

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 SEXUAL HARASSMENT CLAIM, 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 sexual harassment/hostile work environment, or, in the alternative, for a new trial, pursuant to Fed. R. Civ. P. 59(a) and (e) and 60(b)(3). Plaintiff incorporates, by reference, all arguments made in her previous motion for judgment on her sexual harassment claim.

**MEMORANDUM IN SUPPORT OF MOTION**

**I. Legal Standard**

**A. Rule 50(B)**

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

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

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

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

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

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

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

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

## **II. 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").<sup>1</sup>

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.

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<sup>1</sup> Judge Hogan provided guidance on this issue by stating:

To prevail against an employer in these cases, a plaintiff must show that the employer knew or should have known of the existence of a hostile work environment and failed to take proper remedial action. Henson, 682 F.2d at 903. Consequently, although Mr. Harrison was not a University employee, the University may be responsible for his conduct if it knew or should have known that Mr. Harrison's actions created a hostile work environment for the Plaintiff and failed to take corrective action. *Id.* In determining whether an employer should be responsible for a hostile work environment caused by a non-employee, courts consider the extent of the employer's control over the harasser and any other legal responsibility which the employer may have with respect to the conduct of the non-employees. Otis v. Wyse, 1994 U.S. Dist. LEXIS 15172, 1994 WL 566943 at \*7 (D. Kan., Aug. 24, 1994).

1999 U.S. Dist. LEXIS 19516 at \*12-14.

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.

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*,<sup>2</sup> told jurors that Prof. Martin “*played the sexual harassment card.*”<sup>3</sup> The stalking of women in their workplaces should never be so trivialized – nor should the woman stalked be so denigrated<sup>4</sup> for asking that basic safety procedures actually be implemented to keep a serial, delusional, homeless stalker with a criminal record out of the workplaces.

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<sup>2</sup> *Venable* specializes in defending employers against employment discrimination cases, brought on the bases of race, sex, national origin, religion, age and disability. It is ironic then, that *Venable*’s attorneys’ invoked the legacy of Howard University and civil rights to oppose this sexual harassment case and that Howard University’s funds are being used to further the wealth of this large firm that *opposes* civil rights claims.

<sup>3</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>4</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 A**, previously in the record as 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 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.

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.

### **III. Facts as Set Forth in Chief Judge Hogan's 1999 Decision**

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

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

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

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

Judge Hogan elaborated on the facts setting forth Plaintiff's sexual harassment claim.

Here, Plaintiff alleges that Mr. Harrison sent her two letters, left three voice mail messages for her and attempted three personal visits to Plaintiff's office, all due to his conviction that she was his "wife." Plaintiff contends that these interactions with Mr. Harrison convinced her that this "mentally unstable homeless stranger" had conducted research on her since he knew her middle name and the name of a course which she taught in Cleveland. Moreover, Plaintiff refers to a letter written by Mr. Harrison to Attorney Valerie Edwards in Canada as evidence that Mr. Harrison's pursuit of Plaintiff was sexual in nature: "Verily, it appeared that this Valerie Edwards look-alike was actually a taller, more youthful, prettier and (forgive me for saying) more voluptuous woman than the Valerie Edwards whom I had met and known at Lakeside. . . . The truth

is, I had never looked at Valerie Edwards full in the face, on account of painful bashfulness -- while enamored by her person and both distracted and infatuated with her legs -- and so was not aware of her exact features."

1999 U.S. Dist. LEXIS 19516 at \*9-10.

In this case, Plaintiff alleges eight instances of sexual harassment: two letters, hand-delivered to Plaintiff's office; three phone calls to Plaintiff's direct line which were picked up by her voice mail; and three personal visits to Plaintiff's office, although Plaintiff was out of her office during the first two visits and the Security Officer chased Mr. Harrison from her office at the third visit.

1999 U.S. Dist. LEXIS 19516 at \*12.

At trial, and even in the parties' cross-motions for summary judgment, the facts as alleged above were well-established by the testimony of Howard's own security officers, D.C. Metropolitan Police Department records and testimony, Plaintiff's testimony, letters written by Harrison, and even Howard's Law School Dean and Associate Dean. The facts, as stated above, were completely undisputed by any evidence presented by Howard.<sup>5</sup>

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<sup>5</sup> Howard argued, in both its opening and closing statements, that Harrison did not exist or that he had been confused with someone else appearing on some occasions or that Harrison was simply a "gentleman" who "mistook" Prof. Martin for his "estranged wife;" however, Howard's own Security Officer -- now employed by Howard for more than 30 years -- Officer Dowdy, checked Harrison's identification and personally saw him and identified him on two separate occasions -- the second time chasing him from Plaintiff's office, out of the law school building, off campus and into the woods. D.C. Metropolitan Police Department records and the testimony of MPD Detective Brian Henry established that police officers did investigate Plaintiff's stalking complaint and did confirm Harrison's existence with the records of the homeless shelter where he had been residing. Howard's administrators were well aware that there was no "estranged wife," but that Harrison's "natural wife" was fictional and that he was delusional. In addition, although the Court excluded the renowned Prof. Derrick Bell, formerly of Harvard Law School, currently of NYU Law School, from testifying, Prof. Bell did submit an affidavit (**Exhibit B**), also in the record as Ex. S of Plaintiff's October 9, 2002 *Motion for Summary Judgment*, setting forth his own experience with Harrison at Harvard, in 1990, when Harrison demanded that Bell tell him the name of the woman upon whom he based the Geneva Crenshaw character, in his book, *And We Are not Saved*. Prof. Bell described this encounter as "the most frightening experience of my career." Prof. Bell explained that Harrison, disbelieving his response that Geneva was a purely fictional character, threatened to come back and "blow your head off," vowing to "kill all the token Blacks in high places" before beginning his "racial revolution" against Whites. Harrison did not stalk Prof. Bell or target him as a man; rather, Harrison accosted Prof. Bell hoping that Bell would lead him to the "real" woman whom he believed was the model for fictional "Geneva Crenshaw" so that he could stalk her and convince her to be his wife. Had Prof. Bell been permitted to testify, these events and Harrison's obsession with women meeting the general description of the fictional character in his book would have been better developed for the jury.

**IV. The Jury's Verdict Contradicts Judge Hogan's Determination of Law, Howard's Admissions of Fact and all Relevant Undisputed Evidence of Record**

**1. The Jury's Verdict Form**

The jury verdict form included the following questions and the following jury answers:

1. Did the Plaintiff prove by a preponderance of the evidence that:
  - a) Mr. Harrison subjected her to conduct that was sufficiently severe and pervasive to alter the terms and conditions of her employment?  
 YES       NO
  - b) Mr. Harrison's conduct was unwelcome?  
 YES       NO
  - c) Mr. Harrison's conduct was sexual in nature or because of Plaintiff's gender?  
 YES       NO
  - d) Howard University knew or should have know of the alleged conduct?  
 YES       NO
  - e) Howard University failed to take proper remedial action that was reasonably calculated to end the harassment?  
 YES       NO

As discussed below, the jury's response to "1C" directly contradicts: 1) Judge Hogan's 1999 conclusions of law; 2) Judge Hogan's judicial notice during trial that the term "wife" has sexual implications<sup>6</sup> and the dictionary definition of the term "wife;" 3) Howard's own admissions that when Prof. Martin reported Leonard Harrison's stalking of her on campus, Howard understood Harrison's conduct to pose the threat that Harrison would "stalk" or "harass" not only Prof. Martin, but also "other women" on Howard's campus. In short, the jury's verdict cannot stand because it is unsupported, and indeed, expressly and directly contradicted by all of the relevant, undisputed evidence of record, as well as Judge Hogan's conclusions of law.

The jury's answer to the question of whether Harrison harassed Plaintiff based on her sex determined the disposition of this case, both with respect to Plaintiff's sexual harassment/hostile work environment case and her retaliation case, since both are based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) and the D.C. Human Rights Act, which prohibit employment discrimination on the basis of sex. By determining that Harrison *did* harass Plaintiff in her workplace, to the point of it

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<sup>6</sup> The trial transcript is not yet available.

being severe and pervasive, and that Howard University knew of the harassment and failed to take reasonable measures to eliminate the hostile work environment. The jury found that Plaintiff endured this harassment in her workplace, tolerated, if not facilitated by her employer; however, by concluding that the harassment was not on the basis of sex, or sexual in nature, the jury left Plaintiff with absolutely no remedy for being harassed/stalked in her workplace by a delusional, violent homeless stranger with a criminal record or for her non-renewal as a law professor in retaliation for her requests for protection in her workplace.

Not only does the jury verdict result in substantial injustice to Plaintiff, with no remedy for egregious harm, but the verdict conflicts with Judge Hogan's holding, as a matter of law, as well as with the undisputed evidence of record.

**2. The Jury's Notes to the Court, Requesting Additional Instructions on Sexual Harassment and Harassment on the Basis of Sex Demonstrates the Jurors' Confusion over the Law**

The jury's conclusion that Harrison's conduct was not based on sex was based on its misunderstanding of the law with respect to sexual harassment, as evidenced by the questions it sent to the Court requesting more detailed definitions and instructions on the law.

On April 27, 2006, at 12:00 p.m., the jurors sent a note to the Court stating:

Jurors want an explanation under hostile work environment, 1.a.

(1) what is meant by "the terms and conditions of her employment"?

(2) p. 23 # 4 what constitutes "damages." (sic)

The parties agreed on a definition of "damages" as "harm or injury, whether psychological, emotional, financial, or physical." This Court accepted this instruction and read it to the jury. The parties disagreed on the instructions for the terms and conditions of employment. The Court modified this instruction to "The terms and conditions of her employment means the performance of duties/work performance and her work environment," without an explanation of the meaning of "work environment."

On April 28, 2006, at 11:30 p.m.,<sup>7</sup> the jurors sent a note to the Court stating:

“(1) Wives are typically female. Is # 1c an automatic ‘yes’ just because plaintiff is female. (sic)

(2) Please define sexual harassment.”

The parties disagreed sharply on the instructions to be given the jury in response to both questions. Chief Judge Hogan was not present because he was presiding over a judicial conference out of the District of Columbia. Judge Kessler presided in Judge Hogan’s absence. When the parties arrived in Court, Judge Kessler had already written her proposed responses to the jury questions as follows:

(1) “No, it is not an automatic “yes.” You must base your decision on the evidence presented to you;” and

(2) “Refer back to Instruction # 23, defining sexual harassment.”

Plaintiff opposed both of these instructions, pointing out that: 1) Judge Hogan held, as a matter of law, in his 1999 decision, that Harrison’s pursuit of Plaintiff as his “wife,” constituted pursuit on the basis of sex or gender; 2) the dictionary definition of “wife” clarifies that a wife is “a married woman” – thus, female by definition; 3) the answer could instruct the jurors that if they found that Harrison pursued both men and women as his “wife,” then the answer to #1C would be “no,” but if they found that Harrison pursued only women, or primarily women as his “wife,” then the answer would be “yes;” and 4) that Judge Hogan’s 1999 decision included a more specific and clearer definition of sexual harassment than was provided to the jury as Instruction # 23 and the jury’s question indicated that Instruction # 23 was not clear enough and needed to be supplemented. Judge Kessler rejected all of Plaintiff’s suggested instructions.

Judge Hogan’s statement that it is “obvious” that the word “wife” has sexual connotations may well have been the reason that the jury asked the question:

“(1) Wives are typically female. Is # 1c an automatic ‘yes’ just because plaintiff is female. (sic)

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<sup>7</sup> Plaintiff did not receive a call from the Court regarding this question until 12:37 p.m. Plaintiff arrived from Alexandria, Virginia, within one hour of the call, including time spent attempting to gather information to answer the jury’s questions.

The jury may well have perceived the words “obvious” and “automatic” as synonymous. After Judge Kessler’s response that the answer to #1c was not “automatic,” the jurors may well have perceived this instruction to invalidate Judge Hogan’s comment from the bench.

Less than two hours after the jury received Judge Kessler’s instruction (referring them back to the instruction the jurors had already deemed inadequate for them to resolve their differences), the jury returned a verdict for defendant, holding that Harrison’s conduct, though creating a hostile work environment for Prof. Martin, which Howard failed to take reasonable steps to eliminate, the harassment was not sexual in nature or based on Plaintiff’s sex/gender. This conclusion was clearly based on a misunderstanding of the question and the law.

It also appears that Judge Kessler misunderstood the jury’s questions, without the benefit of the background in this case over its eight year saga, the lengthy cross-motions for summary judgment, trial and deposition testimony, the hundreds of exhibits produced at trial, or Judge Hogan’s comments at trial amounting to judicial notice. The jury’s note stating: “Wives are typically female. Is # 1c an automatic “yes” just because plaintiff is female” indicates that the jury did find, as a matter of fact, that Harrison did target Plaintiff as his potential “wife.” The second part of the jury’s question, answered in a vacuum, might well be appropriately answered as Judge Kessler responded; however, since the question was preceded by the jury’s specific statement that “Wives are typically female,” the meaning of the question is changed. The question, preceded by the statement regarding wives as females, indicates that the jury found, as a matter of fact, that Harrison pursued Prof. Martin to be his “wife.” Having reached this determination, at least some of the jurors apparently believed that their job was done and wanted clarification from the Court to convince other juror(s) who refused to acknowledge that pursuit of a woman as a potential wife necessarily constitutes pursuit of her based on her gender.<sup>8</sup>

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<sup>8</sup> When Judge Kessler read the instructions to the jury, several of the jurors looked openly perplexed. One juror, however, nodded not only her head, but her entire upper body vigorously and told the juror next to her, “I told you!” This is the same juror who made gestures and sounds several times through the trial expressing her support for Howard. In fact, this juror threw up her hands and let out a guttural sound during Plaintiff’s closing argument when Plaintiff said, “No woman should have to choose between her

**3. The Court Held that “it is clear that Plaintiff was only the Object of Mr. Harrison's Attention because she was a Female,” Precluding the Jury’s Verdict by Res Judicata and the Law of the Case**

The jury verdict requires re-examination of Judge Hogan’s 1999 decision, the precise questions that it set for a jury trial and the conclusions of law that it reached prior to trial. After identifying the undisputed factual question for the jury, whether Howard responded appropriately to end the hostile work environment for Plaintiff created by Harrison,<sup>9</sup> the Court then proceeded to address Howard’s claim that Plaintiff’s allegations did not establish that Harrison’s conduct was sexual in nature or on the basis of sex.

Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed solely at discrimination because of sex. Oncale v. Sundowner Offshore Services, 523 U.S. 75, 118 S. Ct. 998, 1001, 140 L. Ed. 2d 201 (1998). Workplace harassment is not automatically discrimination because of sex merely because the words used have sexual content or connotations. *Id.* "The critical issue is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.*

**It is clear from Mr. Harrison's own description of his search for "Geneva Crenshaw" or "Valerie Edwards" that he targeted women other than Plaintiff:** "the only method available to me as far as finding Valerie was the most primitive means of choosing the name 'Valerie' from within the vast array of academic category and pursuing it. Eventually, I had lost even the name 'Valerie' and pursued others." Plaintiff argues that Mr. Harrison's pursuit of her as his "wife" was inherently sexual in nature since it was clear that Plaintiff was being pursued as a woman and that she would not have been sought by Mr. Harrison as his wife if she were a man. Moreover, Plaintiff claims that she was being stalked by Mr. Harrison and that stalking is primarily a crime against women, with sexual connotations.

A hostile work environment may be established if the harassment is "because of sex," even if not sexual in nature. Spain v. Gallegos, 26 F.3d 439 (3d Cir. 1999); Hicks v. Gates Rubber Co., 928 F.2d 966, 971 (10th Cir. 1991); Hall v. Gus Const. Co., Inc., 842 F.2d 1010 (8th Cir. 1988). **In this case, it is clear that Plaintiff was only the object of**

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safety and her job.”

<sup>9</sup> Judge Hogan identified Howard’s defenses, distinguishing the factual issues to be decided by a jury from the issues that he was about to decide, as a matter of law, namely, that Harrison’s conduct, as alleged, was based on Prof. Martin’s gender.

In this case, Defendants admit that the sufficiency of the University's response is a factual question for the jury but they contend that Plaintiff's hostile work environment claim must be dismissed because Plaintiff cannot establish a prima facie case of hostile work environment under Title VII. Specifically, Defendants claim that Plaintiff cannot show that Mr. Harrison's conduct was based on sex and that Mr. Harrison's conduct was sufficiently severe or pervasive.

1999 U.S. Dist. LEXIS 19516 at \*8.

**Mr. Harrison's attention because she was a female; therefore, the alleged stalking activities do appear to have been "because of sex" even if they were not inherently sexual in nature.** (Emphasis added)

1999 U.S. Dist. LEXIS 19516 at \*8-11.

**4. The Jury Verdict Contradicts Judge Hogan's Judicial Notice During Trial and is Otherwise Unsupported by the Undisputed Evidence of Record**

As held in Judge Hogan's 1999 decision, Harrison's pursuit of Plaintiff as his "wife" was inherently sexual, since the relationship between a husband and a wife is expected to include sex. This fact was so obvious that the Court stopped Plaintiff's counsel, Mr. Otey, from continuing a line of questioning of Officer Sirleaf, to whether he perceived Plaintiff's complaint regarding Harrison as one that was "sexual in nature" or based on her sex. Since Officer Sirleaf was an agent of Howard, and the first Howard employee who recorded Plaintiff's complaint in a written report, his understanding of Plaintiff's complaint as sexual, or based on her sex, is imputed to the University.

Officer Sirleaf testified that he *did* interpret Harrison's conduct to be sexual in nature because he pursued her as his "wife." As Officer Sirleaf began to elaborate on his perception of a husband and wife relationship as inherently sexual, the Court interrupted the witness and Plaintiff's counsel, saying, "It's obvious, move on."<sup>10</sup> Despite Judge Hogan's conclusion of law, in 1999, "it is clear" that Harrison's conduct was sexual in nature and/or based on sex, and judicial notice that the term "wife" denotes that Harrison's pursuit of Prof. Martin was sexual in nature, a jury has returned a verdict disposing of Plaintiff's entire Title VII and D.C. Human Rights Act claims, based on a contrary conclusion.

The jury's verdict is contrary to all of the undisputed evidence of record, including: 1) rulings from the Court (oral and written); 2) admissions of Howard's binding witnesses, Deans Bullock and Newsom; and 3) statements by Prof. Taslitz, Officer Sirleaf and Mrs. Bruner. The jury also overlooked the specific and common meaning of the word "wife," as defined in English language dictionaries;<sup>11</sup>

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<sup>10</sup> To the extent that Plaintiff was not permitted to continue this line of questioning, she was deprived of her opportunity to further convince the jury that both Plaintiff and Howard's agents clearly understood that Harrison's conduct was sexual in nature and/or based on Prof. Martin's sex/gender.

<sup>11</sup> Wife is defined as "a married woman."

accordingly, the verdict must be set aside and judgment granted for Plaintiff on the issue of sexual harassment/hostile work environment. As set forth in Plaintiff's October 9, 2002 *Motion for Summary Judgment*, incorporated by reference herein, the undisputed facts of record demonstrate that no reasonable juror could conclude that Harrison's conduct did not rise to a level creating a hostile work environment or that Howard took reasonable steps to eliminate this hostile work environment. The jury's findings of fact on these issues confirm that result.

The jury's verdict is only faulty in that it was based on a misunderstanding of law with respect to sexual harassment and harassment on the basis of sex. The jurors asked for additional instruction on these issues, but received none. Left to its apparent conflicting juror views on this issue, the jury made an error of law and concluded that the harassment was not based on sex – despite all undisputed evidence and judicial notice, from the bench, during trial, to the contrary.

#### 5. Criminal Stalking may Constitute Sexual Harassment under Title VII<sup>12</sup>

Plaintiff repeatedly requested that the Court include in its jury instructions the definition of "stalking," pursuant to the D.C. Criminal Code, and specific language from case law establishing that criminal behavior, such as stalking, may also constitute workplace sexual harassment. Plaintiff set forth these proposed instructions as #2 and #3 of her *Proposed Special Jury Instructions*, submitted as part of her pre-trial statement in November of 2005 and requested for the last time on the last day of trial, April 28, 2006. The Court rejected Plaintiff's proposed instructions.

Howard argued that "stalking" is a criminal matter and does not constitute sexual harassment; however, most criminal acts are also actionable in civil law, under comparable civil theories. If an employee is sexually assaulted in her workplace, certainly, it is a crime; however, the employer is not permitted to dismiss it as a criminal matter and allow the employee who committed the sexual assault to continue to work with the person whom he assaulted. The employer still has a duty, under Title VII of the Civil Rights Act of 1964, and the D.C. Human Rights Act, to eliminate the sexual harassment in the

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<sup>12</sup> Since the D.C. Civil Rights Act mirrors Title VII with respect to sexual harassment, the same standards and analysis referenced with respect to Title VII also apply to Plaintiff's pendant D.C. claims.

workplace.

Stalking is a form of sexual harassment, within the meaning of Title VII, where it is based on sex and the victim reasonably perceives the stalker to have created a “hostile or abusive environment” in her workplace.<sup>13</sup>

The legal definition of criminal “stalking,” as codified in D.C. Code Ann. § 22-404 (b) is:

(b) Any person who on more than one occasion ... willfully, maliciously, and repeatedly follows or harasses another person, is guilty of the crime of stalking. (Emphasis added)

(e) For purposes of this section, the term “harassing” means engaging in a course of conduct either in person, by telephone, or in writing, directed at a specific person, which seriously alarms, annoys, frightens, or torments the person, or engaging in a course of conduct either in person, by telephone, or in writing, which would cause a reasonable person to be seriously alarmed, annoyed, frightened or tormented.<sup>14</sup>

Without the definition of “stalking,” the jurors were without the legal reference to evaluate Howard’s repeated distinctions between stalking and sexual harassment, and Howard’s specific accusations that Plaintiff never raises issues of “harassment” prior to Howard’s December 18, 1997 decision not to offer her a permanent position or a renewed visitorship on its law school faculty. In fact, in closing arguments, Howard’s outside counsel, Mr. Shwalb, accused Plaintiff of “*playing the sexual*

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<sup>13</sup> *Crowley v. L.L. Bean*, 303 F.3d 387, 396, 401-403 (D. Me. 2002). See also *Frazier v. Delco Electronics Corporation*, 263 F.3d 663, 668 (7<sup>th</sup> Cir. 2001) (stalking recognized as creating a hostile work environment based on sexual harassment); *Whitmore v. O’Connor management, Inc.*, 156 F.3d 796, 798 (8<sup>th</sup> Cir. 1998) (sexual harassment was so severe that co-worker would “almost call it stalking”); *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1108 (8<sup>th</sup> Cir. 1998) (plaintiff felt that her co-worker “was harassing her, actually, stalking her”); *Angeles-Sanchez v. Alvarado*, 1993 U.S. App. LEXUS 10509 (1<sup>st</sup> Cir. 1993) (sexual harassment/hostile work environment included “stalking”); *Spina v. Forest Preserve District of Cook County*, 207 F. Supp. 764, 772 (D. Ill. 2002) (stalking listed as one of the more severe allegations of sexual harassment); *Ramirez v. New York Presbyterian Hospital*, 129 F. Supp. 2d 676, 678 (S.D.N.Y. 2001) (plaintiff used “stalking” to describe acts of sexual harassment/hostile work environment); *Dolman v. Williamette University*, 2001 U.S. Dist. LEXIS 7772 (D. Or. 2001) (plaintiff employee of a University was stalked by a former student, constituting sexual harassment);<sup>13</sup> *Chontos v. Rhea and Indiana University*, 29 F. Supp. 931, 937 (N.Dist. Ind. 1998)<sup>13</sup> (“stalking” was one of the most “disturbing” acts of sexual harassment).

<sup>14</sup> See *United States v. Smith*, 685 A.2d 380, 383-383 (D.C. App. 1996) (constitutionality of statute fully examined).

*harassment card*,” only after she was rejected for a permanent position on December 18, 1997, never having previously mentioned sexual harassment.<sup>15</sup>

If the jurors had realized that the D.C. stalking statute specifically incorporates “harassment” as part of its definition, the jury would have clearly understood that Plaintiff first alleged that she was being harassed by Harrison, as his prospective “wife,” no later than November 21, 1997, when she filed a “stalking” complaint against Harrison with the D.C. Metropolitan Police Department. This realization would also have bolstered Plaintiff’s credibility with the jury, with respect to all of her claims, since Plaintiff testified that she characterized Harrison’s behavior as “harassment” when she first reported it to Dean Newsom and Officer Sirleaf on November 20, 1997. At that time, she had not yet met with the D.C. police officers and they had not yet classified the harassment as stalking.

**6. The Jury Verdict Contradicts Admissions by Deans Bullock and Newsom Expressly Recognizing that Harrison Posed a Threat to Plaintiff and “Other Women” on Campus**

Associate Dean Newsom specifically admitted, both at trial and in his deposition, that Harrison’s pursuit of Prof. Martin caused him concern about not only Prof. Martin’s safety, but also the safety of other women on campus. See Pl.’s *MSJ* at 12. In her July 1, 1998 memorandum to Norma Leftwich, General Counsel for Howard University, provided as an attachment to Howard’s Position Statement to the EEOC in response to Plaintiff’s EEOC charge of sexual harassment/hostile work environment and retaliation, Dean Bullock admitted that she was specifically aware, by no later than December 1, 1997, that Harrison posed a threat of stalking *and harassment* too Prof. Martin and “other women” on campus.

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

Pl.’s Trial Ex. 8B and Ex. KKK-1 of Pl.’s October 9, 2002 *Motion for Summary Judgment* (MSJ).

Howard adopted Dean Bullock’s statement in its December 8, 1998 Position Statement to the EEOC

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<sup>15</sup>Mr. Shwalb claimed that Prof. Martin never characterized the stalking as sexual harassment until she filed her EEOC charge in May of 1998.

(Exhibit KKK-2 of Pl.'s *M SJ*<sup>16</sup>). On page 2 of the same July 1, 1997 memorandum, Dean Bullock acknowledged that she was aware, as of December 1, 1997, that Harrison had been characterized a “dangerous” and “crazy” and should only be approached by the police or University Security.

Throughout this case and at trial, Howard’s attorneys argued that Prof. Martin did not characterize Harrison’s conduct as “harassment” or indicate that she believed that Harrison’s pursuit of her was sexual in nature or based on her status as a woman. Howard maintained that neither Deans Bullock nor Newsom, nor any other of its agents understood Prof. Martin’s reports to indicate her belief that she was being “harassed” or that such harassment was sexual in nature or based on her gender. Howard has repeatedly referred to Harrison as “a gentleman” who was in search of his “estranged wife,” and that his pursuit of Prof. Martin was a case of “mistaken identity;” yet, Howard’s administrators were well aware that this was no “gentleman,” that there was no “estranged wife,” and that there could be no “mistaken identify” because there was no real person, but only a fictional character in a book, to “identify.”

At trial, Howard wasted Court time attempting to elicit testimony from witnesses to this effect, when it had already acknowledged, years earlier, in its statement to the EEOC, that Harrison’s conduct constituted harassment on the basis of sex. Indeed, Howard has wasted Plaintiff’s, the EEOC’s and the Court’s time, for the past eight years, while draining Plaintiff of her limited financial resources, depriving her of returning to her teaching career, and depriving her of the reputation and income that she enjoyed prior to her termination from Howard, which allowed her to properly provide for her daughter during the remaining years of her childhood and through college and graduate school.

The evidence is clear that Deans Bullock and Newsom, as well as Howard’s additional agent, Howard University Campus Officer Sirleaf and Prof. Taslitz,<sup>17</sup> *always* understood that Prof. Martin’s

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<sup>16</sup> For reasons that are not now clear, although the exhibit was clearly marked for trial as Exhibit 8A, and included in Plaintiff’s exhibit book, it appears that it was not admitted during Mr. Otey’s cross-examination of Dean Bullock, when Ex. 8B was admitted. Perhaps when the trial transcript is available, it will be clear why this document was not admitted into evidence.

<sup>17</sup> Plaintiff’s undisputed testimony at trial was that Prof. Taslitz was the first professor that she showed

memoranda entitled “Security Problem on Campus” and her conversations with them about Harrison, constituted complaints of harassment, based on her sex. The fact that the D.C. Metropolitan Police Department characterized this sexual harassment as criminal stalking highlights the severity of the harassment and certainly does not nullify it, as Howard argued.

Sexual harassment that rises to the level of criminal activity has been recognized as the most extreme form of sexual harassment in the workplace. In *Little v. Windemere Relocation, Inc.*, 301 F.3d 958, 967 (9<sup>th</sup> Cir. 2001), the court found that where an employee was raped by a client after a business meeting, this one incident was severe enough to create a hostile work environment for the plaintiff in her workplace. See also *Turnbull v. Topeka State Hospital*, 255 F.3d 1238, 1243-1244 (10<sup>th</sup> Cir. 2001) (a single incident of sexual assault was “abusive, dangerous and humiliating” enough to create a hostile work environment for the plaintiff, within the meaning of Title VII); *Brock v. United States*, 64 F.3d 1421, 1423 (9<sup>th</sup> Cir. 1995) (“Just as every murder is also a battery, every rape committed in the employment setting is also discrimination on the basis of the employee’s sex.”)<sup>18</sup>

Dean Bullock’s admission, repeating Dean Newsom’s admission that both Deans perceived Harrison’s stalking of Prof. Martin on campus as “harass[ment]” that was directed as Prof. Martin and “other women” as *women*, demonstrates, absolutely, that Howard’s entire “defense” was made in bad faith, in violation of Fed. R. Civ. P. 11, constituting fraud, misrepresentation and/or misconduct justifying

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Harrison’s letters to, on November 20, 1997 and that Prof. Taslitz told her, “Howard’s security is for sh-t. You’ll be raped and killed right in front of that security booth.” He then advised her to call the police. Mrs. Bruner also testified that she understood Harrison’s pursuit of Prof. Martin to be sexual in nature and based on her gender. Prof. Martin testified that her own nightmares about Harrison included a vision that he followed her into the Ladies’ room at work, raped her, slit her throat and threw her body out the window. Mrs. Bruner testified that, once the stalking began, Prof. Martin asked her to watch the Ladies’ room when she used it. Clearly, everyone at Howard whom Plaintiff told about the stalking perceived it as sexual in nature and/or based upon the fact that she was a woman.

<sup>18</sup>Even when conduct might affect both men and women, the conduct may constitute harassment on the basis of sex if the conduct disproportionately affects women. *Turnbull*, 255 F.3d at 1244; see also *Crist v. Focus Homes*, 122 F.3d 1107, 1111 (8<sup>th</sup> cir. 1997). Statistics compiled by the U.S. Department of Justice reflect that women are, in fact, disproportionately affected by workplace violence, such as sexual assault and stalking. See Bureau of Justice Statistics, *National Crime Victimization Survey, Violence in the Workplace*, 1993-1999 (December 2001), at [www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf).

a new trial or amended judgment, pursuant to Fed. R. Civ. P. 60(B)(3). In addition, Rule 11 sanctions are appropriate.

**V. The Jury's Answers to Factual Questions Posed by Chief Judge Hogan's 1999 Decision Require Judgment for Plaintiff**

Having determined, as a matter of law, that Harrison's pursuit of Plaintiff and other women as his "wife," clearly constituted pursuit of her on the basis of her sex or gender, Judge Hogan permitted this case to proceed to trial for a jury to determine: 1) whether Harrison's conduct was severe and pervasive enough to create a hostile work environment for the Plaintiff;<sup>19</sup> and 2) whether Howard University knew or should have known of Harrison's creation of a hostile work environment and failed to take proper remedial action.<sup>20</sup>

Plaintiff has alleged, and the Defendants do not appear to dispute, that she subjectively felt threatened by Mr. Harrison's behavior; however, to prevail on a sexual harassment claim, Plaintiff must also show that a reasonable female would have found these actions to be severely hostile or abusive. Whether or not Mr. Harrison intended his behavior to be abusive or threatening is irrelevant to this inquiry. See Powell, 841 F. Supp. at 1029 ("The reasonable victim standard classifies conduct as unlawful sexual harassment even when

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<sup>19</sup> Judge Hogan clarified the analysis for establishing a "hostile work environment" claim.

To be actionable, a plaintiff must establish that the sexual harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Meritor*, 477 U.S. at 67. In determining whether an environment is "hostile" or "abusive," the court should consider the totality of the circumstances. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). Specifically, a court should consider the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance; and the effect on the employee's psychological well-being. *Id.*

1999 U.S. Dist. LEXIS 19516 at \*7-8; see also \*14.

The severity or seriousness of the alleged conduct varies inversely with the pervasiveness or frequency of the conduct; in other words, "one act may be sufficient if it is particularly severe while less intense incidents may be sufficient if numerous." See Powell v. Las Vegas Hilton Corp., 841 F. Supp. 1024, 1029 (D. Nev. 1992). Moreover, the Court must consider both the victim's subjective impressions of this activity and whether the alleged actions would constitute unlawful sexual harassment from the perspective of a reasonable victim.

1999 U.S. Dist. LEXIS 19516 at \*11-12.

<sup>20</sup> 1999 U.S. Dist. LEXIS 19516 at \*7-8, 14.

harassers do not realize that their conduct creates a hostile work environment. . . . Therefore, the alleged harasser's intent is unimportant and "compliments" are not a defense.")

The alleged incidents in this case may or may not be sufficiently severe or pervasive to amount to actionable sexual harassment. However, they certainly amount to more than the "mere utterance of an epithet." Meritor, 477 U.S. at 67 ("mere utterance of an. . . epithet which engenders offensive feelings in an employee would not affect the conditions of employment to a sufficient degree to violate Title VII). Whether or not a reasonable victim would find them sufficiently severe or pervasive to alter the conditions of Plaintiff's employment and create an abusive working environment is appropriately an issue of fact for the jury, not one which this Court can summarily adjudicate. See Powell, 841 F. Supp. at 1029 (holding that whether two incidents of verbal abuse -- "great tits" and "great legs" -- and three incidents of staring by non-employees constituted sexual harassment of plaintiff was a triable issue of fact).

1999 U.S. Dist. LEXIS 19516 at \*7-8.

Therefore, since the Court finds that Mr. Harrison's conduct could be considered sexual harassment and that the question of whether this behavior was sufficiently severe or pervasive to be actionable is a jury question, and since Defendants admit that there is a material dispute regarding whether the University took appropriate actions in connection with Mr. Harrison, the Court must deny Defendants' Motion to Dismiss or Alternatively for Summary Judgment with regard to the Hostile Work Environment claim.

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

The jury answered the two questions posed by Judge Hogan's 1999 decision by finding that 1) Harrison's harassment was severe and pervasive, causing a hostile work environment for Prof. Martin; and 2) Howard failed to take reasonable steps to end the hostile work environment. Plaintiff has therefore proved her claim of sexual harassment/hostile work environment and is entitled to a verdict in her favor.

#### **VI. Plaintiff Supplements and Renews her October 9, 2002 Motion for Summary Judgment**

The trial testimony, particularly of Deans Bullock and Newsom, directly contradicting Howard's December 8, 1998 Position Statement to the EEOC and Dean Bullock's July 1, 1998 memorandum to Howard's General Counsel, demonstrates the validity of what Plaintiff argued to the Court in her October 9, 2002 *Motion for Summary Judgment*, incorporated by reference herein, with respect to her sexual harassment claim. This case never should have gone to trial. Plaintiff should have been granted summary judgment years ago. Plaintiff's dispositive motion was denied by Magistrate Judge Facciola, on October

20, 2003, based on conclusions of fact and law<sup>21</sup> that were so replete with errors that even Howard University declined to oppose Plaintiff's motions to amend and vacate it.<sup>22</sup>

In its *Opposition to Plaintiff's Motion for Summary Judgment*, Howard refused to file a *Statement of Material Disputed Facts*, even after Plaintiff pointed out to Howard that it had failed to comply with Fed. R. Civ. P. 56.1 and this Court's Local Rules and consented to Howard's motion to allow it to amend its *Opposition* to Plaintiff's dispositive motion to comply with the Rules. As Plaintiff argued in her *Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment*, Howard never filed a disputed statement of facts, with citations to the record supporting its factual allegations because *it could not do so*. Howard never had any evidence to support any arguments that it attempted to make for any of the ever-changing defenses that has put forth over the past eight years. Instead, Howard has simply asserted lie after lie, for eight years, with no proof of the facts asserted. Instead of being subject to Rule 11 sanctions, as Plaintiff has repeatedly requested, Howard has been able to violate rule after rule and order after order of this Court, with impunity, and ultimately, to benefit from its wrongdoing with a jury verdict in its favor for a trial that never should have taken place. Howard never had any valid defense to Plaintiff's claim, but has relied only on arguments that it concocted years into the litigation, with no evidence to support any of them.

In addition to Dean Bullock's false statements at trial, contradicting her July 1, 1998 admission that she and Dean Newsom specifically understood that Harrison's stalking of Prof. Martin constituted "harassment" that posed a threat to her and "other women," on the basis of their sex,<sup>23</sup> Dean Bullock

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<sup>21</sup> As discussed in the accompanying *Motion for Judgment on Plaintiff's Retaliation Claims*, although Judge Hogan made a few modifications in MJ Facciola's *Report and Recommendation*, it remains replete with additional errors of fact and law.

<sup>22</sup> MJ Facciola's October 20, 2003 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>23</sup> In light of Dean Bullock's July 1, 1998 admissions to Howard's General Counsel, attached to Howard's submissions to the EEOC as the primary basis for its *Position Statement* in response to Plaintiff's EEOC charges of sexual harassment/hostile work environment and retaliation, the inescapable

made several other statements regarding her purported efforts to eliminate the hostile work environment for Prof. Martin – all of which she, Dean Newsom, and/or other security officers and/or Plaintiff refuted, without challenge, during trial.

I learned that Dawn Martin believed she was being “stalked” on December 1, 1997, upon reading her memorandum dated November 25, 1997, I immediately contacted Dean Newsom to determine what he knew of the matter. He told me that he had advised Ms. Martin to contact the University Security Office and the Metropolitan Police Department regarding what she should do in connection with her personal safety.

KKK-1 of Pl.’s *M SJ*, page 1.

At trial, however, Dean Bullock never claimed that she called Dean Newsom or asked him anything about the matter. Instead, Dean Bullock testified only that she placed a call to Security Director Lawrence Dawson and left a voicemail message for him which was never returned. Dean Bullock admitted that she never called Dawson again about the matter. Mr. Dawson testified that he never received a message from Dean Bullock.

Bullock’s July 1, 1998 memo continues:

Associate Dean Newsom advised me that he thought that MPD should be called in to provide more manpower in tracking down the individual not only to benefit Professor Martin, but also to prevent harm to other women whom this person might stalk or otherwise harass. In that regard **Associate Dean Newsom arranged a meeting in the West Campus security office with Professor Martin, representatives of Campus Security and of MPD, and himself. Campus Security and MPD stated that they would take the necessary action to end the harassment.** (Emphasis added)

KKK-1 of Pl.’s *M SJ*, page 1, adopted in Howard’s EEOC Position Statement, page 2 (KKK-2 of Pl.’s *M SJ*)

At trial, former Officer Sirleaf, Plaintiff and Dean Newsom all testified that *Plaintiff and Officer Sirleaf*, not Dean Newsom, called the police. Plaintiff testified, unchallenged, that Dean Newsom refused to assist her in calling the police. Both Plaintiff and former Officer Sirleaf testified, unchallenged, that Officer Sirleaf was the only representatives of Campus Security present at the meeting with the police.

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conclusion is that former Dean Bullock perjured herself on the stand. Particularly as an attorney and an officer of the Court, such conduct violates the D.C. Code of Ethics and is sanctionable, up to and including, disbarment. The extents to which Howard and its representatives have resorted to avoid any payment to Plaintiff, or the restoration of her teaching career is extraordinary.

Plaintiff and Officer Sirleaf testified, unchallenged, that Plaintiff called Dean Newsom while MPD was present on campus and convinced him to appear for a portion of the meeting.

Plaintiff testified, unchallenged, that Newsom refused to file any complaint on behalf of the University, but left Plaintiff to file the complaint alone, and that Newsom yelled at Plaintiff in the security office, with her students looking on through the glass encasing of the Security Office. Both Officer Sirleaf and Plaintiff testified, unchallenged, that Dean Newsom stayed only approximately ten minutes. Dean Newsom testified that he had no contact with MPD officers or discussions with any Howard Security Officer about the matter after his brief appearance at the November 21, 1997 meeting in the Security Office.

Both Plaintiff and Officer Sirleaf testified, unchallenged, that the result of the November 21, 1997 meeting was the agreement and expectation that Howard would issue a Bar Notice, banning Harrison from campus, and that if he returned to campus, he would be detained for police and arrested, pursuant to the stalking complaint taken by MPD officers. Officer Dowdy testified that no Bar Notice was issued for Harrison and that he escorted Harrison off campus, on November 25, 1997, because he did not know that that Harrison was stalking Prof. Martin or that a stalking complaint had been taken by MPD.

Bullock's July 1, 1998 memo continues:

On or about the following day, I transmitted a copy of Ms. Martin's report and my response to her to Mr. Dawson, Director of Security via a memorandum asking him to advise law school security officers of the need to be alert to Ms. Martin's concerns.

KKK-1 of Pl.'s *M SJ*, page 2, adopted in Howard's EEOC Position Statement, page 3 (KKK-2 of Pl.'s *M SJ*).

At trial, former Dean Bullock admitted that she never made any attempt to contact Mr. Dawson beyond her purported December 1, 1997 voicemail message, which Dawson never returned. Howard never produced any memorandum from Dean Bullock to Mr. Dawson or to any other member of Howard's security force, referring, in any way, to Prof. Martin or to Leonard Harrison. Mr. Dawson testified that Dean Bullock never told him anything about Prof. Martin or Leonard Harrison and that he had no knowledge of the stalking at all while it was occurring in 1997-1998. Howard has offered

absolutely no explanation for why this purported memo was never produced. Clearly, then, no such memo was ever written.

In her July 1, 1997 memorandum, former Dean Bullock claimed that, in response to Prof. Martin's December 2, 1997 memorandum documenting Harrison's attempt to enter her office on December 1, 1997, and Officer Dowdy's "chase" of Harrison, from her office, down five flights of steps, out of the building, off campus and into the woods, she took the following action.

I asked the security officer on duty what were they doing regarding the "stalker." I am not certain, but I believe it was Officer Sirleaf that I spoke to. He told me that the day before (or there about) another officer ran after the man believed to have been "the stalker." The officer had chased after the man down to and across Connecticut Avenue, I believe Sirleaf told me. He also advised me that the security office had advised Ms. Martin to let them know when she would be on campus and they would accompany her to class and guard her office while she was on campus.

KKK-1 of Pl.'s *M SJ*, page 2-3, adopted in Howard's EEOC Position Statement, page 4 (KKK-2 of Pl.'s *M SJ*).

At trial, Dean Bullock admitted that she never had this or any other conversation with Officer Sirleaf or any other security officer regarding Prof. Martin, Leonard Harrison, the "stalker" or any chase by Officer Dowdy.<sup>24</sup> At trial, Dean Bullock never made any claim that she ever had any belief that security was to provide Prof. Martin with a guard in her office or while she was teaching or otherwise while she was on campus.

Dean Bullock's July 1, 1998 memo continues:

Within a few days of speaking with the security officer I telephoned Mr. Dawson's office and left a message (he was not in) that I was calling about security issues at the law school.

KKK-1 of Pl.'s *M SJ*, page 3.

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<sup>24</sup> Both Officer Sirleaf and Plaintiff testified, unchallenged, that Office Sirleaf was not on campus after November 21, 1997, until the spring semester began in late January of 1998. Officer Sirleaf testified that he went "home" to Liberia, for several weeks and was not at Howard for 1-2 months after taking Prof. Martin's security report on November 21, 1997. Officer Sirleaf is a large man (well over 6 feet tall and well over 300 pounds) with a heavy Liberian accent and a "colorful," outspoken personality, as the court saw during trial. It would be difficult to confuse him with another security officer.

Again, at trial, Dean Bullock never even alleged that she made any attempt to contact Mr. Dawson beyond the one message that she claimed she left him on December 1, 1997 (which Mr. Dawson denied receiving) – prior to receiving Prof. Martin’s December 2, 1997 memorandum. On the stand, Dean Bullock admitted that she never did anything in response to Prof. Martin’s December 2, 1997 memorandum.

Dean Bullock’s July 1, 1998 memo continues:

My office – I and Associate Dean Newsom – gave written and oral notice of Ms. Martin’s stalking report to University Security and requested security assistance for her. Apparently neither Campus Security nor MPD posted notices in the security office or in the library describing the stalker, and Associate Dean Newsom requested the Campus Security Office to post notices. Since he did not have a description of the stalker and Professor Martin did, he asked her to prepare a description to be included in notices to be posted. My efforts were directed at getting security assistance because no one else at the law school is equipped to protect an employee who may be in danger.

KKK-1 of Pl.’s *M SJ*, page 3, adopted in Howard’s EEOC Position Statement, pages 4-5 (KKK-2 of Pl.’s *M SJ*).

At trial, Dean Bullock or Newsom admitted that she *never* spoke to anyone in Howard Security about Prof. Martin or Leonard Harrison. Newsom admitted that, other than his brief appearance in the Security Office on November 21, 1997, in response to Prof. Martin’s request that he be present, he *never* spoke to anyone in Howard Security about Prof. Martin or Leonard Harrison or asked for “security assistance” for Prof. Martin. Dean Bullock admitted that she never asked for “security assistance” for Prof. Martin, other than her one time instruction to her assistant, Barbara Smith, on December 1, 1997, when Prof. Martin refused to return to her office or her classroom without protection, due to the frightening voicemail message that she had just received from Harrison, announcing his plans to visit her in her office that afternoon. Officer Dowdy testified that he had seen and talked with Harrison -- and checked his homeless shelter identification – on November 25, 1997, when he escorted him off campus, not knowing that there was a stalking complaint on him or that Officer Sirleaf had requested that a Bar Notice be issued against him. Prof. Martin had already provided Deans Bullock and Newsom with all of the information that she had gathered on Harrison, in her memoranda of November 25 and December 2,

1997. Since she had only seen Harrison for a second, before Officer Dowdy chased him from her office on December 1, 1997, Officer Dowdy was in a much better position to provide a description of Harrison than was Prof. Martin.

Contrary to Dean Bullock's assertion, Dean Newsom did not just ask Prof. Martin for a written description of Harrison, but asked her to draft the Alert Notice herself, to be posted, despite her statement that she did not know the format used by Howard's security for such Notices and that it would be best drafted by Security. Neither Deans Newsom or Bullock ever requested that Security draft an alert notice for Harrison. In addition, Deans Newsom and Bullock did not have to "ascertain" that no notices were posted because they were the persons who would post or and/or approve the posting any notice posting on the West Campus, otherwise known as the law school, which stands alone on Van Ness Street, off of Connecticut Avenue, far from the main campus on Georgia Avenue where Dean Newsom purportedly sent the request that the notice be posted.

The December 22, 1997 memorandum purportedly sent by Dean Newsom to Campus Security was entitled "*Stalking of Prof. Dawn Martin, Vagrants in the Lounge and Missing Printer in the West Campus.*" (Joint Trial Exhibit 80 and Exhibit GG in Pl.'s MSJ) It appears then, that the stalking of Prof. Martin was equated with *a missing printer* and was not even worth of its own memo. Deans Bullock and Newsom admitted that they never received any response from Security to the Notice, that they never called Security to follow up on the purportedly sent memo and that the Notice was never posted, although they could easily have posted the notice themselves on the law school premises rather than sending it across town to main campus to request that someone from main campus come across town to post the notice. Finally, Howard's Security former Director, Mr. Dawson, and the Deputy Chief, Mr. Armstrong, testified that they never saw this memo before being deposed in this case. Howard never produced the memo as part of the Security Office files and Mr. Armstrong testified, in his deposition, that in his search of the Security files, he did not find any such memo from Dean Newsom.

Plaintiff hereby renews her motion for summary judgment, with respect to all of her claims, as supplemented by the recent, controlling case law decided by the U.S. Court of Appeals for the D.C.

Circuit. The recent stream of cases flowing from the U.S. Court of Appeals 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*, 433 F.3d 889 (D.C. C. 2006) (D.C. Cir. 2006) (Jan.10, 2006), holding that adverse actions included acts that affected future employment opportunities.<sup>25</sup> It next progressed to *Rochon v. Gonzales*, 2006 U.S. App. LEXIS 5028 (D.C. Cir. 2006), holding that 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 – whether it is related to current employment opportunities, future employment opportunities, or even potentially adverse consequences completely unrelated to employment. Its 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.<sup>26</sup> These holdings, independently, and together, demonstrate that Dean Bullock’s conversation (or feigned conversation) 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.

## **VII. Punitive Damages**

The Court denied Plaintiff’s request to allow the jury to consider punitive damages in this case. The Supreme Court has rejected the argument that employers are not liable for punitive damages unless their conduct is egregious or outrageous. *Passantino v. Johnson and Johnson Consumer Products, Inc.*,

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<sup>25</sup> *Holcomb* is 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).

<sup>26</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.

212 F.3d 493, 515 (9<sup>th</sup> Cir. 2000) ("in general, intentional discrimination is enough to establish punitive damages liability"). Retaliation is, by its nature, intentional discrimination.

Punitive damages are particularly appropriate where the discriminating or retaliating official attempts to conceal his/her wrongdoing or lies about his/her conduct. *Connolly v. Bidermann Industries U.S.A., Inc.*, 56 F. Supp. 2d 360 (S.D.N.Y. 1999). As discussed in Section IV, above, since Howard misrepresented the facts, in writing, to a United States government agency, the U.S. Equal Employment Opportunity Commission, in its December 8, 1998 Position Statement (KKK-2 of Pl.'s *MSJ*), based on Dean Bullock's July 1, 1998 memorandum, in which Dean Bullock *lied*, in writing, to Howard's General Counsel (KKK-1 of Pl.'s *MSJ*), this case is a perfect example of a case meriting punitive damages. It is particularly disgraceful that these lies were perpetrated by the female Dean of a national law school touting its legacy of civil rights.

In addition, punitive damages are appropriate where the employer has acted with "malice or with reckless indifference" to the employee's Title VII rights. *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). Dean Bullock callously and recklessly refused to provide the reasonable protection from Harrison that Howard's own security policy mandated. Bullock even lied by stating, in writing, that she was consulting with the Director of Security, Lawrence Dawson, when, in fact, she had never consulted with Dawson or any other Howard University Security Officer or D.C. Metropolitan Police Department officer regarding Prof. Martin or Harrison. 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. Howard's

security force consisted of armed special police officers. Howard's policies and procedures required that, under the circumstances presented by Harrison, University procedures required posting an "Alert" notice, issuing a bar notice to Harrison, requesting an additional security officer to guard the entrance to the law school to stop Harrison from entering the law school building and other measures designed to keep Harrison off the law school premises and assure his arrest if he returned to campus. Pl. MSJ at 7, 8, 10.<sup>27</sup> Dean Bullock told Taslitz that Prof. Martin had "bad judgment," but would not provide even one example of such alleged bad judgment, even though Prof. Taslitz asked for one, several times. MSJ at 18.

Under the facts presented at trial, which are consistent with the presentation of the facts as stated in Judge Hogan's 1999 decision, as well as in Plaintiff's *Motion for Summary Judgment*, Plaintiff is entitled punitive, as well as compensatory damages for her intentional subjection of Prof. Martin to the hostile work environment created by Leonard Harrison and fostered by Dean Bullock.

#### VIII. **Bifurcation**

Finally, if there is a new trial in this case, Plaintiff renews her request that this case be bifurcated, by claim, if tried again before a jury. As Plaintiff previously argued, the claims for sexual harassment, retaliatory non-renewal/termination and breach of contract require different elements of proof. Trying them together did confuse the jury, required repetition of evidence that was presented weeks earlier and created four hours of closing arguments and hundreds of documents that the jury had to assess at the end

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<sup>27</sup> Over Plaintiff's objection, the Court, *sua sponte*, struck portions of the testimony of several of the Howard Security officers, but without the transcript or specific references to what testimony is actually stricken. The Court determined that testimony regarding what these officers would have done, in accordance with Howard's own security policies and procedures, had Dean Bullock or Dean Newsom provided them with the information that Plaintiff had provided them in her memos of November 25, 1997 and December 2, 1997, with background information on Harrison and the letters that Harrison had sent to her and to Valerie Edwards, received by Plaintiff and copied for Deans Newsom on January 12, 1998. Since the jury did hear the stricken testimony, and did find that Howard did not take reasonable remedial measures to end Harrison's harassment, it is not clear whether the striking of this testimony was harmless. Plaintiff asserts, however, that the testimony should not have been stricken, and if stricken, the witnesses should have been recalled so that the questions could be rephrased to ask them what Howard's policies and procedures required at each stage of the stalking and to ask why the required procedure was not followed in this case. Presumably, the officers would have answered that the procedure was not followed because they did not have the pertinent information on Harrison to invoke those procedures. In this manner, the same basic information would have been elicited from the officers.

of four weeks. Clearly, the jury was unable to sift through those hundreds of documents within the day and a half that they deliberated, to identify the documents that were even directly related to Plaintiff's sexual harassment claim to even to understand that Dean Bullock *admitted* years ago, that she and Dean Newsom always understood Plaintiff's complaint about Harrison to be one of harassment, based on her gender.

This case presents a case of first impression in this jurisdiction, with respect to employer liability for the sexual harassment of an employee by a non-employee. This issue is significant enough to be heard by itself, uncontaminated by credibility contests, attempts at character assassination, irrelevant and prejudicial testimony, hundreds of documents, many of which are related to matters of tenure and publication, and other issues that unnecessarily complicated the sexual harassment/hostile work environment claim.

With the benefit of hindsight, Plaintiff respectfully modifies her request for bifurcation to request that the breach of contract claim be saved for last, rather than tried second. If Plaintiff is granted judgment, as a matter of law, on her sexual harassment and retaliation claims,<sup>28</sup> she will already be entitled to the same remedy that she could obtain through her breach of contract claim, which would eliminate the need to try the breach of contract claim, unless the Court's judgment on the retaliation claim was reversed on appeal. In addition, since the retaliation claim is directly related to the sexual harassment claim, it is logical to follow the sexual harassment evidence directly with the retaliation evidence rather than interrupt the evidence with the completely separate evidence of breach of contract.

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<sup>28</sup> By separate motions, filed simultaneously with the present motion, Plaintiff renews her previously filed motions for judgment on her retaliation and breach of contract claims. All arguments made in those motions are incorporated, by reference, herein, including, but not limited to, the additional Rule 11 violations committed by Howard's attorneys, the Defendant's presentation of its defense during Plaintiff's case in chief, hearsay testimony by Howard's witnesses admitted into the record, proper testimony and documentary evidence offered by Plaintiff, but excluded from the record, stricken testimony by Howard's Security Officers, time allocation and restraints, lack of accommodation of Howard professors prepared to testify for Plaintiff, while accommodating Howard professors binding Howard, and the admission of irrelevant and highly prejudicial testimony by Howard's witnesses into the record. Conversely, all arguments made in the present motion are incorporated, by reference in to said motions.

## CONCLUSION

Since the jury did determine that Harrison *did* harass Plaintiff in her workplace, to the point of it being severe and pervasive, and that Howard University knew of the harassment and failed to take reasonable measures to eliminate it, the jury has answered the factual questions posed by Judge Hogan in a manner that compels judgment for Plaintiff, as a matter of law, pursuant to Fed. R. Civ. P. 50(b). Plaintiff respectfully request that this Court grant Plaintiff judgment, as a matter of law, set the case for a new trial on damages for her sexual harassment claim, and direct the jury to determine compensatory and punitive damages for the claim. In the alternative, Plaintiff should be granted a new trial pursuant to Fed. R. Civ. P. 59(b) and of 60(b)(3).

Since Plaintiff's retaliation claims were also dismissed due to the jury's erroneous determination that there was no protected activity under Title VII or the D.C. Human Rights Act since the harassment was not based on sex, Plaintiff is entitled to a new trial on her retaliation claims, if not granted judgment as a matter of law, pursuant to her accompanying motion regarding those claims.

Respectfully submitted,

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