
[DVMARTINLAW@yahoo.com](mailto:DVMARTINLAW@yahoo.com)  
[www.firms.findlaw.com/dvmartinlaw](http://www.firms.findlaw.com/dvmartinlaw)