

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 RETALIATION CLAIMS,  
PURSUANT TO RULE 50(B), 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 retaliation, 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 April 25, 2006 motion for judgment.

**MEMORANDUM IN SUPPORT OF MOTION**

**I. Relationship of Present Motion to Accompanying Motions for Judgment on Retaliation and Breach of Contract Claims**

Plaintiff has simultaneously filed *Motions for Judgment* on her retaliation and Breach of Contract Claims, or, in the alternative, for a new trial on all of her claims. Plaintiff incorporates herein, by reference, all arguments made in each of those motions. The present motion is integrally related to her *Motion for Judgment on her Sexual Harassment Claim*. Since the jury determined that the harassment that Plaintiff endured in her workplace and which Howard University failed to reasonably remedy, was not sexual in nature, or based on sex, the jury determined 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. The jury found no retaliation for protected activity because it found no protected activity.

As Plaintiff has set forth in her accompanying *Motion for Judgment on her Sexual Harassment Claim*, the jury’s conclusion that Plaintiff was did not engage in protected activity was based on a misunderstanding of law and should be set aside. Since engaging in protected activity – or a good faith

belief that one is engaging in a protected activity -- is a pre-requisite to establishing a prima facie case of retaliation, Plaintiff respectfully requests that the present motion be considered after her accompanying *Motion for Judgment on her Sexual Harassment Claim* is decided.

## **II. 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."

**III. Legal Precedent Set by Chief Judge Hogan's 1999 Decision**

The case at bar is significant for all working women and for all employers employing women, In *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), Chief Judge Hogan, following the consistent law of all jurisdictions and EEOC regulations addressing the issue of sexual harassment in the workplace by non-employees, set precedent for this Court by holding, as a matter of law, that:

an employer may be held liable for a hostile work environment that is created by a non-employee, including those non-employees who were invited or permitted to remain on an employer's premises, citing *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1992) ("the environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers in the workplace") and 29 C.F.R. §

1604.11(e) (EEOC Guidelines) ("An employer may also be responsible for the acts of non-employees with respect to sexual harassment of employees in the workplace").

1999 U.S. Dist. LEXIS 19516 at \*7.

Plaintiff, Dawn V. Martin, began with Howard University as a Visiting Associate Professor at of law in July of 1996. Beginning in November of 1997, Professor Martin was stalked in her workplace by Leonard Harrison, a homeless stranger with a criminal record, a history of violence and a pattern of targeting African-American female professors and attorneys, pursuing them as his "wife." Prof. Martin immediately reported the stalking to the law school administration, Howard security and the D.C. Metropolitan Police Department. She repeatedly asked the administration, particularly the Dean, Alice Gresham-Bullock, to bar the stalker from campus, but the University took no reasonable steps to keep the stalker out of the workplace, despite the availability of barring procedures already set in place by Howard University campus security. Plaintiff endured a hostile work environment, pervaded by sexual harassment by the stalker, from November 20, 1997 until the end of her employment with Howard University, in June of 1998.

Plaintiff continued to perform all of her teaching duties, taking certain precautions to protect her students, her teenage daughter and herself from the stalker. Despite thirteen years of outstanding civil rights legal practice/policy-making, four years of teaching equal employment law and torts, recognized scholarship in the area of equal employment law, excellent student evaluations and student petitions and letters in support of her renewal, Plaintiff was not selected for a permanent position or even a renewed visitorship. Plaintiff had left a permanent, tenure-track teaching position in Cleveland to return to the Washington, D.C. area, based on representations that the visiting position would be converted to a permanent, tenure-track position at Howard. This decision, made after the academic "hiring season," left Plaintiff without a job, severely damaged her reputation and tremendously limited her career opportunities. Plaintiff seeks to be restored to the place that she would have been absent the retaliation. She seeks reinstatement, as a full professor at Howard University, with tenure, compensatory and punitive damages, as well as attorneys' fees.

After eight years of litigation, a jury determined that Harrison did harass Prof. Martin in her workplace and that Howard University failed to take reasonable measures to stop it; however, oddly, the jury also determined that this harassment was not sexual in nature or based on Prof. Martin's sex/gender – even though he pursued her to be his “wife.” The jury's conclusion reflects a misunderstanding of the law regarding sexual harassment that resulted, in part, from inadequate jury instructions. As a result of this ruling, Plaintiff's retaliation claims were also denied, as having no statutory basis.

In addition to the legal implications of this case, it has strong social implications for women – and particularly African-American women. Despite the jury's specific finding that Prof. Martin was harassed by the delusional, homeless stranger in her workplace, in closing argument, Howard's outside counsel, a partner in the employment discrimination defense firm of *Venable*, told jurors that Prof. Martin “*played the sexual harassment card.*”<sup>1</sup> The stalking of women in their workplaces should never be so trivialized – nor should the woman stalked be so denigrated<sup>2</sup> for asking that basic safety procedures actually be

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<sup>1</sup> Ironically, this *Venable* partner, Mr. Shwalb, used these words, couched in terms of Howard's legacy for civil rights. Howard repeatedly attempted to cloak its facilitation of the stalking of one of its professors under the robes of the civil rights giant, the late Justice Thurgood Marshall. The implication appears to be that historically Black Universities (HBCUs) should be granted a “free pass” for sexual harassment and that African-American women who are stalked or otherwise discriminated against by HBCUs are less worthy of protection than are women in other Universities or workplaces. This message mirrors the apathy surrounding “Black on Black” crime and should not be tolerated or perpetuated. Certainly, the African-American woman is entitled to the same protection as her White counterparts.

<sup>2</sup> Mr. Shwalb asked the jurors, “Would you want *this woman* teaching your children?” This question might be appropriate to describe a child molester teaching elementary school, but was particularly bizarre in this case where the Plaintiff was a law school professor who taught adults and whose students protested her non-renewal. Howard admitted that Prof. Martin was an excellent law professor and that her teaching evaluations exceeded the norm. Dean Bullock admitted receiving at least two petitions and numerous letters protesting Prof. Martin's non-renewal, praising both her teaching ability and her dedication to her students. Prof. Martin offered some of these letters into evidence (Exhibit VV of Pl.'s *Motion for Summary Judgment*) but the Court excluded them from evidence at trial. Two former students testified as to Prof. Martin's exceptional teaching ability, accessibility and dedication. These letters describe Prof. Martin in terms such as a “phenomenal woman” and a teacher who “really cares” about her students. It was undisputed that Prof. Martin developed exam-taking materials and devoted some Saturdays and other out of class time to teaching Howard students the skill of exam-taking for success in law school and on the Bar Exam and that she brought in an Assistant Maryland Bar Examiner, during both of her years at Howard, to assist with teaching these skills. Prof. Martin graduated from an Ivy League college, Columbia University, with Honors, and a top ten law school, New York University, graduating into the Honors Program and the U.S. Department of Justice, Civil Rights Division. Her entire legal career, of 25 years, demonstrates her dedication to, and specialization in, civil rights law and public service. She has

implemented to keep a serial, delusional, homeless stalker with a criminal record out of the workplaces. The outcome of this case will contribute to the standard set for employers in stalking workplace violence cases and merits the attention of the Bar, as well as advocates for women's rights and civil rights.

#### **IV. 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

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worked for this nation's top civil rights agencies, including the Justice Department's Civil Rights Division, the U.S. Equal Employment Opportunity Commission, the New York State Office of the Attorney General, Civil Rights Bureau. She has been an attorney for the Legal Aid Society of New York. Even after her termination from Howard and the destruction of her career as a law professor, Ms. Martin refused to sell her expertise to an employment discrimination defense firm and turn her experience against the people whom she had advocated for all of her life. Instead, she became a solo civil rights/equal employment law attorney, representing average working people who have been discriminated against on their jobs and need legal representation. Plaintiff is, as is demonstrated by her career, the embodiment of the civil rights legacy that Howard claims it owns. Mr. Shwalb's attempt to devalue Prof. Martin as a person is typical of the tactics used to discredit women who are victims of stalkers and other sexual predators when they stand up for their own safety and their rights in their workplaces.

from her office in retaliation for her filing of a charge with the U.S. Equal Employment Opportunity Commission ("EEOC"). (Emphasis added)

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

Judge Hogan elaborated on the facts setting forth Plaintiff's specific claims of retaliation.

Title VII makes it illegal for an employer to take adverse employment actions against an employee for engaging in activity protected by the statute. See 42 U.S.C. § 2000e-3. In order to establish a prima facie case of retaliation, Plaintiff must show that: (1) she was engaged in protected activity under Title VII, (2) she was subjected to adverse employment action, (3) and a causal connection exists between the protected activity and the adverse action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1973); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Barnes v. Small, 268 U.S. App. D.C. 265, 840 F.2d 972, 976 (D.C. Cir. 1988).

Plaintiff asserts that Dean Bullock took five separate actions against her because she complained about a hostile work environment and requested protection from Mr. Harrison. Specifically, Plaintiff alleges that Dean Bullock retaliated against her by: (1) denying her application for a permanent EEO position at the Law School on December 18, 1997; (2) failing to authorize the Appointment Promotion and Tenure ("APT") Committee to fill vacant positions in January, 1998, because she believed the ATP Committee would recommend Plaintiff for one of these positions; (3) converting a Constitutional Law/Civil Rights position into a Tax/Trusts and Estates position in April 1998 so that the APT Committee could not consider her for the position; (4) leaving a tenure-track position vacant in the Spring of 1998, so that the APT Committee would not consider Plaintiff for the position; (5) ordering Plaintiff on May 26, 1998, to vacate her office by Friday, May 29, 1998, and actually "forcing" her out of the office in early June 1998. (Emphasis added)

With respect to the other four alleged adverse actions, this Court does not read Title VII to suggest that the protections afforded by this statute against retaliation are only available against individuals who have filed formal charges with the EEOC. See Brandau v. State of Kansas, 968 F. Supp. 1416, 1421-22 (D. Kansas 1997) (holding that it was undisputed that plaintiff had engaged in protected opposition to discrimination because she spoke directly with the alleged harasser and reported his conduct to her supervisors); Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1025 (D. Nev. 1992) (holding that where the harasser is a non-employee, protected opposition under Title VII includes the statement to the employee, "I don't have to take this," or a simple request to the employer to "do something."). Moreover, whether or not Plaintiff's letter was sufficiently detailed to put Dean Bullock on notice that she believed she had been the victim of a hostile work environment is a question of fact for the jury. See Howard U. v. Green, 652 A.2d 41, 46 (D.C. App., 1994) (holding that there are no "magic words" which must be chanted in order to invoke Title VII protection), citing EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1012-1013 (9th Cir. 1983). Since an EEOC complaint is not a legal prerequisite for a retaliation claim and since the Court cannot find that no reasonable juror could decide that Plaintiff had engaged in "protected activity" under Title VII when she informed Dean Bullock of Mr. Harrison's activities and complained about what she felt was the inadequacy of campus security, Defendants' motion for summary judgment on the other four retaliation claims must also be denied. n2

----- Footnotes -----

n2 To the extent that the causal connection is in dispute, the Court finds that since the Plaintiff's complaints about Mr. Harrison and campus security were closely followed by the alleged adverse actions, a sufficient causal connection has been established to create a triable issue of material fact with regard to Plaintiff's retaliation claims. See Ramirez v. Oklahoma Dep't of Mental Health, 41 F.3d 584, 596 (10th Cir. 1994) (adverse action a month and a half after protected activity constituted circumstantial evidence of retaliation).

1999 U.S. Dist. LEXIS 19516 at \*14-18.

**V. Plaintiff Engaged in "Protected Activity"**

**A. Plaintiff's Complaints Constituted Protected Activity**

The jury form first asked whether Plaintiff was engaged in "protected activity." This answer depended upon the jury's answer to the first series of questions, regarding whether the conduct that Plaintiff reported, Harrison stalking her in her workplace, constituted sexual harassment or harassment on the basis of her sex/gender, in order to bring her into the protections against retaliation provided by Title VII of the Civil Rights Act of 1964 and/or the D.C. Human Rights Act. Since the jury determined that Harrison's harassment of Prof. Martin, was not sexual in nature or based on her sex/gender, even though he pursued her to be his "wife," the jury's inquiry did not proceed to examine whether the purported legitimate non-discriminatory reasons offered by Howard for Plaintiff's non-selection and non-renewal were false or pre-textual.

The jury's conclusion, that Plaintiff had not engaged in protected activity prior to the adverse actions taken against her, was an error of law and contradicted by all relevant evidence of record. *See Plaintiff's Accompanying Motion for Judgment on her Sexual Harassment Claim*, incorporated herein, by reference. The following discussion, then, proceeds from a reversal of that finding and judgment or a new trial for Plaintiff on her sexual harassment claim.

**B. Plaintiff's Complaints Regarding Harrison's Stalking in her Workplace Constituted Protected Activity, as a "Good Faith" Complaint**

Even if a jury had reasonably determined Harrison's harassment of Prof. Martin was not sexual in nature or based on her sex or gender, Plaintiff engaged in protected activity by reporting harassment that

she *perceived* was based on her sex. 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 (11<sup>th</sup> Cir. 1997); *Trent v. Valley Electric Association, Inc.*, 41 F.3d 524, 526 (9th Cir. 1994).

Plaintiff does not need to prove the underlying sexual harassment that she opposed in order to establish a case of retaliation based on her complaint about what she believed was sexual harassment or harassment on the basis of sex. *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. Unit A Sept. 1981); cert. denied, 455 U.S. 1000, 102 S. Ct. 1630, 71 L.Ed.2d 866 (1982).

Plaintiff and Officer Sirleaf both testified that Plaintiff complained to him that Harrison was harassing her and pursuing her as his wife. She testified that viewed Harrison's pursuit as sexual in nature and because of her sex. In fact, she and Mrs. Bruner both testified that she had Mrs. Bruner watch the Ladies room because she feared an attack by Harrison in her workplace. Plaintiff testified that she feared that such an attack by Harrison could include a sexual assault, in light of his obsession with her and the fictional character in Prof. Bell's book, as his "natural wife." Plaintiff *perceived* Harrison's conduct as sexual or based on her sex, even if the jury did not; accordingly, Plaintiff's good faith belief brought her within the protections of 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.<sup>3</sup>

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<sup>3</sup> To the extent that there was any question as to whether Deans Bullock or Newsom had actual notice of Plaintiff's EEOC charge before he ordered her to vacate her office by May 29, 1998, 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 (Pl. Trial Exhibit 39). Although Howard represented, at trial, that the Grievance Committee had no jurisdiction over sexual harassment of other

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

### **A. Content of the Verdict Form**

The jury form restricted the jurors to the decision that the APT Committee made, on December 18, 1997, selecting Visiting Assistant Professor Cunningham, over Plaintiff, Visiting Associate Professor Martin, to fill the newly allotted EEO/Labor law position, teaching the EEO course that Plaintiff had been teaching at Howard for the previous two years and had taught at Cleveland-Marshall College of Law for two years prior to joining Howard's faculty.

### **B. In 1999, Judge Hogan Held all of Plaintiff's Alleged Adverse Actions to be Adverse Actions, as a Matter of Law**

In his 1999 decision, Judge Hogan specifically identified the adverse actions that were being upheld in this case, to proceed to a jury trial.

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.** (Emphasis added)

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

Specifically, Plaintiff alleges that **Dean Bullock retaliated against her<sup>4</sup>** by: (1) denying her application for a permanent EEO position at the Law School on December 18, 1997; (2) **failing to authorize the Appointment Promotion and Tenure ("APT") Committee to fill vacant positions in January, 1998, because she believed the ATP Committee would recommend Plaintiff for one of these positions;** (3) **converting a**

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EEO claims, the Grievance Committee's own Report specifically states its authority over these claims, including sex discrimination claims. To the extent that the evidence produced at trial by Howard placed the timing of its notice of Plaintiff's EEOC charge into 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 requests for protection from Harrison, her filing of a charge with the EEOC and the filing of an internal grievance.

<sup>4</sup> The jury verdict form did not identify Dean Bullock as the retaliating party, despite Plaintiff's request that she be so identified and Plaintiff's objection to the omission of Dean Bullock as the identified retaliating official. Instead, the jury verdict form limited the question to whether the "APT Committee members" intentionally retaliated against Plaintiff. Plaintiff does not allege, nor is it her theory of the case that the entire APT Committee intended to retaliate against her. Plaintiff has clearly set forth her allegations that Dean Bullock harbored retaliatory animus toward her for her complaints of stalking in her workplace and the Dean Bullock enlisted the assistance of APT Vice Chair, Prof. Andrew Taslitz, who presented the candidates' credentials to the remaining four members of the Committee who honestly believed his misrepresentations regarding the status of her scholarship versus that of the selectee, junior Visiting Assistant Professor Christi Cunningham.

**Constitutional Law/Civil Rights position into a Tax/Trusts and Estates position in April 1998 so that the APT Committee could not consider her for the position; (4) leaving a tenure-track position vacant in the Spring of 1998, so that the APT Committee would not consider Plaintiff for the position; (5) ordering Plaintiff on May 26, 1998, to vacate her office by Friday, May 29, 1998, and actually "forcing" her out of the office in early June 1998. (Emphasis added)**

**With respect to the other four alleged adverse actions<sup>5</sup> ....Defendants' motion for summary judgment on the other four retaliation claims must also be denied.**

1999 U.S. Dist. LEXIS 19516 at 15-16.

Chief Judge Hogan's 1999 decision correctly summarized the allegations in Plaintiff's First Amended Complaint generally, and specifically, ¶¶ 147,<sup>6</sup> 258,<sup>7</sup> 300,<sup>8</sup> 242,<sup>9</sup> 263,<sup>10</sup> 268,<sup>11</sup> 298,<sup>12</sup> 313,<sup>13</sup> and 316.<sup>14</sup> All applications produced as exhibits demonstrated that Plaintiff applied for "any" tenure-track position and never restricted her application to the EEO/Labor position. There was never any valid basis, therefore, to restrict the jury verdict form to Plaintiff's rejection for this one position. The law of the case and *res judicata* therefore prohibited the dismissal of the retaliation claims specifically identified in Judge Hogan's 1999 decision – particularly since the decision was based on sound law at the time and was reaffirmed as sound law by recent cases decided by the U.S. Court of Appeals for the D.C. Circuit.

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<sup>5</sup>Judge Hogan correctly recognized all four of Dean Bullock's alleged acts as adverse actions and part of Bullock's overall plan to remove Prof. Martin from the faculty in response to her requests for protection from a stalker in her workplace. As discussed herein, Magistrate Judge Facciola effectively reversed Judge Hogan's holding on this issue and erroneously granted Howard summary judgment on the two retaliation claims that would have been easiest for Plaintiff to prove and for which *she* should have been granted summary judgment, based on the undisputed evidence of record.

<sup>6</sup> Plaintiff alleged retaliatory rejection for all faculty positions for which she applied (which included repeated applications for "any" tenure-track position, a renewed visitorship, the advertised EEO/Labor Law position, the advertised Constitutional Law/Civil Rights position and the un-advertised Tax position that Bullock purportedly created by reallocating funds from the advertised Constitutional Law/Civil Rights position in late March of 1998).

<sup>7</sup> Plaintiff alleged retaliatory non-renewal of visitorship.

<sup>8</sup> Plaintiff alleged retaliatory rejection for continued visitorship.

<sup>9</sup> Plaintiff alleged retaliatory removal from the faculty.

<sup>10</sup> Plaintiff alleged retaliatory rejection for "any" faculty position.

<sup>11</sup> Plaintiff alleged retaliatory rejection for "any" faculty position.

<sup>12</sup> Plaintiff alleged retaliatory rejection for the advertised Constitutional Law/Civil Rights position.

<sup>13</sup> Plaintiff alleged retaliatory rejection for any of the admittedly available minimum of three tenure-track faculty positions available, while students lobbied for courses that Plaintiff was well qualified to teach.

<sup>14</sup> Plaintiff alleged retaliatory conversion of the Constitutional Law/Civil Rights position to a tax position to prevent the APT Committee from considering her for it.

### C. Howard Obtained a Limited Jury Verdict Form Based on Fraud and Misrepresentation

In its *Motion in Limine to Clarify that Plaintiff's Retaliation Claim is Limited to Her Rejection for The EEO/Labor Position*, Howard argued, *for the first time*, that MJ Facciola's Report limited Plaintiff's retaliation claim to the EEO position and excluded events occurring after December 18, 1997.<sup>15</sup> Howard claimed that MJ Facciola limited Plaintiff's retaliation claims to her December 18, 1997 rejection for the EEO/Labor position and that no evidence pertaining to retaliation, retaliatory animus or vacant positions after December 18, 1997, should be admitted into the record. In fact, MJ Facciola's Report expressly included Plaintiff's claims of non-renewal beyond December 18, 1997, including her April 8, 1998 rejection for a permanent position. *Martin v. Howard University*, 2003 U.S. Dist. LEXIS 18501 at \*31-32. MJ Facciola *never even mentioned* the December 18, 1997 date, nor did he limit the claim to the EEO/Labor position.

Only HU's Decisions Not to Reappoint Martin or Offer Her Another Position Are Cognizable

It is settled in this circuit that an act, claimed to be retaliatory, must constitute an adverse employment action. An adverse action is one that has materially adverse consequences affecting the terms, conditions, or privileges of her employment such that a reasonable finder of fact could conclude that the plaintiff has suffered objectively tangible harm. *Brown v. Brody*, 339 U.S. App. D.C. 233, 199 F.3d 446, 457 (D.C. Cir. 1999). **Two of Martin's retaliation claims easily meet this criterion:** 1) the decision, formalized in Bullock's letter of November 3, 1997, not to reappoint her as Visiting Associate Professor,<sup>16</sup> and 2) **the decision, formalized in Bullock's letter of April 8, 1998, rejecting Martin's**

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<sup>15</sup> When Plaintiff filed her October 30, 2003 *Objection to MJ Facciola's Report*, Howard agreed with Plaintiff, that the *Report* contained material errors. Howard stated that it had "no objection" to Judge Hogan considering the cross-motions for summary judgment *de novo*. In response to Plaintiff's October 24, 2005 *Motion to Vacate MJ Facciola's Report and Recommendation*, Howard again stated that *to MJ Facciola's Report* contained numerous material errors; accordingly, Howard did not oppose the motion.

<sup>16</sup> MJ Facciola's erroneous conclusion that the November 3, 1997 letter was a "decision" made by Dean Bullock not to renew her contract is only one of the many, material factual errors in MJ Facciola's Report, which Plaintiff has identified in her *Objection, Motion for Reconsideration of September 24, 2005 Order* and November 24, 2006 *Unopposed Motion to Vacate MJ Facciola's October 20, 2003 Report and Recommendation*. As has been discussed in numerous filings, including the summary judgment motions and responses, the November 3, 1997 letter from Bullock was a form letter, sent to all visiting professors whose contracts were ending at the end of the year, irrespective of whether they would be renewed. Dean Bullock had no authority to make any decision at that time, regarding the candidate's applications. Profs. Cunningham and Levin received the same letters during the 1996-1997 academic year and both had their one year contracts renewed. During the 1997-1998 academic year, Bullock sent the same form letters to Profs. Martin and Cunningham. Prof. Cunningham was selected for a tenure-track position.

**application for any position on the HU faculty. Combined, they led to Martin's dismissal and the loss of her job.** (Emphasis added.)

*Martin v. Howard University*, 2003 U.S. Dist. LEXIS 18501 at \* 31-32.

Howard has not retracted its misrepresentation, despite Plaintiff's January 17, 2006 *Motion for Reconsideration*, quoting from MJ Facciola's *Report* clearly exposing Howard's misrepresentations. Howard's misconduct is sanctionable, under Fed. R. Civ. P. 11. Certainly, no court order should stand where it was based on the false representations of a party.

**VII. Recent, Controlling Case Law Requires Reversal of MJ Facciola's Partial Grant of Summary Judgment to Defendant with respect to Plaintiff's Most Compelling Retaliation Claims**

**A. MJ Facciola's Reversal, in part, of Judge Hogan's 1999 Decision**

Although MJ Facciola did not limit Plaintiff's retaliation claims to her December 18, 1997 rejection for the EEO/Labor position, he did conclude, *sua sponte*,<sup>17</sup> contrary to Judge Hogan's 1999 decision, that two of Plaintiff's retaliation claims were not based on adverse actions.

1) Dean Bullock's withholding of vacant positions from the APT Committee to prevent the Committee from recommending that Plaintiff be retained to fill one of those positions; and

2) Dean Bullock's March 6, 1997 conversion of an advertised Constitutional Law/Civil Rights position, to a tax position, to prevent the APT Committee from considering Plaintiff for the Constitutional Law position, or any other position, for which she qualified.

MJ Facciola determined that:

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

....  
**Title VII applies only to ultimate employment decisions such as hiring or discharging....**<sup>18</sup>  
(Emphasis added)

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<sup>17</sup> Although MJ *Facciola's Report* stated that Howard raised this argument in its MSJ, as a new argument, not raised in its 1998 *Motion to Dismiss*, this argument was nowhere in Howard's MSJ.

<sup>18</sup> MJ Facciola refers to Plaintiff's non-renewal as a "dismissal" and "the loss of her job," as well as her

*Martin v. Howard University*, 2003 U.S. Dist. LEXIS 18501 at \* 31-32.

**B. Current Case Law Requires Restoration of Plaintiff's Retaliation Claims**

It is now clear that, in this Circuit, adverse actions are not restricted to ultimate, tangible employment actions such as firing, hiring or promotion.

**[a]dverse employment actions are not confined to hirings, firings promotions or other discrete incidents....** So long as a plaintiff meets the statutory requirement of being “aggrieved” by an employer’s action, 42 U.S. C. § 2000(e-16)(c) (2000), we do not categorically reject a particular personnel action as nonadverse simply because it does not fall into a cognizable type.... Although “purely subjective injuries” such as dissatisfaction with a reassignment, public humiliation, or loss of reputation, are not adverse actions, the threshold is met when an employee “experiences materially adverse consequences affecting the terms, conditions, or privileges of employment of future employment such that a reasonable trier of fact could find objectively tangible harm.” (Emphasis added)

*Holcomb v. Powell*, 433 F.3d 889 at 902.<sup>19</sup>

The recent stream of cases flowing from the D.C. Circuit clarifying, expanding and re-evaluating the definition of “adverse action” within the meaning of Title VII, demonstrates that Plaintiff’s repeated warnings that MJ Facciola’s grant of summary judgment on these claims constituted reversible error were based on sound legal principles. This trend began with *Holcomb v. Powell*, 2006 U.S. App. LEXIS 520 at \*30-31 (D.C. Cir. 2006) (Jan.10, 2006), holding that adverse actions included acts that affected future employment opportunities. Next, it decided *Rochon v. Gonzales*, 2006 U.S. App. LEXIS 5028 (D.C. Cir.

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“firing” (2003 U.S. Dist. LEXIS at 25-26); yet, he held that the purported conversion of the Constitutional Law/Civil Rights position for which she applied and the withholding of other vacant positions did not constitute adverse actions or have an “immediate impact upon Martin that would permit them to be characterized as causing objectively tangible harm.” 2003 U.S. Dist. LEXIS 18501 at \* 32. MJ Facciola continued: “While these acts ultimately led, in Martin’s view, to her departure from HU despite her desire to stay in any faculty position, they did not in themselves cause her any harm cognizable as retaliatory.” (Id.) A “firing,” “dismissal” or “loss of a job” is, indisputably, an adverse action within the meaning of Title VII; in fact, it is the ultimate adverse action.

<sup>19</sup> Although MJ Facciola’s *Report* is inconsistent with *Holcomb*, his decision only a month earlier, in *Bowie v. Ashcroft*, 283 F. Supp. 2d 25 (D.D.C. 2003) was consistent with *Holcomb*. See Plaintiff’s December 19, 2005, *Opposition to Defendant’s Motion in Limine Clarifying that Plaintiff’s Retaliation Claim is Limited to Decision not to Hire Plaintiff for EEO/Labor Law Position*, page 16. Oddly, MJ Facciola did not cite his own *Bowie* decision in his October 20, 2003 *Report*, nor did he mention other cases discussed in *Bowie*, such as *Terry v. Gallegos*, 926 F. Supp. 679, 710 (W.D. Tenn. 1996), concluding that the cancellation or withdrawal of a job vacancy can constitute an adverse action.

2006), holding that Title VII makes unlawful any act of retaliation by an employer that might dissuade a reasonable employee from making or supporting a charge of discrimination pursuant to Title VII – whether it is related to current employment opportunities, future employment opportunities, or even potentially adverse consequences completely unrelated to employment.

The D.C. Circuit’s most recent holding on the issue is *Chappelle-Johnson v. Powell*, 2006 U.S. App. LEXIS 6600 (D.C. Cir. 2006) (March 17, 2006), holding that **an adverse action includes the denial of an opportunity to compete for a vacant position**. These holdings, independently, and together, demonstrate that Dean Bullock’s conversation (or feigned conversion) of a position and withholding of vacant positions, for which Plaintiff qualified, constituted an adverse action within the meaning of Title VII, as defined by the U.S. Court of Appeals for the D.C. Circuit.<sup>20</sup>

Dean Bullock denied Prof. Martin the **opportunity to compete for a vacant position** when she left positions vacant and converted the Constitutional Law/Civil Rights position, rather than permit the APT Committee to fill the needed positions, for fear that the Committee would fill one of the positions with Prof. Martin. The consequences for Prof. Martin were certainly “significant” and “material,” since they resulted in her removal from the faculty and left her unemployed.

*Holcomb* held that the defendant’s reassignment of the plaintiff’s duties, to tasks far below her grade level, constituted an adverse action, although she experienced no reduction in pay, grade or title. The court held that the plaintiff experienced tangible harm because the reduction in the quality of her assignments could affect future employment opportunities. Prof. Martin’s non-renewal had both immediate and future tangible effects on her employment. It immediately left her unemployed. In addition, her non-renewal indicated to potential employers that she had not met the requirements for tenure or had failed to fulfill her duties as a law professor, particularly after she had left a tenure-track position in Cleveland and forfeited opportunities with other schools to join Howard’s faculty.

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<sup>20</sup> *Holcomb* is also being followed by the District Court, cited in *Broderick v. Donaldson*, 2006 U.S. App. LEXIS 3248 (D.D.C. 2006) (Feb. 10, 2006); *Adams v. Mineta*, 2006 LEXIS 5783 (D.D.C. 2006) (Feb. 16, 2006); *Maramark v. Spellings*, 2006 U.S. Dist. LEXIS 6633 (D.C.D.C. 2006) (Feb. 3, 2006); *Clipper v. Billington*, 2006 U.S. Dist. LEXIS 3324 (D.D.C. 2006) (Jan. 31, 2006).

*Rochon v. Gonzales*, 2006 U.S. App. LEXIS 5028 (D.C. Cir. 2006), expressly expanded the definition of “adverse action” to include any action taken by the employer to deter or punish protected activity under Title VII -- even to retaliatory acts that are not related to the employment at all.

We hold Title VII makes unlawful any act of retaliation by an employer that well might dissuade a reasonable employee from making or supporting a charge of discrimination pursuant to Title VII.

2006 U.S. App. LEXIS 5028 at \*24-25. *See also* 2006 U.S. App. LEXIS 5028 at \*2, 15-18, 22.

In *Rochon*, the plaintiff, an FBI agent alleged that, in retaliation for his EEO complaint against his employer, the FBI, the FBI violated its own policy and failed to investigate a death threat that a federal prisoner made against him and his wife. The Court of Appeals expressly rejected the defendant government’s argument that the plaintiff did not suffer an “adverse personnel action” and was therefore not the victim of retaliation cognizable under Title VII. 2006 U.S. App. LEXIS 5028 at \*12.

The Court of Appeals specifically 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. *Rochon*, 2006 U.S. App. LEXIS 5028 at \*16. *Passer* held that an employer had illegally retaliated against the plaintiff, under the ADEA, when it cancelled a symposium that was to be held in the plaintiff’s honor. *Id.* Although there was no loss of a material, tangible job benefit, the symposium cancellation was prohibited because it was based on a retaliatory motive and it might reasonably deter other employees from engaging in protected activity.

Certainly, if the cancellation of an honorary symposium constitutes and adverse action under Title VII, the cancellation, withholding and/or a conversion of a faculty position to prevent Plaintiff’s selection for it, must constitute an adverse action – particularly when it actually results in the loss of the very job that Plaintiff holds at the time of the conversion or withholding. Even ordering Plaintiff to vacate her office, while she is using it to grade exams, and while the similarly situated exiting Visiting Professor who had not protested sexual harassment was not required to vacate her office, constitutes an adverse action based on the analysis set forth in *Rochon* and *Passer*. The jury was not properly instructed on this issue, despite Plaintiff’s requests that adverse action be re-defined and the jury verdict form reflect

the current definition. In the present case, Plaintiff alleged retaliatory non-renewal of her teaching contract, as a law professor, at Howard University, for the 1998-1999 academic year and beyond.

MJ Facciola's October 20, 2003 *Report and Recommendation* changed the course of this litigation by dismissing the retaliation claims that Chief Judge Hogan had left intact in his 1999 decision. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516 (D.C.D. 1999), *reversed in part by Report and Recommendation of Magistrate Judge Facciola*, 2003 U.S. Dist. LEXIS 18501 (D.D.C. 2003),<sup>21</sup> adopted as Court Order, September 24, 2005, *reversed in part*, November 21, 2005,<sup>22</sup> *reversed in part January 10, 2006*<sup>23</sup>, *Motion for Reconsideration, based on Holcomb v. Powell, denied*, March 6, 2006.

In *Chappelle-Johnson*, the district court granted summary judgment to the defendant agency, holding that the plaintiff had failed to prove a *prima facie* case, under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), because she did not assert that the position that she sought was actually filled by someone outside of her protected class(es). 2006 U.S. App. LEXIS 6600 at \*6. The Appellate Court reversed and restored plaintiff's retaliation claim, holding:

**Here, Chappell-Johnson does not attempt to show that the position remained open and that the employer continued to seek applicants (the *McDonnell Douglas* formulation). Rather, she attempts to demonstrate that the FDIC denied her an opportunity for advancement that it gave to non-African American and younger employees, namely, the opportunity to compete for a vacant position with a grade for which she would otherwise be ineligible. This is a perfectly acceptable way to try to satisfy her *prima facie* burden, which, under *Brown*, she may do by producing any evidence that gives rise to an "inference of discrimination" (along with evidence sufficient to satisfy *Brown's* other two elements, *see infra* pp. 8-9). (Emphasis added)**

2006 U.S. App. LEXIS 6600 at \*9-10.

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<sup>21</sup> Chief Judge Hogan left these claims intact. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516 (D.C.D. 1999). MJ Facciola reversed this holding and refused to address Plaintiff's breach of contract claim, erroneously holding that Judge Hogan dismissed it in 1999.

<sup>22</sup> Judge Hogan restored the breach of contract claim that he upheld in his 1999 decision, 1999 U.S. Dist. LEXIS 19516, but that MJ Facciola erroneously held was dismissed. Judge Hogan also corrected MJ Facciola's erroneous holding that Plaintiff did not file a Rule 56.1 *Statement of Disputed Material Facts*.

<sup>23</sup> Judge Hogan granted, in part, Defendant's *Motion to Clarify that Plaintiff's Retaliation Claims are Limited to her December 18, 1997 Rejection for the EEO/Labor Position*, which reversed, in part, MJ Facciola's holding that Plaintiff's retaliation claims included her April 8, 1998 rejection for any faculty position, in *Martin v. Howard University*, 2003 U.S. Dist. LEXIS 18501 at \* 31-32.

Chappell-Johnson alleged that her supervisor facilitated promotions for non-African-American and younger employees, but not for her. 2006 U.S. App. LEXIS 6600 at \*1. Her supervisor refused to reduce an advertised Grade 13 position to a Grade 11 to facilitate plaintiff's ability to apply for it. The plaintiff had previously held a GS-11 position and was qualified for the position but for the advertised grade. The plaintiff alleged that advertised grades had been lowered, in the past, to allow non-African-American, younger employees to apply for positions listed at grades above their eligibility levels.

Ms. Chappelle-Johnson did not meet the exact factual test of *McDonnell-Douglas*, but she did meet it in the flexible terms intended by the Supreme Court. The Court of Appeals held that it is not necessary that the plaintiff "show that the position remained open and that the employer continued to seek applicants." It was enough that the plaintiff alleged that the employer "denied her an opportunity for advancement." In *Chappelle-Johnson*, the adverse action was the denial of "the opportunity to compete for a vacant position with a grade for which she would otherwise be ineligible." Plaintiff Martin was also denied "the opportunity to compete for a vacant position." As discussed below, Martin's claims are far stronger than the adverse action sustained in *Chappelle-Johnson*.

**1. Bullock's Conversion (or Feigned Conversion) of the Advertised Constitutional Law/Civil Rights Position Constituted an Adverse Action because it Deprived Prof. Martin of the Opportunity to Compete for a Vacant Position**

On March 6, 1998, Plaintiff, Prof. Martin, wrote to Dean Bullock, with copies to all APT Committee members, specifically requesting that she be considered for the advertised Constitutional Law/Civil Rights position. Prof. Martin noted that she had just learned, from a friend at the U.S. Department of Justice, that the original selectee, a Justice Department employee, had declined Howard's offer and accepted a teaching position elsewhere. APT Committee members declared that, up until they received Plaintiff's memorandum, they believed that the position had been filled because the original selectee had accepted Howard's offer. In immediate response to Plaintiff's application, *on the very same day*, March 6, 1998, Bullock wrote to the APT Committee stating that she was converting the funds from the Constitutional Law/Civil Rights position to fund a tax position. In the same March 6, 1998 memo, Bullock instructed the APT Committee to hire Adjunct Professor Angela Vallario to fill the position.

Bullock's conduct, in conjunction with other evidence of retaliatory motive, is precisely the type of "evidence that gives rise to an 'inference of discrimination'" that the D.C. Circuit held could be used to establish or expand upon the *prima facie* case.

**2. Bullock's Withholding of Vacant Positions Constituted an Adverse Action, Depriving Prof. Martin of the Opportunity to be Considered for a Position**

Even after Bullock purportedly used the funds allocated for the advertised Constitutional Law/Civil Rights position, there were admittedly at least three additional vacant faculty positions for which funding was already authorized. Bullock withheld this knowledge and information from the Appointments (APT) Committee. Prof. Martin was highly qualified for any of the three vacant, undesignated positions. Prof. Martin only sought renewal of the contract she already held. She was already performing the duties of the precise job for which she applied. Plaintiff was the only candidate for a faculty position at the time that Bullock was withholding the vacant positions. Students were protesting Prof. Martin's reappointment and the lack of courses, as well as the shortage of professors. At least one APT Committee member, Prof. Laurence Nolan, specifically asked Dean Bullock whether there were any available positions for which Prof. Martin could be considered. Dean Bullock lied to her own colleague, APT Committee member, Prof. Nolan, stating that there were no faculty vacancies, but that she (Bullock) was trying to help Prof. Martin obtain employment elsewhere (another false statement).

By granting summary judgment to Howard on Plaintiff's retaliation claims of retaliatory withholding and conversion of positions that Plaintiff was highly qualified to fill, MJ Facciola removed from this case the most compelling instances of retaliation. With the restoration of these claims, Plaintiff's motion for summary judgment must be now reconsidered, including these claims, since MJ Facciola never considered them. Accordingly, Plaintiff renews her motion for summary judgment.

**VIII. Under Current Controlling Law, Plaintiff is Entitled to Summary Judgment**

As discussed in Pl. MSJ, at 24-44, in order to shift the burden of production back to Plaintiff, Howard was obligated to produce credible evidence that the APT Committee members not only believed that Prof. Martin was less qualified for the EEO position than was Prof. Cunningham, but that Martin was

*less qualified than no one at all.* In effect, Howard would have to prove that Martin was qualified for a faculty position than an *empty chair*. Even if Howard could convince a jury that it was a “close call” between Profs. Martin and Cunningham,<sup>24</sup> all doubt of retaliation is removed by Bullock’s actions in the spring of 1998. Bullock withheld vacant positions and converted (or pretended to convert) a Constitutional Law/Civil Rights position to a tax position to prevent the APT Committee from considering Prof. Martin for these positions, even when some Committee members were specifically asking whether there was a vacant position to which Prof. Martin could be appointed. Pl. MSJ at 21. Although Howard has represented that Bullock converted the position, both Profs. Nolan and Smith testified that the Constitutional Law/Civil Rights position advertised in 1997-1998 was not cancelled, but remained open and vacant for several years. Nolan depo at 326; Smith depo at 165-169.

In her *Answer to the Complaint*, Dean Bullock admitted that, in the spring of 1998, after two of the advertised positions were filled, the law school had three vacant tenure-track positions that Prof. Martin was qualified to fill. Pl. MSJ at 42; Facts ¶ 236; *Bullock’s Answer to First Amended Complaint* ¶¶ 313, 326. Plaintiff’s applications – including her applications in the fall of 1997 -- were consistently for any faculty position, including any tenure-track position and/or, in the alternative, a renewed visitorship. See Plaintiff’s October 2, 1997 and November 5, 1997 application memoranda, Exs. PP and YY, respectively, of *Plaintiff’s Motion for Summary Judgment*. Never, at any time, did Plaintiff limit her application to the EEO/Labor position or exclude herself from consideration for the Constitutional Law/Civil Rights position. This Constitutional Law/Civil Rights position is the same position that was advertised in 1997-1998, and again in 1999-2000, and additional years, but which Dean Bullock

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<sup>24</sup> MJ Facciola’s conclusion that it appeared to be a “close call” between the candidates was based on testimony of at least one APT Committee member, Prof. Smith; however, Prof. Smith was describing his comparison of the candidates at the time of the APT Committee meeting in which Taslitz misrepresented the candidates’ qualifications. If their qualifications had been presented as stated in their resumes and applications, these APT Committee members would have known that Cunningham’s article was not in print, that it was Martin, not Cunningham, who had a record of publication before joining Howard. Martin’s article just accepted for publication was more than twice as long as Cunningham’s article, also just accepted for publication. Martin had two additional articles in progress, with a substantial draft of the second article. When confronted with the resumes, in his 2002 deposition, Prof. Smith acknowledged that it was Prof. Martin, not Cunningham, who had the superior record of scholarship.

pretended to convert to a tax position, in March of 1998, to prevent the APT Committee from considering Prof. Martin for it. Pl. MSJ at 42. In the 1999-2000 AALS Newsletter, Howard re-listed the position, but changed the requirements to exclude experienced professors from applying from a tenure track position: “The positions would be tenure track or, for experienced teachers, look-see visitorships.” August 5, 1999 AALS Newsletter; Nolan depo at 305. The vacancy remained an “empty chair” for years, although Martin applied for it for several consecutive years. 2000 AALS Newsletter; Nolan depo at 317-326.

Visiting Prof. Betsy Levin was leaving at the end of the spring 1998 semester, after two years at Howard. Pl. MSJ at 41-42.<sup>25</sup> Prof. Levin was hired to teach Constitutional Law and related civil rights courses, as stated in Dean Bullock’s August 5, 1996 memo from then Associate Dean Bullock to Howard’s Vice President of Academic Affairs, regarding salary justifications for Appointments of Visiting Professors Levin and Cunningham. Prof. Levin also had expertise in EEO law and school desegregation law, which Dean Bullock deemed a special addition to Howard’s faculty.

With Prof. Levin leaving Howard, this left a need for teaching in these areas – which were also areas of expertise for Prof. Martin. As discussed in Pl. MSJ at 29, 35-36, Prof. Martin 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, litigation school desegregation cases. 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. She had excellent teaching evaluations and exceptional student support. Pl. MSJ at 2, 19. Martin was recognized as a national expert in EEO law, based, in part, on her national policy-making experience with the 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. Pl. MSJ at 37.

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<sup>25</sup> Where funds were available, Howard renewed visiting professors, even where there was no advertised position. Howard had renewed Visiting Profs. Cunningham and Levin, for the 1997-1998 school year, when their one year visitorships were scheduled to expire at the end of the spring, 1997 academic year. There were no positions advertised. The renewals were simply affected by memorandum from Dean Bullock to the University Senior Associate Vice President for Academic Affairs, dated February 21, 1997

No reasonable juror could conclude that, absent retaliatory motive, Prof. Martin was not more qualified to teach at Howard than an “empty chair” -- particularly while students were protesting both the shortage of courses and faculty members and Prof. Martin’s non-renewal and there were specific teaching needs in Martin’s area of expertise; accordingly, Plaintiff is entitled to summary judgment on her claims of retaliatory removal from the faculty, through the rejection of her applications for *any* tenure-track position and/or a renewed visitorship.

**IX. Howard’s Purported Legitimate Reasons for Plaintiff’s Non-Renewal are False and Pre-Textual**

Had the jury properly found that Plaintiff had participated in protected activity, it would have proceeded to the next jury question, which was whether Howard’s purported legitimate, non-retaliatory reasons for her non-renewal were false and/or pre-textual. The undisputable evidence of record demonstrates that all of Howard’s ever-changing purported reasons for Prof. Martin’s non-renewal are false and/or pretextual. Howard could not produce evidence to support even its untimely, improperly admitted, ever-changing defenses. 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<sup>26</sup> and Mtima.<sup>27</sup>

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<sup>26</sup> Visiting *Assistant* Prof. Cunningham was selected for a permanent, tenure track position, and *reassigned* to teach the EEO class that Prof. Martin had taught at Howard for the previous two years. Prof. 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 higher rank of *Associate* Professor, in contrast to Prof. Cunningham. Pl. MSJ at 38.

<sup>27</sup> Prof. 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. Prof. Mtima had requested to teach Property, not Torts. Pl. MSJ at 43. A Property professor had retired, just as Prof. Mtima was hired, so the slot that he requested had just become available (Pl. MSJ at 42); however, Dean Bullock refused to assign Prof. 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 Prof. Mtima’s teaching schedule. Pl. MSJ at 42-43. Once she assigned Torts I and II to the newly hired Prof. Mtima, Dean Bullock then told Prof. 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, in her 2002 deposition, Dean 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

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.<sup>28</sup> Two years later, Howard claimed that the junior Visiting Assistant Professor Cunningham was a “far superior” candidate than was Visiting Associate Prof. Martin to teach *the very EEO course* that Professor 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. The logical question is, what happened within two years that so changed the positions of these two professors? The answer is that Prof. Martin was stalked in her workplace by a homeless stranger and Prof. Cunningham was not. There is no explanation that rebuts the *prima facie* case of retaliation against Howard.

On the heels of Prof. Martin’s stalking complaint, the “retaliation road” began with Bullock, proceeded to Newsom and then to Tazlitz. From that point on, “all roads lead to Tazlitz.”

At trial, Howard stated that it used four criteria to select Prof. Cunningham over Prof. Martin. Each will be examined below to determine whether Howard has produced any credible evidence to support its claim or whether its assertions are clearly false and/or pretextual.

#### **A. Teaching**

In response to discovery request, in a May 11, 2001 memorandum, page 2 (Pl.’s Trial Exhibit 33), the APT Committee, *via* its Chair, 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

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courses from her to exclude her from the faculty.

<sup>28</sup> 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. Ms. Cunningham had also been an Associate, for four 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, Ms. Cunningham did not qualify to hold a “visitorship” because Visiting Professors were required to hold rank at another school before visiting Howard. Ms. Cunningham did not hold such a rank because she had never taught before she joined Howard’s faculty. Howard used its “visitorships” flexibly and renewed them when it did not have tenure-track positions to available to offer candidates.

and other general course subjects.<sup>29</sup> .... 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, Profs. Nolan, Leggett, Smith and LaRue. *See* Pl.'s MSJ at \_\_\_\_\_. 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 classes and materials and extensive t availability for assistance and her overall dedication to her students. *See* Pl.'s MSJ at \_\_\_\_\_.<sup>30</sup>

#### **B. Scholarship**

The APT Committee May 11, 2001 memorandum, page 2-3 (Pl.'s Trial Exhibit 33), 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 s 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

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<sup>29</sup> This is not an accurate description of the advertised course or of either Prof. Martin's or Cunningham's applications. There 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. In addition, Prof. Cunningham applied for a promotion from Assistant Professor to Associate Professor, since, by then, she had taught for two years. Prof. Martin was already an Associate Professor and therefore did not apply for a promotion, but only an appointment to a permanent or renewed faculty position, at her current rank.

<sup>30</sup> The only witness that attempted to impugn Prof. Martin's teaching was Prof. Taslitz, who made only a minor, feeble attempt, but admitted that APT Committee deliberations did not include any negative inferences regarding Prof. Martin's teaching abilities. Even Taslitz' mildly negative comments are rebutted by Howard's APT Committee's own official statement. With respect to any negative flow of information regarding Prof. Martin, all roads appear to lead to Taslitz – the only member of the APT Committee who had private conversations with Dean Bullock wherein she disparaged Prof. Martin to him, indicating that she wanted Prof. Martin removed from the faculty.

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.)

The Committee's statement is blatantly false and proven to be so by simply reading the resumes and applications of both Profs. Martin and Cunningham from the fall of 1997. In their 2002 depositions, and again at trial, all of the Apt Committee members admitted that they knew that Prof. Martin's extensive 141 page (typeset, rather than manuscript pages) article, "*911: How Will Police and Fire Departments Respond to Public Safety Needs and the Americans with Disabilities Act?*" was not only "complete[d]" by the beginning of the fall, 1997 semester, and in the typing pool, where it had been corrupted and had to be retyped (due to no fault of Prof. Martin), but also that the article had been sent out to Journals on December 1, 1997 and *accepted for publication* on December 17, 1997.

By the same date, as Cunningham's own resume and application clearly state, her 67 page article (published pages) was not yet in print, but was accepted for publication in the spring of 1998 – the same status as Plaintiff's article. Pl. MSJ at 34-35. Profs. Martin's and Cunningham's own resumes and applications demonstrate that Taslitz' representations regarding their scholarship were false. Pl. MSJ at 31-35. In fact, both Plaintiff's and Cunningham's articles were published in the Winter of 1998 (first page of Trial Exhibit 133, internet version of Cunningham article with copyright date and **Exhibit** \_\_\_, first page of internet version of Plaintiff's article (offered as a rebuttal exhibit at trial, but excluded by Court) – a full year after the APT Committee's December 18, 1997 decision.

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. Prof. Cunningham's pending article was to be her first publication since law school, "*The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases.*" Prof. Martin had published five articles since law school, and had been credited with at least four by Howard when she joined Howard's faculty in 1996. Pl. MSJ at 34-35.

Taslitz credited Cunningham with two additional articles in progress, when, in fact, she 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. In sharp contrast, since joining Howard's faculty, Prof. Martin had not only expanded her previously completed article, "*911: How Will Police and Fire Departments Respond to Public Safety Needs and the Americans with Disabilities Act?*" by 70 manuscript pages, but had also completed a draft of a second article, "*Lights, Camera, Discrimination! 'Playing' the Victim under Title VII,*" and had a title, thesis and preliminary research for a third article, "*Still Racist after all these Years – and Protected by the Americans with Disabilities Act?*" All three articles involved completely different theses and research. Taslitz did not raise Prof. Martin's articles in progress when he presented the candidates' qualifications to the Committee. Pl. MSJ at 25-26.

Contrasted with Prof. Martin's five previous publications, Prof. Cunningham had no previous publications, except for a "student note," which is normally not counted at all or is counted with little weight, when considering a faculty member for a promotion, raise, tenure or re-appointment. Plaintiff's MJS at 34. When Cunningham was hired, two years earlier, Bullock's memo justifying Cunningham's requested salary did not represent her as anyone with a "record of scholarship," but rather 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.L. & Feminism* 155 (1991).

During her two years at Howard, she had only produced the one article, not yet published, as of December 18, 1997; yet, Taslitz touted Cunningham, as compared to Martin, as being the "only candidate as with a "record of scholarship." Pl. MSJ at 34-35.

MJ Facciola specifically acknowledged that Prof. Leggett, the named Chair of the APT Committed, 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.<sup>31</sup>

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<sup>31</sup> 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 fact, when

Prof. Nolan specifically testified that she voted in favor of Prof. Cunningham, over Plaintiff, 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 than had Prof. Martin. Pl. MSJ at 32-36.

Prof. Smith also testified that “someone on the Committee” represented that Prof. Cunningham’s scholarship achievements were superior to that of Prof. Martin and that Cunningham had produced more scholarship than had Prof. Martin since joining Howard’s faculty. Pl. MSJ at 35-36. 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. Taslitz misled Profs. Nolan, Legget and LaRue into believing that it was Cunningham, rather than Martin, who had the “superior record of scholarship” and had demonstrated greater potential for scholarship, when, in fact, the opposite was true.

Taslitz *misrepresented* the facts to his colleagues on the APT Committee 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. Again, all roads lead to Taslitz. The reason that 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.

### **C. Service to the Law School**

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

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the two Committee members who had Title VII background, Smith and LaRue, were confronted with Cunningham’s article and its thesis. Cunningham theorized that Title VII protects groups other than those specifically enumerated in Title VII. 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.*

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

This statement precludes any assertion that Prof. Martin did not contribute sufficiently to the University, the community or the legal profession. As Prof. Martin set forth in her November 5, 1997 application for a tenure-track position, or in the alternative, a renewed visitation (Pl.'s Trial Exhibit 33), 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 give help students achieve maximum success in law school exams and the bar exam, particularly since the Howard Law School passage rate for Maryland had become a major concern and even national publicity. (MSJ at 29; Facts ¶ 142) Even Dean Bullock testified that she was aware that Plaintiff gave extra exam taking classes and prepared extensive sample exams and answers for students. (MSJ at 29; Facts ¶ 142) Profs. Boyer and Nolan testified that Plaintiff spent a great deal of time meeting with students. (MSJ at 29) Plaintiff acted as a judge, on a Saturday, for Howard's Trial Advocacy Program, volunteered and participated in Howard's mentoring program, "Close Up," and taught exam taking for the Regional Balsa (Black Allied Law Students Association) conference at Howard. (MSJ at 29; Facts ¶ 142)

#### **D. Collegiality**

The APT Committee May 11, 2001 memorandum, page 3 (Pl.'s Trial Exhibit 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 any way imply that Prof. Martin was not collegial or viewed by the faculty as having any personality flaws, as indicated by Taslitz – once again, the only APT Committee member who had private conversations with Dean Bullock about Prof. Martin's candidacy.

Howard's own APT Committee members deny that there were any allegations of "non-collegiality" or "bad judgment" in its deliberations regarding Prof. Martin. The undisputed evidence of record establishes that four of the five Committee members had never heard any allegations of non-collegiality or bad judgment regarding Prof. Martin. Pl. MSJ at 27-29. In fact, *all five* of the APT

Committee members testified that they found Plaintiff to be very collegial and that they all liked and respected her. Pl. Facts ¶¶185-186. Howard has produced no evidence that the APT Committee ever considered any allegations of “non-collegiality” or “bad judgment” in its deliberations. Plaintiff sought APT Committee notes in discovery, but Howard refused to produce them. Pl. MSJ at 48-49.

Even 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.** Leggett received comments from faculty members about Martin that were not negative. 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.

**... the articulated reasons for firing Martin are contradicted by the potential testimony of 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.**

**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 25-26.2003 U.S. Dist. LEXIS 18501 at \*24-26.

Prof. Nolan specifically asked Dean Bullock if there were any vacant positions for which Plaintiff could be considered, and that Bullock told her that there no more vacant positions. Bullock's statements to Nolan were completely false. Pl. MSJ at 40.

#### **X. Howard's Misrepresentations of both Plaintiff's and Cunningham's Credentials are Evidence of Discrimination/Retaliation**

*Holcomb* held that an employer's substantive misrepresentations regarding a candidate's qualifications constitutes evidence of discrimination. 2006 U.S. App. LEXIS 520 at \*15-16, 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 and misrepresented the qualifications of Prof. Cunningham while under-

representing, misrepresenting and omitting Prof. Martin's qualifications, both to the remaining four APT Committee members and to the Provost, in the memorandum recommending the selected three professors for appointments, Cunningham, Mtima and Robinson.<sup>32</sup>

**XI. Defendant Cannot Produce Evidence of a Legitimate, Non-Discriminatory Reason for Plaintiff's Non-Renewal and Cannot Defeat Plaintiff's Motion for Summary Judgment *Holcomb***

*Holcomb* clarifies that, in order to defeat a MSJ, the non-moving party must not just *articulate* a defense, but actually produce evidence that create a "genuine" issue of material fact that could arguably prove the facts alleged and result in a verdict for the non-movant. 2006 U.S. App. LEXIS 520 at 8-9.\*

Once the plaintiff has established a *prima facie* case, the burden shifts to the defendant **to produce evidence** that the plaintiff was rejected for a legitimate, non-discriminatory reason. (Emphasis added)

2006 U.S. App. LEXIS 520 at \*11, citing *Reeves v. Sanderson*, 530 U.S. 133, 142 (2000) and *Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003). If the employer produces such evidence, the presumption of discrimination, established by the *prima facie* case, "drops out of the case. *Id.*

As Plaintiff argued in her *MSJ*, at 24-43, Howard never produced any evidence of a legitimate, non-discriminatory reason for Prof. Martin's non-renewal. MJ Facciola stated:

In Howard's Answers to Interrogatories dated October 17, 2000, Howard stated that Martin was refused tenure in part<sup>33</sup> 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 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.

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<sup>32</sup> "Robinson II" declined the offer in January of 1998, but Bullock did not inform the APT Committee or allow the Committee to recommend a second candidate for the position. Pl. MSJ at 42. In March of 1998, Prof. Martin learned, from an outside source, that Robinson had not accepted the position. She then applied specifically for the Con Law/Civil Rights position, along with "any other available position or renewed visitorship." Pl. MSJ at 42. Bullock responded to Prof. Martin's application by converting the Con Law/Civil Rights position to a tax position. Pl. MSJ at 41-42.

<sup>33</sup> In fact, this was the only reason that Howard originally articulated.

2003 U.S. Dist. LEXIS 18501 at \* 22-24.

MJ Facciola denied Howard's MSJ since Plaintiff had produced evidence disputing Howard's asserted material facts, holding that the dispute must be resolved by a jury; however, MJ Facciola did not examine this evidence to consider *Plaintiff's Motion for Summary Judgment*.<sup>34</sup> Once the APT members were deposed, it was an *undisputed* fact that they were all well aware, by December 18, 1997, that Prof. Martin's article, "911: How will Police and Fire Departments Respond to Public Safety Needs and the Americans with Disabilities Act?" had been accepted for publication for the spring of 1998.

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<sup>34</sup> 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, and has been 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 Prof. Martin's qualifications with those of Prof. Cunningham, who was hired two years earlier, with no teaching experience, as a "Visiting Assistant Professor," and then promoted to Associate Professor, as is customary, after two years of teaching experience. Since MJ Facciola stated that Plaintiff never filed a *Statement of Material Disputed Facts*, he obviously did not read it. The statement was filed for the specific purpose of demonstrating that Howard's version of the facts are contradicted by the evidence of record. Instead, MJ Facciola said that he would "divine" the facts. 2003 U.S. Dist. LEXIS 18501 at 5. This "divination" of facts is markedly, substantively, and materially inconsistent with the undisputed evidence of record, for all of Plaintiff's claims, as well as the facts set forth in Judge Hogan's precedent-setting 1999 decision, *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). Interestingly, *Holcomb* specifically criticizes the "divin[ation]" of facts and defenses not in the record. 2006 U.S. App. LEXIS 520 at \*36. Unfortunately, Judge Hogan's November 21, 2005 Order is not on LEXIS or the Court's website, while MJ Facciola's Report continues to be reported as a Court opinion on both LEXIS and the internet, misrepresenting Judge Hogan's holding and ridiculing Plaintiff, claiming that she "demand[ed]" that MJ Facciola reverse Judge Hogan's decision, when, in fact, Plaintiff never made any such "demand," or even a request, nor would it make any sense for her to ask for a reversal of a decision in her own favor. Pl. MSJ actually asked the Court to apply the facts of record to the law set forth in Judge Hogan's 1999 decision, including her breach of contract claim. MJ Facciola's Report contains numerous other false statements about Plaintiff that, were they not cloaked in the immunity of the robe, would constitute defamation. MJ Facciola's 2003 Report is an obstacle to Plaintiff's ability to obtain employment and clients, thus hindering her ability to earn a living and to mitigate damages. This published Court decision will affect Plaintiff's career and family for the rest of her life and will inflict injustice and harm to her memory and her family, even after her death. Plaintiff therefore, again, respectfully implores this Court to vacate the Report in its entirety.

Howard never had *an iota* of evidence to support its articulated purported legitimate, non-retaliatory reason for Prof. Martin's non-selection. Howard simply *lied* to this Court and to Plaintiff, in discovery, in blatant violation of Fed. R. Civ. P. 11 and 26(h), for years.<sup>35</sup> Howard should not be permitted to survive summary judgment based on a blatantly false assertion, contradicted by its own witnesses. Such a result violates Fed. R. Civ. P. 11 and 26(h) and should be sanctioned, not rewarded.

**XII. Howard Violated Civ. R. P. 8(c) by Asserting Untimely Defenses not Raised in its Answer to the Complaint**

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) Three years in to this litigation, after Howard's own witnesses and records proved that Howard's original reason was false and pre-textual, Howard asserted a litany of new purported reasons for Plaintiff's renewal. These new defenses included allegations that some of Prof. Martin's colleagues did not find her "collegial" and that she had "bad judgment." Since Howard did not raise a defense of "non-collegiality" or "bad judgment" in its *Answer to the Complaint*, or in its *Motion to Dismiss*, it waived its right to raise this defense three years later. Howard never made any claims of collegiality or bad judgment until 2001 and never mentioned it in its Answer to the Complaint or in responses to Plaintiff's EEOC charge in 1998 or 1999.

Howard has not offered any reason why it should be permitted to violate Fed. R. Civ. P. 8(c). Defendant has attempted to amend its *Answer*, at will and whim, without explanation, years into the litigation. It is now more than six years into the litigation and Howard has never attempted to amend its Answer. In this case, that includes the testimony of professors and clerical persons who have left Howard, as well as memories that have faded. It should not now be permitted to do so. In order to amend pleadings to include untimely Rule 8(c) defenses, pursuant to Fed. Civ. R. 15(a), the movant must

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<sup>35</sup> Howard hid the truth for three years and exhausted Plaintiff's resources while she proceeded through the court's rules and procedures to force Howard to produce discovery, through three court orders in 2001 and a contempt finding against Howard in 2002.

prove that “justice so requires,” if there is no undue prejudice to the opposing party and that the movant has not acted with bad faith or undue delay. *Id.*

Howard has not offered any reason for its three year delay and cannot do so. If any of the reasons that Howard asserted in 2001 had actually been the reasons for Martin’s non-renewal in 1997 through 1998, surely, Howard would have known it in 1999, when it responded to the EEOC and answered the Complaint 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, with no evidence to support even one of Howard’s allegations. In fact, all APT Committee members except Taslitz seemed oblivious to *any* the purported reasons for Prof. Martin’s non-renewal asserted by Howard in either set of its *Answers to Interrogatories*. Pl. MSJ at 24-29.

*Justice certainly does not* require that Howard be permitted to fabricate defenses three years into the litigation, when Plaintiff no longer has available to her the evidence that would have been available three years earlier. A defendant should not be permitted to make up a litany of new defenses after it has had the benefit of discovery against the Plaintiff and after discovery by Plaintiff has revealed that its original defense was nothing more than a baseless lie. Howard hoped to conceal this lie by making discovery so difficult and expensive that Plaintiff would never be able to obtain the evidence to prove its defense false. When Plaintiff did survive his ordeal, Howard resorted to fabricating a list of additional lies, all of which are easily disproved, except for the nebulous claim of “non-collegiality” and “bad judgment,” which amounts to a self-serving mudslinging campaign by Taslitz and his best friend, Gavil. Taslitz’ credibility has already been destroyed since he lied to fellow APT Committee members about the status of the scholarship of the candidates, Profs. Martin and Cunningham. Taslitz’ word, then, cannot be enough to create a genuine dispute of fact, where all other evidence contradicts his word.

**XIII. Howard Violated Civ. R. P. 26(h) by Untimely Changing its Answers to Interrogatories Three Years into this Litigation**

Plaintiff has repeatedly objected to the admission of the untimely evidence offered by Howard, in violation of Fed. R. Civ. P. 26(h). Plaintiff’s August 8, 2001 *Motion for a Default Judgment Based on*

*Untimely, Incomplete and Falsified Evidence, incorporated, by reference, into Plaintiff's Motion for Summary Judgment.* Plaintiff incorporated her *Motion for a Default Judgment*, into her MSJ at 47, and incorporates them both herein, by reference.

**XIV. *Holcomb* Held that the Defendant's "Discriminatory Statements" and "Attitudes" are Evidence of Discrimination**

Where the alleged discriminating official has made statements that indicate discriminatory or retaliatory 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*, 2006 U.S. App. LEXIS 520 at \* 21-22, 26-27, citing *Dunaway v. International Brotherhood of Teamsters*, 310 F.3d 758 (D.C. Circ. 2002).

Despite the protocol at the law school that the Dean is not to interfere with the decision of the APT Committee, Dean Bullock privately shared her animus against Prof. Martin to Taslitz, the Vice Chair of the APT Committee. Pl. MSJ at 17. Bullock and Taslitz both admit that Bullock privately told him that she did not want Prof. Martin on the faculty. Pl. MSJ at 18-19.<sup>36</sup>

As set forth in Pl. MSJ at 16, Dean Bullock made specific statements exhibiting extreme hostility toward Plaintiff in response to her requests that Howard take reasonable steps to bar a serial stalker, with a criminal record, from the law school. Dean 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)

Dean Bullock told Prof. Taslitz that she was having a "bad day" and had "a lot to do" with respect to Prof. Martin's complaints about being stalked by Harrison at the law school (Pl. MSJ at 16-17); yet, Bullock did not even take the most basic steps to keep Harrison from Martin in her workplace. Dean Bullock told Taslitz that Prof. Martin had "bad judgment," but would not provide even one example of

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<sup>36</sup> When Howard's most senior member of the faculty, Prof. 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, Dean 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.

such alleged bad judgment, even though Prof. Taslitz asked for one, several times. MSJ at 18. Dean Newsom also testified that Dean Bullock had told him that she intended to take action to exclude Prof. 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.

Despite private statements to Taslitz and Newsom that she wanted Prof. Martin removed from the faculty, Dean Bullock told Prof. Nolan that she was trying to find another job for Prof. Martin since there were no positions left at Howard. Pl. MSJ at 21. Dean Bullock told Dean Samuel Thompson, of the University of Miami, that the only reason that Prof. 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. Dean Bullock told the EEOC: “*There is no particular reason that I would not want Martin to teach at Howard University School of Law.*” Pl. MSJ at 19.

Dean Bullock’s secret conversations with Taslitz and Newsom demonstrate that she recognized that her motives for removing Martin from the faculty were improper and illegal. Bullock concealed her retaliatory animus toward Martin from everyone except the two people that she enlisted to effectuate her removal from the faculty: 1) Prof. Taslitz, as the Vice Chair and controlling member of the APT Committee; and 2) Associate Dean Newsom, who was her assistant.

On December 3, 1997, two days after Harrison stood in her office, before Officer Dowdy chased him out of the building, off campus and into the woods, Dean Bullock called Prof. Martin personally; however, it was not the call in response to her December 2, 1997 memorandum that Prof. Martin expected. Pl. MSJ at 14. Instead, without any comment on the “chase” of Harrison, Dean Bullock ordered Prof. Martin to pick up a “*very important letter,*” which had been returned by the Post Office.

This purportedly “*very important letter*” was simply the November 3, 1997 form letter sent to all visiting professors (including Cunningham and Levin, both in 1996 and 1997), whose contracts were scheduled to end at the close of the spring semester, irrespective of whether they would be renewed or reappointed by the APT Committee. Pl. MSJ at 14. Normally, such clerical matters were handled by a secretary; however, Dean Bullock chose to make this call personally. Pl. MSJ at 10. In sharp contrast,

Dean Bullock did not regard Harrison's stalking of Prof. Martin in her workplace worthy of a personal call or any response – ever -- to her December 2, 1997 memorandum, written or oral.

Within days after the stalking began, Dean Bullock enlisted Dean Newsom in a campaign of retaliation against Prof. Martin. Pl. MSJ at 14. In addition to doing absolutely nothing to protect Prof. Martin from the stalker, Dean Newsom drastically reduced the number of journals to which Prof. Martin could send her article, "*911: How Will Police and Fire Departments Respond to Public Safety Needs and the Americans with Disabilities Act?*" from 180 to 30 journals – despite the norm of approximately 200 journals, thus reducing her chances of having it accepted for publication. Pl. MSJ at 14.

Then, on December 10, 1997, when classes had ended, professors were no longer keeping office hours, and new hours would have to be established for the upcoming semester, Dean Newsom wrote Martin a memorandum, falsely stating that she had not provided his office with a list of her office hours. Pl. MSJ at 14. Newsom chastised Martin and cautioned her that if she did not keep office hours, she was in violation of her duties as a law professor. Pl. MSJ at 14.

Prof. Martin responded that: 1) she had, in fact, provided Dean Newsom with her office hours months earlier; 2) she had always maintained office hours far beyond those required; 3) her office hours were posted on her bulletin board outside her office door, with a student "sign up" sheet; 4) Dean Newsom had been to her office many times and clearly saw her office hours posted; 5) Dean Newsom was aware that she had been holding office hours in the cafeteria, and had a notice so stating, posted on her door; 6) in her memorandum to Dean Bullock, with a copy to Newsom, Martin had clearly stated that the stalker obtained her office hour from the notice posted outside her door; 7) that she was afraid to be in her office, for her students and herself, if the stalker came to her office, since he was not being kept out of the building; and 8) office hours had ended with the end of classes. Pl. MSJ at 14.

Dean Newsom's memorandum, particularly when he had no response at all to the paramount matter at hand, a stalker in the workplace, was 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 safety very life, reflecting hostility, retaliatory animus and discriminatory "attitude," as defined by *Holcomb*.

Since Howard did not carry its burden of producing evidence to support its articulated defense, Plaintiff's *prima facie* case of retaliation remained un-rebutted and the presumption of retaliation remains in the case. Plaintiff's *prima facie* case is further strengthened by undisputed evidence of retaliatory animus by Dean Bullock. Pl. MSJ, at 24-43. Under *Holcomb*, Howard must produce evidence by which a reasonable jury could conclude that its articulated reason for Martin's non-renewal is true. Howard has not done so. Plaintiff is therefore entitled to summary judgment.

**XV. Taslitz Implemented Dean Bullock's Retaliatory Removal of Prof. Martin from the Faculty**

Taslitz' self interest, as an accused discriminator, and proven lack of credibility, must be considered in examining the competence and credibility of his testimony. Taslitz admitted that he never raised any allegations of non collegiality" or "bad judgment" in any APT Committee meeting or in deliberations. In fact, Taslitz testified that he did not share Gavil's purported perception of Prof. Martin, but instead, found her to be very collegial and "warm." Pl. Facts ¶ 186. Taslitz even testified that he considered himself a "friend" of Prof. Martin. *Id.*

Taslitz admitted that he never discussed Gavil's November 10, 1996 story with her or otherwise indicated to her, in any way, prior to the December 18, 1997 decision, that anyone was disappointed with her performance or would not support her renewal. Pl. MSJ at\_23. To the contrary, Taslitz purported to act as Prof. Martin's mentor, in October and early November of 1997, even asking to review her application before she submitted it to the Committee, to make any suggestions for editing to ensure her renewal. Pl. MSJ at 21-22. All of that changed after the stalking began, on November 20, 1997. Taslitz appears to be saying that he set aside his own opinion of Prof. Martin's personality and professionalism and voted in accordance with Gavil's purported views, based on a nebulous account of a trivial student complaint and Martin's response to it. Even if this were true, *Taslitz' had only one vote.*

On March 31, 1997, Martin wrote to Taslitz, asking for his assistance in speaking to Dean Bullock, telling him that she was aware that there were two to three vacant faculty positions. Pl. MSJ at 21. Taslitz immediately turned this personal letter over to Dean Bullock, along with a cover letter asking for legal representation from the University in case Plaintiff sued. Pl. MSJ at 21. Taslitz never asked Dean Bullock whether the positions were vacant. Pl. MSJ at 21. He knew that, no matter how many positions became available, Bullock would ensure that none of them went to Plaintiff.

Mrs. Bruner testified that Taslitz took minutes during the APT Committee meetings and that she typed them. Pl. MSJ at 48; Pl. Facts ¶ 181. Prof. LaRue testified that he Prof. Taslitz took notes during the meetings and distributed minutes of the meetings. Pl. MSJ at 48; Pl. Facts ¶ 181. Prof. Nolan testified that she took notes during the meetings, but that *she destroyed them*. Pl. Facts ¶ 182. Considering that Plaintiff began contesting her non-renewal immediately after the decision was made, continued to contest it throughout the spring of 1998, and filed an EEOC charge on May 14, 1998, Howard should have instructed all APT members to keep and provide it with notes taken during these meetings.

Certainly, any law professor, including Taslitz and Nolan, realizes that such notes would be requested in discovery. At a minimum, notes should have been maintained to assist the APT Committee members in refreshing their recollection for later testimony. Plaintiff is entitled to an adverse inference that Taslitz' minutes and Nolan's notes would have been incriminating to Howard. Pursuant to Fed. R. Ev. 1002, the Best Evidence Rule, Taslitz should have been precluded from testifying that Prof. Martin was not renewed based on "non-collegiality" or "bad judgment."<sup>37</sup>

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<sup>37</sup> Taslitz has testified in ways that are inconsistent, illogical and confused. Taslitz claimed that he "did not recall" material facts during his 2002 deposition. 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. In an effort to "guess" at why Bullock alleged that Prof. Martin had "bad judgment," Taslitz speculated that Bullock may have been thinking of a faculty meeting in which Prof. Martin debated an issue with a colleague. Taslitz complained that Prof. Martin was "very insistent" that her position was correct. *Id.* He claimed that this insistence might have been interpreted as "bad judgment" by some faculty members. MJ Facciola quoted Taslitz' testimony. 2003 U.S. Dist. LEXIS 18501 at \*20. Despite Taslitz' purported negative perception of Prof. Martin's comments during that meeting, not one of the other eleven faculty members who testified indicated, in any way, that Prof. Martin's behavior at any faculty meeting was inappropriate. To the contrary, Prof. Boyer, who was the professor with whom Prof. Martin debated on

## XVI. Plaintiff Renews her Motion to Vacate MJ Facciola's 2003 Report and Recommendation

Plaintiff has requested that MJ Facciola's published<sup>38</sup> *Report* be vacated and/or reconsidered based on numerous, independent errors of law, including: 1) MJ Facciola's erroneous definition of adverse action; 2) MJ Facciola's improper dismissal of claims, *sua sponte*, where Howard waived any possible right to raise such a defense;<sup>39</sup> 3) MJ Facciola's inconsistent, confused and unsupported "findings" of fact;<sup>40</sup> 4) Howard's misrepresentation of MJ Facciola's decision as limiting Plaintiff's retaliatory non-renewal claim to her December 18, 1997 rejection for the EEO/Labor position, where the *Report* specifically includes an April 8, 1998 rejection and does not mention a December 18, 1997 rejection at all; and 5) case law decided by the U.S. Court of Appeals for the D.C. Circuit since January 10, 2006 that directly and clearly conflicts with the definition of adverse action adopted by MJ.

Despite MJ Facciola's reference to Prof. Leggett's view of Prof. Martin as "collegial," he concluded that *three* members of the APT Committee, constituting a majority of the five member Committee, questioned Plaintiff's judgment or collegiality. MJ Facciola erroneously concluded that "two other Committee members," in addition to Taslitz (2003 U.S. Dist. LEXIS 18501 \*17), questioned

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the exam issue, testified that they disagreed and debated, but with respect, as colleagues. Pl. MSJ at 40-41. Prof. Boyer testified that Prof. 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.

<sup>38</sup> MJ Facciola's Report is published as a Court decision on LEXIS and the Court's website on the internet.

<sup>39</sup> Fed. Rule Civ. P. 8(c) requires the defendant to assert its own defenses or waive them; accordingly, it is an error of law for a judge to dismiss a case based on a *sua sponte* waivable defense. *Erline Co. S.A. v. Johnson*, 2006 U.S. App. LEXIS 6621 at \*24 (4<sup>th</sup> Cir. 1996); *Haskell v. Wash. Twp.*, 864 F.2d 1266, 1273 (6<sup>th</sup> Cir. 1988); *Wagner v. Fawcett Publ'ns*, 307 F.2d 409, 412 (7<sup>th</sup> Cir. 1962).

<sup>40</sup> MJ Facciola specifically held that Plaintiff's April 8, 1998 rejection was upheld; yet, this rejection was in direct response to her March 6, 1998 application for the Constitutional Law/Civil Rights position that Bullock converted – or pretended to convert -- to a tax position on that same day, in direct response to Plaintiff's application, to prevent the APT Committee from considering the application that she had just submitted. MJ Facciola also upheld what he perceived as a claim for a November 3, 1997 rejection; however, there was no November 3, 1997 rejection and Plaintiff never made a claim for a rejection on that date. MJ Facciola also referred to Plaintiff's non-renewal as a "termination," "firing," "dismissal," "rejection for tenure," and a rejection for a promotion to "Associate Professor," although it is undisputed by the parties and the record that Plaintiff was not fired, turned down for tenure or rejected for a promotion to Associate Professor, since she was already held the rank of Associate Professor at Howard when she applied for the positions in 1997 and 1998. MJ Facciola's *Report* contained other factual errors and misrepresentations of the record, as identified in Plaintiff's October 30, 2003 *Objection to MJ Facciola's Report and Recommendation*.

Plaintiff's judgment (2003 U.S. Dist. LEXIS 18501 at \*17, 20-23). In arriving at this conclusion, MJ Facciola made numerous material factual errors, which are contradicted by the undisputed evidence.<sup>41</sup>

1) **Gavil was not a member of the 1997-1998 APT Committee and had no vote regarding Prof. Martin's applications for reappointment or renewal.**<sup>42</sup> Pursuant to *Holcomb*, Gavil's testimony never raised an issue of genuine disputed issue of material fact to be determined by a jury and should not have been a basis for denying Plaintiff's motion for summary judgment. Plaintiff has repeatedly pointed out that Gavil was not a member of the 1997-1998 APT Committee, and cited references to the record

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<sup>41</sup> MJ Facciola's October 20, 2003 *Report* was so replete with errors of fact and law that even Howard agreed with Plaintiff that it contained many errors and merited Judge Hogan's *de novo* review. See Defendant's *Response to Plaintiff's Objection to MJ Facciola's Report and Recommendation*; Defendant's *Response to Plaintiff's Unopposed Motion to Vacate MJ Facciola's October 20, 2003 Report and Recommendation*, page 1.

<sup>42</sup> By considering Gavil's testimony at all, MJ Facciola violated and rendered meaningless his own September 24, 2002 Order precluding Howard from including, in its *MSJ*, any of Gavil's claims of non-collegiality or bad judgment. Howard specifically refused to produce Dean of Students, Denise Purdie-Spriggs for her properly noticed deposition, as part of discovery on this issue. Similarly, Plaintiff had no opportunity to serve Defendant with Interrogatories on this issue. Howard first raised this allegation, in Gavil's deposition, in September of 2002, four years into this litigation and days before the close of the long-awaited, court ordered discovery, after Howard was found in contempt of court for refusing to produce evidence and otherwise thwarting discovery. Howard blatantly violated the Court's September 24, 2002 Order, not only without penalty, but with reward. MJ Facciola relied primarily on the precluded testimony to deny Pl. *MSJ*. Plaintiff believed that she was entitled to rely on the Court order, file her *MSJ* and wait for the Court's order, which may well have granted her summary judgment. If denied, then she believed that she would be granted the opportunity to depose Dean Purdie-Spriggs, as MJ Facciola indicated in September 24, 2002 hearing in which he precluded Howard from using the Gavil testimony. The motions for summary judgment were pending for three years, and decided on November 21, 2005. After losing her *Motion in Limine* to preclude Howard from producing irrelevant and highly prejudicial "evidence" of purported "non-collegiality" and "bad judgment," particularly Gavil's testimony, Plaintiff moved to depose Dean Purdie-Spriggs before trial. In *Opposition*, Howard argued that, despite the Court's September 24, 2002 Order precluding Howard from using Gavil's testimony, Plaintiff was obligated to accept Howard's *September 30, 2002* offer to produce Dean Purdie-Spriggs for a deposition, days before the motions for summary judgment were due. Plaintiff was working diligently to timely file her *MSJ*, with depositions for previous witnesses already "rushed," at *double* the expense of the regular return date on depositions. Howard's "offer" was clearly a desperate effort to undermine and evade the Court's September 24, 2002 preclusion order. Plaintiff did not believe that she was not obligated to allow Howard to undermine a Court's Order in her favor. Howard's subsequent refusal to allow the deposition illustrates its bad faith. After Howard was permitted to violate the September 24, 2002 Order, it refused to allow the deposition that it purported to offer in 2002, days before dispositive motions were due.

demonstrating that it was undisputed that the five members of the Committee were: 1) Isaiah Leggett; 2) J. Clay Smith; 3) Laurence Nolan; 4) Homer LaRue; and 5) Andrew Taslitz.<sup>43</sup>

This one material error of fact alone changes the basis of MJ Facciola's conclusion that three members of the APT Committee, a majority, either found Plaintiff not to be collegial or took into account the opinions of one or more other faculty members that Plaintiff was not collegial.<sup>44</sup> Since Gavil had no vote, his "opinion" of Prof. Martin – whether real in 1997-1998 or fabricated four years later -- is irrelevant to the APT Committee's decision and his testimony should have been excluded at trial.

Summary judgment must also be based on *competent and credible* evidence of record. Although credibility determinations are normally left to a jury, where no reasonable juror could believe a witness' testimony, in light of the contradictory evidence, such testimony cannot defeat a motion for summary judgment. *Woodfield v. Providence Hospital*, 779 A.2d 933, 936 (D.C. 2001). In the present case, Taslitz is an alleged discriminator, motivated to testify falsely to conceal his own illegal conduct. Three years into this litigation, Taslitz suddenly claimed that his best friend, Andrew Gavil, told him of a discussion. Taslitz claimed that Gavil told him of that a student in Prof. Martin's class complained to him about her, that Gavil was "very upset" with her and thought that she should have "sought advice from other faculty members before acting the way [she] did" and "thought it was very bad judgment." Taslitz depo at 248, lines 3-19. Despite these strong statements, Taslitz could not provide any information about what the alleged "behavior" was that so "upset" Gavil or what type of advice she should have sought.

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<sup>43</sup> Plaintiff's *Reply to Defendant's Opposition to Pl. MSJ*; Plaintiff's *Motion to Strike Defendant's MSJ*; Plaintiff's *Reply to Defendant's Opposition to Plaintiff's Motion to Strike Defendant's MSJ*; Plaintiff's October 30, 2003 *Objection to MJ Facciola's October 20, 2003 Report and Recommendation*; Plaintiff's *Reply to Defendant's Response to Plaintiff's Objection to MJ Facciola's October 20, 2003 Report and Recommendation*; Plaintiff's October 4, 2005 *Motion for Reconsideration of September 24, 2005 Order*; Plaintiff's *Unopposed Motion to Vacate MJ Facciola's October 20, 2003 Report and Recommendation*. All of these filings are incorporated, by reference, herein.

<sup>44</sup> Howard's false representation that Gavil was a member of the Committee and that his opinion of Plaintiff was a factor in the APT Committee decision because he actually voted, is a violation of Fed. R. Civ. P. 11 and sanctionable, particularly since Howard has never specifically withdrawn this claim. Howard's misrepresentation was material and has caused great confusion in this case, including erroneous holdings on dispositive motions.

The November 15, 1996 conversation between Profs. Martin and Gavil occurred less than three months after she had joined the faculty, and more than a year prior to the December 18, 1997 decision. Gavil testified that he could not recall the nature of the student's complaint, the *name* of the student complaining,<sup>45</sup> the circumstances or location of the conversation about the student or the outcome of the complaint. Plaintiff's November 11, 2002 *Motion to Strike Defendant's Motion for Summary Judgment* ("Mot. to Strike") at 8-12. Although Gavil claimed that he recalled nothing else of the conversation about this student, he insisted that he was sure that during the conversation, Prof. Martin referred to the student as "that bitch" – a claim that Plaintiff vehemently denies. Martin freely states that, she said that the student was a "brat" in this private conversation with her colleague who suddenly confronted her with the trivial complaint that she did not call on the student often enough in class. Martin used the word "brat" because the student's behavior childish, disruptive, and inappropriate for an adult law student. Gavil's vague, subjective, unsubstantiated testimony is completely irrelevant and immaterial to this case.<sup>46</sup>

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<sup>45</sup> In an effort to refresh Gavil's recollection, Plaintiff even named the student during the deposition, off the record, to protect her reputation. Pl. Mot. to Strike at 11; Pl. Facts ¶ 224; Gavil depo at 143. Even then, Gavil testified that he could not recall whether that was the student in question. *Id.* On the other hand, Taslitz testified that this was a student whom Gavil "though well of." Taslitz depo at 252, l. 11-13. At the time of the November 10, 1996 complaint, this first year student had been in law school less than two months; yet Gavil "though well" enough of this student to entertain a her meritless and trivial complaint and report his colleague to the Dean of Students, take her make "a mountain out of a molehill." Even the student in question recognized her own childishness and lack of merit of her complaint.

<sup>46</sup> As discussed in Pl. *Mot. to Strike*, 11-12, Gavil's testimony regarding his perception of Prof. Martin has absolutely no probative value, within the meaning of Fed. R. Ev. 403. Permitting Gavil to testify at trial was unduly prejudicial to Plaintiff. Gavil destroyed his own credibility. For example, Gavil testified that he saw Martin making copies of her article, in the copy room, "rushing" to send them out to journals because she knew how late she was in getting it out. Pl. Facts ¶ 196; Gavil depo at 49-50, 99, 111. In fact, Martin did not copy, mail, or otherwise prepare her article for distribution. Pl. Facts ¶ 197. This was all done by Mrs. Bruner, the Director of Faculty Services, as is customary, and as Mrs. Bruner testified. Pl. Facts ¶ 197. It is not possible, then, that Gavil saw Prof. Martin making copies of her article for distribution, "rushing" to get it out.

Gavil testified that he was disappointed that Prof. Martin did was not working on a second article, in addition to the completion of her extensive article, "*911: How Will Police and Fire Departments Respond to Public Safety Needs and the Americans with Disabilities Act?*" He admitted however, that he had little contact with Prof. Martin, had never asked her whether she was working on a second or third article and did not know that she had a draft of a second article and a thesis, title and some research for a third article since joining Howard's faculty (Gavil depo at 112; 152-153), all of which was listed on her resume and her application for a renewed position on the faculty. Where a witness' testimony is so

MJ Facciola ignored the sworn declaration of the student in question, now a local practicing attorney, filed as Exhibit A of Plaintiff's *Motion to Strike*. *Motion to Strike* at 8. This student apologized to Prof. Martin for her bad behavior during her first semester of law school, took every course that Prof. Martin ever taught at Howard, including four courses, praised Martin as one of her best professors, and not only signed, but *helped circulate* a petition protesting Martin's non-renewal. Pl. Mot. to Strike at 8.

Plaintiff wrote a November 16, 1996 memorandum to Dean of Students, Denise Purdie-Spriggs, with a cover memo to Prof. Gavil, documenting their conversation about the student in question, including her name. Gavil had reported the student's complaint about Prof. Martin to Denise Purdie-Spriggs. Prof. Martin was extremely perplexed at Gavil's motives for reporting such a trivial student complaint. Dean Purdie-Spriggs expressed agreement with Prof. Martin. Dean Purdie-Spriggs tried to return the memo to Prof. Martin, but Prof. Martin insisted that she keep the memo in her files to ensure that these events would not be misrepresented at a later date. Pl. Mot. to Strike 3-4; Pl. MSJ at 28-29, fn.10; Facts ¶¶225.<sup>47</sup> MJ Facciola completely ignored Martin's memorandum to Purdie-Spriggs, (Exhibit

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completely and obviously void of credibility and competence – as well as relevance -- it is not an appropriate basis for defeating a motion for summary judgment. *Woodfield v. Providence Hospital*, 779 A.2d 933, 936 (D.C. 2001).

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

Finally, Professors Spencer Boyer and Henry Jones are the most senior faculty members at Howard University Law School. They are the members of the faculty that actually worked with the civil rights giants, such as James Nabrit, whose legacies Howard Invoked. Prof. Boyer is not only the most senior member of Howard's faculty, but he is the most senior African-American faculty member at any law school in the country. He has taught more African-American female professors than any other law professor in the United States. Prof. Boyer testified that Taslitz and Gavil are part of a “click” of professors favored by Dean Bullock, who are appointed to key Committees and intimidate non-tenured professors to pressure them into voting as Taslitz as they instruct them at faculty meetings. Pl. MSJ at 23-27. Prof. Jones similarly testified that Gavil is disrespectful to senior colleagues. Jones depo at 68-69.

<sup>47</sup> On December 21, 2005, Plaintiff filed a motion to depose Dean Purdie-Spriggs and Prof. Steven Jamar. In its pre-trial statement, for the first time, Howard identified Jamar as a witness who would

ZZZ of Pl. MSJ), as well as Plaintiff's sworn declaration about the incident (Exhibit J of Pl. MSJ), which she recalled vividly, in sharp contrast to Gavil's purported vague recollection.

**2) Nolan Never Questioned Prof. Martin's Character, but Lobbied for her Retention** MJ Facciola did not name Prof. Nolan in his *Report*, but referred to Taslitz' deposition testimony wherein Taslitz claimed that Prof. Nolan questioned Prof. Martin's veracity with respect to her representations about the status of her article. 2003 U.S. Dist. LEXIS 18501 at \*17. In fact, Prof. Nolan testified that *she did not question Plaintiff's statements or disbelieve her*. Pl. MSJ at 289. MJ Facciola's factual conclusion was again based on his blanket acceptance of Howard's false representation of the record, based on the testimony of an alleged discriminator and proven liar, Taslitz, ignoring Plaintiff's citations to the record correcting this, as well as other, erroneous factual assertions made by Howard. MJ Facciola's conclusion that Prof. Nolan found some personality flaw in Prof. Martin is a based on a complete misrepresentation of Prof. Nolan's testimony.

With both Gavil and Nolan subtracted from the equation, MJ Facciola's purported *majority of three* APT Committee members questioning Prof. Martin's judgment or collegiality then, is reduced to an *exclusive minority of one* – *Taslitz* – the instrument of Dean Bullock's retaliation. It is not possible, then, and no reasonable juror could conclude, that despite Prof. Martin's credentials, a majority of the Committee member voted against her because of a perceived personality flaw.

**3) MJ Facciola Relied Primarily on Taslitz' Testimony, despite his Proven Lack of Credibility and Competence.** Despite the undisputable evidence that Taslitz lied to his colleagues about Martin's and Cunningham's credentials, MJ Facciola's Report relies heavily on Taslitz' testimony, even where it conflicts with that of other witnesses and documentation. *See* discussion in Section \_\_\_\_.

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testify about his negative "interactions" with Plaintiff. Howard provided no specifics about what "time" Jamar ever spent with Plaintiff or about any "negative interactions." In its December 16, 2005 Motion *in Limine*, Howard offered Jamar as a witness who would testify that his "interactions" with Prof. Martin purportedly led him to the opinion that Prof. Martin was not "collegial" and had "bad judgment." As Plaintiff had virtually no interaction with Jamar and cannot imagine what "negative interactions" he could possibly claim took place between them. As Plaintiff and other professors stated, Jamar is an anti-social person who rarely speaks to his colleagues, even to say "hello" in the hallway. Pl. Facts ¶¶ 198-201.

## CONCLUSION

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

Respectfully submitted,

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